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<sup>2</sup> Appointed May 10, 1908.



# COURT RULES.

## SUPREME COURT OF MISSISSIPPI.

### 1.

It is hereby made the duty of all parties appealing to this court to file the transcript of the record in the office of the clerk of the Supreme Court, not less than twenty days before the time for taking up the docket of the district to which the case belongs. A failure to observe this rule shall cause the case to be sent to the heel of the docket, unless it shall appear that the failure was intentional and for the purpose of delay, when said case shall be dealt with as a delay case and appellants taxed with all cost of appeal. This rule shall not apply to state cases, nor shall it prevent the court from extending the time upon affidavit filed showing good cause.

### 2.

Every transcript of a record brought to this court shall be distinctly and plainly written or typewritten, on paper not less than eight nor more than eight and one-half inches wide, and fourteen inches long, on one side of every leaf; and each page shall be numbered at the bottom, at or near the center, and there shall be a blank margin at the top of not less than one inch, the paper to weigh not less than fourteen pounds to the ream. Transcripts may be typewritten, on linen paper, to weigh not less than eight pounds to one thousand sheets and must be double spaced.

No carbon or other duplicates will be received, nor will transcripts written or typewritten with copying ink be filed. Such transcripts, whether written or typewritten, shall be prefaced by a suitable index, and shall be securely bound in nonflexible paste-board covers, with marbled sides, in volumes of about an equal number of pages, not to exceed in any case two hundred and fifty pages in a volume, for the payment of which binding the appellant will be allowed sixty cents per volume, to be taxed with the costs. The appellant may cause the transcript to be bound as above described, or he may, at the time of taking his appeal, deposit, with the clerk of the court from which the appeal is taken, a binding fee of sixty cents per volume of two hundred and fifty pages.

In such cases the clerk shall transmit the

unbound transcript, with the binding fee, to the clerk of this court. Transcripts shall not be folded, but may be rolled for transmission, if not bound as required; and, if not bound, the sheets shall not be fastened together.

No transcript shall be taken from the clerk's office by any party or counsel until the same shall have been bound.

### 3.

#### Transcript—What to Contain.

A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions, and the order, judgment, or decree appealed from, unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which request shall be annexed to the transcript; and exhibits to declarations, bills, answers, depositions, etc., shall immediately follow the particular plea or deposition, first referring to them, and shall be copied but once. The several answers of witnesses as made in depositions shall each follow consecutively the particular interrogatory to which they are responsive; and no commission to examine a witness, nor certificate of a commissioner to a deposition, nor any proceedings to obtain such commission, shall be inserted in any transcript, except where a question as to the sufficiency or legality thereof appears from the record to have been decided; and no fee shall be allowed for anything besides those matters required to be embraced in the transcript.

### 4.

#### Agreed Transcript.

By agreement of parties or their attorneys, made in writing and attested by the clerk of the court in which any case may be pending or record existing, (which agreement shall be filed, and made a part of the transcript of such record,) such parts of the record and proceedings as shall be agreed shall constitute the transcript of the record to be brought to this court, and shall be certified as such, and be considered a full transcript in this court for the consideration and final adjudication of the cause here.



## 5.

**Suggestion of Diminution.**

If a record be imperfect, diminution may be suggested by either party, and certiorari awarded; provided it be done in the first week of the term, or within four days after the assignment of errors is filed.

## 6.

**Records and Papers—How Filed.**

No record or other paper shall be considered as filed until so marked by the clerk—process of this court excepted—and the clerk shall indorse the date of filing.

## 7.

**Assignment of Errors.**

The appellant or his counsel shall file on a separate sheet of paper a statement of the grounds of error relied on, at least fifteen days before the first day for the call of the docket to which the case belongs, and, at the end of the assignment shall state whether or not oral argument is desired, and a certificate that a copy of it has been delivered, or mailed to the appellee, or his counsel.

No error not distinctly assigned shall be argued by counsel, or considered by the court. In appeals returnable at any time the assignment shall be filed, with like statement and certificate, fifteen days before the hearing of the case.

## 8.

1. No brief shall be filed by the clerk for either side unless there is appended a certificate that a copy of it has been delivered, or mailed to the opposing party—or his counsel, or the original submitted for examination and also a statement in writing filed as required in par. 7 whether or not oral argument is desired.

2. All cases in which no request for oral argument has been made shall be submitted on the first day of the term or time appointed for taking up the docket of the district to which the case belongs.

3. In all cases to be submitted without oral argument, appellant's brief shall be filed not later than twelve days before the first day of the term appointed for taking up the docket of the district to which the case belongs, and appellee's brief not later than five days before said time, and any rejoinder brief by appellant not later than said return day; the same number of days applying before the hearing in appeals returnable at any time. In all cases to be argued orally appellant's brief shall be filed not later than twelve days before the day on which the case is set for hearing, and appellee's brief not later than five days before said time, and any rejoinder brief by appellant not later

than the day on which the case is set for argument. No oral argument will be permitted until briefs are on file.

4. There shall be no setting of the criminal docket except by special order of the court, all criminal cases being due to be called for hearing on the return day for the criminal docket for each district.

5. There shall be no cases set for hearing during the last week for the hearing of the civil docket for any district.

6. No more than ten cases shall be called for hearing on any day.

7. The setting of civil cases shall be made as follows: All civil cases not preference causes—shall be set by the clerk of the court, under the direction of the court, in following manner: On the return day of each district, the clerk shall submit all cases in which oral argument has not been requested in a writing filed on the return day of the said district; the clerk, under the direction of the court, shall then on the said return day for each district set all the cases in which such written request for oral argument has been filed as aforesaid, daily as follows: That is to say, on the return day for each district he shall set for hearing on that day under the direction of the court, ten cases for hearing that day; for the second day he shall in like manner set ten cases for hearing, the said ten cases to consist of so many of the ten cases set for the return day as may not have been heard on that day, together with so many other cases as will make ten cases for hearing on the second day; and this course he shall pursue day by day throughout the call of the civil docket for each district, except the last week. The clerk shall each day publish in one or more of the papers published in the city of Jackson, a statement showing the condition of the docket from day to day as to the hearing of civil cases, which statement shall clearly disclose what cases were disposed of on the day preceding the publication and what cases are set for the next day. The clerk shall also on the return day for each district mail to each and every lawyer interested in the call of the civil docket for that district, a certified copy of the entire civil docket for such district so that every such attorney upon posting this copy of the civil docket in his office and comparing therewith the published daily statement of cases to be heard, in the Jackson papers aforesaid, may be able as nearly as possible to ascertain when his case will be called.

## 9.

**Argument.**

Not more than two counsel on the same side, nor a longer time for argument than one hour and a half on a side, will be allowed unless by special leave of the court before

argument begun; where there are two counsel on the same side, they may divide the time allowed between themselves.

## 10.

**Suggestion of Error.**

The court will, at any time within fifteen days after a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper. But in cases decided within one week of final adjournment for the term, suggestions of error may be filed and dealt with according to the regulations of rule eleven. No extension of time will be granted for the filing of a suggestion of error except on account of sickness, or other extreme cause, the maximum time as to extension not to exceed thirty days, and the application for extension of time must be made within the fifteen days.

## 11.

**Suggestion of Error—Effect of Adjournment.**

Where an adjournment of the court shall preclude the required presentation of the suggestion of error, its presentation to the clerk, and his filing it within the time prescribed for presenting such suggestion of error to the court, shall stay all proceedings under the judgment until the next meeting of the court, when it shall be acted on by the court as if it had been presented to it when it was presented to the clerk, unless a majority of the judges of the court shall certify, in writing, to the clerk, prior to the next meeting of the court, that they have considered the suggestion of error and have determined to overrule it; and, on receipt of such certificate, such proceedings shall be had as if a suggestion of error had not been presented.

## 12.

**Reargument—When Heard.**

When a reargument is ordered, the cause shall be placed at the end of the docket of its district, and heard at the same term.

## 13.

**Papers Out of Office.**

When a cause is regularly called on the docket for hearing, if the transcript of the record be not in the court, the counsel to whom it is charged by the clerk shall pay a fine of twenty-five dollars.

## 14.

**Motions.**

Every Saturday shall be motion day; and, if counsel be not present and have no briefs

filed when their motions are regularly called, such motions shall be dismissed; and no motion once disposed of or dismissed shall again be heard.

No motion will be considered until the opposite party shall have had at least three full days' notice, by mailing, or delivery to such party a copy of same.

## 15.

**Motions Docketed—Reasons Filed.**

No motion shall be heard unless it has been entered on the docket, and the reason in support thereof filed with the papers on at least a half sheet of paper.

## 16.

**Motion to Dismiss—When Waived.**

When a motion is made to dismiss, and counsel for the motion either withdraws it or suffers it to be dismissed for want of prosecution, it shall be considered a waiver of the defect on which the motion was based, unless it be so material that no judgment can be given.

## 17.

**Dismissed Cause—How Reinstated.**

No cause that has been dismissed shall be reinstated without an affidavit setting forth probable error in the proceedings.

## 18.

**Docket—How Called—Delay Cases.**

At each term of the court the docket of each district shall be taken up in its order. But on regular motion day, by motion entered for that purpose, causes may be submitted on a suggestion that they are brought here for delay, and, if satisfied of the truth of such suggestion, the court will take up such causes first of their district, and make proper disposition of them.

## 19.

**Failure to Prosecute—Cause Dismissed.**

When any case shall be called for trial in its order, if no counsel appear and no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution.

## 20.

**Calculations.**

When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the court, in writing and figures, with a certificate by some counselor not interested in the cause that the

calculation is correct; and no such error will be noticed unless so presented to the court.

## 21.

**Agreement of Counsel.**

No agreement between counsel will be regarded unless reduced to writing, and signed and filed by them.

## 22.

**Authority of Counsel—When Required.**

On motion supported by affidavits, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting any appeal in this court; and, on failing to produce such authority or furnish such evidence, the appeal may be dismissed.

## 23.

**State Cases.**

The docket of criminal cases for the whole state shall be taken up on the second Monday after the Monday fixed by law for calling the docket for each district, and the provisions of Rules 7 and 8 shall apply as to assignments of error and briefs. Only cases in which transcripts of the record shall have been filed shall be called, unless sixty days since the date of the certificate provided for by section 78 of the Code of 1906 shall have expired, in which case they shall be called.

The attorney general may at any time inform the court of any case in which the time for filing the transcript has expired, and move for affirmance of the judgment; and nothing herein contained shall extend the time when, under the law, transcripts should be filed in this court.

## 24.

**When Appellee may Not Waive Time.**

After a case has been called on the docket, the appellee shall not be permitted to waive the time within which citation is required to be served, nor to enter his appearance for trial of the cause at that term.

## 25.

**Attorneys must be Admitted to Practice.**

Attorneys at law who have not been admitted to practice in this court shall not be permitted to argue orally, or file briefs or any paper, in any cause in this court.

## 26.

**Papers Not Filed after Submission.**

The clerk shall not file with the papers of any cause any paper, after the cause has been argued or submitted, except by leave of the court.

## 27.

**Original Papers—When Considered.**

Whenever it shall, in the opinion of the judge or chancellor, be necessary or proper that original papers of any kind should be inspected in the Supreme Court, such judge or chancellor may make such rule or order for safe-keeping, transporting, and return of such original papers as to him may seem proper; and such papers will be considered in connection with the transcript.

## 28.

**Costs Paid by Appellant—When Mandate Retained.**

When costs are awarded in this court against the appellee, and there shall have been a return of nulla bona to an execution against him, and the costs shall be paid by appellant, no mandate shall issue upon the application of the appellee, until he shall pay into the court, for the use of appellant, the costs paid by him.

## 29.

**Penalty for Violations of the Rules of This Court.**

Any litigant, who by himself or his counsel, fails to comply with any of the provisions of the foregoing rules, shall, on motion of the party aggrieved, be taxed with such proportion of the appeal costs as in the judgment of the court may seem just and proper, in addition to any other penalty which may be provided by the rules.

## 30.

**Suggestion of Error—Copy must be Given Opposite Party.**

The clerk of this court will not file any suggestion of error unless the same be accompanied by a certificate that a copy of it has been delivered or mailed to the adverse party, or to his counsel of record.

## 31.

**As to Remedial Writs.**

No application for supersedeas, or any other writ or remedial process mentioned in section 992 of the Code of 1906, except in cases of greatest emergency, and for injunctions, shall ever be acted on, in any case pending in any court, by any member of the Supreme Court, ex parte; but every such application, except in cases of greatest emergency, and for injunctions, shall be accompanied by written notice served on the opposite party, or his counsel, or some of them, at least five days before the hearing; and all such applications must be acted on only when both sides are represented at the hearing, or after such five days notice, duly served and attested as above.



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(124 La.)

No. 17,300.

**TABERNACLE BAPTIST CHURCH v.  
GREEN et al.**

(Supreme Court of Louisiana. March 15, 1909.  
Rehearing Denied June 30, 1909.)

**1. FACTS.**

The ancestor of defendant was pastor of the plaintiff church. Before the church had been incorporated, his congregation intrusted him with an amount to buy two lots, 13 and 14, for the church.

**2. PURCHASE OF PROPERTY.**

He bought the lots over 10 years ago, and after the church had been incorporated he transferred lot 14 to the church (not lot 13).

**3. MEMBERS OF CHURCH EXPELLED.**

The claim that the pastor Green laid to lot 13 caused dissensions among the members. A number of the members who were with Green (only a minority under his leadership) succeeded in ousting his enemies from the congregation.

**4. DATIEN EN PAIEMENT.**

The Green faction transferred as a dation en paiement lot 14 to Green, the pastor, in payment of an asserted claim of his.

**5. RELIGIOUS SOCIETIES (§ 20\*)—PROPERTY.**

Lot 14 having been transferred to the church by Green, the pastor, it was not within the authority of the minority to surrender it to him under the guise of a dation en paiement, the consideration of which was not shown.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 20.\*]

**6. FRAUDS, STATUTE OF (§ 56\*)—TITLE TO REALTY—PAROL EVIDENCE.**

Lot 13 was not transferred by Green, the pastor, to the church. The contradictory oral testimony about the title is not satisfactory at best. Besides, title to realty cannot be established by oral testimony.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 85; Dec. Dig. § 56.\*]

**7. ADVERSE POSSESSION (§ 13\*) — TITLE BY PRESCRIPTION.**

There have been a number of suits among the parties. One of the results is that plaintiff has concluded itself. Besides, Green, the pastor, and his family, the defendants, have been in possession over 10 years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65-76; Dec. Dig. § 13.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the Tabernacle Baptist Church

against Samuel C. Green and others. Judgment for plaintiff in part, and defendants appeal, and plaintiff joins therein. Affirmed.

Nix & Tichenor and Clegg, Quintero & Giddlere, for appellants. Albert Voorhies and Rene O. Metoyer, for appellee.

**BREAUX, C. J.** Plaintiff, a church (the congregation colored), in its petition claims title to two lots of ground in the city of New Orleans, Nos. 13 and 14.

The defendant's father, Henry Clay Green, bought these lots in 1891 from Bradish Johnson for the price of \$310.

It is asserted by plaintiff that, by reason of the fact that the corporation had not been incorporated at the date the property was bought by Henry Clay Green, it was bought in his own name.

Some time after this purchase by Henry Clay Green, he transferred lot No. 14 to plaintiff corporation. He did not transfer lot No. 13.

From this time on there was dissention in the church. A majority of the congregation insisted that lot 13 belonged to the church as well as lot 14.

Henry Clay Green having departed this life a few years ago, his heirs are made parties defendants.

They in their pleading controvert plaintiff's claim, and contend that plaintiff is concluded by the plea of res judicata, also by estoppel, and that the late Henry C. Green was the owner of both the lots; that he leased the property to the plaintiff and remained the owner. The judge of the district court rendered judgment recognizing the plaintiff as owner of lot 14, but decided that lot 13 is owned by defendants. On appeal, the plaintiff joined in the appeal, and asked for an amendment of the judgment so as to recognize its right to lot 13.

The Tabernacle Baptist Church adopted a charter on the 27th day of April, 1892. By the terms of the charter, members of the board of deacons and the parson of the church were to be elected on the 3d day of May each year.

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\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiff's complaint is, as made to appear by the pleadings and by the testimony, that at the time designated for the annual election in 1898, at which time there was loud dissension in the church for reasons before stated, the late Henry C. Green refused to call an election or to allow one to be called; that, none the less, a majority of the board of deacons called an election about that time and elected another parson, and took steps to depose the incumbent, Green.

It appears that Green did not mildly submit, but took steps to protect his tenure as parson, and also, to hold on to the property, and afterward he availed himself of the opportunity offered by willing deacons, who were entirely under his influence, to become the owner of lot No. 14, which he had previously transferred to the church, as before stated.

There is no question but that he bought this lot 14, and it may be also lot 13, for the church.

In transferring No. 14 as before mentioned, he stated in the deed that he had bought it for the account of the church, but the recital of the deed in which he transferred lot 14 is silent about 14. Henry C. Green, although in the minority, had the members expelled who had pronounced themselves against him on account of his retaining one of the lots, as they state.

One of the members of the congregation by the name of Moore remained the friend of Green and under his influence. He was subservient to the will of Green.

This man Moore and a few others and the family of Green were about all that remained of the congregation. None the less, he remained pastor, and with some determination held off the expelled members.

Moore, it seems, was an officer. He assumed to represent the plaintiff corporation in two suits for small amounts, each for less than \$100, brought by the pastor, Green, against his own church.

Moore obligingly appeared and confessed judgments. In the course of time, two judgments confessed as before mentioned, and other claims of the pastor, were increased to about \$900.

These amounts, also (that is, the difference between the two judgments and the \$900), the man Moore acknowledged, and proceeded to satisfy the claims by making a dation en paiement to Green of lot No. 14. In that way, Green was reinstated as owner of 14, and now owned 13 and 14.

The record does not disclose that the church was indebted to the pastor for these confessed judgments or for the other amounts making up the \$900. He carried things relating to the church property his own way.

This indebtedness for which the dation en paiement was made has every appearance of having been made up between the pastor, Green, on the one hand, and the members of his congregation who were his followers in

all of the dissensions that had arisen in the church, on the other.

The church people before the expulsion had contributed, as shown by the minutes and the testimony of witnesses, to the church and to the satisfaction of its indebtedness at different times.

These contributions were received by the Green people, and no complete account had been rendered.

It is strange that Green, in addition to these collections, became a creditor of his own church to the amount which he claims. In other words, it is not explained why it is that Green, the pastor, became a creditor for so large an amount in the face of the fact that considerable sums were collected to meet all of the indebtedness of the church.

The inquiry naturally arose among the members, What has become of the contributions of the members?

We may as well state here that, as before mentioned, Green was the pastor, his son was the secretary toward the end of their troubles, and his daughter swore that she was the undersecretary.

It seems that they received the money in the church. It devolved upon them to give an account of what had become of this amount.

It also appears that the pastor, Green, and his family organized a private corporation of which he was the president. They were known as the "Hopeful Land Company, Limited, of New Orleans."

The charter of this corporation is dated the 23d day of the month of November, 1899.

What was the business of this corporation does not appear, except as relates to this one transaction. That was the written statement of a promise by it to sell to the church lot 14.

There was no title in this property in the Hopeful Land Company; none the less, they bound themselves absolutely to sell the property to the church on monthly installments of \$5 each.

In another agreement, Green, the pastor, after he had become the owner by dation en paiement, figures as a promising vendor. He also bound himself to sell the same property to the church.

In other words, the Hopeful Land Company was to be the vendor, and at another time Green, the pastor, who had no more title than the corporation from all appearances, was to become the vendor.

These were rather loose proceedings on the part of the pastor and his corporation. It tends to throw discredit on their claim to the lot in question. The congregation or the board of deacons do not seem to have amounted to anything; it was all Green's work. They were a willing flock in his hands. His will always prevailed. He did as he pleased, and the proceedings were by Green, pastor, who chose to use the name of others for the purpose of accomplishing the end in view, which does not appear to have been entirely

devoid of the selfish, if the testimony of the witnesses is to be believed.

We note that, in one of the minutes at an election held during one of the years during which he was the pastor, they elected him for life; made him immovable in office. In subsequent years they, none the less, again elected him pastor.

There is positive testimony that the congregation paid over \$400 on account of the purchase of the two lots. There is no testimony that the church owed any such amount as that which appeared in the dation en paiement.

We have concluded that, the pastor having transferred lot No. 14 to his church for which he had not paid, his heirs are bound by it, and that it was not transferred back to him by the church; that the illegally made up quorum had no authority in the premises.

He could not arbitrarily bring on the expulsion of the majority of the congregation who claimed both lots.

As to lot 13: There is no written evidence of its transfer to the church by the pastor, who had it in his name. The title after these many years must remain where it is. The oral testimony admitted is not sufficient to show conveyance of title. Besides, the plea in estoppel and the proceedings in other cases introduced in evidence, in which the pastor was on one side and a large number of the members of the congregation on the other, are of such a character as to justify us, we think, in declining to decree that the property is in the church. The pleas before mentioned cure whatever defect there is in the title to defendant to lot 13. Ten years have elapsed, during which time the pastor and his family were in possession as owners.

These pleas have not the effect claimed for them as relates to lot 14, as it was dedicated by all concerned to religious uses over 10 years ago under title.

This case is *sui generis*. Under the facts and circumstances it could not be anything else.

For reasons assigned, and the law and the evidence being in favor of plaintiff, the judgment appealed from is affirmed.

(124 La.)

No. 17,880.

**STATE ex rel. THURMOND v. CITY OF SHREVEPORT.**

(Supreme Court of Louisiana. June 14, 1909.  
Rehearing Denied June 30, 1909.)

**1. MUNICIPAL CORPORATIONS (§ 62\*) — DEFINING DUTIES OF OFFICER—DELEGATION OF POWER.**

It is a violation of a city charter, confiding to the council the power of defining the duties of the auditor, for the council to attempt to delegate this power to the mayor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 154; Dec. Dig. § 62.\*]

**2. MUNICIPAL CORPORATIONS (§ 155\*)—REMOVAL OF OFFICERS.**

The provision of a city charter authorizing the council to remove any officer or employé when his service is no longer necessary to the public interest cannot apply to the auditor, whose office, created by the charter with certain prescribed duties, some of which are essential to the operation of the city government, and which must be performed by him alone, cannot possibly cease to be necessary.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 155.\*]

**3. MANDAMUS (§ 76\*)—SALARIES OF OFFICERS—INTERFERENCE OF COURT.**

The court may interpose where a city council, having no power to abolish an office created by the charter, or to remove the officer except for cause, manifestly attempts to do this indirectly, by abuse of its discretion to fix the salary of the officer, fixing it so low that no competent person will accept the office.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 158-160; Dec. Dig. § 76.\*]

**4. MUNICIPAL CORPORATIONS (§ 164\*)—SALARY OF OFFICERS—INTERFERENCE OF COURT.**

A city council empowered, in the exercise of its discretion, to fix the salary of the city auditor at a sum not exceeding \$1,500 per year, having reduced it from \$1,500 to \$300, in a manifest attempt to abolish the office, which it could not do, or to remove the officer, which it could not do in the absence of cause, will be ordered to restore it to not less than \$900; the evidence showing that to be the lowest reasonable salary for the office, and any amount above that being a matter of discretion.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 164.\*]

Nicholls and Monroe, JJ., dissenting.

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Mandamus, on the relation of T. H. Thurmond, against the City of Shreveport. From the judgment, defendant appeals. Modified.

Lewell C. Butler, City Atty., and Pugh, Thigpen & Herold, for appellant. Hall & Jack, for appellee.

**PROVOSTY, J.** The relator alleges that the city council, desiring to remove him without cause from the office of city auditor, first passed an ordinance expressly so providing, and then, on discovering that it had no right to do so, recalled the ordinance, and immediately proceeded to do by indirection what it could not do directly, namely, to pass another ordinance making the office undesirable to any one competent to fill it, thereby practically abolishing it. This it did by reducing the salary of the office from \$1,500 to \$300 a year, and delegated to the mayor the power to designate what hours the city auditor should keep at the city hall. Relator asks for a mandamus to the mayor and members of the council directing them to restore the salary to \$1,500 a year.

Six out of fifteen councilmen, being the minority members of the council, filed answers in this suit averring that in their opinion the salary of the relator ought to be

\$1,200 a year. The seven majority members and the mayor filed an exception of no cause of action; and, on its being overruled, filed an answer. In this answer the councilmen allege that they fixed the salary of the relator in the exercise of the discretion vested in them by the city charter, and that the court is without jurisdiction to control that discretion; that they acted in good faith, in the public interest; that the relator continued to discharge the functions of the office after this reduction had been made, and is therefore estopped from contesting; that a competent person can be secured for the position at this reduced salary; that the relator "is grossly incompetent, disrespectful, officious, and meddlesome," and has neglected his public duties at various times; that he is particularly incompetent, in that he is not a stenographer; that he has been guilty on many occasions, while in the discharge of his duties, of insubordination, particularly in his published interviews regarding the city administration; that he is officious, particularly in his personal conduct and demeanor, at all times while in the discharge of his duties; that:

"He has not kept the hours at the city hall as designated by the mayor, but has left his post of duty when needed on several occasions, and when expressly instructed by the mayor to remain.

"Third. That he is guilty of misconduct in office, particularly in seeking to compel said mayor and council to pay him a higher salary than the services incident to the office will justify or the administration of the city's affairs make necessary, and is prosecuting suits against the city and its board of trustees in his official capacity, in which he makes under his oath false and untrue charges against the council and its members; that he has been guilty of malfeasance in office, particularly in this: that, while acting as secretary to the council, he wrongfully and illegally embodied into the minutes of a meeting held by said council, on the \_\_\_\_\_ day of \_\_\_\_\_, 1909, a certain protest filed by himself, and which was no part of the records, proceedings, or actions of the council, and caused same to be published in the official journal of the city as a part of its minutes, and had the city charged with the expense of its publication.

"Fourth. That the services of the city auditor are no longer worth exceeding \$300 per year; that said sum is commensurate with the nature and character of the services to be performed; that the council, in the exercise of its discretion, has fixed the salary at \$300 per year; that the office of city auditor was created when the city was doing extensive paving, grading, and improving work, which unusual and extraordinary work made creation of the office imperative, but that said work has been completed, and the duties now devolving on said auditor are quite insignificant and unimportant, and do not justify a salary exceeding said sum."

The charter of the city of Shreveport (Act No. 153, p. 306, of 1898, § 22) creates the office of city auditor, makes the officer eligible by the city council, and provides that he shall hold his office until the expiration of the term of office of the members of the council by whom he was elected. The charter authorizes the council to remove by a

majority vote any officer or employé "for incompetency, neglect of duty, malfeasance in office or when the service of such officer or employé be no longer necessary to the public interest." It defines the duties of the city auditor, and provides for his compensation, as follows:

"The city auditor shall be ex officio secretary of the council, keep a record of all proceedings, attest all ordinances, receive and file all papers belonging to the council, and shall prepare two copies of the assessment roll and file one with the clerk of the court of the parish of Caddo, and the other in the office of the city comptroller, and the said council shall fully define the duties of the auditor, and may impose upon him any duties herein defined as those of the comptroller, except those of collection of taxes and licenses, and shall fix his salary not to exceed \$1,200 per annum, and shall give bond in a sum to be fixed by the council."

By Act No. 192, p. 344, of 1906, this was amended so as to increase to \$1,500 the maximum amount at which the council may fix the auditor's salary.

The council fixed the auditor's salary at this maximum amount of \$1,500; imposed upon him the duties of auditing the books of the comptroller and other officers, and of acting as secretary of the mayor and of the several committees of the council. This was the situation when the relator, Thurmond, was elected to the office of city auditor as his own successor, in November, 1908, at the going into office of the present city council.

On December 15, 1908, an ordinance was introduced in the council reading:

"That the services of the present incumbent of the office of city auditor be and the same is hereby declared no longer necessary in the public interest, and that T. H. Thurmond, Esq., be and he is hereby removed therefrom.

"That the mayor be and he is hereby authorized and empowered to employ a secretary who shall be a stenographer and whose duties shall be to assist the comptroller, and who shall also be secretary to the mayor and such other officers as may be prescribed from time to time by the mayor or council, and whose compensation shall be the sum of nine hundred (\$900) dollars per annum, payable monthly."

On motion, this ordinance went over to the meeting of January 12, 1909. It was then voted on, but failed to secure the requisite number of votes. Thurmond filed a protest, denying the right of the council to remove him. The ordinance came up again at the meeting of January 19, 1909, and was then adopted, by a vote of eight to five, the council being composed of 15. At the meeting of February 4, 1909, the "action of removing the city auditor was reconsidered," and the relator was "reinstated." At the meeting of February 9, 1909, the following resolution was adopted by the council by a vote of eight to six, two of the members being absent, to wit:

"Defining the duties of the city auditor, and fixing compensation.

"Be it resolved by the city council of Shreveport, in legal and regular session convened, that the city auditor be ex-officio secretary to the



council, the mayor and all committees, and shall perform all duties defined by the city charter as incumbent on him, and shall have such hours at the city hall as the mayor may designate.

"Be it further resolved, etc., that the salary of said auditor shall be the sum of three hundred dollars per year, payable monthly."

At the meeting of April 16, 1909, the finance committee reported the following to the council, and recommended its adoption:

**"Annual Salaries of City Officials and Employés.**

"Mayor, \$2,000. Comptroller, \$1,800. Auditor Secretary, \$900. City Attorney, \$2,000. City Physician, \$600. Extra for attending pest house, \$400. Street Commissioner, \$1,500. Asst. Street Commissioner, \$1,000. Plumbing Inspector, \$960. Sexton, \$900. Pound Keeper, \$900. City, \$1,200. 2 Helpers, \$1,200. Building Inspector, \$300. City Hall Janitor, \$480. Helper, \$260.  
"Total, \$18,440.00."

The majority councilmen made no attempt whatever to substantiate the defenses based upon their having had cause for removing the relator.

For explaining the great reduction in the salary of the relator, they showed that there had been a great reduction in the income of the city caused by the adoption of prohibition, which cut off the revenue theretofore derived from the saloon licenses, and that no works of public improvement were going on for the moment, so that the work of the auditor's office had greatly fallen off; and that the relator was not a stenographer, and it was necessary to hire a stenographer to do much of the work which properly fell to him.

As a matter of fact, the evidence shows but a very insignificant cut in the salaries of officers. The salaries of the mayor, chief of police, and chief of fire department were not reduced. In fact, the evidence does not show any reduction in salaries, except in that of the comptroller, which was reduced \$50 a month, he now getting \$1,800 a year. The city attorney stated at the bar, in the course of the argument, that his salary had been cut from \$1,500 to \$1,200. The street commissioner's salary was raised from \$1,000 to \$1,500, but additional duties were placed upon him. There had theretofore been two assistant street commissioners at \$100 (?) apiece. One of them was dispensed with, and the salary of the other raised from \$100 (?) to \$1,000. We imagine this \$100, must be a typographical error. The other officers are the city physician, plumbing inspector, sexton, pound keeper and two helpers, building inspector, city hall janitor and helper. The evidence does not show whether their salaries were reduced.

The evidence shows that the relator is a good bookkeeper and highly competent. The minority councilmen, and several ex-mayors and other ex city officials, testified that a reasonable salary for the work which the charter and the ordinances impose upon the auditor would be not less than \$75 a month; that the salary of \$25 is ridiculous, and that

no competent person could be procured to accept the office at that price. Not one of the defendants testified; and they called but one witness, the comptroller, who thought that a salary of \$900 would be reasonable, and agreed with the witnesses for relator that the amount of \$25 was ridiculous, and could not be viewed in any other light than as a "notice to quit."

Upon the foregoing facts, there can be no difference of opinion but that the majority of the city council have sought to remove the relator from office by starving him out, and placing him under the beck and call of the mayor. The charter confides to the council itself the power of defining the duties of the auditor; the attempt to delegate this power to the mayor is in itself a violation of the charter.

The learned city attorney and the other learned counsel appearing for the city take the position that the discretion which the city charter confides to the council of fixing the salary of the city auditor cannot be controlled by the courts. And we infer that the defense of the case was conducted on that theory in the lower court, since the majority councilmen were not put on the stand to testify regarding what had been their real object in thus cutting off the city auditor to a salary manifestly inadequate.

Before entering upon the discussion of the case, we deem it well to say that, the city auditor being an officer created by the charter, with certain specific duties prescribed by the charter, and which must be performed by him and can be performed by no one else, the office is not one of those which the council is authorized by the charter to dispense with whenever no longer necessary, and that defendants do not pretend that it is. The office cannot possibly cease to be necessary, since several of the functions attached to it by the charter are essential to the operation of the city government.

In support of the contention that the courts are powerless to interfere with the discretion confided by the charter to the city council, the learned counsel for defendants refer to no authority, except the recent decision of this court in the case of Gentry v. Village of Dodson, 49 South. 635. But what the court held in that case was that, "under the circumstances disclosed by the record" in that particular case, the court could not interfere; and the circumstances of the case are stated by the court as follows:

"The village of Dobson contains about 1,000 inhabitants. Its revenues during the year 1906 from all sources (including fines, \$410) aggregated \$1,711.73; of which amount \$1,464 was paid out in salaries of the officers, leaving only \$274.73 for the improvements of the streets and pavement and all the other municipal expenses. Of the amount paid out in salaries, the mayor (T. G. Payne) received \$240, and the marshal (R. R. Gentry) received \$1,000, making \$1,240, much more than half the total amount collected. Among the voters there seems to have been some dissatisfaction flowing

out of this condition of affairs, as the campaign in 1907 was conducted upon a platform of more economic administration of public affairs, and the party advocating the economy elected their ticket, at least the aldermen and marshal.

"After the installation of this new board of aldermen, true to their platform, they materially reduced the salaries of the village officers. The salaries of the aldermen were abolished altogether, each alderman agreeing to serve without pay. The salary of the mayor was reduced from \$240 to \$70; that of the clerk from \$40 to \$25; that of the attorney reduced from \$100 to \$35; and the salary of the marshal was reduced from a guaranteed salary of \$65 per month (in reality above \$1,000) to a salary of \$15 per month. This they supposed would leave them about \$600 for the improvements of the streets, instead of a small amount (say about \$274.75) formerly left for both streets and other miscellaneous expenses outside of salaries.

"Mr. Campbell, the newly elected marshal, after the salary of the office had been reduced to \$15 per month, and after serving several weeks under this salary, became dissatisfied, and, pursuing the only course open to him, resigned.

"The Governor, on the 17th day of October, 1907, appointed the plaintiff, R. R. Gentry, marshal, to fill the place made vacant by the resignation of Campbell, the salary to which office had been previously fixed at \$15 per month; but in the meantime, and before he took the oath and gave bond as marshal, that office had been divorced from the offices of street commissioner, tax collector, and tax assessor, and the salary fixed at \$1 per month, \$1 for each arrest, and 10 per cent. of all fines collected."

Very far from being committed to the doctrine that the courts are powerless to interfere in cases of abuse of discretionary power by municipal councils and police juries, this court, after the most mature consideration, has deliberately committed itself to the very opposite view. *Evans v. Police Jury*, 114 La. 767, 38 South. 555; *Davis v. Police Jury*, 120 La. 163, 45 South. 47; *Denis v. Shakespeare*, 43 La. Ann. 93, 8 South. 893.

No doubt, the power which creates may destroy. Where the Legislature, or a municipal council, has created an office, it may destroy it. Where either has the discretionary power of removal, it may exercise it without let or hindrance. The acceptance of an office does not create a contract between the officer and the political body under which the office is held. An officer has no proprietary interest in the office, but he holds it simply in, and subject to, the public interest. On all these points an abundance of decisions may be found all upholding the right to remove the officer, or to reduce or abolish altogether his salary. But where the Constitution creates an office, the Legislature cannot abolish or nullify it, either by direct or indirect means; and, where the Legislature creates an office, a city council cannot abolish or nullify it, either by direct or indirect means. And, if either the Legislature or a city council sought to do by indirection what it thus could not validly do directly, the duty of the courts to interfere would be perfectly plain. In the case of the Legislature, its at-

tempt to override the Constitution by indirection would be held to be unconstitutional; and in the case of a municipal council mandamus would lie. Code Prac. art. 829; *Denis v. Mayor*, 43 La. Ann. 93, 8 South. 892. For instance, the offices of sheriff, clerk of court, etc., are created by the Constitution, and the fixing of the fees of these officers is left to the discretion of the Legislature. Would any one say that the Legislature could indirectly abolish these offices, or remove these officers, by assigning their duties to other officers, or by so reducing the fees of the office that no one would undertake to perform the duties? It stands to reason that a municipal council cannot abolish or nullify an office created by the Legislature, and cannot, directly or indirectly, remove without cause an officer whom it is authorized to remove for cause. If, instead of merely reducing the salary, the council abolished it altogether, no one but would say that such action was illegal and could be rectified by the courts. It would be a palpable disregard of the charter, and a violation of the duty which the charter imposed upon the council to fix the salary. But what practical difference is there between such a case and one like the present, where, as shown by the evidence, the salary is fixed so low that no competent person would accept the office; where the ostensible fixing of the salary is a mere mask for abolishing the office or removing the officer? Is the illegality of the action of the council to escape the vision of the courts simply because it is masked? Are the courts to be circumvented by a plain subterfuge?

Upon that point, the decisions in other jurisdictions, so far as we have been able to find, are all one way. Thus:

In *Reld v. Smoulder*, 128 Pa. 324, 18 Atl. 445, 5 L. A. 517, the Supreme Court of Pennsylvania said:

"It will not be seriously contended that the Legislature had any power to pass upon the necessity for the appointment, for this discretion is expressly committed to the clerk, who is to act with the consent and approval of the court. Nor will it be pretended that the assistant clerk might be removed from his office by a simple act of the Legislature. There was no power competent to remove him save the tribunal which conferred the appointment.

"If the Legislature may repeal the act adjusting the salary without making any further or other provision in that behalf, it may practically abolish the office. If the assistant clerk may thus be deprived of the office, the clerk of court and judge are both liable to the same fate, and in this way that might be done by indirection which could not be done directly. It is true that the salary is a matter which, by the Constitution, is submitted to the discretion of the Legislature. In the exercise of that discretion, by the act of 1874 (P. L. 206), the salary was fixed at \$1,500, and this rule of compensation will continue until by some other statute it is changed. The salary first fixed may perhaps be increased or diminished, subject to the restriction of the thirteenth section of the third article of the Constitution, as the Legislature should from time to time see fit to provide; but to repeal the provision for a salary altogether is to remove a clerk from his office."

In *White v. Worth*, 126 N. C. 570, 36 S. E. 132, the Supreme Court of North Carolina said:

"The Legislature may abolish a legislative office, and this is the end of it. *Hoke v. Henderson*, 15 N. C. 1, 23 Am. Dec. 677. When the office is abolished, this ends the term of the officer holding it, as there can be no officer without an office, and, of course, no salary without an officer. The Legislature may reduce the salary of an existing legislative office, if this is done for the benefit of the public, and not for the purpose of injuring the incumbent or to starve him out. But, if it clearly appears that it was done for that purpose, it would be void. *State v. Gale*, 77 N. C. 283; *Hoke v. Henderson*, supra. In cases where only a part of the salary is taken from the officer, it would have to appear from the legislation itself that the object was unlawful, or the courts would not interfere. *Hoke v. Henderson*, supra. But if the Legislature should undertake to deprive the officer of the whole of his salary, while his office still continued, the intent would so plainly appear that the act would be declared void. *Hoke v. Henderson*, supra; *Cotten v. Ellis*, 52 N. C. 545."

In *People v. Burby*, 17 App. Div. 165, 45 N. Y. Supp. 347, it was held that (quoting syllabus):

"The Legislature had no power to deprive a constitutional officer of his fees by relieving him of the duties of his office, and providing that, if he exercises such duties, he shall be entitled to no compensation."

In this same case the court quoted approvingly the decision of the Supreme Court of Pennsylvania, supra, in *Reid v. Smoulter*, as follows:

"It has been held that merely depriving an officer of his fees was equivalent to depriving him of his office, and was unconstitutional."

In *Bunting v. Gales*, 77 N. C. 285, the court said:

"Neither can the Legislature take away the entire salary of an officer"—citing *Cotten v. Ellis*, 52 N. C. 545.

In *Wesch v. Common Council*, 107 Mich. 149, 64 N. W. 1051, which is the decision apparently opposed to the foregoing decisions, the court said:

"The petition does not aver that the duties of the officer continue as they were prior to the petitioner's appointment, and does not state what portion of relator's time has been taken up with the performance of the duties of the office, nor does it allege that the action of the council was factious. Bad faith or improper motive cannot be inferred from the facts stated, or presumed in the absence of statements upon which an inference can be predicated; and we must therefore assume that good reasons existed for the reduction of the compensation from the former figure, and the payment of a mere nominal salary. When the petitioner was appointed, he knew that the salary of the office had not been fixed for the term for which he was appointed. His appointment and acceptance was subject, not only to the right of the council, but to its duty as well, to fix the salary. *Fournier v. West Bay City*, 94 Mich. 463, 45 N. W. 227."

That case is clearly and plainly differentiated from the instant case on its facts. The allegations which are said not to have been made in that case are distinctly made in the

instant case, and, what is more, are proved.

The case of *Board, etc., v. Westbrook*, 64 Miss. 312, 1 South. 352, decided by the Supreme Court of Mississippi, is identical with the one at bar in all essential particulars. The syllabus of the case reads as follows:

"The board of supervisors of a county, wishing to abolish the office of chief health officer of the county, and not having the power to do so directly, sought to accomplish that result by reducing the salary of the officer to a mere nominal sum—\$1 per month. Held, although Rev. Code Miss. 1880, § 790, imposes upon the board of the supervisors the duty of fixing the salary of the chief health officer of their county, yet the laws for the protection of the public health, being of general application, cannot be nullified in any county by the board fixing the salary at a rate so low that no competent physician will accept the office."

See, to the same effect, *Morris v. Glover*, 121 Ga. 751, 49 S. E. 786, where the Supreme Court of Georgia said:

"Can the Legislature by indirection accomplish what it is restricted from doing by the organic law of the land? Among the incidents of public office are the discharge of its duties and the enjoyment of its emoluments by the individual entitled to the office. \* \* \* The duties and emoluments are of the substance of the office; its name but the semblance. \* \* \* An office created by statute, but not defined in or recognized by the Constitution, may be abrogated by statute. But where an office is created or guarded by express constitutional provision, its scope cannot be enlarged or lessened by statute, nor can the office be filled in any other manner than that prescribed by the Constitution. \* \* \* It has been held that the taking away of the salary amounts to the abolition of the office. *Reid v. Smoulter*, 128 Pa. 324, 18 Atl. 445, 5 L. R. A. 517."

For a long list of decisions on the same point, see 23 A. & E. E. 406, in support of the text:

"Where the term of office is fixed by the Constitution, the Legislature cannot extend or abridge the term so fixed, either directly or indirectly."

See, also, 29 Cyc. 1396.

See, also, cases cited at page 421 of 23 A. & E. E. in support of text:

"Though the tenure and compensation are fixed by statute, the Legislature cannot abolish an office of constitutional origin by a colorable reduction of the compensation or by taking it away altogether."

Changing "Constitution" for "statute," and "city council" for "Legislature," and the text here quoted covers the present case exactly.

It goes without saying that in all such cases the court could interfere only where upon the facts it was perfectly plain that the reduction of the salary was resorted to merely as an indirect or colorable means of abolishing the office or of removing the incumbent. Of course, in such cases every intendment would have to go in favor of the action complained of. For instance, in the case of *Gentry v. Village of Dobson*, supra, this court refused to interfere, although the circumstances gave rise to a very strong suspicion that the sole motive was to get rid of the officer. In order that the court

should have grounds for interfering, the evidence would have to show as a matter of fact that the action complained of was purely and simply an attempt to do by indirection what could not be done directly; an attempt on the part of the municipal council to override or nullify the charter. In the present instance, denial is made in the pleading and in the argument of counsel that such was the intention, or that such would be the effect or operation of the action complained of; but on the evidence, no attempt, or, if any, none but the feeblest and most perfunctory, has been made to disguise the plain fact that such was the intention and such would be the result. This court cannot base its judgment upon a denial in the pleading, or upon a denial in the argument of counsel, but must base it upon the evidence. The evidence shows that the lowest reasonable salary for the office of city auditor, as the duties of that officer are at present fixed by statute and by ordinance, would be \$75 a month. The court will not fix the salary, but will make the mandamus peremptory to the extent of ordering that it be fixed at not less than the amount of \$75 as long as the duties of the officer shall remain as at present fixed.

The upper limit of \$1,200, afterwards raised to \$1,500 by the Legislature, affords some indication of what the salary of this officer should approximately be.

The judgment appealed from is modified so as to read: It is ordered, adjudged, and decreed that the writ of mandamus herein issued to the city of Shreveport and the trustees, members of the city council, be and the same is hereby made peremptory to the extent of ordering the said council and the individual members thereof to meet without delay and fix the salary of the city auditor of said city at not less than \$75 per month, to date from February 1, 1909; and that the cost of the lower court be paid by the city of Shreveport, and those of the appeal by the relator.

NICHOLLS and MONROE, JJ., dissent.

On Rehearing.

LAND, J. Relator and defendant have both filed petitions for a rehearing of this cause.

Relator contends that his salary as auditor should be fixed at \$100 per month. Defendant contends that the relator's salary should remain at \$25 per month, as fixed by the city council.

Mr. Rives, who has been comptroller of the city of Shreveport a number of years, was called by defendant, and testified that the budget for 1909 contained an appropriation of \$900 per annum for the auditor. This amount was subsequently reduced by action of the city council to \$300 per annum. The original budget was adopted by unanimous

vote on February 4, 1909. On February 9, 1909, the auditor's salary was reduced to \$300 by a vote of eight to six. An amendment proposed, that the salary be fixed at \$75 per month, was voted down. No member of the city council moved that the salary of the auditor be fixed at a greater amount. There is nothing in the record to show that the relator protested against the fixing of the salary at \$75 per month as per proposed budget of December 8, 1908. In fact, all the members of the city council voted for the original budget; and relator made no complaint until it was proposed to reduce the salary from \$900 to \$300. Mr. Rives, with practical knowledge of the duties required of relator as auditor, testified that \$900 per annum was a reasonable compensation, considering the nature of the services and the financial condition of the city of Shreveport, and that he believed that the office could be filled for that salary. This was the common opinion of the members of the city council when the budget was adopted, and we do not think that the relator has any good grounds to complain of the court's adoption of \$900 per annum as a minimum reasonable compensation for the services required of the auditor of the city of Shreveport. Such services may be worth more, but any amount above the minimum is a matter of discretion.

On the other hand, not a single witness in the case testified that \$25 per month was a reasonable compensation for the services of relator as auditor, or that any person at all competent could be procured to fill the office at a salary less than \$75 per month.

The manifest intent of a majority of the city council was to dispense with the services of an auditor; but, finding that this could not be done legally under the city charter, the same majority resorted to the device of fixing the salary so low that the relator could not afford to keep the office.

The authorities cited in our original opinion justify the interposition of the courts in cases where it is manifest that the municipal authorities have sought, either directly or indirectly, to abolish a statutory office or to starve out the incumbent.

Rehearing refused.

(124 La.)

No. 17,427.

ROBERT GAIR CO. v. COLUMBIA RICE PACKING CO., Limited, et al.

(Supreme Court of Louisiana. June 15, 1909.)

1. CORPORATIONS (§ 432\*)—CONTRACTS—EXECUTION—EVIDENCE.

Evidence held to show that the guaranty of a corporation given by its secretary was given with the knowledge and acquiescence of the president and directors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 432.\*]

**2. CORPORATIONS (§ 432\*)—OFFICERS—POWERS.**

The authority of a subordinate agent of a corporation may be established by proof of the usage which the corporation had permitted to grow up with the acquiescence of the board of directors charged with the duty of supervising and controlling the business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1727; Dec. Dig. § 432.\*]

**3. CORPORATIONS (§ 399\*)—OFFICERS—POWERS.**

Persons dealing with the president of a corporation in the usual manner and within the scope of the powers which the president had been accustomed to exercise with the assent of the directors, though in ultra vires of the corporation, may assume that he had been actually invested with such powers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1583; Dec. Dig. § 399.\*]

**4. CORPORATIONS (§ 370\*)—POWERS.**

A corporation possesses only those powers which its charter confers on it either expressly or by implication.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511-1515; Dec. Dig. § 370.\*]

**5. CORPORATIONS (§ 487\*)—CONTRACTS—ULTRA VIRES—VALIDITY.**

Contracts made by a corporation beyond the scope of its express or implied powers are void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893-1898; Dec. Dig. § 487.\*]

**6. CORPORATIONS (§ 416\*)—IMPLIED POWERS—GUARANTEEING CONTRACTS.**

A corporation was formed to establish, erect, and operate a rice mill, and, in connection therewith, to buy and sell real estate, live stock, and commodities that such corporations are authorized to deal in under the statute, and with authority to make contracts and possess the powers and privileges that corporations may lawfully possess. All its stockholders were stockholders in another corporation, formed to carry on the business of packing rice, buying rice from the mill company and others. The packing company was an independent venture. It was not shown whether its stock was held exclusively by the stockholders of the mill company. The secretary of the mill company was the vice president of the packing company. *Held*, that the mill company had no implied power to guarantee the contracts of the latter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1623-1625; Dec. Dig. § 416.\*]

**7. CORPORATIONS (§ 370\*)—POWERS—"IMPLIED POWERS"—"INCIDENTAL POWERS."**

Implied powers of corporations presumptively exist only to the extent that may be necessary to enable them to carry out the express powers granted and to accomplish the purpose of their creation, and an incidental power may be defined to be one that may be immediately appropriate to the execution of the specific power granted, and not one that has some slight or remote relation to it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1515; Dec. Dig. § 370.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3435, 3495, 3496.]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Philip Sidney Pugh, Judge.

Action by the Robert Gair Company against the Columbia Rice Packing Company, Limited, and another. There was a judgment for

plaintiff against the defendant the Columbia Rice Packing Company, and in favor of co-defendant the Crowley Rice Milling Company, and plaintiff appeals. Affirmed.

Dart & Kernan, for appellant. Chappuis & Holt, for appellee Crowley Rice Milling Co., Ltd.

**PROVOSTY, J.** The Robert Gair Company, plaintiff in this suit, of Brooklyn, N. Y., manufacturers of paper boxes, and the Columbia Rice Packing Company, of Crowley, in this state, entered into a contract by which the former was to manufacture and ship to the latter 1,400,000 cartoons for packing rice; and this suit is for a balance of \$6,740.85, alleged to be due under this contract. Plaintiff has made the Crowley Rice Milling Company, also of Crowley, in this state, a party defendant, alleging that it guaranteed the performance of the contract by its codefendant. The two defendant companies will be designated hereinafter respectively, as the packing company and the milling company. Judgment went in the lower court against the packing company, but in favor of the milling company, and plaintiff alone has appealed; so that the packing company is not a party to this appeal.

The guaranty in question was signed for the milling company by its secretary, John Green. The milling company denies that its said secretary had any authority to bind it in the matter, and avers that the giving of such a guaranty is outside of and beyond its own powers as a corporation.

While the contract was in course of negotiation, Green, who, besides being secretary of the milling company, was one of the directors of the packing company, wrote twice to the plaintiff company, in the name of the milling company, with reference to the proposed contract. In the first of these letters he said:

"We have your price and proposition which we are giving careful attention and will have our attention as soon as we get the hand-painted designs from you."

In the second of these letters he said:

"We have your favor of the 27th and note you have not yet mailed us designs of the cartoons for which we are anxious in order to get our order placed so that we will be able to get the goods in time to be used about the middle of September. From what Mr. Guild states, we anticipated having the designs some two weeks ago. We hope when received they will meet our approval so there will be no further delay."

From these letters and from plaintiff's answer to the second, one would suppose that the proposed contract was to be with the milling company itself instead of with the packing company.

Before the plaintiff company would close the contract, it required that security should be given; and thereupon Green gave, in the

name of the milling company, the guaranty sued on.

By the charter of the milling company all the powers of the corporation are vested in the board of directors; but the president and the secretary, acting jointly, are authorized to make contracts "in the regular transaction of its business." In practice, Green alone attended to the business, and by general repute, and according to his own testimony given in a suit brought by the company, was manager. He says, however, that except in this business with the plaintiff company he always acted under the supervision of the board of directors, and never entered into any contracts, outside of routine business, without first obtaining their authorization; and there is nothing in the record expressly to the contrary. He says that the board of directors knew nothing of this guaranty given to the plaintiff, nor of a correspondence based upon it carried on by plaintiff with the milling company, beginning in the latter part of November, when the packing company began to be slow in sending in its orders for the cartoons, and lasting several months, in which plaintiff was calling upon the milling company, as guarantor, to urge the packing company to greater diligence.

If it be true that the directors of the milling company had no knowledge of this guaranty or of this correspondence, such absence of knowledge could not have been the result of accident; for this guaranty was an important contract, involving eight to nine thousand dollars—the largest this milling company had ever entered into, excepting that for the erection of its plant. The president of the milling company was constantly in the office. The directors must have been there frequently, for Green says that in all he did he acted under their supervision, except in the one instance of this guaranty. There were two regular meetings of the board of directors each year, and special meetings as occasion required. There was a standing committee whose duty it was to "examine into the condition of the corporation at any time they selected, but not less than once every quarter." It is incredible that these directors should not have known and approved of this guaranty, unless Green studiously and fraudulently kept all knowledge of it from them, and this he denies that he did—simply "overlooked" it, he says. Green was not more largely interested in the packing company than were his fellow officers of the milling company, the president and the directors. There was every reason why he should have communicated with them on the subject, and none why he should have abstained from so doing. He alone testifies; they do not. We conclude that this guaranty was given with the knowledge and consent of the president and directors of the milling company, and that this consent was given with as much observance of formality as was customary in

the transaction of the business of the company.

"The authority of the subordinate agent of a corporation often depends upon the course of dealings which the company or its directors have sanctioned. It may be established some time without reference to official record of the proceedings of the board, by proof of the usage which the company had permitted to grow up in the business, and of the acquiescence of the board charged with the duty of supervising and controlling the company's business. Parties dealing with the president of a corporation in the usual manner, and within the scope of the powers which the president had been accustomed to exercise with the assent of the directors, and not ultra vires of the corporation, would be entitled to assume that he had been actually invested with those powers." *Berlin v. P. L. Cusachs*, 114 La. 744, 38 South. 539; *Blanc v. Germania Nat. Bank*, 114 La. 739, 38 South. 537.

The other defense, that of ultra vires, must however, be sustained. It is elementary that a corporation possesses only those powers which its charter confers upon it either expressly or by implication. Or, as more fully stated in the case of *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 48, 11 Sup. Ct. 478, 35 L. Ed. 64:

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders; not to be subject to risks they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

The powers of the corporation are defined in the charter, as follows:

"The object and purposes for which this corporation is formed are the establishment and erection of a modern rice mill with all proper and requisite machinery, fixtures and appurtenances thereof, at said town of Crowley in said parish of Acadia, in this state, and the maintenance, conducting and operation there of a general milling, storing, manufacturing and commercial business in connection therewith to buy and sell real estate, live stock and all articles and commodities that such corporations are authorized to deal in under the statutes of the state."

There is nothing here that would authorize the company to guarantee, gratuitously or otherwise, the contract of a third person. But the learned counsel for plaintiff contend that such authority is to be found in article 1 of the charter, which declares what the name and duration of the corporation shall be, and adds that it—

"shall have authority to sue and to be sued, may acquire and hold real estate and personal property and receive and convey title thereto; may make contracts and generally shall possess all the powers and privileges that corporations are or may be lawfully authorized to possess within this state."

We think the powers of the corporation are determined by the clause which defines its objects and purpose, and not by this general clause, which, when read in connection with the clause defining the object and purpose of the organization of the corporation, simply means that, for carrying out the said object and purpose, the corporation shall have all the powers that corporations usually have. The power or authority to conduct a rice milling business certainly does not expressly include the power or authority to guarantee the contracts of an independent corporation. Does it include it impliedly, or as fairly incidental?

The learned counsel for the plaintiff argues that it does; that the giving of this guaranty was in line with the business of the milling company, and directly and immediately appropriate to the execution of the specific powers granted by the charter, because the packing company was nothing more than an instrumentality created and made use of by the several rice mills of Crowley, of which the milling company was one, for creating a market for their rice by putting it up in more attractive and salable packages. Counsel assimilate the situation to that where a brewing company, in order to create or maintain a market for its beer, installs a saloon or hotel keeper in certain premises, and guarantees the payment of the rent of the premises. 7 Thompson, Corp. 837; 29 A. & E. E. 47.

There can be no denial that the two companies were not entire strangers to each other; all the stockholders of the milling company were stockholders in the packing company, and Green was the vice president of the packing company. But pretty much the same relation existed between the packing company and all the other rice milling companies of Crowley, and the evidence shows that this packing company was an independent venture, which was to buy its rice not specially from any particular rice mill or mills, but wherever it could get it most advantageously; and that while a great many, or most, of the stockholders of the several milling companies were interested in it, the corporations themselves, as corporations, had nothing to do with it. The record does not show whether or not the stock of the packing company was held exclusively by the stockholders of rice milling companies. Under these circumstances, we do not think that the packing company was a mere instrumentality in the carrying on of the business of the milling company; and, hence, we do not think that the power to sign this guaranty can be said to have been fairly incidental to the power expressly granted by the charter. The law upon this point is stated in the case of *State v. Newman*, 51 La. Ann. 837, 25 South. 410, 72 Am. St. Rep. 476, as follows:

"Implied powers, in corporations, are presumed to exist only to the extent that may be neces-

sary to enable such bodies to carry out the express powers granted, and to accomplish the purpose of their creation; and an incidental power may be defined to be one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it."

We quote from the Supreme Court of Texas, as follows:

"It is not easy to lay down a rule by which the question may be determined; but the following, as announced by a well-known text-writer, commends itself not only as being reasonable in itself, but also as being in accord with the great weight of authority: 'Whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this. It may not, under the pretext of fostering, entangle itself in proceedings with which it has no legitimate concern. In the next place, the courts have, however, determined that such means shall be direct, not indirect; i. e., that a company shall not enter into engagements, as the rendering of assistance to other undertakings from which it anticipates a benefit to itself, not immediately, but mediately by reaction, as it were, from the success of the operations thus encouraged—all such proceedings inevitably tending to breaches of duty on part of the directors; to abandonment of its peculiar object on part of the corporation.' Green's Brice's Ultra Vires, 88.

"In short, if the means be such as are usually resorted to and a direct method of accomplishing the purpose of the corporation, they are within its powers; if they be unusual, and tend in an indirect manner only to promote its interests, they are held to be ultra vires. *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 782.

"The test is not whether the particular enterprise or undertaking would be to the benefit of the corporation guaranteeing the contract, but whether the exercise of such authority, in view of the circumstances, is reasonably necessary to the proper conduct of its legitimate business."

In the present connection, the following cases may be read with interest.

In *Davis v. Old Colony Railroad Co.*, 131 Mass. 258, 41 Am. Rep. 221, it was held beyond the power of a railroad corporation and a corporation engaged in the manufacture and sale of musical instrument to guarantee the expenses of a musical jubilee and festival, though made with reasonable belief that the holding of such festival would be of great pecuniary advantage to such corporation by increasing their proper business, and though the festival had been held and the expenses incurred in reliance upon the guaranty.

In *West Maryland Railroad Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 62 Atl. 351, 2 L. R. A. (N. S.) 892, 111 Am. St. Rep. 362, a contract by a railroad company guaranteeing the payment of dividends on stock and interest on bonds of a hotel company on the lines of its road was held ultra vires and void, though it expected that the construction and operation of such hotel would greatly increase the receipts of the railroad company.

To the same effect are the following cases: *Germania Safety Vault Co. v. Boynton*, 71 Fed. 797, 19 C. C. A. 118; *Humbolt Min. Co.*

v. American Mfg., etc., Co., 62 Fed. 356, 10 C. C. A. 415; Best Brewing Co. v. Klassen, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 763, 76 Am. St. Rep. 26; Penn. R. R. Co. v. St. Louis, etc., 30 R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Memphis Grain, etc., El. Co. v. Memphis, etc., R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798.

Judgment affirmed.

(124 La.)

No. 17,654.

**STATE v. BLOUNT.**

(Supreme Court of Louisiana. June 19, 1909.  
Rehearing Denied June 30, 1909.)

**1. JUDGES (§ 51\*)—RECUSATION.**

Where a motion to recuse the presiding judge assigns no legal grounds for recusation, it may be by him overruled without reference to another judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 227, 229; Dec. Dig. § 51.\*]

**2. CRIMINAL LAW (§ 1158\*) — REVIEW — CHANGE OF VENUE.**

A motion for a change of venue overruled on evidence preponderating in favor of the state presents nothing for review.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1158.\*]

**3. CRIMINAL LAW (§ 135\*)—TRIAL—REFUSAL TO HEAR ARGUMENT.**

The refusal of the judge to hear argument is not assignable as error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 135.\*]

**4. CRIMINAL LAW (§ 369\*)—EVIDENCE—RES GESTÆ.**

Where a man and two women were killed at the same time and place by the same person or persons, evidence as to the whole occurrence is admissible on the trial of a charge of murder of either.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

**5. HOMICIDE (§ 214\*)—DYING DECLARATIONS—INADMISSIBLE IN PART.**

Dying declarations must go in as a whole, although some of the statements, if standing alone, would be inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 449; Dec. Dig. § 214.\*]

**6. CRIMINAL LAW (§ 413\*)—DECLARATIONS OF ACCUSED—ADMISSIBILITY.**

Declarations of the accused are admissible in his favor, only when they form part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.\*]

**7. HOMICIDE (§ 213\*)—DYING DECLARATIONS—COMPETENCY AS WITNESS OF PERSON MAKING DECLARATION.**

Under the laws of the state of Louisiana an ex-convict is a competent witness in a criminal case, and therefore his dying declarations are admissible in evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 445; Dec. Dig. § 213.\*]

**8. WITNESSES (§ 344\*)—IMPEACHMENT—REPUTATION FOR TRUTH.**

The general reputation of a witness for truth and veracity cannot be impeached by evidence that he falsified on another occasion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1125; Dec. Dig. § 344.\*]

**9. CRIMINAL LAW (§§ 683, 1153\*)—REBUTTAL TESTIMONY—DISCRETION OF COURT—REVIEW.**

The purpose of rebuttal testimony is to disprove and discredit the evidence adduced in behalf of the defendant. The question of the allowance of evidence in rebuttal is left largely to the discretion of the trial judge, and his rulings will not be disturbed except in extreme cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. §§ 683, 1153.\*]

**10. HOMICIDE (§ 252\*)—EVIDENCE—SUFFICIENCY.**

A charge that the testimony of one witness is sufficient basis for a verdict in a murder case, provided that it satisfies the jury of the guilt of the accused beyond a reasonable doubt, is good law.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 252.\*]

**11. CRIMINAL LAW (§ 822\*)—CHARGE—CONSTRUCTION AS A WHOLE.**

A charge to the jury must be taken as a whole, and its prejudicial effect determined from that standpoint.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

**12. CRIMINAL LAW (§ 830\*) — REQUESTED CHARGE—REFUSAL.**

The judge properly refused to charge a hypothetical statement of facts on which no proposition of law was predicated.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 830.\*]

**13. CRIMINAL LAW (§ 1156\*)—REVIEW—DISCRETION OF LOWER COURT — MOTION FOR NEW TRIAL.**

The judge's rulings on motions for a new trial will not be disturbed except in clear cases of abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.\*]

(Syllabus by the Court.)

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert Stephens Ellis, Judge.

Avery Blount was convicted of murder, and he appeals. Affirmed.

William Breed Kemp, Thomas Phillip Sims, and Clay Elliott, for appellant. Walter Gulon, Atty. Gen., and William Hutchinson McClendon, Dist. Atty. (Robert Raymond Reid and Ruffin Golson Pleasant, of counsel), for the State.

LAND, J. The defendant was indicted for the murder of John C. Breeland, and was found guilty as charged. Defendant was sentenced to death, and has appealed.

John C. Breeland, Mrs. Breeland, his wife, and Mrs. Everett, her daughter, on January 22, 1909, after dark, were murdered in the public road, near Tickfaw, in the parish of Tangipahoa. Avery Blount was charged with the three murders, in separate indictments. He was tried for the murder of John C. Breeland. His defense was an alibi. He was convicted, and appealed, as above stated, and relies for the reversal of the verdict



and sentence on numerous bills of exception.

Defendant on February 4, 1909, petitioned for a change of venue, and a day was set for the hearing of the application. Defendant at the same time moved the trial judge to recuse himself, on the ground that he had formed and expressed an opinion concerning the matter in question adverse to the defendant.

#### Recusation.

The motion set forth no legal cause for recusation, and was properly treated by the trial judge as frivolous. Where a motion assigns no legal grounds of recusation, it may be overruled without reference to another judge. *State v. Chantlain*, 42 La. Ann. 718, 7 South. 669. This court, in recently refusing the writs in *State of Louisiana v. Avery Blount*, *In re Avery Blount Applying for Writs of Mandamus and Prohibition*, No. 17,461 (no written opinion filed), tacitly approved the ruling in the case of *State v. Chantlain*.

#### Change of Venue.

All the numerous witnesses, with one or two exceptions, testified that the defendant could get a fair and impartial trial in the parish of Tangipahoa. A jury acceptable to the prosecution and the defense was obtained without difficulty. Defendant's application for change of venue was therefore properly overruled.

#### Declining to Hear Argument.

After hearing all the evidence on the motion for a change of venue, the trial judge stated that he did not desire to hear argument, and overruled the motion. Subsequently the trial judge offered to hear argument, but this offer was declined by counsel for the defendant. We know of no law which compels a judge to hear an argument, if he feels competent to decide the question under consideration without such assistance. *State v. Dunn*, 41 La. Ann. 612, 6 South. 176; *State v. Boasso*, 38 La. Ann. 207. Besides, the ruling was correct, and therefore the defendant was not prejudiced.

#### Bill No. 5.

Defendant objected to testimony relative to the wounds received by Mrs. Breeland and Mrs. Everett, and the position in which their bodies were found at the scene of the homicide, on the ground that such testimony was irrelevant, immaterial, and illegal. The objections were overruled, and the evidence admitted by the trial judge for the following reasons:

"Because the shooting and killing of the two women and Breeland formed one continuous transaction, closely linked together, and were parts of the *res gestæ*; and because said evidence had bearing on the question of the intent with which the killing was done, the kind of firearms and missiles used, the distance of slayer

from victim as shown by the appearance and size of the wounds of all the parties killed, etc.; besides, every fact shown as to the scene of the murder, the articles found there, the nature of the wounds on the women, their position in the buggy, the baby found beside the road and near the buggy in which its mother was dead, the tracks made in and around the road and ditches by the person committing the murder, were necessary in order to corroborate or discredit the testimony of the witnesses."

#### Wharton says:

"When an extraneous crime forms a part of the *res gestæ*, evidence of it is not excluded by the fact that it is extraneous. Thus, on a trial for murder, evidence that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person, was held admissible, under the circumstances of the case, notwithstanding the evidence tended to prove a distinct felony committed by the prisoner; such shooting and killing of the deceased appearing to be connected as parts of one entire transaction." *Id. Crim. Ev. § 81*.

In *State v. Vines et al.*, 34 La. Ann. 1081, where two persons were killed at the same time, and the defendants were on trial for the murder of one, exception was made to permitting a witness to narrate the whole occurrence, on the ground that the testimony would disclose the killing of the other person, which being a distinct felony was not admissible. This objection was overruled, and the ruling was sustained on appeal, the court saying, "As a general rule, all that occurs at the time and place of the killing, in 'homicide cases, is admissible'—citing *Wharton's Crim. Ev. § 262 et seq.*; and also that proof of a different crime is admissible when both offenses are closely linked or connected, especially in the *res gestæ*, and also when such proof is pertinent and necessary to show intent—citing *State v. Mulholland*, 16 La. Ann. 376; *State v. Patza*, 3 La. Ann. 512; *State v. Rohfrisch*, 12 La. Ann. 382.

Proof of a different crime from the one charged is admissible when both offenses are closely linked and constitute part of the *res gestæ*. *Marr's Crim. Jurisprudence of La. p. 676*:

"The test (of *res gestæ*) is whether the fact or circumstance put in evidence is so connected with the main fact under consideration as to elucidate its character, to further its object, or to form in conjunction with it one continuous transaction." *Id. p. 682*.

The evidence was clearly relevant. The two women and Breeland were murdered at the same time by the same person or persons, and evidence as to the killing of the women threw light on the killing of Breeland, and vice versa.

Bills 6 and 7 are bad for the same reasons, and because the dying declarations of Breeland were confined to the circumstances of the killing of the three persons at the same time by the same person or persons. Besides, this court has held more than once that a dying declaration must go in as a whole, and is not rendered inadmissible because some of its statements, of themselves

and if standing alone, would be inadmissible. *State v. Carter*, 107 La. 792, 32 South. 183.

#### Bill No. 8.

On cross-examination of a witness for the prosecution, the defense brought out a statement that the witness told Avery Blount that Breeland had accused him of being one of the parties who did the killing, and that Blount, notwithstanding, went to the scene of the homicide, and remained there until the witness left. Having elicited this testimony, the defense then asked the witness to state what Blount had said by way of reply when informed that Breeland had accused him of committing the deed. The prosecution objected on the ground that the declarations of the accused were not admissible as evidence in his favor. This objection was properly sustained, as the declarations were made hours after the homicide and formed no part of the *res gestæ*. *State v. Johnson*, 35 La. Ann. 968.

#### Bill No. 9.

We can hardly understand the reason for reserving this bill. The sole question before the judge was whether the evidence adduced disclosed a proper foundation for the admission of the dying declarations of the deceased. All the witnesses tendered were heard, and there was some conflict in the testimony as to what was said by the deceased. The counsel for the defense offered to prove by one of the witnesses that what the deceased said amounted to nothing more than an expression of opinion. The judge correctly ruled that it was for the court to decide whether the deceased merely expressed an opinion or made a positive declaration.

#### Bill No. 10.

The defense objected to the admission of the dying declarations of the deceased in evidence, on the ground that J. O. Breeland was an ex-convict who had served out his sentence in the penitentiary for the crime of mule stealing. The facts are admitted. It is admitted in brief and argument of defendant that, under the provisions of Acts No. 29, p. 39, of 1886, and No. 185, p. 355, of 1902, and No. 41, p. 77, of 1904, J. O. Breeland, if living, would be a competent witness.

"On the question of competency the general rules of the competency of witness are applicable. That is, where the declarant would be a competent witness if living, his dying declaration is admissible, unless otherwise objectionable; but where for any cause, such as infamy, want of religious belief, lack of mental capacity, or the like, the declarant would not have been permitted to testify, had he survived, his dying declaration is not admissible in evidence. And where by statute a want of religious belief is no longer a disqualification of witnesses, although the irreligious character of the declarant cannot be relied on to exclude his dying declaration, it may be shown that he did not believe in a future state of rewards and punishments, for the purpose of impeaching his credibility; for such a person, although in articulo mortis, might not be solemnly impressed with the necessity of speaking the truth." 21 Cyc. 991, 992.

Act No. 29, p. 39, of 1886, reads in part as follows:

"That a competent witness in all criminal matters shall be a person of proper understanding."

It has been held that persons who have been convicted of infamous crimes and have served out the sentences imposed therefor are competent witnesses, provided they meet the requirements of the statute in the matter of understanding. *State v. Mack*, 41 La. Ann. 1082, 6 South. 808; *State v. McManus*, 42 La. Ann. 1194, 8 South. 305. In *State v. Williams*, 111 La. 179, 35 South. 503, it was held that Act No. 29, p. 39, of 1886, imposed no disqualification on account of lack of information concerning or faith in the existence of a Supreme Being or a future state of rewards and punishments, and no disqualification outside the statute can be recognized by the courts. The only objection made below was that the deceased was an ex-convict. This objection was properly overruled, as Breeland, if living, would have been a competent witness against the defendant. Objections not made at the time cannot be considered.

#### Bill No. 11.

On the cross-examination of one Ben Kinchen, a witness for the defendant, who had testified in chief that he had killed Joe Everett and wounded John Everett and Walter Everett a few days before the murder of John O. Breeland, counsel for the state, for the avowed purpose of testing the credibility of the witness, asked a number of questions, which were answered. Counsel for the state then asked the witness if he had not gone to a certain house by mistake. Defense objected that the inquiry was not relevant to any matter brought out on the direct examination, and was immaterial. The objection was overruled. The judge says:

"Witness Ben Kinchen on his examination in chief testified that he left Tickfaw just about 6 o'clock, and went in a northerly direction toward Independence Town, about 5 miles above Tickfaw. That he reached Independence some time after, and went to Mrs. Sanders' house, just north of Independence. The defendant (witness) having fixed his whereabouts at two different times, I permitted the state to ascertain his whereabouts, routes, movements, and actions during the interval."

The inquiry seems to have been relevant for the purpose of impeaching the story of Kinchen, who was also under indictment for the murder of Breeland and the two women. The answers objected to were mainly in the negative, and prejudiced neither the witness nor the defendant.

#### Bill No. 12.

The defense called an ex-member of the grand jury for the purpose of showing that one of the state's witnesses had on a former occasion testified to a falsehood before the grand jury, and requested the trial judge to release the ex grand juror from his obliga-

tion of secrecy. The judge refused, because such release was unnecessary for the reason that the testimony sought to be elicited was inadmissible on elementary grounds. The ruling was correct. A witness cannot be impeached in such a manner.

#### Bill No. 13.

George Nelson, witness for defendant, was asked:

"Did Walter Everett (state witness) ever acknowledge to you that he had sworn falsely before this court in order to convict a man?"

On objection by the state, the question was ruled out, because the statement inquired about was on an entirely different subject-matter from the case on trial, and because the witness sought to be impeached had not been put on his guard. The judge might have added that the offer was an attempt to prove general bad character by evidence of the acknowledgment of a particular instance of wrongdoing. The ruling was correct.

#### Bill No. 14.

The objection to the adjournment of the court from Saturday, 3:55 p. m., until Monday morning, to enable the state to summon witnesses in rebuttal, is without merit. The matter was one within the discretion of the court.

#### Bills Nos. 15 and 16.

The testimony objected to was admissible in rebuttal according to the statement contained in the per curiam of the judge. If such testimony was a mere rehash of the evidence, as stated in defendant's objection, no harm was done. The testimony of the defendant that he did not recognize the Breelands when he passed them in the dark made it important for the state to contradict him on this point. The testimony of the two witnesses in rebuttal tended to show that as vehicles passed the name of "Breeland" was called or shouted in a woman's voice. We do not very well see how the state could have anticipated that the defendant would take the stand and testify that he did not recognize the Breelands as he passed them in the road. The purpose of the testimony in rebuttal is to disprove and discredit the evidence adduced on the part of the defendant. The whole matter of rebuttal evidence is largely in the discretion of the trial judge, and his rulings will not be disturbed except in extreme cases. Marr's Crim. Jurisprudence of La. p. 744 et seq.

#### Bill No. 17.

The testimony of another witness called in rebuttal by the state was objected to on the same grounds stated in bills Nos. 16 and 15. While the subject-matter was different, the per curiam shows the same reasons for the admissibility of the evidence to disprove certain testimony adduced on the part of the defendant to show that another person

might have committed the crime. While the evidence in chief had touched somewhat on the physical condition of this third person, it was merely in anticipation of a supposed line of defense that would be adopted by the accused. The evidence in rebuttal was restricted by the court to points not covered by the evidence in chief. We see no error in the ruling.

#### Bill No. 18.

This bill was reserved to a portion of the charge of the court to the jury, as follows:

"Under the laws of Louisiana the testimony of one witness is sufficient upon which to base a verdict in all cases of this character, provided such testimony satisfies you of the guilt of the accused beyond a reasonable doubt."

This is good law.

"At common law, one witness is sufficient in all cases, with the exception of perjury, at every stage of the prosecution." Wharton on Crim. Law, vol. 1, § 801.

By statute two were required in high treason. Id. We must assume that the charge as given had some application to the case. It may be that it was made to meet some contention of counsel before the jury. It is argued that the charge might have induced the jury to believe that the dying declarations of Breeland were per se sufficient to convict the defendant. But the judge also charged as follows:

"When such evidence as dying declarations have been brought into a case, it is to be weighed by the jury in connection with all the other evidence, to the end that their findings may be based on the entire evidence and upon all the facts and circumstances that may have been proven."

If the accused desired a more practical charge or one more applicable to the facts of the case, his counsel should have formulated a special charge and submitted the same to the trial judge.

#### Bill No. 19.

This bill was reserved to the following excerpt from the general charge, to wit:

"You are not at liberty to disbelieve as jurors if you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if an oath had not been administered."

This extract forms the last part of a paragraph of the charge relating to doubts produced by undue sensibility, or arising from trivial or fanciful suppositions, or remote conjectures as to a possible state of facts differing from that established by the evidence; and the court in conclusion addressed the jury in the language already quoted, which seems to be a paraphrase of the language used in *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, 325. The judge had already charged the jury as follows:

"Your personal opinions as to facts not proven cannot properly be considered as the basis of your verdict; you may believe, as men, that

certain facts exist, but as jurors, you can only act upon evidence introduced upon the trial, and from that alone you must form your verdict, unaided, unassisted, and uninfluenced by any opinion or presumption not based upon the testimony."

Stripped of rhetorical embellishment, the extract objected to means simply that the jurors should exercise their judgment as in other matters of importance. On exception being made, the judge modified the charge as follows:

"Gentlemen, if you believe from the evidence, as men, that certain facts exist, then you have no right to disbelieve as jurors. You must base your verdict solely upon the evidence and the law as given by the court, and be influenced in your finding by nothing else."

The charge was full, fair, and impartial, and, considered as a whole, left no room for complaint. We cannot assume that the jury was misled by the remarks excepted to by the accused, especially after the modified charge was given.

#### Bill No. 20.

The defendant requested the court to charge the jury that if the evidence established beyond a reasonable doubt a certain state of facts—

"the jury in such case should consider well and weigh carefully all the evidence introduced by the state and the defense, all the explanations offered. The presumption of the law is that the accused is innocent, and the burden of proof is upon the state to overcome this presumption. And the evidence on the whole in such a case must not only be consistent with the guilt of Avery Blount, but inconsistent with any other rational conclusion, and, if it is not so, then he is entitled to be acquitted."

The judge charged the last paragraph as requested. He properly refused to charge the hypothetical statement of facts, because no proposition of law was predicated thereon.

#### Bills of Exceptions Nos. 21, 22, 23, 24.

These bills were reserved to the refusal of the court to grant defendant a new trial. Bill No. 21 was to the refusal of the judge to grant a new trial on the ground of the intimidation of the defendant, jurors, and witnesses by the presence of a company of local state militia in and about the courthouse and jail during the trial.

The Governor, at the request of the presiding judge, ordered the company to report to the sheriff during the trial to protect the court and its officers, the defendant, the jury, and the witnesses, and to preserve the peace. There is nothing to show that the defendant was prejudiced in his trial by the presence of this company, the members of which were men well known to the defendant, and some of them related to his counsel. Bill No. 22 was reserved to the refusal of the judge to grant further time to procure the attendance of alleged witnesses whose names were furnished to defendant in

an anonymous letter. There was no motion in writing or affidavit filed. The request for delay was made on the day fixed for the hearing of the motion for a new trial. We are not prepared to say that the judge abused his discretion in refusing to grant further delay.

Bill No. 23 was to the refusal of the judge to grant a new trial on the ground that Juror Thompson had stated, before he was taken on the jury, that defendant ought to be hung, or words to that effect. The alleged statement was sworn to by one witness, who was positively contradicted by Thompson. We cannot say that the judge erred in believing Mr. Thompson. Similar charges had been made as to two other jurors, but no witnesses were adduced to substantiate them.

Bill No. 24 was taken to the refusal of the judge to grant a new trial on the ground that the verdict of the jury was contrary to the law and the evidence. This bill presents nothing that this court can review, as we have no jurisdiction over the facts. The responsibility for conviction on the evidence rests with the jury and the trial judge.

Bill No. 25 covers the same ground as the four bills just considered.

It is therefore ordered that the verdict and sentence in this case be, and the same are hereby, affirmed.

(124 La.)

No. 17,734.

#### BOARD OF COM'RS OF BAYOU TERRE-AUX-BŒUFS DRAINAGE DIST. v. BAKER.

(Supreme Court of Louisiana. June 23, 1909.)

#### 1. COURTS (§ 93\*)—PREVIOUS DECISIONS AS CONTROLLING.

Principles laid down in matter of interpretation of the will of the lawmaking power should not be recalled save for the most cogent and controlling reasons.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 93.\*]

#### 2. CHANGE IN DECISION.

When change becomes unavoidable because of different opinion arrived at, it should extend no further than actually necessary.

#### 3. JUDGMENT (§ 668\*)—CONCLUSIVENESS—PERSONS CONCLUDED.

Those who were parties to a former litigation and have accepted the terms of a decision and have acted thereon are not to be considered as if they were third persons regarding views expressed contradictorily with them.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 668.\*]

#### 4. RATIFICATION OF ELECTION.

An election was held in the interest of local improvement. Owing to recent opinion expressed, another election was held to ratify and confirm that which was previously done. The prior proceedings were properly ratified and confirmed.

#### 5. LEGAL ELECTION.

The last election, considered separately and apart from the first, is in itself legal; all the requirements have been complied with.

**6. TAXES SEPARATELY CLASSIFIED.**

The ad valorem tax and the acreage tax were classified separately, and bonds issued secured as to their payment by each.

**7. DRAINS (§ 18\*)—BOND ISSUE ELECTION—IRREGULARITIES—CURE.**

The consideration is the work done and to be done in draining the district. It is complete and valid from first to last. It relates back a few months. It is all part of one continuous plan of drainage, and the dating of the bonds is not, under the circumstances, an act which invalidates the bonds in any respect. The election and the issue of the bonds were made legal, if they were not previously, by the last election.

[Ed Note.—For other cases, see Drains, Dec. Dig. § 18.\*]

(Syllabus by the Court.)

Appeal from Twenty-Ninth Judicial District Court, Parish of St. Bernard; Robert Emmet Hingle, Judge.

Action by the Board of Commissioners of the Bayou Terre-aux-Bœufs Drainage District against Earl R. Baker. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 48 South. 654.

Frederick Augustus Ahrens, for appellant. Henry L. Favrot and Nemours Henry Nunez, for appellee.

**BREAUX, C. J.** The purpose of plaintiffs in instituting this suit was to have it decreed that the proceedings were conducted in due and regular form; that they are in every respect legal, and the bonds are valid.

There is no dispute and no ground of dispute as to the facts. The demand of plaintiffs is clearly stated, and the defense is set forth in the answer with some particularity.

Whether a tax of five mills on all assessable property in the plaintiff district, and another tax of three cents per acre on every acre of land within its limits shall be levied for 40 years, beginning with 1908, for the purpose of draining the district, have been legally imposed, is the question.

The proposition to levy the tax was submitted to the property taxpayers and an election held on August 15, 1908.

The proposition to issue bonds in the sum of \$100,000 was submitted at the same time.

The commissioners proclaimed the election carried, and issued the bonds on the 1st of September, 1908.

These bonds were sold, but the purchaser, to wit, Earl R. Baker, declined to accept on grounds which will be noticed later.

We for a moment take up for decision the question growing out of the election of August 15, 1908, and the bond issue just before mentioned.

A suit was brought in the district court to have the election of August 15, 1908, and the issue of bonds of September 1, 1908, declared legal.

Judgment was rendered in this suit in favor of the plaintiff.

The defendant before named, Baker, brought up an appeal to this court, and in

this court it was decided that the election had been properly held under the authority of the police jury; but this court declined to maintain the bonds as valid, as it was sought to secure them by both taxes, to wit, the ad valorem 5 per cent. tax and a specific three-mill tax per acre combined.

On that ground, the judgment appealed from was reversed.

On the 9th of January following, the police jury called an election in compliance with the requirements of the decision in the former case; also in the case of *Esteves v. Bayou Boeuf Drainage Dist.*, 121 La. 991, 48 South. 992.

The following were the propositions submitted to the property taxpayers of the district at the last-mentioned election:

(1) "To vote a five mills tax for forty years on all assessable property in the district, beginning with 1908, as voted on August 15, 1908."

(2) "To vote a three cents per acre tax on every acre of land in the district for forty years, beginning with 1908, voted on August 15, 1908."

(3) "To create an indebtedness of one hundred thousand dollars, and authorize the issuing of bond for a like amount, the bonds to bear five per cent. interest, to run for forty years"

—consisting of two amounts of \$40,000 and \$60,000; secured the first by bond for amount of \$40,000, the second by bonds for amount of \$60,000.

This court held in the case of *Buard v. Board of Commissioners of the Portage Drainage District of Pointe Coupee*, 123 La. 590, 49 South. 204, that the board of commissioners were the governing authorities, and that they alone were authorized to hold tax elections in the election districts. The views to the contrary, in prior opinions, to the extent that the parties to these cases were concerned, remained unaffected by the last opinion; none the less, the board of commissioners of the Bayou Terre-aux-Bœuf drainage district deemed it advisable to call an election for June 14, 1908, and submitted the following:

(1) "To ratify and confirm the voting of the five mills tax for forty years on the assessable property in the district, beginning with 1908."

The tax was voted on August 15, 1908.

(2) "To ratify and confirm the voting of a three cents per acre tax on every acre of land in the district for forty years, beginning with 1908. Tax voted on August 15, 1908."

(3) "To create an indebtedness of forty thousand dollars and authorize a bond issue of like amount, payable in forty years, to be secured by the five mills tax before mentioned."

(4) "To create an indebtedness of sixty thousand dollars and authorize a bond issue of like amount, bearing interest and payable as before mentioned, to be secured by three cents per acre tax."

It will be observed that plaintiffs and the taxpayers qualified to vote have separated the two taxes—that is, the ad valorem and the specific—and they have classified the bonds as a security for their payment, and identified each class with the particular security

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stated, so as to conform with the views of the court as expressed in the former Baker Case, 123 La. 75, 48 South. 654.

These last propositions were submitted to the property taxpayers at an election held on June 14, 1909, as just above stated, and after the delays and advertisements the property taxpayers in the district ratified and confirmed the proceedings before mentioned and again authorized the issuance of these bonds.

They were the bonds which were tendered and which the purchasers declined to accept.

The proceedings were regular.

The defendant in support of his refusal to accept the bonds argues, through counsel, that Act No. 145, p. 248, of 1902, and its amendment, intrusted the board of commissioners of the district with the holding of elections, and that an election held under the direction of the police jury is null and void.

We will say that the plaintiffs in holding the election of January 9, 1909, under the auspices of the police jury, complied with the decisions of this court in the former Baker Case, 48 South. 654, 123 La. 75, and the case of *Esteves v. Bayou Terre-aux-Bœuf Drainage District*.

While it is true that the opinion was not *res judicata*, it was, none the less, rendered *inter partes*, and must be considered from that point of view strictly as between the parties, as binding, but it must be said that it is not binding further than *inter partes*.

We will not stop to discuss at any length the two elections, the one of August 15, 1906, and the other of January 9, 1909, further than to state as above, as between the parties, they must have authority.

The maxim, "*Actus curiæ neminem gravabit*"—that is, the action of the court should injure no one—is applicable. These parties have accepted the decision.

This brings us to a consideration of the important issue of the case; that is, the effect to be given to the last election, that held on June 14, 1909.

The proposition of the defendant is that an election called to validate an invalid election proceeding cannot be retroactive and have the effect of validating the first election.

Why is it not possible for the taxpayer to ratify a prior election? It is an approval of that which was done, and a second expression of their will. There was nothing new proposed. There was nothing in law to prevent them from expressing their will a second time on the subject in order, if there had been any illegality or irregularity in the first election, it might be cured. These taxpayers came forward, as they had a right to do, and once more expressed the desire to improve their district as proposed. They expressed their willingness in due form to assume the obligations of paying the bonds.

If we were to concede for a moment that the taxpayers did not ratify that which was done, the Drainage District would, none the

less, be bound for the taxes and the bonds from the date before mentioned. But they did ratify. The purpose in holding this last election was to make the bonds legal and valid as originally issued.

Under the circumstances, in view of prior decisions, there can be no valid objection to the date of the bonds, which precedes by some months the date of the election. They had issued that which they conceived were valid bonds, and which they had a right to conceive were valid bonds after having complied with the text of the decisions to which we have before referred.

There was no error committed in the proceeding of the last election held to render the invalidity of these bonds reasonably certain. The plaintiffs relied upon the conclusiveness of the expressions of the court.

It might work a grievous wrong, the Supreme Court of the United States said in a case somewhat similar, "to overthrow these expressions and decisions." "When the decision is one affecting the validity of bonds, notes, or bills, expressions and decisions should generally be held conclusive," particularly as relates to those who are parties to the litigation. *Vail v. Territory of Arizona*, 207 U. S. 201, 28 Sup. Ct. 107, 52 L. Ed. 169.

The actions taken by the taxpayers is really more forcible and expressive than a ratification or a confirmation, by reason of the fact that they absolutely obligated themselves in this election to pay the taxes and the bonds as well as the interest.

We have considered every point presented, and have not found that there is good ground upon which to decree the nullity of the election or the invalidity of the bonds.

For reasons assigned, the judgment appealed from is affirmed.

(124 La.)

No. 17,359.

LYONS et al. v. WOMAN'S LEAGUE OF NEW ORLEANS.

(Supreme Court of Louisiana. June 7, 1909.  
Rehearing Denied June 23, 1909.)

1. PARTITION (§ 30\*)—COMMON PROPERTY.

Where a surviving parent holding property in common with a minor child desires to have a particular part of the common property adjudicated to her, under article 343 of the Revised Civil Code, she must, under the provisions of that article, have not only the interest of the minor in that property adjudicated, but that interest together with that of the parent. *Massey v. Steeg*, 12 La. Ann. 78, 79.

[Ed. Note.—For other cases, see *Partition*, Dec. Dig. § 30.\*]

2. VENDOR AND PURCHASER (§ 142\*)—BREACH BY VENDOR—EARNEST MONEY—RETURN.

Where it was stipulated in a promise of sale "that the one thousand dollars deposited by the proposed purchasers was earnest money, and should the sale fall through any fault of the vendor the one thousand dollars shall be returned to the purchaser with an additional one thousand dollars according to law," and the proposed sale falls because of the vendor's failing to tender a valid title, the stipulation recit-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed must be enforced by the court. *Jefferson Sawmill v. Iowa & Louisiana Land Co.*, 48 South. 428, and *Légier v. Braughn* (not yet officially reported) 49 South. 22.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 142.\*]

Breaux, C. J., dissenting in part.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Action by Alice D. Lyons and another against the Woman's League of New Orleans. Judgment for defendant, and plaintiffs appeal. Reversed in part, and affirmed in part.

Benjamin Ory and Charles Ferdinand Claiborne, for appellants. Florence Loeber and Henry Denis, for appellee.

NICHOLLS, J. The plaintiffs in this suit are Mrs. Alice Depew, widow of Jacob C. Lyons, and Jack Clifford Lyons. They alleged that they were the true and lawful owners of certain described property, together with all the buildings and improvements. That the title of said property was then vested, one undivided fourth in petitioner Jack Clifford Lyons, as one of the two sole heirs of the late Jacob C. Lyons, and three undivided fourths in petitioner Mrs. Alice D. Lyons, by virtue of the community of acquets and gains between her and her said late husband, Jacob C. Lyons, as hereinbefore mentioned, and by virtue of the adjudication to her of the interest (one undivided fourth) of her minor child, Alice Elizabeth Lyons, in said property by judgment of the civil district court, signed January 23, 1908, rendered in the matter of the succession of said late Jacob C. Lyons, No. 79,061 of the docket of said court, a certified copy whereof has been registered in the conveyance office of this parish in Conveyance Book 216, folio 445.

That, by written agreement filed as part of the petition, the Woman's League of New Orleans contracted to purchase from petitioner, for the price and sum of \$15,000, payable \$4,000 cash, and the balance in 10 equal installments, payable 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 years after date, with interest at the rate of 7 per cent. per annum; the whole as appears by the said written agreement dated November 12, 1907, filed for reference.

That on March 17, 1908, they tendered a good and legal title to said property, free and clear from all incumbrances, to said Woman's League of New Orleans, through its president, Miss Charlotte B. Elliott, the whole as more fully appears by the annexed proposed act of sale of said property, duly signed by petitioners, with all proper certificates thereto showing that the title of petitioner to said property then and was at the time of said tender free and clear from

all incumbrances, and as more fully appeared by the procès verbal of tender executed by Benjamin Ory, notary public in this city, in presence of two witnesses, annexed and filed for reference.

That they and their authors were then, and had been for over 10 years, in full, quiet, public, undisturbed physical and corporal possession of said property, and that the refusal of said Woman's League of New Orleans to comply with its agreement of purchase was without any good and legal cause or reason whatsoever. That they were then, and had been ever since the 1st day of February, 1908, ready to deliver to said purchaser both the legal title and the physical possession of said property; that on February 13, 1908, the said Woman's League of New Orleans peremptorily and unconditionally refused to take title to said property, and to carry out their agreement of purchase hereinbefore mentioned; that this refusal, as hereinbefore mentioned, was without just and legal cause, and petitioners were entitled to a specific performance of said agreement of purchase notwithstanding such refusal.

In view of the premises, the annexed written agreement of purchase, and the annexed act of sale and tender thereof, together with all the certificates annexed thereto being considered, petitioners prayed that the Woman's League of New Orleans be cited, and, after due proceedings had and legal delays, that there be judgment, in favor of petitioners and against the said Woman's League of New Orleans, to comply with its adjudication within a delay to be fixed by the honorable court, and that on default thereof there be further judgment herein against said Woman's League of New Orleans for the full amount of the purchase price of said property, to wit, the sum of \$15,000, less the sum of \$1,000 paid by said Woman's League of New Orleans to petitioners on account of the purchase price aforesaid, with legal interest on said sum of \$14,000 from judicial demand until paid; that the described property be thereafter sold by the civil sheriff of this parish to pay and satisfy the judgment thus rendered against it, together with interest thereon as aforesaid, and all costs. They prayed for all other requisite and necessary judgment and decrees in the premises, and for general and equitable relief.

Annexed to and accompanying the petition was the following instrument:

"Agreement to Purchase.

"We, the Woman's League of New Orleans, a corporation duly organized under the laws of Louisiana, hereby agree to purchase for the sum of fifteen thousand (\$15,000.00) dollars, and the widow and heirs of Jacob C. Lyons, hereby agree to sell for said amount, the property, with all improvements thereon, No. 1115, Prytania street, between Calliope and Clio and bounded

by St. Charles avenue, now occupied by the New Orleans Free Library, said property consisting of a three-story brick building on lot measuring about eighty-two feet on Prytania street, by a depth of one hundred and twenty feet more or less.

"The terms to be four thousand (\$4,000.00) dollars cash, balance in notes of equal amounts payable in one, two, three, four, five, six, seven, eight, nine and ten years, with interest at the rate of seven per cent. per annum, interest on all of the notes to be paid annually, the maker of said notes to have the privilege of taking up said notes at any time before maturity by paying the accrued interest thereon.

"It is understood between the parties that the one thousand (\$1,000) dollars deposited by the proposed purchaser is earnest money, and should the sale fall through by any fault of the vendor the one thousand (\$1,000) dollars shall be returned to the purchaser with an additional one thousand (\$1,000) dollars, according to law. It is also understood between the parties that the sale shall be completed within ninety days from the date hereof, and that the rents shall be collected by the vendor up to the day of signing of the act of sale. The taxes for 1907, both city and state, will be paid by the vendor.

"New Orleans, November 12th, 1907.

"[Signed] Alice D. Lyons,

"Per W. G. Depew.

"[Signed] Charlotte B. Elliott,

"Per Woman's League."

The defendant answered. After pleading the general issue, it admitted that by written agreement dated November 12, 1907, it contracted and promised to purchase from plaintiffs the property described in the written agreement and promise of sale which was annexed, but it averred that the title to said property as offered by plaintiffs was defective, and the said property did not belong exclusively to them, but was partly the property of the minor child of Mrs. Alice D. Lyons, one of the plaintiffs. That the manner in which the said plaintiff pretends to have acquired the share and interest of her said minor child in said property by adjudication of the same to her is illegal and invalid, and has produced no legal divestiture of the rights and ownership of said minor. Respondent averred further that the undivided portion of the said plaintiff in the property is still affected and incumbered by the legal mortgage in favor of her said minor child. And now assuming the character of plaintiff in reconvention, respondent averred that the aforesaid promise of sale of November 12, 1907, provides that the \$1,000 deposited by respondent is earnest money, and that, should the sale fall through any fault of the vendor, the said \$1,000 shall be returned to the purchaser, with an additional \$1,000, according to law.

That it is by the fault of the said plaintiff that the sale had failed, because she could have procured a legal disposition and divestiture of her said minor child's rights in the said property, and thereby been able to give respondent a valid title to the same.

Wherefore respondent prayed that the plaintiffs' suit be dismissed at their cost. And respondent prayed further for judgment in its favor condemning plaintiffs to pay it the said sum of \$1,000 with interest accord-

ing to law. And respondent prayed for all general and equitable relief.

The district court rendered judgment rejecting plaintiffs' demand for specific performance, and further adjudged and decreed that defendant, the Woman's League of New Orleans, do have judgment against plaintiffs, Alice Depew, widow of Jacob C. Lyons, and Jack Clifford Lyons, for the sum of \$1,000, with legal interest thereon from November 13, 1907, until paid, and costs of suit to be paid by plaintiffs in solido.

It was admitted on the trial that Jacob C. Lyons at his death left surviving him as his sole and only heirs only two children, issue of his marriage with Miss Alice D. Lyons; that they were named Jack Clifford Lyons, of age at the time of said admission, above 21 years of age, and Elizabeth Lyons, at that time about 10 years of age. The plaintiff Mrs. Alice D. Lyons has appealed.

In the Supreme Court, the defendant and appellee has answered the appeal. It represents that the judgment appealed from is erroneous in the respect that it decides that the defendant is not entitled to the earnest money stipulated in the promise of sale, because the plaintiffs were willing and offered to execute an act of sale of the property mentioned in the promise of sale though the title thereof was defective. Defendant prayed that the judgment be reversed in that respect, but affirmed in every other respect, and that there be judgment against the plaintiffs and appellants in favor of respondent according to law for the earnest money stipulated in the provision of sale.

The district judge assigned the following reasons for the judgment:

"The record shows that the property in suit was acquired by Jacob C. Lyons during the community of acquets and gains existing between him and his wife, Alice Depew. At his death he left surviving him his said wife and their two minor children, Jack Clifford Lyons, now a major, and Alice Elizabeth Lyons, a minor now 10 years old. The respective interests of said parties in said property, therefore, were for Mrs. Lyons one undivided half, for Jack Clifford one undivided fourth, and for the minor one undivided fourth.

"Jacob C. Lyons' succession was duly opened, and among the proceedings therein had there appears a petition of Mrs. D. A. Lyons, individually and as the duly qualified tutrix of her minor child, Alice Elizabeth, averring that she is owner in common with said minor of sundry movables and immovables (among the latter the property in question), and that 'she is desirous of having the share, portion, and interest of said minor' in said movables and immovables adjudicated to her at the price of estimation and value set forth in the inventories thereof of record. The prayer of her petition is that a family meeting be convened to determine whether or not said adjudication is to the interest and advantage of said minor.'

"The family meeting convened in accordance with said petition, declared that the adjudication would be to the interest of the minor, and recommended that it be made for the aggregate price of \$39,710.67 as per the estimate of the experts appearing in the inventories. Thereupon a decree of adjudication was rendered from which the following extract is taken as bearing on the matter at issue.



"On the petition of Mrs. Alice D. Lyons, the mother and natural tutrix of the minor, Alice Elizabeth Lyons, to have the latter's undivided interest in certain property held in common between said minor and said natural tutrix adjudicated to the said Mrs. A. D. Lyons, considering the deliberations of the family meeting in behalf of said minor held before Benjamin Orr, notary public, on January 20, 1903, the order on which said family meeting was held and the procès verbal of said family meeting herein filed:

"It is ordered, adjudged, and decreed that the deliberations of said family meeting be approved and homologated, and accordingly,

"It is further ordered, adjudged, and decreed that the one undivided fourth interest of said minor, Alice Elizabeth Lyons, in the property hereinafter described, and held in common by her with her said mother, Mrs. A. D. Lyons, be and the same is hereby adjudicated to said Mrs. A. D. Lyons, her mother, at the price and sum hereinafter mentioned, being the price of the estimation fixed thereon by the experts appointed by the court and set forth in the inventory herein." \* \* \*

"(Here follow the description and estimation of several items of property, inclusive of the realty in suit.)

"It is further ordered, adjudged, and decreed that the property so adjudicated remains specially mortgaged to secure the payment of said price of adjudication and the interest thereof."

"On the day following the rendition of that judgment, Mrs. Lyons, with a view to relieving her property of the general mortgage resulting from the tutorship of her minor child, and of the special mortgage consequent upon the adjudication aforesaid, presented to the court an account showing that the amount of the rights of said minor was \$35,215.88, which account had been submitted to and approved by the undertutor, and prayed that the minor's rights be liquidated and fixed at the amount stated. Her prayer having been granted, she next offered to specially mortgage, in order to secure the minor's rights liquidated as aforesaid, a square of ground and other real estate which formed part of the property owned in common with said minor and was included in the judgment of adjudication.

"Upon the recommendation of the family meeting convened at her request, and in accordance with the report of the experts appointed by the court that the property offered to be specially mortgaged exceeded by at least 25 per cent. the liquidated rights of the minor, the court authorized the special mortgage to be executed, and thereafter, upon proof of its recordation in the mortgage office, ordered the annulment and erasure from the books of said office of the general mortgage resulting from the confirmation of Mrs. Lyons as tutrix and of the special mortgage recognized by the judgment of adjudication.

#### "Opinion.

"Defendant contends in the first place that the adjudication should have been of the whole property held in common, and not merely of the minor's share therein, and that the special mortgage securing the payment of the price of adjudication should have borne upon the whole property, and should not have been restricted by the decree of adjudication to the minor's interest. That contention is well founded. Article 343 of the Revised Civil Code, as amended by Act No. 60, p. 83, of 1900, reads: 'Whenever the father or mother of a minor has property in common with him, they each can cause it to be adjudicated to them, either in whole or in part, at the price of an estimation made by experts appointed by the judge and duly sworn, after a family meeting, duly assembled, shall have declared that the adjudication is for the interest of the minor, and the undertutor

shall have given his consent thereto, and in this case the property so adjudicated shall remain specially mortgaged for the security of the payment of the price of the adjudication and the interest thereof.'

"The pronoun 'it,' following the verb 'cause' in said article, clearly refers to property in common with him, and it is the property (in common) so adjudicated which must remain specially mortgaged to secure the payment of the price of adjudication. That is also apparent from the French text of the Civil Code of 1825, art. 338:

"Lorsque le père ou la mère d'un mineur a des biens en commun avec lui, il peut se les faire adjuger, en tout ou en partie; \* \* \* et dans ce cas, les biens ainsi adjugés demeureront hypothéqués spécialement." \* \* \*

"Besides, the precise issue was determined by the Supreme Court in *Massey v. Steeg*, 12 La. Ann. 78, 79, in these words:

"It is contended by the appellants that the minor's right of mortgage in this case should be restricted to the undivided half, as their share of the property adjudicated to their father. We do not think so. The law expressly declares that the property held in common—not the undivided half thereof—may be adjudicated to the surviving parent, and, so adjudicated, shall remain specially mortgaged for the security of the payment of the price of adjudication."

"It is argued, however, by counsel for plaintiffs, that *lex neminem cogit ad vana*, and that it is a vain thing to adjudicate to the parent that part of the property in common of which he is already the owner, and that all that he needs to acquire is the share of his minor child.

"The reply to that argument is that the privilege granted to the parent by article 343 is in derogation to the general rules established for the protection of those who, from want of age and experience, are supposed to be incapable of guarding their own interest, and should be restricted within the limits of the provisions under which it is awarded.' *Harty v. Harty*, 8 Mart. (N. S.) 518.

"In other words, when a statute confers an exceptional privilege particularly as regards the acquisition of minors' property, its provisions must be strictly followed. To the suggestion that some of those provisions are useless, the reply is: '*Ita lex scripta est*.'"

"Hence, it being so written in article 343, the parent who wishes to acquire his minor child's share in the property held in common must cause the whole property to be adjudicated to him, or else he takes nothing by the adjudication.

"But, says counsel for plaintiffs: 'Whenever a judgment has been rendered by a competent court adjudicating (as was done here) community property to a surviving spouse, and neither fraud nor spoliation is alleged or shown, the correctness of the judgment cannot be inquired into collaterally.' And he cites *Succession of McClean*, 23 La. Ann. 17; *Sanders v. Carson*, 2 La. Ann. 293; *Orr v. Thomas*, 3 La. Ann. 582; *Ferrier v. Ferrier*, 9 La. Ann. 423; *Succession of Hebert*, 4 La. Ann. 77.

"In those cases the collateral attack was upon the proceedings leading up to the decree of adjudication on the ground that they were irregular and informal; whereas here it is the effect to be given to the decree itself which is questioned, it being argued justly, in my opinion, that there is no law authorizing the transfer and divestiture of minors' property in the manner stated, and hence the judgment of adjudication falls short of its purpose.

"Moreover, as the defendant cannot be compelled to accept a title suggestive of litigation, it undoubtedly has the right to show that the decree of adjudication is liable to a direct attack by the minor upon attaining the age of majority.

"It must be said, however, in justice to plaintiffs' counsel who obtained the said decree, that he is not alone in his erroneous interpretation of article 343, and that other experienced probate lawyers have given their sanction to judgments adjudicating only the minors' share of the common property. His suggestion that, if the court be correct in the views herein expressed, many titles to real estate in New Orleans will be endangered, has strongly appealed to the court to arrive at a different conclusion. But this is not a case for the application of the maxim, 'Communis error facit jus.' The decision in *Massey v. Steeg* above referred to was rendered more than 51 years ago, and has never been overruled, so far as I am aware. And a reference to *Fleming's Formulary*—a work carefully compiled from the pleadings of most expert pleaders at the bar—will show that the Supreme Court's construction of article 343 in that case has been generally accepted and followed. (Pages 124-126.)

"The court being of opinion that the title tendered to defendant is defective in the particular stated, it becomes unnecessary to consider the other interesting issue raised by defendant as to the validity of the special mortgage given by Mrs. Lyons in lieu of both the general mortgage resulting from her confirmation as tutrix and the special mortgage to secure the price of adjudication.

"As to the reconventional demand, defendant is entitled to recover under it no more than the \$1,000 deposited as earnest with interest. Article 2463, Rev. Civ. Code, which the parties evidently had in view in writing the stipulation regarding the payment of an additional \$1,000, says, 'But if the promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise, to wit, he who has given the earnest by forfeiting it, and he who has received it by returning the double.' Therefore it is only when the vendor has arbitrarily receded from the promise that he can be made to return double the earnest. So far from receding from the promise to sell, plaintiffs are even now insisting upon its fulfillment. It would be strange justice indeed to enforce against them the penalty provided in article 2463 simply because, in the opinion of the court, their title to the property is not such as defendant can be compelled to accept.

"It is therefore ordered, adjudged, and decreed that plaintiffs' demand for a specific performance be rejected, and that defendant, the Woman's League of New Orleans, have judgment in reconvention against plaintiffs Alice Depew, widow of Jacob C. Lyons, and Jack Clifford Lyons, for the sum of \$1,000, with legal interest thereon from November 13, 1907, until paid; all costs of suit to be paid by plaintiffs in solido."

In the brief filed on behalf of the plaintiffs' counsel, copying article 343 of the Civil Code, they say:

"Whenever the father or mother of a minor has property in common with him they can cause it to be adjudicated to them either in whole or in part," etc.

"In whole" when minors hold the property in common with the father or mother; in part when majors and minors hold the property in common with the father or mother.

Such has been the interpretation of the article and the practice of lawyers from time immemorial. Whenever the co-owners of the father or mother were all minors, all the property was adjudicated as an easy operation; and when some of the co-owners

were majors and others minors, then only share interest and "part" of the minor or minors was adjudicated. It could not be done otherwise, for the law did not and could not adjudicate the "part" of the majors. To say that only the "whole" property and not a "part" can be adjudicated is to speak in contradiction and disregard of the letter of the article which authorizes the adjudication of the property "in whole or in part."

But the defendant says that the article continues, "and in this case the property so adjudicated shall remain specially mortgaged," etc. They argue that the word "property" means the "whole property," but the meaning of this word must be gathered from the whole article. It evidently means the "property in whole or in part so adjudicated shall remain specially mortgaged," etc. Why put upon the word an interpretation which would require more property to guarantee the price of adjudication than the property itself adjudicated, or more than the minors own? Besides, such an interpretation would restrict and limit the right of adjudication to cases only where the co-owners were all minors. For, in all cases where there would be one major, the parent could not take advantage of the article, because the family meeting could not recommend the adjudication of the major's part, nor could the court adjudicate it.

The spirit of the law was to enable either parent of the minor to acquire the "part" or interest of the minor child or children in property held in common at a fair valuation, in order to avoid the cost of a partition and the differences to which joint ownership gives rise.

"The adjudication of the common property to the surviving parent is not founded upon the narrow consideration of pecuniary advantage, but, as has been well observed by counsel, in the greatest good of the children. It enables the parents to continue the former business of the community, and secures to the children their home with all its associations." *Succession of Hebert*, 4 La. Ann. 77 (78).

As early as 1849, in the *Succession of Hebert*, 4 La. Ann. 77, Chief Justice Eustice, speaks of the application of the father "to have the interest of his children in the property adjudicated to him," etc.

In 1854, in the case of *Ferrier v. Ferrier*, 9 La. Ann. 428 (432) the judgment of adjudication read:

"\* \* \* And that the share of the minors, Leon, Rosa, and Emma Ferrier, in the property held in community between the said Auguste Ferrier and their mother, Delphine Porche, be adjudicated to the said Auguste Ferrier," etc.

Although this judgment was vigorously assailed on four grounds, it did not occur to the plaintiff's attorneys to attack it on the ground set up here, that the "whole" and not a "part" of the property could be adjudicated for the reason, no doubt, that the bar interpreted article 343 as authorizing the adjudication of the "shares of the minors."

The Supreme Court maintained the adjudication "for the share of his deceased wife, Delphine Porche, in the community property," etc.

In the Succession of Lydia Robinson, 23 La. Ann. 17, the minors' share of the community was adjudicated to their natural father at an estimated value of half of the community property. Held:

"A judgment of adjudication cannot be attacked collaterally, there being no fraud nor spoliation shown."

"The judgment of adjudication having been rendered by a court of competent jurisdiction, and no fraud or spoliation being shown, its validity cannot be inquired into collaterally." *Sanders v. Carson*, 2 La. Ann. 393 (395); *Winchester v. Cain*, 1 Rob. 421.

Chief Justice Bermudez wrote the following syllabus in the case of *Ealer v. Lodge*, 36 La. Ann. 115:

"Rights of the creditors of the community cannot be defeated by adjudication of the share of minors in the common property to the surviving spouse," etc.

Article 343 has always been literally interpreted.

Thus it has been held that movable property be adjudicated, although the article provides that "the property so adjudicated shall remain specially mortgaged," and we know that movables cannot be mortgaged. *Massey v. Steeg*, 12 La. Ann. 78.

In the cases of *Harty v. Harty*, 8 Mart. (N. S.) 518, and *Berteau v. O'Brien*, 2 La. Ann. 162 (163), it was held that not only community property but property held by any title in common by the parent and his minor child, could be adjudicated. But the defendants point confidently to the case of *Massey v. Steeg*, 12 La. Ann. 78. Upon page 79 we copy the following language:

"The law expressly declares that the property held in common—not the undivided half thereof—may be adjudicated to the surviving parent, and so adjudicated shall remain specially mortgaged for the security of the payment of the price of the adjudication."

The syllabus reads as follows:

"When such adjudication takes place, the special mortgage in favor of the minor, resulting from the adjudication, attaches to such of the property adjudicated as is susceptible to mortgage. The right of mortgage in this case is not restricted to the individual share of the minors, but the whole property remains specially mortgaged for the security of the payment of the price of the adjudication."

With all due respect, the court did not quote the law in full, and both its language and the syllabus are obiter dicta. The law does not declare that "the property held in common may be adjudicated." But it expressly says that the property in common may be adjudicated "in whole or in part."

The question before the court in that case was not whether the "whole" or a "part" of the property could be adjudicated; therefore, whatever the court said on that subject was "obiter." The whole property has been ad-

judicated, because all the co-owners were minors.

The syllabus in those days was not made by the court, and therefore it was not responsible for it. But we will show that the language used by the court was not necessary to the decision of the case, and, therefore, is also obiter.

The plaintiffs, *William Masset et al.*, had obtained a judgment against *Steeg*. They could not execute this judgment against *Steeg*, because there was a general mortgage on his property as tutor of his children, and a legal mortgage resulting from the adjudication to him of the immovables of the community, valued at \$2,000, and movables valued at \$800. The plaintiffs asked that the minors' claims against the property of their father be reduced to one-half the price of the immovables, say \$1,000, and be restricted to the half of the immovable property adjudicated.

The court refused, on the ground that movables as well as immovables could be adjudicated; and, on the second ground, that the whole property under the law, and not only one-half thereof was adjudicated, and that the whole property remained mortgaged to secure the price of adjudication. But this second ground was not necessary to the decision of the case, because the court, in concluding, gave the true and incontestable reason as follows:

"But, conceding it to be as contended for, still it is difficult to perceive in what manner such restrictions could possibly inure to the benefit of the appellants, inasmuch as the law creates in favor of the minor a tacit, independently of the special, mortgage on the property of his natural tutor, from the day on which the tutorship devolved upon the latter, as security for his administration and the responsibility resulting from it. Civ. Code 1838, art. 354; *Gonsoulin v. Migues*, 5 La. Ann. 565."

In a subsequent case decided in 1884, the question came squarely for decision before this court, viz.: Upon what portion of the property adjudicated rests the privilege of securing the price of adjudication—upon the whole property, or upon the part adjudicated?

And the court decided that it affected the "part" adjudicated. *Opinion Book*, 58, p. 557—*A. & L. Werner v. Succession of Anton Werner*, No. 9087 (Sup. Ct. La., May 5, 1884, unreported), Mr. Justice Todd:

"*Anton Werner*, the father of plaintiffs, was twice married. The plaintiffs are the issue of the first marriage. After the death of his first wife he was confirmed as natural tutor of his minor children, and caused the community property to be adjudicated to him, giving a special mortgage on the property which was immovable to secure the minors. He then contracted a second marriage, the issue of which was four children, who are still minors and are represented in this suit by a dative tutor; *Anton Werner* and his second wife being both dead. The controversy in the case is with respect to the proceeds of the property specially mortgaged, as stated, to secure the children (of the first marriage) under the adjudication referred to. The property was sold under a

proceeding to enforce the mortgage by the plaintiffs contradictorily with the tutor of the minor heirs of the deceased. The tutor asserts a preference on the proceeds to the amount of \$1,000 by reason of the privilege in favor of children left in necessitous circumstances, and from a judgment sustaining this demand the plaintiffs have appealed. The adjudication of the common property of the first marriage to the father of the plaintiffs was in the nature of a sale, at least to the extent of the plaintiffs' half interest in the property. This interest was conveyed to the father for a price which he bound himself to pay. There was wanting no requisite of a sale to the extent stated. Of course, if it was a sale by operation of law, it superinduced the vendor's privilege, but it is too plain for argument that such privilege must be measured by and confined strictly to the thing sold, and cannot exceed the price of it. The entire property was embraced in the adjudication, but one undivided half of this property belonged to the father as the survivor of the community, and the residue of his minor children by right of inheritance from their mother. In contemplation of law, they sold this interest to their father, and the law created in their favor a privilege for the price, and, as this resulted from the operation of law, it needed not to be expressed or stipulated in the act of evidencing the adjudication and special mortgage accompanying it. The privilege could not, however, exist on that portion of the property already owned by the father and for which he had no price to pay. It was limited to the minors' half of the property, which, having been sold under the foreclosure of the mortgage, now operates on the proceeds of the sale. The vendor's privilege, under the terms of the law creating the privilege in favor of necessitous children, outranks the latter. Hence we conclude that the plaintiffs were entitled by preference to one half of the proceeds of the property sold. Out of the other half the minor heirs must be paid their privilege, if sufficient; that is, this remaining half of the proceeds must be their sole reliance for the satisfaction of their privilege. The surplus, if any, the plaintiffs are entitled to."

The facts of the case were that the interest of the two minors in all the properties held in common by Anton Werner and his two minor children, Aloysius and Louis Werner, was adjudicated to Anton Werner at the valuation placed thereon by experts—say \$3,625; that subsequently, the rights of the two minors against their father and tutor were liquidated and fixed at \$3,525, and secured by a special mortgage in lieu of the general minors' mortgage and the mortgage resulting from the adjudication; that the only property let by Anton Werner consisted of the property specially mortgaged to A. & L. Werner; that it did not sell for an amount sufficient to pay said minors' claims.

But, after all, to what avail is all this discussion? Are we not wrangling over words rather than over substance? A pretty edifice made up of theories and nice grammatical distinctions may be built from a critical analysis of the mere words of article 343. But its object and intention is what we must ascertain.

The practical object of article 343 was to enable the parent to have adjudicated to himself, not the whole property, for the parent already owned a part of it, but the part, the share, the interest of all the minor co-

proprietors, whatever that interest might be, even though some majors might also be co-proprietors with the parent and minors. Such interpretation must be given to article 343 as will carry out that object. To limit the article to cases where minors alone are co-proprietors would be a restriction in violation of the article. Counsel argue that the lawmaker could not have intended that the whole property should be adjudicated to the parent, for the parent was already the owner of an undivided half, and he could not "buy" or have adjudicated to himself his "own property," citing articles 495 and 2443 of the Revised Civil Code, and *Banks v. Hyde*, 15 La. 392, and *Alderson v. Sparrow*, 16 La. Ann. 227.

Defendants' counsel urge that the words, they can cause it (the property) "to be adjudicated in whole or in part," mean a part of the common property, but that part itself must be the common property and adjudicated as such, and not a separate part of that part of the common property, to wit, the undivided share of the minor.

They say there is nothing in the argument that the parent was himself prior to the adjudication a part owner of the property to be adjudicated to him, for the tenure of the father's ownership after the adjudication is different from what it was before—before it was an undivided interest in the property as a whole, after the adjudication it was an interest in entirety in the specific property adjudicated. They maintain the correctness of the trial judge's position in the case.

In reference to the question of earnest money, counsel quote *Baudry La Cantinierie*, vol. 17, verbo "Sale and Exchange," p. 56, § 92; 2 *Pothier on Sales*, p. 221, No. 508; 1 *Duvergier*, p. 153, § 140; 43 *Dalloz* "Rep de Leg," p. 119, No. 332; *Williams v. Hunter*, 13 La. Ann. 476; and *Wilberding v. Maher*, 35 La. Ann. 1182—as sustaining the trial judge in the position taken by him on that subject.

In reply of this, counsel for defendant cited *Demolombe*, vol. 1, p. 546, No. 549; *Merlin*, verbo "Arrhes," p. 95; *Trolong*, *De la Vente*, p. 174; *Baudry La Cantinierie on Sale*, p. 53; *Freret*, vol. 14, p. 115; *Smith v. Hussey*, 119 La. 32, 43 South. 902; and *Jefferson Sawmill v. Iowa & Louisiana Land Co.*, 48 South. 428; and *Legier v. Braughn*, 49 South. 22 (not yet officially reported).

We have carefully considered this case, and are of the opinion that the judgment of the district court, except in so far as it concerned the matter of the earnest money, is correct, but on that branch of the case it is erroneous. The prayer of the appellee contained in its answer to the appeal is well founded, and it is hereby granted.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from, in so far as it decrees the defendant on its reconventional demand entitled to recover under it from the plaintiff no more than the sum of \$1,000

deposited as earnest money, with interest, is annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the defendant on its reconventional demand recover from the plaintiff the sum of \$2,000, with interest thereon from judicial demand. Except as so altered the judgment appealed from is hereby affirmed.

**BREAUX, C. J.** I concur in the opinion and decree affirming the judgment of the district court. I dissent from that part of the decree which amends the judgment of the district court (as relates to alleged earnest money).

(124 La.)

No. 17,421.

**W. C. DEJEAN & BRO. v. LEE.**

(Supreme Court of Louisiana. May 24, 1909.  
On Rehearing, June 30, 1909.)

**1. EXEMPTIONS (§ 44\*)—WORK HORSES—HOMESTEAD LAW.**

Two work horses are exempt from seizure and sale.

Plaintiff pointed out to the sheriff two horses of his debtor as exempt from seizure. The judgment appealed from decrees that they are exempt. It does not appear that there was error in exempting the two horses.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 52, 53; Dec. Dig. § 44.\*]

**2. EXEMPTIONS (§ 39\*)—CORN FOR CURRENT YEAR.**

The necessary corn for the current year is exempt from seizure, whether cultivated by the farmer on his own 160 acres of land, also exempt, or land of another. A farmer, head of a family dependent upon him for support, are the requirements for the exemption.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 41; Dec. Dig. § 39.\*]

(Syllabus by the Court.)

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; Edward Taylor Lewis, Judge.

Action by W. C. Dejean & Bro. against Robert E. Lee. From an order dissolving writs of attachment and sequestration, plaintiff appeals. Amended.

Garland & Harry, for appellant. Peyton Randolph Sandoz, for appellee.

**BREAUX, C. J.** Plaintiffs sued the defendant for a balance due them of \$209.55, with legal interest from judicial demand. At the same time plaintiffs sued for writs of sequestration and attachment, which were issued, and the following property of defendant was attached:

One pair of mules; one bay horse; one black mare; one wagon; and there was sequestered two-thirds of about 6,000 pounds of seed in cotton, and two-thirds of about 2,250 pounds of cotton in the field, and about 70 bushels of corn.

The mules and the wagon were subse-

quently released from seizure, as they were not owned by defendant.

The defendant admits that he was indebted for the amount claimed by plaintiffs.

The defendant has a family, consisting of his wife and 10 minor children, dependent upon him for support. He is a farmer, and cultivated a small crop.

The defendant complains before the district court of the writs of attachment and sequestration, on the ground mainly that the property was exempt from seizure under the homestead law, and that the writs improvidently issued.

The judge of the district court held that the plea of exemption under the homestead law was well taken, and that the attachment of the horse and the mare and the sequestration of the corn was not sustainable. He dissolved the writs as to this property, and held that, as plaintiffs' seizure was in violation of a prohibitory law, plaintiffs should pay damages, which the court fixed at \$75.

The court maintained the sequestration of the cotton.

The question for decision is whether the two horses and the corn sequestered are exempt from seizure under the homestead law.

The contention of appellant (plaintiff in the district court) is that defendant owned and had two horses in his possession at the moment of the seizure under the attachment and sequestration mentioned.

We have noted that a horse and a mare were seized. We do not infer that defendant had two mares, but that he had a horse and a mare, both equally exempt.

The contention of plaintiffs is that this mare was not seized; that it was owned by defendant; for that reason he cannot be allowed the mare first above mentioned.

The defendant testified that he had sold this mare.

Whether he had sold it or not, if he had only one mare, plaintiffs' claim as to it is not well founded. If he had it in his possession as owner, it could not be seized because it was exempt from seizure. If he sold it after the seizure, it was, none the less, exempt, and leaves plaintiffs without ground of complaint.

In addition, in regard to these horses, the plaintiffs directed the sheriff not to seize two of defendant's horses, as they were exempt from seizure.

They are the horses which were seized, and which the court decided were exempt from seizure.

Plaintiffs remain with scant ground of complaint on this point, in view of the fact that they directed that they should not be seized.

Under article 244 of the Constitution, defendant's two horses were exempt; "two work horses shall be exempt from seizure"—quoting from the statute.

We come next to the corn, some 70 bushels

of which were released from seizure by the district court, because, as that court found, it was not subject to seizure under the homestead law.

The defendant as a farmer, it is true, had produced that corn on the land of another. The place on which the corn grew, cultivated by defendant, did not belong to defendant. It does not for that reason take it away from the terms of the law, which provides that the cultivator of the soil for his own account shall have sufficient corn for himself and family for one year. Ownership of the land is not a condition to the exemption. The lessee may be entitled to that exemption, or any one who cultivates the soil for his own account.

The purpose evidently was to give some aid under the law to the man in need. The need is more sorely felt where the resource of the cultivator of the soil is the return of the crop. In case of extreme need he is entitled to corn from his crop.

It would be an incongruity if the owner of 160 acres of land was entitled to the exemption and the cultivator of the soil who does not own the land he cultivates was not entitled to the same exemption under the terms of the law.

The article does not, as relates to corn, refer to ownership; why by interpretation consider the word as written in the law?

The purpose is to protect the cultivator of the soil, whether his own soil or that of another, until another crop begins to grow.

To conclude, the farmer who cultivates a crop has a right to enough corn for himself and family for one year.

In this instance, 70 bushels is not excessive.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is affirmed.

#### On Rehearing.

No special complaint is directed by plaintiffs against that part of the judgment which condemned them to pay \$75 damages for illegal seizure of property subject to exemption under the homestead law as alleged.

As this amount would have been deducted from the amount claimed by plaintiffs against defendant, if it had been allowed, it seems to be a matter of little concern to plaintiffs. We, none the less, will have to pass upon the question, as plaintiffs ask that the whole judgment be set aside and annulled.

Passing to the question really at issue, further examination has resulted in our concluding that the horses seized are not subject to the exemption claimed.

Two horses of defendant were not seized. They remained in his possession.

It seems that the two horses seized were not horses actually used by defendant in making his crop.

He testified that they were gentle—colts—that had not been used in farming. As they were not work horses, they were, therefore, subject to seizure. They will have to be sold as subject to plaintiffs' claim.

After having concluded that plaintiffs had a right to seize the horses which have been seized, it follows that we will have to amend our decree by striking therefrom the \$75 allowed to the defendant as damages. As plaintiffs succeeded in sustaining their demand, in part at least, they cannot be held in damages. Under the circumstances, damages cannot be allowed.

It is ordered, adjudged, and decreed that the two horses seized shall be sold in satisfaction of plaintiffs' claim.

In other respects the judgment of the district court and of this court remains unchanged.

It is ordered, adjudged, and decreed that defendant pay all costs incident to the issuance of the writs as they apply to the seizure of the horses, and that plaintiffs pay all costs incident to the seizure of said writs as they apply to the seizure of the corn.

It is further ordered, adjudged, and decreed that the judgment be amended by rejecting the demand of defendant for \$75 damages, and that defendant and appellee pay the costs of appeal.

Decree amended, and rehearing refused.

(124 La.)

No. 17,431.

HENRY LOCHTE CO., Limited, v. LE-FEBVRE (PEOPLE'S BANK, Intervener).

(Supreme Court of Louisiana. June 14, 1909.  
On Rehearing, June 30, 1909.)

#### 1. PLEADING (§ 72\*)—PRAYER FOR RELIEF—ABANDONMENT OF RIGHT.

The prayer for general relief gave a right to interveners to a judgment recognizing their pledge and pawn claimed in the body of the petition.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 72.\*]

#### 2. PLEDGE AND PAWN PROPERLY RECORDED.

The act of pledge and pawn, having been properly recorded in the parish of Iberville, is recognized on the crop made in that parish.

#### 3. AGRICULTURE (§ 12\*)—LIENS—RECORD.

The act of pledge and pawn not having been properly recorded in the parish of West Baton Rouge, it does not secure the pledge and pawn; it secures a privilege similar to that which plaintiffs, Lochte & Co., have.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. § 41; Dec. Dig. § 12.\*]

#### 4. PLEADING (§ 129\*)—IMPUTATIONS OF PAYMENT—FAILURE TO QUESTION—EFFECT.

Imputations of payment not questioned by pleading remain unchanged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.\*]

(Syllabus by the Court.)

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Twenty-First Judicial District Court, Parish of West Baton Rouge; L. B. Claiborne, Judge.

Action by the Henry Lochte Company, Limited, against Victor M. Lefebvre, in which action the People's Bank intervened. Judgment for plaintiff, and intervener appeals. Reversed.

Clarence Samuel Hebert and Alex. Hebert, for appellant. John F. Odom, Justin Charles Daspit, and Ivy Green Kittredge, for appellee.

#### Statement of the Case.

**BREAUX, C. J.** Plaintiffs are grocers in the city of New Orleans.

The defendant is a sugar planter, and has a plantation store, and during the year sells goods and merchandise to his laborers. The plaintiffs sold goods on credit to the defendant, who made advances of those goods to the employes in making the year's crop.

The defendant, indebted to plaintiffs for \$7,519.12, confessed judgment on the 18th day of January, 1908.

By the confession and the judgment defendant sought to admit that the sum of \$3,757.72 was secured by privilege on his 1907 crop.

The method followed to obtain evidence of the credit was: Defendant executed his notes in favor of the plaintiffs for amount of the latter's indebtedness for groceries consigned to defendant payable at the end of the year.

At maturity, the notes were not paid. It was on these notes that suit was brought and judgment confessed as before stated.

Plaintiffs obtained a writ of fieri facias in accordance with which the sheriff seized 500 barrels of first, and 200 barrels of second, clarified.

A few days after the seizure had been effected, to wit, on the 23d day of January, 1908, the defendant obtained an order from the court permitting him to furnish a forthcoming bond, under section 3411 of the Revised Statutes, for the return of the sugar seized, in case its return is called for.

The People's Bank of Plaquemine intervened about the same time, and claimed that originally it had a privilege on the crop, and particularly on the part seized, for the balance due of \$16,525.92, with 8 per cent. interest from January 30, 1907, and 10 per cent. on the amount judicially claimed as fee of attorney.

The act under which the bank claims and on which it bases its intervention recites that the defendant executed a promissory note for the amount before stated, which is identified with the act drawn to secure the advances, interest, and fees. The act contains the usual clause, "pledge and pawn" of the crop to secure advances.

For convenience, the borrower, Lefebvre, executed notes from time to time for amounts borrowed from the bank, which were annexed to the \$25,000 note held by the bank.

This was done up to the grinding season. After that time the bank paid on defendant's check. As defendant realized cash on his crop, he deposited it in bank.

The intervener and third opponent asked for an order from the court directing the sheriff to retain the proceeds of sales in his hands until further order of court.

Intervener also asked for recognition of the privilege accorded by law for the balance due, interest, and fee, and for payment of the amount by "priority and privilege over other claims," quoting from intervener's prayer.

In answer to this petition, plaintiff pleaded the general issue.

According to the evidence, the act executed by defendant in favor of the bank was recorded in the "Record of Liens and Privileges" and Pledges in the parish of Iberville, and it was only recorded in the Book of Mortgages in the parish of West Baton Rouge. It was not recorded in the Book of Liens and Privileges.

The Australia plantation, on which the crop was cultivated, is situated about one half in Iberville and the other half in the parish of West Baton Rouge.

The plaintiff, Lochte & Co., agreed to sell groceries to the defendant early in the year.

The defendant states as a witness that during the year he received goods from the plaintiff to supply his laborers and his tenants, and to that extent lessened the amount of cash that he needed from the People's Bank to pay cash obligation, particularly his pay roll. That the goods he obtained from plaintiff and the cash from the bank went "hand in hand" into the actual making of the crop of 1907, and he added that he thought that the People's Bank, through its president, knew that he received these supplies from plaintiff company.

It is also a fact that the defendant received amounts from the bank to pay the expenses of grinding and taking off the crop.

The amount thus received and expended was \$10,955.32.

At one time the intervener referred to this sum as an amount of proceeds from the crop placed to the credit of defendant in bank, and which he later withdrew to pay the expenses of the grinding and saving his crop.

At another time it is referred to as an amount which the bank advanced to defendant to meet the expenses just mentioned.

At one time, while testifying, the president, Dunlap, as a witness, is quite positive that it was the bank's money which they loaned to defendant on his own check. He repeated that it was a loan. The evidence on this point is conflicting.

The following is a statement of the conclusion arrived at by our learned Brother of the district court:

First. That the People's Bank advanced \$25,000 to the defendant in accordance with

act of privilege, pawn, and pledge, within the intendment of Act No. 66, p. 114, of 1874.

Second. That the plaintiff company advanced to the defendant, under a verbal contract, supplies to make his crop of 1907 to the amount of \$5,757.72.

Third. That the sugar seized in this case sold on the open market for \$16,666.55, and that the entire crop sold for \$30,674.42, out of which amount the bank had received \$14,007.87 prior to the seizure.

The court a qua deducted the \$14,007.87 from the \$25,000, the total advance as per the judgment, leaving a balance due the bank of \$10,992.13, secured by privilege first in rank out of the proceeds of sugar seized and sold.

The judgment of the district court fixed the amount at \$16,666.55.

The balance of the proceeds was decreed subject to the privilege of Lochte & Co.

#### Discussion and the Decision.

Several objections were urged during the trial which we will dispose of at this time.

#### The Act of Pledge and Pawn.

The plaintiff, Lochte & Co., objected to the act executed by defendant in favor of the intervener as not in the authentic form, and that it did not make proof of its contents. It was introduced in evidence as an authentic act and as making full proof of the rights claimed.

It was regularly offered, and not the least objection was urged against its admissibility. It follows, whether authentic or not, is now of no moment. No objection having been raised, it is now properly before the court as evidence.

#### The Bond.

During the trial in the district court, plaintiff objected to the forthcoming bond furnished by the defendant to the sheriff on the ground that it was made payable to the sheriff; it should have been made payable to the plaintiff.

That question is not properly before us. The issue presented and the argument lead us to the conclusion that plaintiff is secured enough by the bond, and, if it is not, the sheriff himself and others concerned will have to respond for the amount.

But above all, we do not consider that issue as being before us. We, therefore, pass it without further comment.

#### Judgment is Not Evidence of a Privilege.

The plaintiff company attaches importance to the confession of judgment made by defendant in its favor.

The judgment on which the *fi. fa.* issued is binding upon all parties here concerned. It cannot be collaterally attacked to the end of setting aside the seizure.

We will not review the decisions upon this point, but are content to leave it, after citing

Hennen's Digest, verbo "Judgment," with the statement that in this instance there is in one respect an exception to the decisions cited, because the opponents and all concerned claim under the judgment; this, however, for reasons we will state in a moment, does not include the privilege sought to be recognized by the terms of the judgment as binding upon the parties.

It is different from the judgment itself decreeing an amount due as to this privilege on the crop claimed by plaintiff. As to the privilege, the judgment, as relates to the privilege, is *res inter alios acta*, and it is not binding upon third persons. Claiming the proceeds has the effect of admitting the moneyed part of the judgment, but it does not admit the privilege.

The confession is in effect evidence of the defendant's willingness to accord a privilege, but no privilege can be created by mere confession. A privilege is a real right which grows out of the nature of the debt. It is not created by the mere agreement or convention of the parties, nor by confession of judgment of a defendant. Rev. Civ. Code, arts. 3185, 3186.

But there was a privilege proven by verbal testimony. If there were only the confession, there would be no evidence before us. But the defendant, as a witness for the intervener, we have before noted, has testified that the groceries supplied by the Lochte Company were as useful in operating the plantation as the cash advanced by the intervener; that each was used in paying the laborers, including the tenants who worked on shares with the owner, as is sometimes the case with some of the laborers on large plantations.

The defendant testified that the funds advanced by the bank and the groceries of the plaintiffs were used in paying the laborers. The goods as well as the advances "went to the employes."

#### Tenants.

Objection is urged by intervener to the privilege for groceries which went to the tenants.

It appears that a small part of the crop was cultivated on the share system with the tenants. The groceries were delivered to the owner, who at the end of the year deducted amounts due by the tenants for provisions and advances.

The amounts obtained from this source and the advances were small.

There must be evenhanded justice in this thing. If plaintiffs are not entitled to recover, neither is the intervener.

The bank is allowed the privilege which it claims; so are the plaintiffs.

It was a plantation store from which the advances were made. The case comes within the principle laid down in *Cain v. Pullen*, 34 La. Ann. 518.

It must be borne in mind there is no ques-



tion of "pledge and pawn" before us; only a privilege.

Before leaving this point, we will illustrate by a practical example. The bank handed, say, \$100 to the planter. He turned it over to the tenant, who expended it as he pleased, to make crop or not as he chose. Still the bank has a privilege.

The groceryman forwards provisions, which are delivered by the planter to the tenant, and go to the latter's support or that of his family. It must in the nature of things be applied to plantation purposes. Why should the banker have a privilege and the grocer not, particularly as it is testified that the bank was aware "that you had these supplies from the Henry Lochte Company, and particularly, further, in view of the fact that the supplies to laborers and tenants lessened the amount of cash that you needed from the People's Bank or elsewhere to pay your cash obligations, particularly your pay roll"?

We find four causes why plaintiff has a privilege concurrently with opponent on the crop in West Baton Rouge.

First, the understanding that plaintiffs were selling the groceries applied toward feeding the laborers and tenants.

Second, the advances and the groceries were for the same laborers and tenants on the place.

Third, as relates to security in West Baton Rouge, plaintiffs and opponents are on the same level.

Fourth, the cash and the groceries were paid and delivered through the same agency.

They gave rise to debts for necessary supplies furnished to the plantation. Rev. Civ. Code, art. 3217.

If plaintiffs and opponents have no privilege on the crop in West Baton Rouge, plaintiffs would still have the right to recover under their judgment.

We are of the opinion that under the facts and circumstances of this case each has a privilege on the crop in West Baton Rouge concurrently and pro rata, and we so decree.

#### Pleading as Relates to Pledge and Pawn of the Crop.

This being a controversy between opponent and plaintiffs about the proceeds of a crop, we take up in the next place the claims of the first—third opponent.

It is contended by plaintiffs that this opponent has waived its "pledge and pawn." This contention is not sustained.

The petition of the third opponent specially refers to its "pledge and pawn." It sets forth all rights it has under the written act of pledge. But in the prayer it claims a preference and privilege. There was thereby no abandonment of its pledge and pawn, which it had not failed to allege at length. For reasons hereafter stated, our ruling at this point applies only to the crop made in Iberville parish.

The body of the petition may be considered in connection with the prayer, and when it is very evident that there was not the least waiver intended, and the prayer with the petition render it evident that the pleader included all of the rights of the petitioner, there is no reason to hold him as having abandoned a right.

It would be different if the petition contained no reference to the "pledge and pawn," and the prayer was silent in regard to a superior right expressly claimed.

The act was duly inscribed in the parish of Iberville. The intervener has a claim on that part of the plantation situated in the parish of Iberville—this includes one-half of the place—and by agreement we are informed that one half of the crop was made on the part of the plantation within the limits of that parish.

The whole crop sold for \$12,569.78. Intervener has a right to the whole amount for which that part of the crop made in Iberville sold, and to a share, in proportion to its claim, to the crop in West Baton Rouge. The plaintiffs have a right to a proportionate share of the crop in West Baton Rouge.

#### Want of Proper Registry.

It follows: A different issue presents itself regarding the crop of defendant in the parish of West Baton Rouge.

The act in this last-named parish was recorded in the Book of Mortgages only. The statute provides that the clerks of the district courts in all the parishes, except the parish of Orleans, "shall keep a separate book in the mortgage office for recording liens and privileges on crops instead of in the Mortgage Book. Act No. 51, p. 43, of 1890.

"Pledges, pawns," are stricti juris. The law must be complied with.

In this state of the issues, plaintiff and the intervener each has a privilege on the crop on Australia made in West Baton Rouge, without "pawn" or "pledge" to the opponent, and they will divide concurrently, as before stated, the proceeds of the crop made in that parish in the proportion of the interest of each.

#### Credit under Judgment of District Court.

We are next in the order of issues, as presented and argued, to consider and determine whether the amount collected by the intervener on the judgment appealed from was properly credited in that judgment.

We are not of that opinion. Our reasons are: A change of the imputation of payment as proposed in that judgment would result in applying the fund to the payment of another claim than that to which it has been applied. The application of the fund, as shown on the account of the intervener, has been made heretofore in accordance with the consent of the debtor, the defendant. The plaintiffs cannot at this time change the

payment from one fund, secured as they contend, to another fund not secured.

The amount in question was advanced during the grinding season from funds which defendant had deposited in the intervening bank, being part of the proceeds of the defendant's crop, pledged and pawned. It was absolutely necessary to let defendant have this amount to enable him to save his crop.

When the amount was returned, it was applied to the satisfaction of intervenor's claim generally, without regard to whether it was the part secured or not secured, according to plaintiffs.

The advances made by the bank were \$20,600.

According to one of the theories of the case, the advances made by the bank for the grinding season, from the funds placed to defendant's credit, as before stated, were partly secured by the difference between the \$20,600 and the \$25,000.

According to another theory, it was all secured; if not by pledge and pawn, it was secured by a privilege.

But leaving these grounds regarding imputation of payment out of further consideration, the following is controlling:

The intervenor's petition and its accompanying account credited the amount first above mentioned on this point as before stated.

Plaintiffs met the petition of opponent by the answer of general denial. There was no objection urged in the answer to the imputation of payment as made.

The objection to the imputation of payment should be urged by plea.

From this point of view, the amount of intervenor's claim at the time it was filed was..... \$16,525 92  
Amount received by intervenor from sales of sugar and molasses in New Orleans prior to this suit and 10% fee of attorney..... 3,956 14

\$12,569 78

The proceeds of crop in Iberville are credited on intervenor's claim 6,355 20

The proceeds of the crop in West Baton Rouge are credited in part to plaintiff, and in part to intervenor, in the proportion of amount due each; that is, to plaintiff.. 5,757 72

Plus interest to intervenor..... 6,214 58

Plus interest and fee of attorney due on the respective amounts at the date of settlement.

It is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed.

It is further ordered, adjudged, and decreed that the proceeds of the crop made on the Australia plantation in West Baton Rouge be applied in the proportions before stated, and as to Iberville as before stated.

It is further ordered, adjudged, and decreed that appellees pay the costs of appeal,

and that the costs in the district court be paid from the common fund derived from the sale of the crop made on the plantation in West Baton Rouge.

### On Rehearing.

PER CURIAM. The evidence is not sufficiently certain to enable us to determine what necessary plantation supplies were advanced by the plaintiff to the defendant to enable him to make a crop of sugar on his plantation. There is nothing in the record to show what specific articles were so furnished and the prices charged for the same. The case will be remanded for the restricted purpose of enabling the parties to adduce further evidence on the issue of privilege vel non claimed by the plaintiff.

It is therefore ordered that a rehearing be granted, and this cause remanded for further evidence and proceedings on the issue of the existence and extent of the privilege claimed by the plaintiff, with instructions to render judgment upon said issue, and otherwise in accordance with the views set forth in the opinion of this court.

(124 La.)

No. 17,303.

### Succession of DRYSDALE.

(Supreme Court of Louisiana. Nov. 4, 1908.  
On the Merits, March 15, 1909. On  
Rehearing, June 14, 1909.)

### 1. APPEAL AND ERROR (§ 383\*)—BONDS—AMOUNT.

There are three grounds set forth in the motion to dismiss the appeal. Two have already been decided in No. 17,277, 47 South. 367, under our supervisory jurisdiction.

There remains only one ground for decision; it relates to the alleged insufficiency of the appeal bond.

The appeal cannot be dismissed on that ground. The case is of that class of cases made appealable suspensively on bond for costs.

The judge a quo fixed the amount of the bond, and it was furnished by appellant in accordance with the judge's orders.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2042; Dec. Dig. § 383.\*]

### 2. WILLS (§ 70\*)—VALIDITY—EXECUTION IN FOREIGN COUNTRY.

A will made in Canada by a resident of the state of Louisiana is entitled to probate in the courts of said state on proof that the formalities prescribed by the laws of Canada have been observed in the confection of the instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 184; Dec. Dig. § 70.\*]

### 3. WILLS (§ 289\*)—PAPERS BOUND TOGETHER—PRESUMPTION.

Sheets which are bound together and constitute the will at the testator's death are presumed to have been bound together at the time of the attestation, when the papers are coherent and in their natural order.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 289.\*]

#### 4. EVIDENCE (§ 587\*)—SUSPICIOUS CIRCUMSTANCES—SUFFICIENCY.

Wrongdoing cannot be proved merely by suspicious circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2436; Dec. Dig. § 587.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

In the matter of the succession of Julia P. Drysdale. From a judgment refusing probate to the will propounded, the executors appeal. Reversed and rendered.

See, also, 47 South. 367.

Percy Sommers Benedict and Aloysius Joseph Cahill, for appellants. Woodville & Woodville, for appellees.

#### On Motion to Dismiss the Appeal.

BREAUX, C. J. The following are the grounds of appellee's motion to dismiss:

First. The amount of the bond, to wit, \$500, is insufficient for a suspensive appeal.

Second. A suspensive appeal will not lie from a judgment refusing to appoint executors, nor from a judgment recognizing legal heirs and sending them into possession.

We will state in the first place: The facts are sufficiently stated in No. 17,277, entitled Succession of Miss Julia P. Drysdale, Miss Mary Ann Pike et al., praying for certiorari and mandamus, recently decided by this court (rehearing refused October 7, 1908) 47 South. 367, to relieve us from the necessity of stating them again. All of the grounds of the motion, save one, have already received consideration from this court. It has been held, as to these two grounds, that the losing party had a right to a suspensive appeal on a bond for costs. These grounds, heretofore sustained as just stated, relate to the recognition of the heirs and the sending them into possession. There remains, therefore, only one ground for us to decide, and that is, that the bond is insufficient.

In the cited case, the district court refused to execute the judgment on the application of the appellees, Miss Mary Ann Pike and others.

It was correct on the part of the district judge to refuse to execute the judgment and to decline to place the heirs in possession.

As relates to the application for the appointment of an executor: That application is a mere incident of the case. If the suspensive appeal were to be dismissed, there would remain a devolutive appeal as relates to the application. The case would still be before us, as the suspensive appeal really suspends nothing as the issues are before us. We must decline to dismiss it, as its dismissal would serve no purpose.

The only remaining ground for our decision, as before stated, is whether the amount of the bond is sufficient for a suspensive appeal.

It is sufficient. There was no judgment for

money, and no moneyed demand suspended by the appeal. There was no reason for requiring a larger bond. The bond for costs suffices in this class of cases.

The motion to dismiss is therefore overruled.

#### On the Merits.

LAND, J. The pleadings and issues in this case are set forth in Succession of Drysdale, 121 La. 816, 46 South. 873, and need not be repeated. The cause was nonsuited for the purpose of giving the executors an opportunity to probate the alleged original will of Mrs. Drydale in the court below.

In July, 1908, the executors produced said alleged original will, and, after notice to the heirs at law, proceeded to probate the same. After hearing the evidence and argument, the judge took the matter under advisement, and on July 31, 1908, rendered judgment refusing to probate the alleged will because in his opinion the document as a whole was not sufficiently proven. The executors have appealed.

We make the following extracts from the opinion of the judge a quo, viz.:

"The original will consists of three typewritten sheets of paper. The first two sheets contain the caption and various bequests, among them a legacy, at the top of the second page, to Janet Carpenter, wife of Thomas H. P. Carpenter, of \$4,000, and to each of her children as follows: To Julia, \$1,500 and her diamond earrings, breastpins, and diamond and emerald rings; to Drysdale, \$500; to Elsdon, \$500 and the late Andrew Drysdale's watch and bank box; to Frank, \$500, and watch and chain in bank box. Later down on the page is a legacy to Thomas H. P. Carpenter of the balance of her estate, whatever it may be, after all expenses have been paid, for his services to the deceased and her late husband while living; these legacies constituting the greater part of her estate. The last sheet contains five lines, in which the testatrix names the executors and states she signs her name. It also contains 11 half lines of typewriting, stating she declared this her last will and testament in the presence of the witnesses, and at her request they all signed their names. The last sheet is signed 'Julia P. Drysdale, W. H. Magill, A. E. Jones,'

"It appears in substance from Mr. Magill's testimony that while he was at work in Mr. Carpenter's house, in Minona, in the province of Ontario, Canada, Mrs. Drysdale came in and asked him to witness her will. She said she needed two witnesses. He stepped to the door and called Mr. A. E. Jones, who was in another room in the office also working for Mr. Carpenter; that Jones came in; that Mrs. Drysdale produced two or three, perhaps four, sheets of typewriting fastened together at one end with a brad or paper fastener, and said it was her will; that she walked to a high desk and signed it; that he then signed the last page just below her signature, and Jones then signed below him; that he did not read the will attentively—just scanned it; Mrs. Drysdale did not mention its contents; that he did not remember its contents; that he could not in any way identify the two first pages as the same two pages annexed to the page he signed; that he could only identify the last page, because his signature was placed thereon; that, after they had all signed, Mrs. Drysdale left the office, tak-

ing the will with her; that after she left he told Jones that they had better not say anything about it, and that he never mentioned it; that after Mrs. Drysdale's death he was told by Mrs. Carpenter that he had witnessed a will. Mr. A. E. Jones in substance tells the same story. He says, however, that he did not read the will, and could only identify the last page because his signature was appended thereto.

"Mrs. Drysdale died in August, 1905. Mr. Carpenter came to New Orleans, and inquired if there was a will here. He tried also to settle up the estate with her heirs. While here, on November 5, 1905, he telegraphed his lawyer, S. F. Washington, in Hamilton, Ontario, Canada, to secure affidavit from his (Carpenter's) wife to examine package in office of Harrison & Lewis and report contents by wire. On November 6th, Washington wired Carpenter that he had found will in office of Harrison & Lewis, and that he and McCloskey were executors.

"On the same day Carpenter wired Harrison & Lewis to send will to this city, which was done. Carpenter received here the original will, and took it from here to Canada for probate. There is no positive evidence of what became of the will or where it was from the time it was signed in September, 1903, in Carpenter's office, until it was found in November, 1905, in the office of Harrison & Lewis.

"Mr. Harrison's testimony was taken by commission, and he says: 'I cannot say I was acquainted with Julia P. Drysdale. I think she was introduced to me in the office of Teetzel, Harrison & Lewis or Teetzel, Harrison & McBrane. There was what purports to be her will found in my office, on inquiries made by Mr. Washington and Mrs. Carpenter. It was taken from the vault by my clerk at my request, on inquiry from Mr. Washington and Mrs. Carpenter. I cannot say that I lodged it there, or who did. I am not sure that she (Mrs. Drysdale) was a client of mine. She may have been a client of Mr. Teetzel's, but she was not at all events a personal client of mine.' Mr. Teetzel's testimony has not been taken.

"On the 2d day of January, 1906, the will was presented for a probate by Judge J. F. Monck, acting surrogate judge, in the surrogate court, in the county of Nonworth, province of Ontario, Canada. It was presented by and probated on the application of the executors.

"It appears from the testimony of Judge Monck that a typewritten will is valid by Canadian law if signed by the testator in the presence of two witnesses present at the time and who sign as witnesses in the presence of the testator and each other; that he probated the will in question on the affidavit of W. H. Magill, dated December 11, 1905, and A. E. Jones, dated December 13, 1905, both affidavits made before J. H. Crenor, notary public in the province of Ontario, Canada, and that it is the practice in Canada to probate wills on the affidavits of witnesses.

"Magill and Jones in their affidavit state: 'That I am one of the witnesses named in the paper writing now hereunto annexed, purporting to be and contain the last will and testament of Julia Pike Drysdale, late of New Orleans, in the state of Louisiana, widow, deceased, who died on or about the 19th day of August, Anno Domini 1905, at New Orleans, and who had at the time of her death a fixed place of abode at New Orleans, in the state of Louisiana, the said will bearing date the 14th day of September, Anno Domini 1903, beginning thus: 'This is the last will and testament of me, Julia Pike Drysdale of the City of New Orleans,' ending thus: 'In witness thereof I have hereunto set my hand the day and year first above written,' and being subscribed thus: 'Julia P. Drysdale,' and having viewed and perused the said will, and particularly observed that there are no additions, alterations, or interlineations in said will, I, the said William Henry Magill (and Alva

Edgar Jones), make oath that the same is now in all respects in the same state, plight, and condition as when the said will was executed by said testatrix.' \* \* \*

"The evidence of Magill and Jones contradict their affidavit, and show that what they swore to is not strictly true. It is true that they signed the last sheet of the will, and that Mrs. Drysdale signed it. It is not true that they identify the first two pages or the whole document as the will she signed. Magill could not, although he scanned it, and Jones could not, because he even did not read it. Their affidavits were made on hearsay evidence, and what they believed, but did not know, to be true."

The trial judge held that the three typewritten sheets had not been proved to be the will of Mrs. Drysdale under the rules of evidence applicable to the probate of wills in this state, and points out that articles 1648 and 1649 of the Revised Civil Code require the witnesses to swear that they recognize the testament presented to them as being the same that was signed by the testator in their presence. Continuing the judge said:

"The two witnesses, Magill and Jones, failed to make the proof required by these articles. They have proved only the last page.

"Considering that the sheets of paper presented to the witnesses and declared by the testatrix to be her last will were fastened together at one end with a brad, could be easily separated, and other pages substituted before the last page without altering the sense of the will or the substitution being detected from reading the will; considering, further, the length of time between the signing of the will and its being found at the suggestion of Carpenter, one of the executors and the residuary legatee, and his wife, the principal legatee, neither of whom are the heirs of the deceased; that during said time no evidence is produced to show where the will was, nor any evidence produced to show when or how the will came to be in or by whom placed in the office of Harrison & Lewis; considering, further, the acts and conduct of Carpenter as disclosed in the record, and his failure to testify herein; considering the facts, together with the absolute failure of the two witnesses to identify and approve the papers presented to be the last will of the testatrix; and considering, further, that it ought to be by very strong and conclusive proof made before this court before it receives and probates a will disbaring and disinheriting practically the legal heirs of the deceased, her brother and sister, and giving her property to a stepdaughter and her husband—the court rejects the pretended will, declines to probate it, and from all the evidence declares that the deceased died without a will, and that Mary Ann Pike and John Thomas Pike are her legal heirs, and entitled to be put in possession of her estate. \* \* \*

The judge a quo admits that the last page of the will was sufficiently proven by the testimony of the two subscribing witnesses. This last page was, at the time it was signed, attached to two other pages, the whole constituting the last will and testament of the decedent, in which the testatrix nominated Bernard McCloskey and T. H. Carpenter as joint executors. Mrs. Drysdale retained possession of the instrument. In November, 1905, this same last page was found in a safe in the office of Harrison & Lewis, attached to two other pages of typewritten matter, the whole constituting a coherent testament, containing a large number of par-

ticular legacies. After directing the payment of her debts, the testatrix bequeathed to her sister, Mary Ann Pike, \$4,000, also all her household furniture, etc., and cluster diamond ring. The next bequest was one of \$2,500 to John Thomas Pike, the brother of the testatrix, followed by bequests of \$100 to each of his four children by names. These bequests to the contestants herein were about 25 per cent. of the inventoried value of the estate. Other bequests were made to friends, relatives, and connections, aggregating \$8,000. Then follow the legacies to Mrs. Carpenter and children, amounting in all to \$7,000. The last special legacy was to her old colored servant, Francis Duplantier. The testatrix left \$200 for the purpose of maintaining her tomb, wherein she desired to be buried by the side of her deceased husband, in Hamilton, Canada. The numerous special legacies are of such a nature that it is most improbable that they were the work of a forger. For instance, the jewelry of the testatrix is specifically described and distributed among several legatees, and the watch of her deceased husband is given to one of his grandchildren and his chain to another, both articles being described as in the bank box of the testatrix. Special legacies are made to 16 children by name. It is not suggested that the will contains a single error as to names, articles, or facts. The residue of her estate was bequeathed to T. H. P. Carpenter for services to her and her late husband when living. The total inventory of Mrs. Drysdale's estate was \$28,423.26. The total special bequests in money amount to \$20,200. What the residuum of the estate will be does not appear. Mrs. Carpenter was the stepdaughter of Mrs. Drysdale, who had no children of her own. Mrs. Drysdale spent her summers at the home of the Carpenters in Canada, and her relations with them were very intimate. The will presented for probate was not drafted in the sole interest of the Carpenters, as about one-half of the gross estate of the testatrix was bequeathed to other persons. The internal evidence points to Mrs. Drysdale as the maker of the testament. It is hardly possible that any third person could have been the author of an instrument showing such knowledge of the articles of jewelry owned by Mrs. Drysdale and the particular box in which her deceased husband's watch and chain were kept. A forger would hardly have thought of such details, or have distributed the estate among so many legatees.

The testament as presented was taken with other papers from a large folding envelope, worn by use, found in the office safe of Harrison & Lewis. On the back of this envelope appears the word "Drysdale," apparently in the handwriting of the deceased. The other papers consisted of an old bank passbook in the name of Mrs. Drysdale, 13

checks drawn by Mrs. Drysdale on the same bank, and a deed of date January 9, 1892, signed by Mrs. Drysdale, containing an agreement to purchase lots in Winona Park, with two letters of attorney of same date from Mrs. Drysdale to Carpenter attached thereto.

All the acts and declarations of Carpenter soon after the death of Mrs. Drysdale tend to show that he did not know of the existence of this will. It was not until November 5, 1905, that he appears to have been informed that there was a package of Mrs. Drysdale's papers in the office of Harrison & Lewis.

The first contention of the opponents was that the signature of Mrs. Drysdale to the will was a forgery. Their contention now is that the two first sheets are forgeries, or at least have not been proved to be genuine. There is no evidence to support the charge of forgery. The asserted suspicious circumstances relate to the failure of Carpenter to testify, and to his personal acts and conduct. Carpenter had nothing to do with the concoction of the will, and his acts of commission or omission cannot affect the question, unless it be shown that the will has been tampered with by some one. The assertion that Carpenter had possession of the passbook which was found with the will in the same envelope rests on the testimony of Miss Pike to the effect that Mrs. Drysdale told her that the book was turned over to Carpenter in the settlement of Andrew Drysdale's estate. The passbook in the record is in the individual name of Mrs. Drysdale, and covers the period from June 17, 1892, to August 27, 1896. Andrew Drysdale died in 1896. Carpenter was the "adjuster" of the estate, and settled his accounts with Mrs. Drysdale in May, 1897. From the statement rendered by Carpenter, it appears that Andrew Drysdale had a passbook in the same bank. As far as the statement shows, Mrs. Drysdale's personal passbook had nothing to do with the settlement of the estate. Her husband's passbook was probably turned over to Carpenter, who was administering the estate. Miss Pike or Mrs. Drysdale may have confused the two passbooks. Be this as it may, testimony as to the declarations of a dead person is the weakest of all evidence and the worst kind of hearsay, and is utterly insufficient to establish any fact against a third person.

The same statement shows that J. V. Teetzel of Ontario, was the solicitor for the estate of Andrew Drysdale in Canada, and was paid a fee. It was in the office occupied or formerly occupied by Harrison & Teetzel that the envelope containing the will and other documents belonging to Mrs. Drysdale was found. It may be here stated, for what it is worth, that Judge Monck, who probated the will in Canada, testified that Harrison & Teetzel said that they were attorneys for

Mrs. Drysdale. It appears that Teetzel is on the bench. His deposition was not taken on either side.

The facts are that Mrs. Drysdale made a will, and soon after her death a will signed by her and the same witnesses and of the same date was found in the law office of a solicitor who had represented the estate of her husband. The testament has been positively identified as to the last sheet, on which appear the nomination of the executors and the signatures of the testatrix and the witnesses. In the absence of evidence, what is the legal presumption as to the other sheets?

In Am. & Eng. Ency. Law (2d Ed.) p. 603, the rule at common law is thus stated:

"As a general rule, the witnesses need not attest every sheet of a will, nor is it necessary that every sheet should be shown to them. It is sufficient that all the sheets were in the room at the time of execution and attestation, and, in the absence of proof to the contrary, such is the presumption. Sheets which are bound together and constitute the will at the testator's death are presumed to have been bound together at the time of the attestation."

Gardner on Wills, p. 36, says:

"Where papers are found fastened together after the death of the testator, coherent and in their natural order and containing a will, there is a presumption that they were in this condition when the will was executed."

While we have no cases in our State Reports on this subject, it seems to us that the above rule is founded in common sense. Otherwise, the parties and the witnesses would be required to sign or attest each folio of every written instrument evidencing a will or agreement. It is more reasonable to presume that the document presented is the same that the testatrix executed than to suppose that some one has committed a felony by abstracting certain sheets and substituting others. Wrongdoing cannot be proved by mere suspicious circumstances.

Mrs. Drysdale made a will in September, 1903. All the known facts of the case tend to prove that she deposited this testament in the office of Harrison & Teetzel. Mrs. Drysdale died believing that she had left a last will and testament. A few days before her death, Miss Pike called on Mr. McCloskey and inquired if he had a will. When he gave a negative answer, Miss Pike seemed surprised, and said that Mrs. Drysdale had led her to believe that Mr. McCloskey had her will.

It is shown beyond question that the will is perfectly valid under the laws of Canada, and that the evidence here adduced is sufficient to probate it in that jurisdiction.

By the laws of Louisiana, the will, if it

had been executed here, would be void for want of form, in that it has not the necessary number of witnesses, and was not read at the time in a loud, audible voice. It is impossible, therefore, for the will to be proved in the state of Louisiana as is required in the case of local wills.

Our former decision, reserving the right of the executors to present the original will for probate in this state, assumed that it could be probated here if all the formalities required by the laws of Canada had been observed in its confectio. In Succession of Hall, 28 La. Ann. 57, it was held, first, that a foreign will could be probated in the state of Louisiana, and, second, that, if valid according to laws of the place of its execution, it will be valid in this state. The cases cited here by appellee's counsel, to wit, Robert v. Allier's Agent, 17 La. 17, and Succession of Robert, 2 Rob. 427, were considered and disposed of in Succession of Hall, supra, 28 La. Ann. 59, 60.

The question of the identity of the folios constituting the instrument as a whole is one to be solved by the rules of evidence. The trial judge erred in not applying the presumption of identity which we have already discussed, and in holding that it was essential that each particular folio should be positively identified by the witnesses.

In our opinion, the will was sufficiently proven by the evidence in the record.

The question whether a decree of probate in this case will conclude the opponents from hereafter attacking the will by direct action is prematurely raised, and need not be considered.

It is therefore ordered that the judgment appealed from be reversed, and it is now ordered that the document of date September 14, 1903, presented and filed below as the last will and testament of Mrs. Julia Pike Drysdale, be recognized as such, and recorded and executed according to its tenor; and it is further ordered that the executors nominated in said testament be confirmed, and that letters issue to each of them on his qualifying according to law; costs below to be paid by the succession, and costs of appeal by the appellees, heirs at law.

#### On Rehearing.

PROVOSTY, J. It is ordered, adjudged, and decreed that the judgment appealed from be set aside, and that this case be remanded for further trial, with leave to the parties to amend their pleadings; the costs of the present appeal, as well as all other costs, to abide the final result.

(124 La.)

No. 17,303.

Succession of DRYSDALE.

(Supreme Court of Louisiana. June 23, 1909.)

DESCENT AND DISTRIBUTION (§ 78\*)—EFFECT OF WILL—POSSESSION OF ASSETS.

If the will attacked is invalid, the collateral heirs will have the right to the possession of the succession; not otherwise.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 263; Dec. Dig. § 78.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

In the matter of the succession of Julia P. Drysdale. From a judgment against the executors, they appeal. Reversed.

See, also, 122 La. 37, 47 South. 367.

Percy Sommers Benedict and Aloysius Joseph Cahill, for appellants. Woodville & Woodville, for appellees.

BREAUX, C. J. There are two orders of appeal and two bonds.

The issues have been unnecessarily divided in the district court.

As they are before us in two separate appeals without objection, they will be disposed of separately.

One of the appeals was taken from a final judgment rendered against the executors in the suit of the succession of Julia Pike Drysdale on rule to probate the last will and testament of the deceased, the late Mrs. Drysdale.

In that appeal, the judgment was reversed, and the case was remanded to the district court for further trial.

The other appeal was taken from a final judgment rendered against the executors in the suit of the succession of Julia Pike Drysdale putting the legal heirs in possession of her estate.

This judgment is dated the 31st day of July, 1908.

It is before us on appeal, and the necessity presents itself of making some disposition of the appeal.

We have concluded to make similar disposition of this appeal as that which was made in regard to the appeal before mentioned. The judgment is set aside, and the case remanded for further trial, with leave to amend pleadings.

It follows from the foregoing, we decline to send the heirs into possession of the property of the succession.

We make no question but that ordinarily an heir who presents himself and asks to be sent into possession should be sent into possession if the succession is intestate.

But in this case there is a will; whether forged or not, valid or not, are questions to be decided.

Until the questions of forgery vel non, validity vel non, are decided, the question

of possession will have to remain in abeyance; the status quo is maintained.

The question of the validity of the will and the right to possession will be tried together.

If for any reason the will be not valid, the heirs will have the right to possession, and it will be so decreed.

If the will be decreed valid in the district court, the right of the heirs to go into possession and ignore the will will be denied.

In each case the right of appeal will remain.

It is ordered, adjudged, and decreed that the judgment before mentioned is annulled, avoided, and reversed; the cause is remanded to be tried in the district court.

The costs will await the final decision of the case.

(124 La.)

No. 17,354.

UNION SAWMILL CO. v. SUMMIT LUMBER CO. et al.

(Supreme Court of Louisiana. June 14, 1909.)

JUDGMENT (§ 251\*)—CONFORMITY TO ISSUES.

The cause of action on which plaintiff declared being that defendants had committed an actual trespass by entering on certain tracts of land, and cutting and removing timber therefrom, with allegations of fear of trespass on other tracts unless injunction was issued as prayed, and allegations of the cutting and banking of a certain amount of timber, sequestration of which was prayed, and the prayer, so far as concerns the question of ownership, being to be decreed the owner of said logs, the allegation that plaintiff was the owner and in possession of certain lands and the timber thereon, and the owner of and in possession of the timber on certain other lands, was simply in aid of the action of trespass, so that consideration of, and judgment as to, the question of ownership and possession, beyond what was necessary for determining the question of trespass, was beyond the issues involved, and so unauthorized.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.\*]

Appeal from Fourth Judicial District Court, Parish of Union; Robert Brooks Dawkins, Judge.

Action by the Union Sawmill Company against the Summit Lumber Company and another. Judgment for plaintiff. Defendants appeal. Affirmed in part, and set aside in part.

W. Hall Trigg, Minor Lee Moore, and James Walter Elder, for appellants. Lamkin, Millsaps & Dawkins, for appellee.

NICHOLLS, J. Plaintiff alleged that it was the true and lawful owner of certain lands situated in the parish of Union, as well as all timber growing thereon, described as S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section 15, N. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ , section 22, township 22 north, range 1 east. That it was also the true and lawful owner and possessor of all the merchantable timber stand-

ing, growing, and being on certain lands also described and situated in said parish, and had the use and possession of said lands, as well as the rights of way, ingress and egress, into and from, over and across, the same for the purpose of cutting, felling, and removing its said timber. That the Summit Lumber Company had through its officers, attorneys, agents, and employes, and particularly the so-called Arkansas Southeastern Railroad Company, a pretended railroad corporation which claimed to have been incorporated under the laws of Louisiana as a common carrier, illegally, knowingly, and maliciously entered upon, cut, felled, and removed petitioner's standing timber from said described lands, and particularly from the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , and N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , of section 27, and the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 20, said township 22 north, range 1 east, and would continue to cut, fell, and remove petitioner's said timber unless enjoined and restrained by the court, to petitioner's great loss and irreparable injury.

That the said defendants had already cut, felled, and removed from its described lands and timber more than 200,000 of its merchantable timber, which was well worth the market price of \$10 per thousand feet, or the sum of \$2,000; that the timber so illegally cut, felled, and removed belonging to petitioner was then situated and located along the spur track or tram road of the said defendant running through the southwest quarter of section 22, said township and range, and petitioner feared they would conceal, part with, dispose of, or send timber out of the jurisdiction of the court during the pendency of the suit, and that it was necessary that the same be seized, sequestered, and taken into the custody of the court until the termination of the same.

Petitioner represented that it had been damaged in the further sum of \$500 on account of the willful and malicious trespass upon its said property by the said defendants, and in the further sum of \$100 as attorney's fees incurred by it in the employment of counsel to bring and prosecute this suit, which sum it was entitled to recover in solido against the said defendants.

It averred that there was still standing and remaining on said lands more than 6,000,000 feet of merchantable timber, which was well worth the sum of \$3 per thousand feet, or \$18,000, standing at the stump, which was also in danger of being trespassed upon and felled and removed by said defendants, unless enjoined and restrained as aforesaid. Petitioner prayed that the Summit Lumber Company and the said so-called Arkansas Southeastern Railroad Company be cited; that a writ of injunction issue directed to the said defendants, enjoining, prohibiting, and restraining each and all of them, their officers, agents, attorneys, and employes from trespassing upon, entering upon, cutting, fell-

ing, and removing, or from in any manner interfering with petitioner's said land and timber, and its peaceful use, occupancy, and possession thereof; that a writ of sequestration issue directed to the sheriff of the parish of Union upon plaintiff's executing bond in the manner prescribed by law, commanding him to seize, sequester, take into his possession, and keep until the further orders of the court the 2,000 feet of saw logs cut, felled, and removed from petitioner's said property as alleged in the petition and situated on the premises above described; that on trial petitioner have judgment against the defendants in solido for the full sum of \$500 as damages and injury done to its said property by and through the illegal, willful, malicious, and wanton trespass upon its said timber, and in the further sum of \$100 damages as attorney's fees incurred in the bringing and prosecution of the present suit; that the writ of sequestration herein sued out be sustained, and petitioner decreed the owner of the property seized, and that the writ of injunction be perpetuated. It prayed for all necessary orders and decrees, for costs, and for full and general relief.

Defendants excepted that plaintiff had filed a similar suit against defendants in case of No. 5,173 of the docket of the court—Union Sawmill v. Summit Lumber Company et al.—and that defendants desired to plead its pendens as to the issues involved in the suit and the one numbered 5,173 as aforesaid. Defendants prayed that plaintiff's suit be dismissed, and that its right to sue for damages caused by the illegal issuing of the writs of injunction and sequestration be reserved. This exception was overruled.

Defendants answered by generally denying all of plaintiff's allegations except such as might be specially admitted.

They admitted that to certain portions of the described land and timber they had no title, and averred they had not attempted to assume any control over same. They admitted that they had cut timber on 10 acres of land belonging to the plaintiff which was described as the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 27. This admission was subsequently modified in an amended answer.

Defendants attacked the validity of what is known as "the McShane contracts," on which, to some extent, plaintiff bases its rights of ownership on the grounds:

First. That the offers made therein were without consideration, and were never signed and accepted by McShane.

Second. That the contracts were lacking in mutuality.

Third. That the conditions thereof had never been complied with.

Defendants alleged damages for \$61,000 on account of the alleged illegal issuing of the writ of injunction causing a deterioration and loss of its timber and the necessity of keeping idle its teams, machinery, and em-



ployés. It also alleged damages in the further sum of \$600, damages as attorney's fees necessary to secure the dissolution of the writs of injunction and sequestration.

The district court rendered the following judgment:

"It is hereby ordered, adjudged, and decreed that the plaintiff is the owner of the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section 15, and the N. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of section 22, township 22 north, range 1 east.

"And the plaintiffs are also recognized as the owners of all the merchantable timber on the

"E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ , section 16;

"E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ,

"S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ ,

"N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ ,

"S.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , section 17;

"E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ,

"W.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ , section 18;

"N. W.  $\frac{1}{4}$ ,

"W.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ,

"S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ ,

"N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , section 19;

"E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ,

"S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , section 20;

"S. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , section 21;

"E.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ ,

"S. E.  $\frac{1}{4}$ , section 22;

"S.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ ,

"N. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ ,

"S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ ,

"E.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ ,

"E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ,

"N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , of section 27;

"S. E.  $\frac{1}{4}$ ,

"E.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ ,

"And all that portion of S.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , east and north of Big Loutre, section 28;

"Also S.  $\frac{1}{4}$  of N.  $\frac{1}{4}$ ,

"And the N.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ ,

"N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , of section 29;

"All in township 22 north, range 1 east.

"On the above description the injunction is perpetuated and maintained, and the defendants are restrained from trespassing in any manner thereon upon the land above decreed as belonging to plaintiffs, and perpetuated as to the other description of land above, so as to prevent the defendants from in any manner interfering with the plaintiffs' claim to the timber thereon.

"Plaintiffs' claims on the other descriptions set forth in their petition not mentioned herein are rejected, and injunction sued out thereon is dissolved.

"It is further ordered, adjudged, and decreed that the plaintiffs are recognized as the owners of 33,000 feet of the timber seized under writ of sequestration herein, and the writ of sequestration is maintained and perpetuated to that extent, and dissolved as to the remainder of the timber. Defendants' claim for damages is rejected."

The district judge assigned the following reasons for the judgment:

"The plaintiff's title to the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , Sec. 15, and N. E. of N. E. and S.  $\frac{1}{2}$  of N. E. Sec. 22, is not disputed, and its title to the timber on the following descriptions is established by transfers and by judicial admissions of defendants, viz.: E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ , Sec. 16; S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ , N. W. of S. W.  $\frac{1}{4}$ , and S.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , Sec. 17; E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ , and W.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ , Sec. 18; N. W.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ , and N. W. of S. W.  $\frac{1}{4}$ , Sec. 19; E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ , S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , Sec. 20; S. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , Sec. 21; E.  $\frac{1}{2}$  of N. W. and S. E.  $\frac{1}{4}$ , Sec. 22; S.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , Sec. 27; S. E.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ , and all that portion of S.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  east and north of Big Loutre, Sec. 28.

Also S.  $\frac{1}{4}$  of N.  $\frac{1}{4}$ , N.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ , and N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Sec. 29, all in Tp. 22 N., R. 1 E.

"It is shown in the evidence that, of the 200,000 feet of timber seized, at least 33,000 belongs to plaintiff. This 33,000 feet were taken from plaintiff's holdings in sections 27 and 29. Defendants cut and removed timber from some of the other descriptions given above, but the court is not able to say how much was removed from the other descriptions. Plaintiff was therefore warranted in suing out the injunction and the writ showed perpetuated, and defendants restrained from trespassing in any manner upon the lands indicated above as being owned by plaintiff, and restrained from trespassing upon or interfering with the timber, or other rights of plaintiff as shown by its contracts on the other descriptions given above. The injunction should be dissolved as to all other descriptions in plaintiff's petition not named above.

"As stated above, plaintiff is the owner of 33,000 feet of the timber under seizure. It should be decreed owner of at least that much, and the writ of sequestration perpetuated to that extent. By consuming the timber of plaintiff with their own, the defendants brought down the writ on their part of the timber, and should not be entitled to damages flowing from that process.

"Indeed, it is not apparent that defendants have suffered damages by reason of the sequestration. The suit by consent of the parties was not brought to a speedy trial. Besides, defendants, if they had so desired, could have bonded the seized timber.

"Let there be judgment in accordance with these views."

The defendants appealed.

The plaintiff has answered the appeal, praying that the judgment appealed from be amended so as to decree it to be the owner of all the lands and timber described in its petition, and to decree it to be the owner of the 200,000 saw logs seized under the writ of sequestration; that it also be decreed to recover the \$600 damages claimed in its petition.

While the plaintiff alleged itself to be the owner of and in possession of certain lands and the timber thereon described by government subdivisions, and the owner of and in possession of all the merchantable timber standing on certain other lands also described by government subdivisions, the cause of action upon which it declared, and upon which it brought defendants into court, was that they had committed an actual trespass by entering upon particularly mentioned tracts, and cutting, felling, and removing timber therefrom. Plaintiff alleged that it feared that they would trespass on the other lands unless enjoined from so doing by the issuing of a writ of injunction, which it prayed should issue. The writ issued as prayed for. Plaintiff alleged that defendants had actually cut and felled 200 feet of timber, worth \$2,000, which they had banked along a certain spur track mentioned. It prayed that such timber should be sequestered under a writ of sequestration. On the court's order this was done.

The plaintiff did not pray to be decreed the owner of the land nor of the timber of which it alleged itself to be the owner. The prayer of its petition, so far as the question

of ownership was concerned, was "to be decreed the owner of the logs" which it alleged had been cut, felled, and removed, and which it prayed should be sequestered. Plaintiff did not allege that defendants had possession of the lands or standing timber or claimed ownership thereof. Plaintiff filed no supplemental or amended pleadings in the case. In its answer to the appeal taken herein by the defendants, plaintiff prays that the judgment appealed from be amended so as to decree it to be the owner of all the land and timber described in the petition. Defendants, on the other hand, complain that the judgment as rendered has gone entirely too far in the matter of the recognizing and decreeing ownership in the plaintiff, and that it should be corrected in that respect. They claim that the action as brought was not a petitory action; that the allegations as to ownership which were made by the plaintiff did not make it such. That the allegations referred to were made simply in aid and support of and incidentally in the action of trespass; that the action as brought was one charging them with having illegally, knowingly, and maliciously cut, felled, and removed 200,000 feet of timber. That there were no contractual relations between the parties, and the allegation in question should be given weight and effect to in respect and with reference only to the timber which the court held to have been actually cut, and not beyond the purpose of determining whether they had been guilty of a trespass in cutting the same; that any consideration of the question of ownership and possession beyond this was unauthorized and ultra petitionem.

The plaintiff in its prayer for an amendment of judgment does not pretend that it is entitled, in respect to its claim against defendants for having trespassed by cutting and felling timber, to a change in the judgment; it acquiesces in the determination of the court as to the trespass and as to the amount of the timber cut. It only claims that the court erred in not having decreed it to be the owner of all the land and of all the timber which it mentioned in its petition as belonging to it. We not only think that plaintiff is not entitled to the change, but that the court in the judgment actually rendered went beyond the pleadings and the prayer of plaintiff's petition. The matters at issue in the case were submitted on brief; the attorneys of neither plaintiff nor the defendant were present to explain and argue the contentions relied on by their respective chiefs. In the briefs the rights of parties outside of the question of trespass have not been discussed. We have very recently held, what we have announced before, that the court would not determine abstract questions and that it could not be expected to study and trace up titles to property which

counsel did not think proper to present to it in proper shape after discussion. As matters have been placed before us in this case, we shall not attempt to pass upon the claims of either party beyond what is strictly necessary to determine the trespass which the court has found to have been actually committed. We consider the allegations of ownership and possession to have been made with reference to that issue. Under the evidence we are of the opinion that the trespass to the extent committed was accidental. We do not think it was intentional, willful, or malicious. We do not find it was the intention of the defendants to commit a trespass in the future.

We are of the opinion that the judgment recognizing plaintiffs to be the owner of 33,000 feet of timber seized under the writ of sequestration herein, perpetuating the writ to that extent, dissolving it as to the remainder of the timber, and rejecting defendants' claim for damages, is correct, and to that extent it is hereby affirmed. As to all other questions of ownership and possession of the lands and timber involved herein, the judgment is set aside as being beyond the issues involved.

Ex parte NATHAN.

(Before a Justice of the Supreme Court of Florida. Oct. 3, 1908.)

1. HABEAS CORPUS (§ 107\*)—ADMISSION TO BAIL.

A person charged with being an accessory before the fact to murder by counseling, hiring, or otherwise procuring murder to be committed is charged with a capital offense under the statutes of this state, and when held in actual custody under a mittimus issued by a committing magistrate to await the action of the grand jury has a right upon habeas corpus proceedings before a justice of the Supreme Court to show by all the evidence proper in the case, including that for the prosecution, that the proof is not evident and the presumption is not great of the guilt of the accused of a capital offense, and that consequently the accused is entitled to bail under the Constitution.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 96; Dec. Dig. § 107.\*]

2. HABEAS CORPUS (§ 47\*)—WITNESSES (§ 10\*) — PROCEEDINGS — ISSUANCE BY SUPREME COURT JUSTICE — ATTENDANCE OF WITNESSES.

In the issuance of and in the hearing upon a writ of habeas corpus, a justice of the Supreme Court acts as a court in the exercise of judicial power, and has inherent and implied authority to make the power effective by necessary and proper procedure. Subpenas for witnesses to attend the hearing may under the statute be issued by the clerk of the Supreme Court upon order of the justice issuing or hearing a writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 47;\* Witnesses, Dec. Dig. § 10.\*]

3. BAIL (§ 49\*)—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE.

In an application for bail for a person charged with a capital offense, the burden is upon the accused to show that he or she is en-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

titled to bail. The quantum of proof required is a sufficiency to show from a fair consideration of all the evidence that the proof is not evident and the presumption is not great that the accused is guilty of a capital offense. The character and extent of the proof to make the necessary sufficiency depend upon the circumstances of each case.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 199-201; Dec. Dig. § 49.\*]

**4. BAIL (§ 43\*)—CRIMINAL PROSECUTION—RIGHT TO.**

The purpose of the constitutional provision that "all persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great," is to secure the right to bail in all cases except those in which the facts and circumstances show with reasonable certainty that the accused is guilty of a capital offense.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 153-164; Dec. Dig. § 43.\*]

**5. BAIL (§ 43\*)—CAPITAL OFFENSE—RIGHT TO.**

Where the testimony is of less probative force than is necessary under the circumstances of the case to show evident guilt or a great presumption of guilt of a capital offense, the accused is entitled to bail. Where the proofs establish only a probability of guilt, bail should be allowed.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 153-164; Dec. Dig. § 43.\*]

**6. HABEAS CORPUS (§ 90\*)—PROCEEDINGS—WITNESSES—CROSS-EXAMINATION AND IMPEACHMENT.**

At a hearing in a habeas corpus proceeding to procure bail, the usual right to cross-examine and to impeach the witnesses exists to the state and the petitioner.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 90.\*]

**7. BAIL (§ 43\*)—CAPITAL OFFENSE—RIGHT TO.**

In habeas corpus proceeding for the allowance of bail to a person charged with being accessory before the fact to murder, which under the statute is a capital offense, where the testimony shows merely that the body of a murdered person was found, that a few days before the discovery of the crime the person charged as principal was with the deceased when she left a house where she boarded, that the principal took deceased's clothes from her boarding place early the morning after she left, that some of the clothes were found in petitioner's house, that the actions of the petitioner after the discovery of the crime were such as to arouse suspicion against her, that something resembling blood was found on the floor of petitioner's house and the floor was scoured soon after the discovery of the crime, and that petitioner is a married woman living with her husband and others in the same house, such testimony indicates a probability that the petitioner knew something of the crime; but it is not evident proof, nor does it justify a great presumption, that the petitioner, as accessory before the fact, aided, counseled, hired, or otherwise procured a murder to be committed, and the petitioner upon such a showing should be allowed to give bail with sufficient sureties as provided by law.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 161; Dec. Dig. § 43.\*]

(Syllabus by the Justice.)

Original application for a writ of habeas corpus by Kizzle Nathan to be admitted to bail. Bail allowed by the Justice.

Francis B. Winthrop, for petitioner. W. H. Ellis, Atty. Gen., Geo. W. Walker, State's Atty., and J. L. Billingsley, for the State.

**WHITFIELD, J.** Upon an application alleging under oath that Kizzle Nathan was unlawfully restrained of her liberty in the actual custody of the sheriff of Leon county, by being denied the right of bail upon a charge of accessory before the fact to murder, of which charge she is not guilty, and the proof is not evident nor the presumption great of her guilt, a writ of habeas corpus was issued by a justice of the Supreme Court. Leon county is in the Second judicial circuit. The judge of the circuit being in a distant county holding court, and the Supreme Court not being in session, the writ was at the request of Francis B. Winthrop, Esq., counsel for the petitioner, made returnable before the justice who issued the writ, at Tallahassee, in the Supreme Court room at the Capitol, situated in Leon county, where the petitioner was being held in custody. Upon praecipe of counsel for the petitioner, subpoenas for witnesses were issued by the clerk of the Supreme Court upon an order therefor made by the justice who issued the writ and before whom it was made returnable. Notice of the writ and the hearing thereon were directed by the justice to be given to the Attorney General and the state's attorney by counsel for the petitioner.

The Constitution provides that "the writ of habeas corpus shall be grantable as of right, freely and without cost." "All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." Sections 7 and 9, Declaration of Rights. "Each of the justices [of the Supreme Court] shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody and may make such writs returnable before himself or the Supreme Court, or any justice thereof, or before any circuit judge." Section 5, art. 5. See, also, section 2248 et seq., Gen. St. 1906.

In the issuance of and in the hearing upon a writ of habeas corpus, a justice of the Supreme Court acts as a court in the exercise of judicial power, and has inherent and implied authority to make the power effective by necessary and proper procedure. Subpoenas for witnesses may be issued by the clerk of the Supreme Court upon order of the justice issuing the writ or hearing the cause. Section 2253, Gen. St. 1906.

Under the Constitution all persons charged with crime are entitled as matter of right to bail by sufficient sureties, except where the proof is evident or the presumption is great that the accused is guilty of a capital offense.

In an application for allowance of bail to

a person charged with a capital offense, the burden is upon the accused to show that he or she is entitled to bail. *Rigdon v. State*, 41 Fla. 308, 26 South. 711.

The quantum of proof required is a sufficiency to show, from a fair consideration of all the testimony, the proof to be not evident and the presumption to be not great that the accused is guilty of a capital offense.

The character and extent of the proof to make the necessary sufficiency depend upon the circumstances of each case.

The purpose of the constitutional provision is to secure the right to bail in all cases except those in which the facts and circumstances show with reasonable certainty that the accused is guilty of a capital offense. 5 Cyc. 66.

A person accused of a capital offense and held in actual custody under a mittimus issued by a committing magistrate to await the action of the grand jury is entitled upon habeas corpus proceedings before a justice of the Supreme Court to introduce evidence as to the truth of the charge, and should be admitted to bail unless "the proof is evident, or the presumption great" that the accused is guilty of a capital offense. *Benjamin v. State*, 25 Fla. 675, 6 South. 433.

In proving the right to bail in a capital case, it is necessary to show that from all the testimony proper in the case the proof of guilt is not evident and the presumption of guilt is not great. 5 Cyc. 67.

Where the proofs establish only a probability of guilt, bail should be allowed. *Galney v. State*, 42 Fla. 607, 29 South. 405.

Bail will be denied a person charged with a capital offense, where a verdict of guilty of the capital offense, found on the evidence, would be sustained. *Thrasher v. State*, 26 Fla. 526, 7 South. 847; 5 Cyc. 64.

Where the evidence is sufficient to sustain a verdict of guilty of a capital offense, it must be sufficient to show the proof of guilt is evident, or the presumption of guilt is great.

If the testimony is of less probative force than is necessary under the circumstances of the case to show evident guilt or a great presumption of guilt of a capital offense, bail should be allowed.

At a hearing in a habeas corpus proceeding to procure bail, the usual right to cross-examine and to impeach the witnesses exists as to the state and the petitioner. *Rigdon v. State*, 41 Fla. 308, 26 South. 711.

The statutes provide that whoever aids in the commission of a felony, or as accessory thereto, before the fact, by counseling, hiring, or otherwise procuring such felony to be committed, shall be punished in the same manner prescribed for the punishment

of the principal felon, and that one who commits murder in the first degree may suffer capital punishment.

Where a person has been taken into official custody on a charge of accessory before the fact to murder, and applies for bail in a habeas corpus proceeding, the accused is required to show from all the testimony that should properly be introduced in the case, including that of the state, that the proof is not evident nor the presumption great that the accused is guilty of a capital offense.

In a habeas corpus proceeding brought by a person charged with a capital offense for the purpose of being admitted to bail, if it appears from a fair consideration of all the testimony that the proof is not evident and the presumption is not great of the guilt of the accused of a capital offense, bail should be allowed.

The testimony adduced at the hearing showed merely that the body of a murdered person was found; that a few days before the discovery of the crime the person charged as principal was with the deceased when she left a house where she boarded; that the principal took deceased's clothes from her boarding place early the morning after she left; that some of the clothes were found in petitioner's home, near where the body was found; that the actions of petitioner after the discovery of the crime were such as to arouse suspicion; that something resembling blood was found on the floor of petitioner's home, and the floor was scoured soon after the discovery of the crime; that the petitioner is a married woman living with her husband and others in the same house.

This evidence indicates a probability that the petitioner knew something of the crime; but it is not evident proof, nor does it justify a great presumption, that the petitioner, as an accessory before the fact, aided, counseled, hired, or otherwise procured the murder to be committed. Under the provisions and principles of law above announced, the petitioner on this showing is entitled to bail by sufficient sureties as provided by law.

After a full consideration of this cause upon the testimony adduced and the argument of counsel for the petitioner and for the state, it is determined that the proof is not evident and the presumption is not great that the petitioner is guilty of the capital offense charged, or of any capital offense. It is therefore ordered and adjudged that the petitioner be permitted to give bail with sufficient sureties as required by law, and thereupon to be discharged from custody under the commitment.

**STEVENSON & HERZFELD v. WHATLEY et al.**

(Supreme Court of Alabama. June 17, 1909.)

**1. APPEAL AND ERROR (§ 1053\*)—RULINGS ON EVIDENCE—PREJUDICE.**

In an action by a chattel mortgagee for conversion, an instruction that the mortgage had not been paid and that plaintiffs were entitled to recover, unless they authorized the mortgagor to sell the mortgaged mules, rendered harmless any error in the court's ruling on evidence as to the foreclosure or payment of the mortgage.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1053.\*]

**2. CHATTEL MORTGAGES (§ 229\*)—SALE BY MORTGAGOR—AUTHORITY—QUESTION FOR JURY.**

In an action by chattel mortgagees for conversion of certain mules, whether plaintiffs had given the mortgagor unconditional authority to sell the mules *held* for the jury.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 229.\*]

**3. CHATTEL MORTGAGES (§ 229\*)—MORTGAGED PROPERTY—SALE BY MORTGAGOR—CONVERSION—EVIDENCE.**

Where, in a suit for conversion, consisting of the sale of certain mortgaged mules, defendants claimed that plaintiffs had given the mortgagor unconditional authority to sell them, evidence as to what the mortgagor did with the proceeds, and that he informed plaintiffs he was using it in his mill business, and that they did not repudiate his act in so doing, was admissible on the issue of the mortgagor's authority.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 229.\*]

**4. TORTS (§ 26\*)—JOINT TORT-FEASORS—ISSUES AND PROOF.**

Where, in a suit against two defendants for a joint conversion, defendants pleaded that they were not jointly liable, and it was proved that one of them had nothing to do with the purchase or taking of the animals alleged to have been converted, plaintiffs could not recover.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 33; Dec. Dig. § 26.\*]

Appeal from Circuit Court, Clay County; John Pelham, Judge.

Action by Stevenson & Herzfeld, a partnership, against M. H. Whatley and M. A. Mayo for the conversion by them of four mules. Judgment for defendants, and plaintiffs' appeal. Affirmed.

Plea 1 was as follows: "That the defendants are not guilty of a joint conversion of said property alleged in plaintiffs' complaint." The facts tend to show that the plaintiff firm loaned one G. L. Hadden \$1,800, secured by a mortgage on certain oxen, mules, and other stock, among them the mules for the conversion of which recovery is sought. The other facts appear in the opinion of the court. As to plea 1 the proof shows that Whatley got the mules by purchase, and it is not shown that Mayo had anything to do with the purchase or the taking of the mules.

D. H. Riddle, for appellants. Whatley & Cornelius, for appellees.

ANDERSON, J. The trial court, at the request of the plaintiffs, gave certain charges, to the effect that the mortgage had not been paid and that plaintiffs were entitled to recover unless they authorized Hadden, the mortgagor, to sell the mules. This rendered any errors, if any there were, in ruling upon the evidence as to the foreclosure or payment of the mortgage, error without injury.

There was proof from which the jury could infer that the plaintiffs gave Hadden unconditional authority to sell the mules, and if this was true the defendant Whatley would be protected in buying them and in paying the money to Hadden as the agent of plaintiffs. It is true plaintiffs denied this authority, and also claimed that, if they authorized him to sell at all, it was with the understanding that he was to bring them the purchase money. It was a question for the jury, however, as to whether or not plaintiffs authorized Hadden unconditionally to sell the mules, and the trial court did not err in refusing the general charge requested by the plaintiffs.

There was no error in permitting Hadden to tell what he did with the money from the sale of the mules, coupled with the further testimony that he informed the plaintiffs that he was using it in the mill business and that they did not repudiate his act in so doing. This was a circumstance for the jury, corroborative of the contention of defendants that the sale had been authorized by the plaintiffs.

Aside from the foregoing, this case would have to be affirmed. Issue was taken on plea 1, and, whether a good plea or not, it was proven beyond dispute, and the defendants were entitled to the general affirmative charge. *Glass v. Meyer & Son*, 124 Ala. 332, 26 South. 890; *Capitol City Co. v. Cofield*, 131 Ala. 198, 31 South. 37; *Taylor v. Smith*, 104 Ala. 537, 16 South. 629. This plea 1 was interposed by both defendants, and the proof shows that there was no joint conversion of the property by these defendants.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

**HILL v. STATE.**

(Supreme Court of Alabama. June 17, 1909.)

**1. WITNESSES (§ 270\*)—CROSS-EXAMINATION.**

On a prosecution for maliciously shooting into a railroad car, a witness testified that he was scuffling with one M. over a pistol in an effort to prevent M. from shooting into the same car, and defendant asked him on cross-examination what reason he had for thinking M. was going to shoot into the car. *Held*, that an objection to the question was properly sustained,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as immaterial and without the field of cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 926, 955-957; Dec. Dig. § 270.\*]

**2. CRIMINAL LAW (§ 799\*)—INSTRUCTIONS—ARGUMENT OF COUNSEL.**

A party cannot require the court to avoid the effect of erroneous argument of counsel by giving charges refuting it; the remedy being to object when the argument is uttered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1946; Dec. Dig. § 799.\*]

**3. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—REASONABLE DOUBT.**

A requested instruction, predicating acquittal on a mere belief by the jury of a reasonable doubt, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922; Dec. Dig. § 789.\*]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Jim Hill was convicted of maliciously shooting into a railroad car in which were human beings, and he appeals. Affirmed.

The evidence tended to show that on Sunday evening a special passenger train on the A. & B. A. L. Railway, consisting of an engine and two coaches, in which were about a dozen people, was fired into near Tredegar, in Calhoun county, Ala.; that several shots were fired, and one of the balls entered the rear coach and lodged in a wooden partition in the car. Evidence further tended to show that Ben McCall, John Heath, and several other boys, including this defendant, were near the track when the train passed, and that, while they heard no shots fired and saw no one shoot, just after the train passed the defendant came to where they were, and was in the act of loading his pistol, saying that he had taken good aim at an old fellow's head.

The charge refused to the defendant was as follows: "If you believe, after the consideration of all the evidence, you have a reasonable doubt of the defendant's guilt, you must give the defendant the benefit of such doubt, and find him not guilty." During the closing argument to the jury the solicitor said: "If the defendant did not shoot into the train, why doesn't he produce a witness who was present to prove that he didn't do it." No objection was made to this argument, and at its conclusion the following charge was requested: "The jury is not authorized to draw any adverse inferences against the defendant because of the absence of any alleged witness."

T. T. Sensabaugh, for appellant. Alexander M. Garber, Atty. Gen., for the State.

McCLELLAN, J. The conviction was for wantonly or maliciously shooting into a railroad car in which there were human beings, as condemned by Code 1896, § 5360. There was abundant evidence, which, if credited

by the jury, would support the verdict rendered.

John Heath testified that he was scuffling with one Moore over a pistol in an effort to prevent Moore from shooting into the same train into which appellant was charged to have shot. On the cross-examination the defendant's counsel propounded this question to the witness: "What reason did you have for thinking Will Tom Moore was going to shoot at the train?" The solicitor's objection was properly sustained by the court. Whatever the witness' reason, it was entirely immaterial, and was without the proper field of cross-examination. Whether his reason for his act was a good or bad one, it could not be inquired into for a legitimate purpose on the trial of this defendant. Jones on Ev. (2d Ed.) § 137; McDonald v. Jacobs, 77 Ala. 524.

Charge 3, refused to defendant, was properly so treated, because it predicated acquittal upon a mere belief by the jury that they had a reasonable doubt of defendant's guilt. It is a reasonable doubt, and not the mere belief that such a doubt appears, that requires the acquittal of a defendant on a criminal charge.

However improper and erroneous may be the argument of counsel to the jury on a trial, the complaining party cannot require the court to aid him in avoiding its effect by the giving of special charges refuting or otherwise answering the argument. The remedy is to object to the argument at the time it is uttered.

There is no error in the record, and the judgment is affirmed.

Affirmed.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

**STEPHENS v. STATE**

(Supreme Court of Alabama. June 17, 1909.)

**1. GRAND JURY (§ 20\*)—ORGANIZATION BY COURT ADJOURNED BY OPERATION OF LAW.**

An indictment attempted to be preferred by a grand jury organized by a court which has been adjourned by operation of law is void.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 20.\*]

**2. CRIMINAL LAW (§ 977\*)—VOID INDICTMENT—EFFECT AS TO JUDGMENT.**

Where the indictment is void, the judgment in a criminal case is also void.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 977.\*]

Appeal from Clay County Court; W. J. Pearce, Judge.

Jim Stephens was convicted of an offense, and he appeals. Appeal dismissed.

Whatley & Cornelius, for appellant. Alexander M. Garber, Atty. Gen., for the State.

**McCLELLAN, J.** Under the authority of *Forbes v. State*, 48 South. 592, the appeal must be dismissed, because the alleged indictment was attempted to be preferred by a grand jury organized by a court that had by operation of law become adjourned. The indictment and judgment were void.

**SIMPSON, DENSON, and MAYFIELD, JJ., concur.**

### LOWMAN v. STATE.

(Supreme Court of Alabama. June 17, 1909.)

#### 1. JURY (§ 90\*)—CHALLENGE—GROUNDS—RELATIONSHIP TO ACCUSED.

That the wife of a juror was the first cousin of accused's mother-in-law did not make accused and the juror related by consanguinity or affinity, so that it was error to allow the state to challenge him on that ground.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 413, 415; Dec. Dig. § 90.\*]

#### 2. WITNESSES (§ 248\*)—EXAMINATION—RESPONSIVENESS.

Where a state's witness was asked on cross-examination whether he had not been taking an interest in the prosecution, the latter part of his answer, "Well, I have; only telling about who the witnesses were," was properly allowed, within the court's discretion, as explaining the extent of his activity, even if it went beyond the question.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 861-863; Dec. Dig. § 248.\*]

#### 3. HOMICIDE (§ 156\*)—EVIDENCE—ADMISSIBILITY—PREMEDITATION.

In a homicide case, where there was evidence that, some days before the killing, decedent had gone to accused's house and made improper proposals to his wife which she communicated to accused, and that he had consulted his brother-in-law as to what to do about it, and went with him to the place of the shooting, the state could show that accused and the brother-in-law had been shooting the morning before the homicide, as tending to show preparation and premeditation.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 286, 287; Dec. Dig. § 156.\*]

#### 4. CRIMINAL LAW (§ 424\*)—ACTS OF CONSPIRATORS—ACTS AFTER PURPOSE ACCOMPLISHED—FLIGHT.

Even though there was evidence that accused and his brother-in-law were practicing shooting the day before the killing, tending to show premeditation and conspiracy to kill decedent, evidence that after the killing the brother-in-law fled from the place of the killing was not admissible against accused: it having no bearing on accused's intent, the common purpose having been then accomplished.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1002-1009; Dec. Dig. § 424.\*]

#### 5. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even if the evidence was insufficient to show, *prima facie*, conspiracy between accused and another to kill decedent, at the time evidence was admitted of threats by such other against decedent, so as to make their admission error, it was harmless, where the subsequent evidence was sufficient to make out a *prima facie* case of conspiracy.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3140; Dec. Dig. § 1169.\*]

#### 6. CRIMINAL LAW (§ 1153\*)—APPEAL—DISCRETION OF TRIAL COURT—CROSS-EXAMINATION.

Much must be left to the trial court's discretion in the control of cross-examination, and error in allowing too great latitude must be clearly prejudicial to justify reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3064; Dec. Dig. § 1153.\*]

#### 7. WITNESSES (§ 349\*)—IMPEACHMENT—CHARACTER OF WITNESSES.

The bad general character of a witness, or his reputation for truth, may be shown; and a state's witness could be asked on cross-examination whether he had not been charged with running after other men's wives, though it could not be shown that on one or more specific occasions he had been charged with lewdness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1135-1139; Dec. Dig. § 349.\*]

#### 8. WITNESSES (§ 353\*)—IMPEACHMENT—KNOWLEDGE OF IMPEACHING WITNESS.

On cross-examination, an impeaching witness can be questioned as to what he has heard of acts of the witness impeached likely to affect his character or reputation, in order to test the extent and the soundness of the impeaching witness' knowledge of general character.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1159; Dec. Dig. § 353.\*]

#### 9. WITNESSES (§ 338\*)—IMPEACHMENT—VIOLATION OF STATUTE.

Repeated violations of a statute will affect one's general reputation, though the act done is wrong merely because prohibited by statute.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1114, 1115, 1118; Dec. Dig. § 338.\*]

#### 10. WITNESSES (§ 338\*)—IMPEACHMENT—"GENERAL CHARACTER."

One's "general character," as relating to his credibility as a witness, means the estimate in which he is held by the community.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1114, 1115, 1118; Dec. Dig. § 338.\*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3057.]

#### 11. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REQUESTS—CHARGES ALREADY GIVEN.

Charges requested by accused, which were covered by those already given for him, were properly refused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

George W. Lowman was convicted of homicide, and he appeals. Reversed and remanded.

Bilbro & Moody, for appellant. Alexander M. Garber, Atty. Gen., for the State.

**SAYRE, J.** The wife of juror Hall and defendant's mother-in-law were first cousins. They were not related by consanguinity or affinity. *Kirby v. State*, 89 Ala. 63, 8 South. 110; *Danzey v. State*, 126 Ala. 15, 28 South. 697. "Though the consanguineal of the wife are always related by affinity to the husband, and the consanguineal of the husband to the wife, it is to be remarked, on the other

er hand, that the consanguinity of the husband are not at all necessarily related to the consanguinity of the wife. \* \* \* Nor is the husband related to the affines of the wife, nor vice versa." 2 Steph. Com. 285. For the error in allowing the state's challenge of this juror for cause, the judgment of conviction must be reversed.

A witness for the state having been asked on cross-examination, "Have you not been taking an interest in this prosecution?" answered, "Well, I have; only telling about who the witnesses were." The defendant's motion to exclude the last clause of the answer was properly overruled. The witness was sworn to speak the truth, the whole truth, and nothing but the truth. If it be conceded that the answer went beyond the inquiry, the witness' explanation of the extent of his activity was admissible and competent, and its allowance at the time was within the discretion of the court.

There was testimony to the effect that the deceased, some days before the killing, had gone to defendant's house in his absence, and had made an improper proposal to the latter's wife, which fact she had communicated to defendant; that defendant had advised with a brother of his wife about the wrong alleged to have been done to him by the deceased, and at the time of the killing had gone to the place where it occurred with Jim Cunningham, another brother of his wife, to see defendant about it. This brother was present at the killing. It was not denied that defendant had killed deceased by shooting him with a gun. In connection with these facts it was competent for the state to show that defendant and the last-named Cunningham had been shooting in the morning before the homicide, as tending in some slight degree to show preparation, and hence premeditation. But the evidence that the same Cunningham had fled from the scene after the killing was not competent. If the two had conspired to take the life of deceased, the blow had been stricken, the common purpose had been accomplished, and the subsequent acts of the accomplice were not admissible as evidence of the defendant's guilt. It shed no light on the fact or intent of defendant's act then past. *Williams v. State*, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133; *Everage v. State*, 113 Ala. 102, 21 South. 404.

There had been evidence to show a community of purpose on the part of defendant and Andy Cunningham to do violence to the deceased. If it be conceded that this evidence, as it stood at the time of the admission of evidence of threats made by Andy in the absence of defendant, was insufficient to make out a prima facie case of conspiracy, and therefore that there was error in admitting the evidence of such threats, such error was harmless, for the reason that subse-

quent evidence strengthened the showing of conspiracy to a degree which justified the action of the court.

The record does not make clear the theory upon which was admitted over the defendant's objection, after it had once been excluded, the testimony of Andy Cunningham, elicited by the state on cross-examination, as to a conversation between the witness and the deceased at White's mill on the day before the homicide. We do not see that it shed light upon the nature of the occurrence. We do not, however, rule that its admission was error, since much must be left to the discretion of the trial court in the control of cross-examination, and it requires a strong case to justify reversal for too great latitude. *Ingram v. State*, 67 Ala. 67.

Nor, on the other hand, are we given to understand the alleged error of the trial court in refusing to allow a state's witness to be asked on cross-examination whether he had been charged with running after other men's wives. It was proper to give in evidence the bad general character of the witness, or his bad character for truth and veracity, though ordinarily a witness would be spared the embarrassment of answering such questions in regard to himself; but it could not be shown in the way of original attack upon him, that on one or more occasions he had been charged with lewdness. *Moore v. State*, 68 Ala. 360; *Rhea v. State*, 100 Ala. 119, 14 South. 853.

The defendant having, upon what seems to have been proper occasion (*Haley v. State*, 63 Ala. 83) and without objection from the state, brought forward a witness who testified to his good character for truth and veracity, the state, on cross-examination, asked the witness whether he had heard that the defendant had been accused of selling liquor. On cross-examination an impeaching witness can be questioned as to what he had heard of acts or conduct likely to affect the character and reputation of the witness impeached, for the purpose of testing the source, extent, and soundness of his knowledge of general character. *McCutchen v. Loggins*, 109 Ala. 457, 19 South. 810. Repeated violations of statute law will doubtless affect general character, which, when made the subject of proof in courts of justice, means the estimate in which one is held by the community, although the thing done may not be of positive moral quality in itself, and inoffensive in the absence of statute.

There was no error in the matter of charges given and refused. Charges refused to the defendant were either positively bad or were covered by charges given on his request.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.



# **FIRST NAT. BANK OF LINEVILLE v. ALEXANDER.**

(Supreme Court of Alabama. June 8, 1909.)

## **1. BILLS AND NOTES (§ 164\*) — NEGOTIABLE NOTES—FORM.**

A note by which the maker, four months after date, promised to pay at a bank, to the order of M., a certain sum of money, with interest from maturity until paid, containing a waiver of exemptions, etc., and retaining title to certain mules, was negotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 414; Dec. Dig. § 164.\*]

## **2. BILLS AND NOTES (§ 484\*)—ACTIONS—PLEA—PAYMENT.**

In an action on a negotiable note by the indorsee, a plea alleging that it was agreed that the note was to be paid by the proceeds of work done, etc., and that the maker paid plaintiff by the proceeds of work all that was due on the note prior to the commencement of the suit, and that plaintiff received the full benefit thereof, the proceeds being in money, constituted a plea of payment in money; the source from which the money was derived being immaterial.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1535; Dec. Dig. § 484.\*]

## **3. WITNESSES (§ 140\*) — TRANSACTION WITH PERSON SINCE DECEASED—INTEREST.**

In an action by a bank on a note, which defendant claimed he had paid with the proceeds of work done on a railroad grade, of which the bank had received the benefit, it was no objection to a question, asked of a witness who had no pecuniary interest in the result of the suit, whether he was employed by the cashier of the bank to work on the railroad, that the cashier had since died.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 598; Dec. Dig. § 140.\*]

## **4. BILLS AND NOTES (§ 511\*)—MATERIALITY—INTRODUCTORY TESTIMONY.**

Where, in an action by a bank on a note, defendant claimed that the note had been paid with the proceeds of work done on a railroad grade, evidence in regard to the work, which was introductory to testimony that it was paid for and the money appropriated to defendant's debt, due plaintiff, was admissible.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 511.\*]

## **5. EVIDENCE (§ 244\*)—BANK CASHIER—PAYMENT OF NOTE—ADMISSIONS.**

An admission by a bank cashier, since deceased, to defendant, that he had paid off a note sued on and the cashier's agreement to bring defendant the note, was admissible against the bank.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 920; Dec. Dig. § 244.\*]

## **6. WITNESSES (§ 140\*)—TRANSACTION WITH PERSON SINCE DECEASED—INTEREST.**

That there was a suit pending between plaintiff bank and witness did not make the witness interested in the result of a suit brought by the bank against witness' son, so as to preclude witness from testifying to the payment of the note sued on by the son to the bank's cashier, since deceased; there being nothing to show that witness' suit related to the same note.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 599; Dec. Dig. § 140.\*]

## **7. EVIDENCE (§ 244\*) — ADMISSIONS — BANK CASHIER.**

In an action by a bank on a note, evidence that \$125 or \$130 in cash was paid by

defendant on the note, and that the cashier of plaintiff bank, since deceased, said that that paid the note, was not objectionable, because it did not appear that the bank received the benefit of the work, with the proceeds of which the note was paid, or that the note was paid in money.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 920; Dec. Dig. § 244.\*]

## **8. WITNESSES (§ 140\*)—DECLARATION OF PERSON SINCE DECEASED.**

In an action by a bank on a note, alleged to have been paid out of the proceeds of railroad work, a witness who had no interest in the result of the suit was properly permitted to state what the bank's cashier, since deceased, said about an agreement with defendant as to how the note should be paid, which was mere inducement to the further statement that it was agreed between defendant and the cashier that each month defendant could pay what he made out of the proceeds of the work, except an amount to be saved out to feed his mules.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 598; Dec. Dig. § 140.\*]

## **9. TRIAL (§ 255\*) — INSTRUCTIONS—DUTY TO REQUEST.**

Where defendant considers that admissible evidence may be confusing to the jury, he should request a proper charge explaining it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 632; Dec. Dig. § 255.\*]

## **10. WITNESSES (§ 37\*) — KNOWLEDGE — CONTENTS OF BOOKS.**

Where a witness testified that she had no independent recollection of the contents of the books of plaintiff bank relative to credits on a note sued on, beyond those indorsed on the note, and could not tell without seeing the books whether there were any such credits, the court properly sustained objections to questions asked of her as to what the books showed with reference to credits not indorsed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.\*]

Appeal from Clay County Court; W. J. Pearce, Judge.

Action by the First National Bank of Lineville against T. E. Alexander. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 152 Ala. 585, 44 South. 866.

The note as set out in this record is as follows:

"\$313.55. Lineville, Ala., May 6, 1905.

"Four months after date I promise to pay to the order of J. M. Minnis \$313.55, value received, with interest from maturity until paid, payable to the First National Bank of Lineville, Alabama. [Here follows waiver of exemption, etc., and also retaining title to two mules.]

"[Signed] T. E. Alexander."

Certain credits were indorsed on the back of the note, aggregating \$107.65, and the name "J. M. Minnis" was indorsed thereon. The substance of plea 3 is stated in the opinion of the court.

Walter S. Smith, for appellant. E. J. Garlison, for appellee.

**SIMPSON, J.** This action was brought by the appellant against the appellee on a promissory note. When the case was before this court on a former appeal, the note was not set out in the record, and, from the description in the complaint copied into the record, it was declared to be a nonnegotiable note. From the description and copy of the note in this record, it is a negotiable promissory note, payable originally to J. M. Minnis, and by him indorsed.

When this case was here before, we held that plea 6 was subject to demurrer, because it did not show that the corporation (the bank) had received the proceeds of the work claimed to have been done by defendant under the ultra vires agreement. *First Nat. Bank v. Alexander*, 152 Ala. 585, 44 South. 866.

Plea 3, in the present record, alleges that the agreement was that the note was to be paid "by the proceeds of work done," etc., and "that he paid to plaintiff, by the proceeds of work done, \* \* \* all that was due on said note, prior to the commencement of this suit"; also that said "contract or agreement was, before the commencement of this suit, executed in full, and the said bank received the full benefit thereof, and received the proceeds of this agreement in full accord and satisfaction of said note, before the commencement of this suit; said proceeds being in money." This is simply a plea of payment in money, and, if all that was due on the note was paid in money to the bank, it is immaterial from what source the money was derived. The illegality of the agreement has no bearing on the case. There was no error in overruling the demurrer to said third plea.

In examining the witness A. A. Alexander, he was asked by the defendant whether he was employed by R. L. Ivey to do work on the railroad. The only objection made to this question was that said Ivey acted in a fiduciary capacity to plaintiff and is now deceased. It was not shown that said witness had any "pecuniary interest in the result of the suit"; hence there was no error in overruling the objection.

There was no error in admitting the testimony of A. A. Alexander in regard to the work, as that was merely introductory to the testimony that said work was paid for and the money appropriated to the debt due plaintiff.

There was no error in allowing the witness Alexander to testify that he heard R. L. Ivey tell the defendant that he had paid off the note in suit, and that he would bring it to him the next time he came up. Said Ivey was the cashier of the plaintiff bank, which officer is the proper person to receive payment of notes due the bank, and his admissions of payment were admissible. The statement does not mention how the payment was made.

The fact that there was another suit pending between the plaintiff and the witness Alexander did not render said witness incompetent to testify as to a payment made by his son to said Ivey as cashier of the bank. That did not make the witness interested in the result of this suit. It is not shown that the suits related to the same note.

The answer to said question is not liable to the objection that it was "not shown that the plaintiff received the benefit of said work," or that "said amount was paid in money"; nor does it impinge upon the principle that said cashier was not authorized to receive anything but money as a payment on the note. While he speaks of the fact that they had been paid for their work, yet the gist of the testimony is that \$125 or \$130 in cash was paid on the note, and that the cashier said that paid the note. The objections were properly overruled.

There was no error in overruling the objection to the question to the same witness, and the answer thereto, as to what Ivey said about the agreement as to how the note was to be paid. Said witness swore that he had no interest in the result of the suit, as before stated, and, as to the agreement, it was only inducement to the further statement that "each month he could pay what he made, except he could save out enough to feed the mules." This was merely an agreement to pay out of the proceeds of the work. If the defendant considered that it might be confusing to the jury, he could have requested a proper charge of the court, in accordance with the previous decision of this court in this case.

No error can be predicated on the sustaining of objections to the various questions to the witness Mrs. E. L. Ivey as to the books of the bank and their contents as to credits on the note, beyond those indorsed, as she said that she had no independent recollection of the matters, and could not tell, without seeing the books, whether there were any such credits thereon.

The judgment of the court is affirmed.  
Affirmed.

**DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.**

**WALSTROM v. OLIVER-WATTS CONST. CO.**

(Supreme Court of Alabama. June 10, 1909.)

**1. SALES (§ 3\*)—DISTINGUISHED FROM OTHER TRANSACTIONS—BUILDER'S CONTRACT.**

A contract to make and deliver concrete blocks at so much a block for the walls of a house, and to lay the blocks at so much a square foot, is not, because limited to the building of the walls and the fact that the price is fixed at so much a block and so much for placing each

in the wall, changed from a builder's contract to one for the sale of the blocks, so as to make the law governing sales of chattels apply.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 9; Dec. Dig. § 3.\*]

**2. CONTRACTS (§ 295\*)—BUILDING CONTRACTS—SUBSTANTIAL PERFORMANCE.**

As to a building contract, the contractor may sue where he can show a substantial performance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1353; Dec. Dig. § 295.\*]

**3. CONTRACTS (§ 305\*)—BUILDING CONTRACT—PART PERFORMANCE—WAIVER OF OBJECTIONS.**

Where a contractor has failed to perform, or has performed in a different manner than that provided by the contract, or abandons the work, the owner can refuse to accept it and require performance before being liable on the contract or on quantum meruit; but he may by act or word, or a failure to act or speak, accept the partial performance, or performance in a different manner, and thereby waive strict performance, rendering himself liable on a quantum meruit less such damage as he may sustain from the contractor's breach, but not for the contract price, unless so agreed after breach by the contractor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1468; Dec. Dig. § 305.\*]

**4. CONTRACTS (§ 319\*)—PARTIAL PERFORMANCE—QUANTUM MERUIT.**

That which will render an owner liable on a quantum meruit for a partial performance does not necessarily amount to a waiver of his right to recoup damages for the contractor's breach, and he should have such amount deducted from the contract price as is equal to the difference between the value of the work agreed to be done and the work done.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1493; Dec. Dig. § 319.\*]

**5. CONTRACTS (§ 304\*)—ACCEPTANCE OF WORK—OCCUPATION OF BUILDING.**

The mere occupancy by the owner of a building erected on his land and part payment do not themselves amount to an acceptance of the work as in compliance with the contract, unless coupled with some act or language from which acceptance may be reasonably inferred.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1459; Dec. Dig. § 304.\*]

**6. CONTRACTS (§ 304\*)—ACCEPTANCE OF WORK—UNAUTHORIZED ACCEPTANCE.**

An unauthorized acceptance of work by an architect does not waive the owner's right to damages against the contractor for failure to fully perform.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1459; Dec. Dig. § 304.\*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by the Oliver-Watts Construction Company against P. F. Walstrom. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

M. M. Ullman, for appellant. Robert N. Bell, for appellee.

**MAYFIELD, J.** This was an action upon an express contract, to which were joined the common counts. The complaint contained four counts, three of which declared upon the expressed contract to construct the walls of a house, and the other upon the common

counts, and sought to recover a balance due; there having been a part payment, and the defendant having occupied and used the house. The contract was in words and figures as follows:

"August 4, 1906.

"Mr. Sidney Ullman, City—Dear Sir: We will make and deliver blocks as per our agreement on lot opposite Glen Iris gate for 23 cents per block. We will also make and deliver special designs of water tables and sills, as per detail, for 10 cents per lineal foot above our previous bid. The blocks are to be plain and faced with a three to one mixture. Will also lay the block up, beginning at water table, for 30 cents per square foot, over all, counting water table in measurement. A cost of one cent per superficial foot will be added for pointing these blocks about our previous bid. Hoping to be favored with this valued order, we remain, very truly.

"An additional charge of (1c) one cent is to be allowed for projected corner blocks.

"Oliver-Watts Const. Co.,

"By W. G. Oliver.

"August 6, 1906.

"The above bid is accepted, except in matter of water table, which is to be stock pattern, at regular price of balance of blocks. It is understood that the price of 30c per square foot includes all work except pointing up and price of sills.

"For P. F. Walstrom,

"By Sidney M. Ullman, Architect."

To the complaint defendant filed six pleas, which set up a breach of the contract by plaintiff in furnishing bad blocks and in failure to properly construct. Three of these pleas may be classed as pleas of recoupment. A demurrer was sustained to the first plea, and overruled as to the other five. To these five pleas plaintiff filed six replications, setting up acceptance of work, waiver of plaintiff's breach, etc. To these replications defendant filed three rejoinders, one general and two special, setting up a conditional acceptance under promise that plaintiff would make good the defects.

It is sufficient to say that the evidence of each party tended to prove the averments of each of the respective pleadings. At common law this would have been a very short and simple issue, though the pleadings are copious; that is, the one (and that only) raised by the rejoinders. But under our statute, both parties being allowed to plead double, the pleadings are very lengthy and often complicated, involving many issues, most of which are frequently immaterial. The present record is a splendid object lesson to illustrate the evils of double pleading. Here the defendant denies the complaint, then confesses it and avoids it. The plaintiff in turn denies the pleas, and confesses and avoids. Defendant, asserting the right of a woman

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

determined on having the last say, rejoins by denying the replications, then admits and avoids. The plaintiff then asserts his right of opening and closing the pleadings, as well as the argument, so he rebuts, by denying the rejoinder, then admitting it and avoiding it. And thus the game of "tag" goes on, with each trying to trip the other, until the whole gamut of pleadings is run, or the nomenclature of the ancient pleader, the ingenuity of the modern, or the patience of the trial court is exhausted. What is said above is not intended by the writer as a criticism of the conduct of this particular trial, but to illustrate the evils of the statutory system of pleadings.

It is both evidently and concededly true that the bone of contention in the lower court, as in this, is the construction of the contract upon which the action is brought. Most all of the other questions depend more or less upon a proper decision of this question. The appellant (defendant below) contends that the contract is one to build the walls of a house, and must, therefore, be treated as a builder's contract. The appellee (plaintiff below) contends that it is a contract "whereby the appellee sold personal property, namely, cement block, to appellant, and agreed to put them up under the direction of appellant's architect," and hence that the law governing sales of chattels applies as to breaches of contract, measure of damages, etc. In this contention we agree with the appellant as to the character of the contract, but not to the full extent to which some of his argument goes, as to the necessary duties of both parties, and as to the measure of damages; nor do we agree with appellee as to its contention as to these matters.

The contract speaks for itself, and we think the language is too plain for argument; that it cannot be classed as a contract for the sale of a mere chattel. It is true that a part of it includes necessarily the sale or furnishing of concrete block, the building material, by the appellee for the appellant; but it also contemplates the making of the blocks themselves of a particular kind of material, and the construction of the walls of appellant's house out of such block. So it is as strictly and certainly a builder's contract as if appellee had contracted to build the whole house and furnish the materials according to given stipulations; but, of course, the liability of the contractor, who undertakes to build a part only of a structure, is not, in all things and to the full extent, that of a contractor who undertakes to build the whole. The liability of each is measured and limited by the obligations and duties either expressed in or implied from the contract of each particular case. The nature and character of the contract are the same in each case. A contract to build a house, by which the builder is to furnish the material, whether it be wood, brick, or stone, or other materials specified, would certainly not be classed as one for the

sale of chattels; nor do we think that the limitation of a contract to the building of the walls out of concrete blocks, and the fact that the price is fixed at so much per block and so much for placing each in the wall, convert or change it from a builder's contract to one for the sale of a chattel.

The trial court, at the request of the plaintiff (appellee here), gave each of the following charges:

"I charge you that the defendant is not entitled to recover in this case, if you believe all the evidence."

"If the defendant accepted the work, or moved into the house and used the building, the defendant would be liable for the actual value of the work."

"The defendant is bound to pay the reasonable value of the work, if he accepted it and used it, whether it was in conformity to the contract or not."

"I charge you that if the plaintiff did the work on certain walls of the defendant's house, but the work was not such work as had been agreed on in the contract, then the defendant is bound to pay only the reasonable value of such work, if it was used and accepted by him, unless it appears that the work had been changed by direction of himself or agent."

"I charge you that if, when the plaintiff finished the cement block walls, as they did finish them, whether it was in accordance with their contract or not, the defendant had the right to have the walls in the condition he contracted for them, and to spend money, if necessary, to put them in that condition; and if you find from all the evidence that defendant accepted the walls and used them, and made no expenditures to have them placed in the condition contracted for, then the defendant must pay the reasonable value of the walls when he accepted them."

The trial court refused to give, at the written request of the defendant, the following charge:

"I charge you, gentlemen of the jury, that a mere naked occupancy or use of a building erected on the land of the owner does not itself amount to an acceptance of the work as done in compliance with the contract, unless the possession and use be coupled with some act or some language from which acceptance or acquiescence may be reasonably inferred. The owner is not bound to remove the building or abstain from using it."

The ruling and action of the court as to some of these charges, if not as to all, was clearly error, under the evidence and pleadings as shown by this record. We agree with counsel for appellee that the case of *Davis v. Badders et al.*, 95 Ala. 348, 10 South. 423, is in point, and that many of the rules of law therein announced are applicable to the case at bar; but we cannot go with counsel to the point of holding that that case supports his contention, or supports the rul-

ing of the trial court as to all the charges above set out.

As to the questions involved in these charges and applicable to this case, Justice Clopton expressly says that they are settled in this state, first, in the case of *Thomas v. Ellis*, 4 Ala. 108, and subsequently in the cases of *Merriweather v. Taylor*, 15 Ala. 735, *English v. Wilson*, 34 Ala. 201, and *Bell v. Teague*, 85 Ala. 211, 3 South. 861, which cases have been subsequently followed, in a long line of unbroken decisions, down to and including that in the case of *Aarnes v. Windham*, 137 Ala. 513, 34 South. 816. This last case was one very much like the one at bar, so far as the issues and evidence are concerned, and quotes from *Davis v. Badders*, *supra*. The court, in the *Aarnes-Windham* Case, gave the general charge for the plaintiff, the evidence and issues being very similar, if not practically the same. This court (Justice Haralson writing the opinion) reversed and remanded the cause on account of this erroneous ruling.

While the court in this case did not give the affirmative charge for the plaintiff, it instructed the jury that "the defendant was not entitled to recover if they believed all the evidence," which was in effect the same. It is true that the charge in the former case fixed the amount of the verdict, but the decision was not based upon that ground. Justice Haralson, after quoting at length from the opinion in the *Davis-Badders* Case, *supra*, and from other authorities upon which it is based, says: "Under the plea of the general issue the defendant was entitled to recoup the damages caused by the workman's breach of contract in the performance of the work. As to what constitutes acceptance of work done, it is held that it may be express or implied from the conduct of the employer; that the mere naked occupancy or use of a building erected on the land of the owner does not, however, warrant an inference of acceptance of the work as done in compliance with the contract, unless the possession and use be coupled with some act or some language from which acceptance or acquiescence may be reasonably inferred, since the owner cannot divest himself of possession without surrendering a portion of his freehold; that the owner is not bound to remove the building, or abstain from using it, since, being attached to his land, it becomes his property; and that part payment is not an acceptance, but only an acquiescence to the extent of the payment. 6 Cyc. 67-69. Whether a contract has been performed according to the terms, and whether the fact of moving into and using the building amounts to an acceptance of the work as a full compliance on the part of the builder with his contract, are questions to be determined by trial and depending on all the circumstances of the case. *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442."

If what is said above was the law in the case then under consideration, it is certain-

ly true and applicable in the case at bar. The contract sued on in that case is like that here in judgment, the evidence in that case was in nearly every particular like the evidence in this, and the trial court in that case had charged the jury to the same effect as in the case at bar. If the defendant in each of those cases was entitled to recoup under the general issue for plaintiff's failure to fully perform, and was not precluded because the defendant had taken possession of the house and occupied it, and thus received some benefit, then certainly this defendant should not, as a matter of law, be denied that right when he not only pleaded the general issue, but also pleaded recoupment specially.

If the jury had been allowed so to do in this case, under the evidence they might have found that the defendant had suffered damages on account of plaintiff's failure to perform the contract fully, and that the amount thereof was in excess of the balance due for the reasonable value of the materials furnished and work performed, in which event, under the plea of recoupment, defendant would have been entitled to a judgment for the excess. They might have found, under the issues and evidence in this case, that acceptance of the work (if it was accepted by defendant) was conditioned upon or induced by plaintiff's promise (if they found it made such) that it would remedy the defects and make the job in all respects according to the contract, or it was open for the jury to find, under these issues and evidence, that the mere occupancy of the premises by defendant, and failure to tear away the walls and rebuild, were not a waiver of his right to hold the plaintiff liable for the breach of the contract, if they found as a matter of fact it had breached it. But the charges of the court precluded nearly, if not all, of these inquiries, and were, for that reason, erroneous.

The decisions of this court, above referred to, and text-book writers on the subjects and questions involved in this case, have made the law practically certain. As to building contracts, the contractor may sue on the contract when he can show that he has substantially performed his part, except as he may allege and prove a legal excuse of being prevented by the act of the other party, of God, or of the law. A substantial performance or compliance is in such cases considered sufficient. It would be illogical and unjust to allow a recovery of the contract price, when suing on the contract, without proof of performance on the part of the plaintiff; and partial performance is not sufficient. The undertaking must be performed fully. This is usually a condition precedent. In order to recover on a partial performance, the contractor may sue on a quantum meruit where the other party has permitted him, without objection or complaint, to do the work, but not in strict accordance with the contract, and has accepted the work and voluntarily

appropriated his labor, or the result thereof, and derived a benefit therefrom. These are rights of the builder or contractor.

The owner of the building or structure to be made or erected also has correlative rights in the matter. If a contractor has failed to perform his part of the contract, or has performed it in a different manner from that provided by the contract, or abandons the work, the owner can refuse to accept it, and require performance, before being liable on the contract price or a quantum meruit; but he may, by word or act, or by a failure to speak or act, accept the partial performance, or performance in a different manner, and thereby waive strict or full performance, and render himself liable on a quantum meruit, less such damages as he may sustain from the contractor's breach, but not for the contract price, unless so agreed, after breach on the part of the contractor. That which will make an owner liable on a quantum meruit, on a partial or incomplete performance on the part of the contractor, does not necessarily amount to a waiver of his right to recoup damages for the contractor's breach; and upon the whole he should certainly have such amount deducted from the contract price as will be equal to the difference between the value of the work agreed to be done, and that of the work done. *Phillips v. Seymore*, 91 U. S. 646, 23 L. Ed. 341; *Farmer v. Francis*, 12 Ired. (N. C.) 282; *McGrath v. Horgan*, 72 App. Div. 152, 76 N. Y. Supp. 412; 6 Cyc. 67-69; *Suth. on Dam. pp. 2156-2158*.

As said and quoted above, mere occupancy by the owner of the building erected on his own land, without more, does not justify the conclusion, or warrant the inference, of acceptance of the work as done in compliance with the contract. Nor do part payment and occupancy, without more, justify such inference or conclusion; nor is he precluded, by such occupancy, part payment, or liability on a quantum meruit, from showing defects in the performance and recovering damages therefor. An unauthorized or improper acceptance or approval of the work by an architect or superintendent will not be a waiver of the owner's right to recover damages of the contractor for failure to fully perform. 6 Cyc. 70; authorities *supra*. Where a builder or contractor relies upon a quantum meruit, and there is a special contract, which was not wholly performed by him, he must show by a preponderance of the proof that the work done or material furnished was of the value claimed, over and above the damages resulting from the noncompliance with the contract on his part. 6 Cyc. 104.

On trial upon such issues, and under such evidence as appears from this record, it is a question for the jury, under proper instruction from the court, whether the contract has been substantially performed according to its terms, and the nature of the work, whether

the building was accepted or not, whether the work was done in a reasonable time and with reasonable diligence, whether the builder is liable to the owner in damages for breaches of the contract, if there be a breach by him, and, if so liable, the amount thereof. The authorities above cited are uniform in holding that an owner, who has sustained injury by reason of a breach of the building contract on the part of the builder, may recover in a separate action against the builder, or, if sued by the builder on a quantum meruit, that he may recoup or set off such damages as are the proximate result of the breach, the amount of which, as above stated, being the difference between the value of the work furnished or building constructed and the value of that contracted for, or the reasonable value of the extra work occasioned the owner in making the building conform to the contract stipulations. 6 Cyc. 113; *Suth. on Damages, §§ 709-711*.

What is said above in this opinion is not intended to conflict with the case of *Carbon Hill Co. v. Cunningham*, 153 Ala. 573, 44 South. 1016, and the cases cited; but it is in line with them. It was manifest error in the trial court to give and refuse the charges set out above.

As the case must be reversed and remanded, it is not necessary to pass upon the other assignments. What we have said in this opinion, we think, sufficiently passes upon and disposes of all questions material on this appeal.

Reversed and remanded.

SIMPSON, DENSON, and McCLELLAN, JJ., concur.

#### CENTRAL OF GEORGIA RY. CO. v. SIMONS.

(Supreme Court of Alabama. June 8, 1909.)

##### 1. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error, if any, in sustaining objections to questions, was without injury, where witness testified without objection to the identical facts sought to be elicited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200, 4201; Dec. Dig. § 1058.\*]

##### 2. RAILROADS (§ 446\*)—INJURIES TO ANIMALS ON TRACK—QUESTIONS FOR JURY.

Notwithstanding an engineer may have been negligent in failing to reverse the engine or apply the emergency brakes, and while the cause assigned by him for his failure to do so may not be sufficient, and though he admits that he could have stopped his train sooner, had he reversed the engine or applied the brakes, yet it does not follow, as a matter of law, that the killing of a cow on the track was the proximate result of his failure to so reverse the engine or apply the brakes, or that if the train had been stopped sooner the killing would have been averted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1628, 1637; Dec. Dig. § 446.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by M. F. Simons against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Espy & Farmer, for appellant. R. D. Crawford, for appellee.

MAYFIELD, J. This is an action of case, by appellee against appellant railroad company, to recover damages for the negligent killing of a cow of the plaintiff by the agents of the defendant railroad company. The trial was had upon the general issue, and resulted in a verdict and judgment for the plaintiff in the sum of \$24. From this judgment, the defendant appeals and assigns as error: First and second, the sustaining of objections to questions propounded by defendant's counsel to the engineer; and, third, the giving of the written affirmative charge for the plaintiff, by the court, at the request of the plaintiff.

It is unnecessary to decide whether or not there was error in sustaining objection to the questions propounded to the witness Walker, who was the engineer in charge of the train which killed the cow, the subject-matter of the suit, for the reason that, if it were error (which we do not decide), it was clearly without injury, because it affirmatively appears that the witness testified without objection to the identical facts sought to be elicited by the question to which objections were sustained. *Kroell v. State*, 139 Ala. 1, 36 South. 1025; 5 Mayfield's Digest, p. 355.

As to the third and last assignment of error—the giving of the written affirmative charge at the request of the plaintiff—the court is of the opinion that this was reversible error. While there was no dispute or conflict that the cow, the property of the plaintiff, was killed or injured by the train of the defendant company, and while it may be said that the defendant railroad company, or its agents in charge of the train at the time and on the occasion complained of, were guilty of negligence, and while it is admitted that the train could have been stopped sooner if the emergency brakes had been applied and the engine reversed (which affirmatively appears was not done), yet it was a question for the jury to say whether or not such negligent acts shown by the evidence, or the failure to stop the train as soon as it could have been stopped, was the proximate cause of the injury. This was clearly a question of fact for the jury, and not one of law for the court. It was open for the jury to find, under the evidence shown by this record, that although the train could have been stopped sooner by the application of the emergency brakes, or by a reversal of the engine, it could not have

been stopped in time to prevent the injury complained of. It was also an open question for the jury whether the engineer in charge of the train was guilty of negligence in failing to sooner observe the dangerous proximity of the animal to the track, and if they should find that he was guilty of no negligence in failing to sooner observe the animal, he having testified that he used every means within his power known to skillful engineers in order to stop the train, and that if he had applied the emergency brakes or reversed his engine he would have endangered the lives of himself and his crew, it was then a question of fact, which could be determined only by the jury, from this and the other evidence, as to whether or not the defendant company was guilty of actionable negligence which proximately contributed to the injury complained of.

While the engineer may have been guilty of negligence in failing to reverse the engine or to apply the emergency brakes, and while the cause assigned by him for his failure so to do may not be sufficient (which, however, we do not decide), and though he admitted that he could and would have stopped his train earlier than he did if he had applied his emergency brakes and reversed his engine, yet it does not conclusively follow, as a matter of law, that the injury complained of was the proximate result of his failure to so apply the brakes or to reverse the engine, or that if the train had been stopped earlier the injury would have been averted. These were questions of fact which should have been left to the jury. So. *Railway Co. v. Reaves*, 129 Ala. 457, 29 South. 594; *Choate's Case*, 119 Ala. 611, 24 South. 373; *Starke's Case*, 126 Ala. 365, 28 South. 411.

For this error the judgment must be reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

## BIRMINGHAM RY., LIGHT & POWER CO. v. STANFIELD.

(Supreme Court of Alabama. June 10, 1909.)

### CARRIERS (§ 245\*)—ACTIONS—PLEADING AND PROOF—RELATION OF CARRIER AND PASSENGER.

In an action against a railroad company for injuries, where the complaint alleged the relation of carrier and passenger, the relation as alleged was a material averment; and where the proof conclusively showed the relation of master and servant, it was error to refuse a general affirmative charge for defendant.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 245.\*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by G. F. Stanfield against the Birmingham Railway, Light & Power Company.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Tillman, Grubb, Bradley & Morrow and L. C. Leadbeater, for appellant. Gibson & Davis, for appellee.

**MAYFIELD, J.** The pleadings, evidence, and charges of the court in this case bring it indisputably within the rules of law and evidence announced in the case of Birmingham Railway, Light & Power Co. v. Sawyer (Ala.) 47 South. 67, and upon that authority the case must be reversed.

The complaint in each count alleged the relation of carrier and passenger, while all the proof conclusively showed the relation of master and servant existed between the parties at the time of the injury. There was no tendency of the evidence to prove the relation as alleged, which was a material averment.

The general affirmative charge should have been given for defendant, as was requested in writing.

The judgment is reversed, and the cause remanded.

**SIMPSON, DENSON, and McCLELLAN, JJ., concur.**

#### JEMISON v. FREED.

(Supreme Court of Alabama. June 17, 1909.)

##### 1. JUDGMENT (§ 46\*)—CONFESSION OF JUDGMENT.

A note provided that notice and protest on nonpayment at maturity were waived, and that suit might be brought thereon in any precinct in any county in the state, also that the maker and indorser authorized any attorney at law to appear for him in any court at any time and confess a judgment, etc. *Held*, that the last stipulation conferred power to confess judgment without preliminary process, and was not limited by the first stipulation, which referred merely to the venue of the judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 46.\*]

##### 2. JUDGMENT (§ 53\*)—CONFESSION—PROVISION IN NOTE—VALIDITY.

A provision for confession of judgment without preliminary process is invalid, and a judgment thereon may be vacated, under Code 1907, § 4298, providing that agreements or stipulations to confess judgment, or to authorize another to do so, made before commencement of suit, in which the judgment is confessed, are void, and the judgment so confessed may be annulled on motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 90; Dec. Dig. § 53.\*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action between J. A. Jemison and M. M. Freed. From the judgment, Jemison appeals. Affirmed.

Bush & Bush, for appellant. Ward & Ward, for appellee.

**SAYRE, J.** In *Hutchinson v. Palmer*, 147 Ala. 517, 40 South. 339, it was held that, where one executes a note in which he embodies a power of attorney authorizing an appearance and confession of judgment on failure to pay at maturity, a judgment rendered in accordance with the power is as valid and binding as if rendered on service of process. Such powers are now void. Code 1907, § 4298. The cited section, however, does not affect the case in hand.

In the transcript of the docket of the inferior court, sent to the city court in response to a common-law writ of certiorari, there appears a copy of a note given by the defendant to the plaintiff, which contains the following provision: "Notice and protest on nonpayment at maturity is waived by each maker and indorser hereof, and suit may be brought hereon in any precinct in any county in Alabama. Each maker and indorser hereby authorizes any attorney at law to appear for him in any court in term time or vacation at any time hereafter and confess a judgment," etc. It sufficiently appeared that judgment had been rendered on confession by an attorney at law without preliminary process to bring defendant into court. Let it be assumed that the note, a copy of which is to be found in the transcript, was the basis of the judgment confessed, that it was properly certified, and was therefore properly before the city court, and is now properly here. This appeal cannot be sustained. The case-made cannot be distinguished on any substantial ground from that of *Hutchinson v. Palmer*, supra. The authority to bring suit in any precinct in any county in Alabama did not limit or impair the subsequently conferred power of attorney to confess judgment without preliminary process. The first stipulation refers to the venue of the judgment, and cannot be construed as a requirement that process issue; for the sole purpose of the second is to waive such process. The two stipulations cover distinct fields, and neither trenches upon the other.

We have considered the questions raised by the assignments of error and the argument of counsel, and find no error.

Affirmed.

**DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.**

#### SLOSS-SHEFFIELD STEEL & IRON CO. v. SHARP.

(Supreme Court of Alabama. June 17, 1909.)

##### 1. MASTER AND SERVANT (§ 258\*)—INJURY TO SERVANT—COMPLAINT—SUFFICIENCY.

Notwithstanding a count for injury to a miner, averring that plaintiff was burned by a fire in the mine, "said fire being caused by the ignition or explosion of gas in said mine,"



is defective in that it alleges inferentially only that there was an explosive gas in the mine, yet where such defect, and the failure to allege that the gas was generated in the mine, if necessary, were not pointed out by a demurrer to the count, it was not erroneously overruled.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 830; Dec. Dig. § 258.\*]

**2. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—COMPLAINT—SUFFICIENCY.**

A count for injury to a miner need not aver that the failure to observe Code 1896, § 2914, requiring a mine owner to maintain ample ventilation to carry off and render harmless noxious gases, was negligence, as a failure to observe a duty imposed by mandatory statute is negligence per se.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 822; Dec. Dig. § 258.\*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Personal injury action by S. A. Sharp against the Sloss-Sheffield Steel & Iron Company. Judgment for plaintiff for \$250 and defendant appeals. Affirmed.

See report of former appeal in this case, found in 47 South. 279, where the fourth count is set out in the opinion.

On a remandment of the cause this count was amended as follows: By striking out the words "or other explosive substances." And it was further amended by inserting just after the word "defect" the words "arose from or." The complaint was further amended by adding two counts not necessary to be here set out.

The following demurrers were assigned to the fourth count: "(1) It does not aver that defendant negligently failed to provide a way to conduct air into said mine in sufficient quantity. (2) Because the failure to provide a way for air, as alleged in such complaint, is not a defect as a matter of law. (3) It is not averred that plaintiff received his injuries as a proximate consequence of a defect in the ways, works, machinery, or plant of defendant, and because said count presents no liability under the employer's liability act or the common law.

Tillman, Grubb, Bradley & Morrow, for appellant. W. K. Terry and W. T. Stewart, for appellee.

SAYRE, J. When this cause was here on a former appeal (47 South. 279) it was ruled that the demurrer to the fourth count of the complaint should have been sustained, because, in addition to the duty fixed by section 2914 of the Code of 1896 upon the operators of mines to provide and maintain ample means of ventilation for the circulation of air through the main entries and other working places in their mines, to an extent that will dilute, carry off, and render harmless the noxious gases generated in the mine, the count sought to impose upon the operators of mines the further duty to provide and maintain a circulation of air sufficient to

brush out other explosive substances. Upon its return to the trial court this ruling was met by an amendment which eliminated that objectionable feature of the count. Demurrer to the count as thus amended was interposed, and again overruled, and this ruling is made the subject of the sole assignment of error.

The assignment now is that the count failed to aver that there were noxious gases generated in the mine, and, since the presence of noxious gases generated in the mine is the condition upon which is predicated the duty enjoined by the statute, the count fails to show a breach of the statutory duty. The count avers that the plaintiff was burned by a fire in the mine where he was at work; "said fire being caused by the ignition or explosion of gas in said mine." No doubt the Legislature had not in contemplation the possibility of noxious gases in mines other than such as are generated there. The purpose was to require that noxious and explosive gases shall be swept out. Such was the duty of the operators of the mine without the statute. It is possible that noxious and explosive gases may find their way into mines, so that it could not be said that they were generated there, and doubtless the count in question is defective, in that it alleges inferentially only that there was an explosive gas in the mine; but this defect, and the failure to allege that the gas was generated in the mine, if that was necessary in any case, were not pointed out by the demurrer. We cannot, therefore, on the record presented, affirm that there was error in the ruling complained of.

Nor did the count need the help of an averment that the failure to observe the statute was negligent. Failure to observe a duty imposed by positive mandatory statute is negligence per se. *Kansas City, N. & B. R. R. Co. v. Filippo*, 138 Ala. 487, 35 South. 457.

Affirmed.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

**BYRD v. BEALL.**

(Supreme Court of Alabama. June 8, 1909.)

**1. TRIAL (§ 194\*)—QUESTIONS OF LAW OR FACT.**

A requested charge, in effect an affirmative charge for defendant, was properly declined, where under the evidence it was clearly a question for the jury whether defendant was liable to plaintiff.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 194.\*]

**2. SALES (§ 364\*)—ACTIONS—INSTRUCTIONS.**

A charge, requested by defendant, that there was no evidence that the lumber shipped did not come up to the warranty and to specifications called for in the order, and, if there were rejects and culls reported to a certain person, defendant was not bound by such re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ports, was properly refused, as at least confusing and misleading.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 364.\*]

**8. EVIDENCE (§ 355\*) — PRIVATE WRITINGS — ACCOUNT.**

Where an account is shown to be a correct transcript from the books of plaintiff, coupled with evidence that it had been presented to defendant before suit and admitted to be correct, and that the identical account offered in evidence was the one admitted by defendant to be correct, entitles it to admission in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1444; Dec. Dig. § 355.\*]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Action by W. W. Beall against R. E. Byrd. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts are sufficiently stated in the opinion. The following charges were refused to the defendant: (4) "The court charges the jury that there is no evidence in this case that the lumber shipped did not come up to the warranty and to specifications called for in the order, and, if there were rejects and culls reported to Beall, the defendant is not bound by such reports." (1) "The court charges the jury in this case that if they believe the evidence they cannot find for the plaintiff for the items of the account introduced in evidence in this suit, growing out of the culls and rejects as shown by the account.

W. O. Mulky, for appellant. C. D. Carmichael, for appellee.

**MAYFIELD, J.** This is an action of assumpsit by appellee against appellant. The complaint contained four counts; the first, second, and third being common counts, and the fourth claiming damages for breach of special contract. While it appears that special pleas were filed to the complaint, yet the judgment entry shows that the trial was had upon the general issue, with leave to give in evidence any matter which might support a special plea. The trial resulted in a verdict and judgment for the plaintiff for the sum of \$245, from which judgment the defendant appeals, here assigning as error the refusal of the court to give two written charges requested by the defendant, numbered 1 and 4, respectively, and the overruling of his objection to the introduction in evidence of the statement of account offered by the plaintiff on the trial.

Charge No. 1 was properly refused, for the all-sufficient reason that it was in effect the affirmative charge for the defendant as to the items of the account introduced in evidence by the plaintiff. Under the evidence in this case it was clearly a question for the jury whether or not the defendant was liable to the plaintiff for the items shown by the account introduced in evidence and

against which the charge was intended; and, of course, the court, under this state of facts, properly declined to take the question from the jury. *Beall Bros. v. Johnstone*, 140 Ala. 339, 37 South. 297.

Unquestionably this account was admissible in evidence, and the account was competent and legal evidence. The plaintiff testified that the defendant owed him when the suit was commenced, and, producing the account in question against the defendant, testified that it was drawn from his books and was an exact copy of his books; that he himself made the original entry from which the account was drawn; that at an arbitration, before the suit was brought, this account, the basis of the present suit, was used; that at that time the defendant admitted that it was correct; and that the identical account offered in evidence was the one there used. This was certainly sufficient proof for the admission of the account as evidence. It is true that the defendant denied that he admitted the correctness of this account on arbitration, and also denied that he received a copy of the statement of the account, and there may be evidence that the identical account offered on the trial was not used on the arbitration and was not the one admitted by the defendant to be correct, if such admission were made; but the truth of these disputed matters was properly left as a question for the jury.

The other charge requested by the defendant, and refused by the court, and as to which error is assigned, was properly refused. It was not a proper charge, when applied to the evidence as shown by this record, and for the further reason alone that it was, at best, confusing and misleading, could have been properly refused. *Birmingham Ry. Co. v. Wildman*, 119 Ala. 547, 24 South. 548; *L. & N. R. Co. v. Brinkerhoff*, 119 Ala. 606, 24 South. 892. The mere fact that the account is shown to be a correct transcript from the books of the plaintiff, though kept by him, without more, would not authorize the introduction of the account in evidence; but that, coupled with the evidence of the plaintiff that the account had been presented to the defendant before suit brought, and that the defendant had admitted that it was correct, and with the fact that the identical account offered in evidence was the one admitted by the defendant to be correct, made the account admissible in evidence. There was, therefore, no error in the court's overruling the objection of the defendant to the introduction of the account in evidence. *Rice v. Schloss*, 90 Ala. 416, 7 South. 802; *Joseph v. Foundry Co.*, 99 Ala. 47, 10 South. 327; *Kilpatrick v. Henson*, 81 Ala. 464, 1 South. 188; *Ware v. Manning*, 86 Ala. 238, 5 South. 682.

The account being admissible in evidence, and there being evidence of the admission of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the correctness of the same by the defendant, the weight and sufficiency of such evidence were clearly questions for the jury. While the evidence was not conclusive—while it was open to show that the items composing said account had no foundation in fact, or were incorrect, or that the defendant had no knowledge of their correctness at the time he is alleged to have admitted the correctness of the same—yet the evidence of plaintiff and of the account was properly submitted to the jury. There was also sufficient evidence as to the consideration, as well as to the correctness of the account, to be submitted to the jury; and the jury having determined the question, and decided it in favor of the plaintiff, and there appearing to be no error of the trial court in the admission of such evidence, or in the submitting of the same to the jury, the cause must be affirmed.

Affirmed.

SIMPSON, ANDERSON, and DENSON,  
JJ., concur.

# BIRMINGHAM RY., LIGHT & POWER CO. v. PARKER.

(Supreme Court of Alabama. June 17, 1909.)

## 1. CARRIERS (§ 314\*)—PASSENGERS—PERSONAL INJURIES—ASSAULT BY EMPLOYÉS—SUFFI- CIENCY OF COMPLAINT.

An allegation in the complaint in a passenger's action for assault that the conductor wantonly assaulted plaintiff by grasping her by the arm and shoulders was equivalent to an allegation that he wantonly grasped her by the arm and shoulder, and sufficiently charged wanton assault.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.\*]

## 2. CARRIERS (§ 314\*)—PASSENGERS—PERSONAL INJURIES — ASSAULT BY EMPLOYÉ — COM- PLAINT.

An allegation in the complaint in a passenger's action that the conductor wantonly assaulted plaintiff by grasping her by the arm and shoulder, by winking and smiling at her, did not mean that the conductor grasped plaintiff by winking and smiling at her, and only charged one assault; the smiling and winking only being alleged in aggravation.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.\*]

## 3. CARRIERS (§ 283\*)—PASSENGERS—INJURIES —CARE REQUIRED—FEMALE PASSENGERS.

The contract of carriage of female passengers implies that the carrier will protect them against obscenity, immodest conduct, or wanton approach.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 283.\*]

## 4. CARRIERS (§ 283\*)—PASSENGERS—INJURIES —ACTS OF EMPLOYÉS—SCOPE OF EMPLOY- MENT.

The carrier's duty to protect female passengers from indecent assaults by its servants should not be frittered away by nice questions as to whether the servants were acting within the scope of their authority.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 283.\*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Melvie Parker against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Tillman, Grubb, Bradley & Morrow and Charles E. Rice, for appellant. Frank S. White & Sons, for appellee.

SAYRE, J. This is an action for an assault committed on the appellee, a girl, who was a minor and a passenger, by a conductor of the appellant while acting within the line and scope of his employment. The single assignment of error is grounded upon the action of the trial court in overruling the demurrer to the third count of the complaint as amended.

So much of that count as requires consideration here avers that the conductor "wantonly assaulted the plaintiff by grasping her by the arm and shoulders, by winking and smiling at her." It is stated as in the way of argument for the appellant that the quoted averment is not the equivalent of an averment that the conductor wantonly grasped the plaintiff by the arm and shoulder. We think that there is no appreciable difference between the meaning of the allegation adopted and that proposed in argument as its legally sufficient alternative. Each charges a wanton assault, and so states a cause of action. Nor do we reluctantly withhold our assent from the appellant's companion proposition that the meaning of the complaint is that the conductor grasped plaintiff by winking and smiling at her. One assault only is charged, and as a circumstance of aggravation it is averred that the conductor at the same time made demonstrations which may well have been offensive and shocking to a decent woman. They need not be taken to constitute the assault alleged, nor even any necessary part of it, but, if proved, gave a character and meaning to the assault alleged proper to be considered.

The general duty of carriers to conserve by every reasonable means the convenience, comfort, and peace of passengers, and to protect them against insult, indignity, and personal violence, and their liability for such injuries when inflicted by their agents and servants, received treatment in conclusive style by McClellan, C. J., in *Birmingham Ry. & Elec. Co. v. Baird*, 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43. We think, however, that the language of Hutchinson on Carriers may be appropriately quoted in this connection: "The contract of carriage as to female passengers embraces an implied stipulation that the carrier will protect them against general obscenity, immodest conduct, or wanton approach." And again: "The duty which a

carrier owes to a female passenger to protect her from indecent assaults by its servants cannot be frittered away by questions of whether the servants were acting within the scope of their authority." Sections 982, 1101.

There was no error in the ruling made the subject of review, and the judgment of the trial court is affirmed.

Affirmed.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

**FIELDS et al. v. HENDERSON.**

(Supreme Court of Alabama. June 17, 1909.)

**1. JUDGMENT (§ 419\*)—CANCELLATION—NOTICE OF SUIT—MERITS.**

Equity will cancel a judgment at law, when complainant avers and proves that he has had no notice of the suit and has a meritorious defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 794; Dec. Dig. § 419.\*]

**2. JUDGMENT (§ 461\*)—VACATION—MERITS.**

Where a judgment was rendered on a note for the price of certain cattle, and defendant sued to set it aside for alleged lack of notice, but admitted contracting the debt, and the weight of the evidence showed that it had not been paid, contrary to complainant's claim, the court erred in setting aside the judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 461.\*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Suit by J. W. Henderson against A. E. Fields and others to set aside a judgment. Decree for complainant, and defendants appeal. Reversed and rendered.

M. L. Ward, for appellants. W. L. Chenaunt and D. A. McGregor, for appellee.

ANDERSON, J. A court of equity will cancel a judgment at law when the complainant avers and proves that he had no notice of the suit and has a meritorious defense to same. McDonald v. Cawhorn, 152 Ala. 357, 44 South. 395; Dunklin v. Wilson, 64 Ala. 162; Rice v. Tobias, 89 Ala. 214, 7 South. 765. In the case at bar, while there may be some little doubt as to whether or not the complainant had notice of the suit, we think the evidence fails to show that he had a meritorious defense to same.

The undisputed evidence shows that complainant bought cattle from the respondent Fields. Both of the Fieldses testify that he gave a note for the purchase price of same. Ward testified that said note was turned over to him for collection, and that he got judgment upon same in justice court, and subsequently sued upon said judgment in the circuit court, where the judgment in question was rendered. The complainant admitted contracting a debt for the cattle, but claims that he gave no note for same and

that said debt has been paid. We think the weight of evidence shows that complainant is mistaken in this, and that the note was given and was never paid. The amount of the note, with attorney's fees, interest, and the cost in justice court, can very well correspond with the sum for which the judgment in the circuit court was subsequently rendered.

The judge of the law and equity court erred in granting the relief sought, and the decree is reversed, and one is here rendered dismissing the bill of complaint.

Reversed and rendered.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

**ST. LOUIS & S. F. R. CO. v. HOOKER.**

(Supreme Court of Alabama. June 10, 1909.)

**LIMITATION OF ACTIONS (§ 127\*)—COMPLAINT—AMENDMENT—NEW CAUSE OF ACTION.**

Before limitation had run, plaintiff sued before a justice; the complaint alleging that defendant railroad company negligently killed plaintiff's hog by running a locomotive engine or train over or against it. In the circuit court on appeal plaintiff amended the complaint, after the time fixed by the statute of limitations had expired, by substituting a count charging that defendant's servants so negligently operated the train that they ran it against the hog, the property of plaintiff, and killed it. Held, that both the original and amended complaints were in case, charging simple negligence, and hence the amended count related back to the commencement of the suit, and the cause of action stated therein was not barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by J. E. Hooker against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff in the circuit court, on appeal from a justice of the peace, and defendant appeals. Affirmed.

Bankhead & Bankhead, for appellant. Leith & Gunn, for appellee.

SIMPSON, J. This is a suit by the appellee against the appellant for the killing of a hog. The action was commenced in the justice of peace court on June 9, 1905; the complaint being that "the defendant negligently killed a hog, the property of plaintiff, by running a locomotive engine or train over or against said hog." In the circuit court, on October 23, 1906, the plaintiff amended the complaint by substituting a count claiming that "the servants of defendant in charge of said train so negligently operated the same that they ran said train, or the engine thereof, against a hog, the property of the plaintiff, killing said hog." The plea of the statute of limitations of one year was interposed as to the amended complaint, it was proved that

the hog was killed on May 18, 1905, and the court rendered judgment for the plaintiff.

The appellant contends that, under the previous decisions of this court, the amended complaint did not relate back to the bringing of the suit, and, it being shown that the action was barred at the time of the filing of said amended complaint, the judgment should have been for the defendant. In the case of *City Delivery Co. v. Henry*, 139 Ala. 161, 166, 34 South. 389, 390, while it was held that the second and fourth counts, which charged that "the defendant, through its agent or servant, wantonly, willfully, or intentionally caused," etc., was in trespass, charging the willfulness, etc., against the defendant itself, yet, in discussing the first and third counts, which charged that "the defendant, by and through its agent or servant, \* \* \* negligently caused," etc., the court said: "If it be granted that, construing the averments against the pleader, the intentment is that the running against and striking the plaintiff was directly caused by the negligent act of the defendant itself, and not that the collision was due to the negligent act of the defendant's servant merely, still the injury, being a resultant of negligence, and not of intentional causation, would be indirect, wanting in the application of force, and consequential, within the doctrine which distinguishes case from trespass."

It will be seen that in this case both the original and amended complaints were in case, charging simple negligence, and neither the case cited nor the case of *Freeman v. Central of Ga. Ry. Co.* (Ala.) 45 South. 898, applies. The amended count related back to the commencement of the suit, and the judgment of the court is affirmed.

Affirmed.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

#### BIRMINGHAM WATERWORKS CO. v. COPELAND.

(Supreme Court of Alabama. June 10, 1909.)

##### 1. TRIAL (§ 250\*)—REFUSAL OF REQUESTS—CHARGE NOT BASED ON PLEADING OR EVIDENCE.

In an action for damages from the bursting of a water pipe in a house, where there was nothing in the pleading or evidence to indicate that special damages were claimed because the pipe burst on Christmas Eve, it was not error to refuse charges that no extra damages could be allowed because the pipe burst on Christmas Eve.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 584; Dec. Dig. § 250.\*]

##### 2. TRIAL (§ 250\*)—REFUSAL OF REQUESTS—CHARGES ANSWERING ARGUMENT OF COUNSEL.

It is not error to refuse charges requested merely to answer the argument of opposing counsel.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 250.\*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by G. W. Copeland against the Birmingham Waterworks Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The two charges referred to in the opinion are as follows: "(1) I charge you that in assessing the damages the jury cannot take into consideration the fact that it was Christmas Eve. (2) I charge you that you cannot allow the plaintiff any greater damages because of the fact that the pipe broke and the water was thrown into his house on Christmas Eve." It appears from the record that, in closing his argument for plaintiff, plaintiff's counsel referred to the fact that the water was thrown in plaintiff's house and interfered with it on the eve of Christmas, and he requested the jury to award more damages on that account. The court instructed the jury that it could not award exemplary damages, but actual damages only.

John London, for appellant. Bowman, Harsh & Beddow, for appellee.

SIMPSON, J. This action, by the appellee against the appellant, is for damages claimed to have been suffered by the plaintiff from the bursting of a water pipe of the defendant, causing injury to the property and health of plaintiff and his family. The only assignments of error relate to the refusal of the court to give the two charges set out.

There is nothing in the pleading or evidence to indicate that any special damages were claimed because of the fact that the bursting of the pipe occurred on Christmas Eve. The trial judge charged out the second count in the complaint, and also properly charged the jury that they could not award "any exemplary or punitive damages."

The said charges requested and refused seem to be merely to answer the argument of counsel representing the plaintiff, and this court has frequently held that the court cannot be placed in error for the refusal to give such charges. *Barnes v. State*, 134 Ala. 37, 41, 32 South. 670; *White v. State*, 133 Ala. 123, 127, 32 South. 139; *Mitchell v. State*, 129 Ala. 25, 39, 30 South. 348.

The judgment of the court is affirmed.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

#### VERNON v. STATE.

(Supreme Court of Alabama. June 17, 1909.)

##### 1. COMMERCE (§ 41\*)—TRAFFIC IN ORIGINAL PACKAGES—DIVISION OF CONTENTS OF PACKAGE.

Where accused ordered four quarts of liquor from a dealer in Tennessee, two for himself and two for another, and the liquor was received in one box by express, the shipment ceased

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to be interstate commerce, and became subject to the state laws, when accused removed it from the box.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 31; Dec. Dig. § 41.\*]

**2. INTOXICATING LIQUORS (§ 146\*)—OFFENSES —“SALE” — “OTHER UNLAWFUL DISPOSITION OF.”**

Where accused ordered liquor for another from a dealer without the state, receiving an amount sufficient to pay therefor, accused was an agent to purchase such liquor, and was not liable under Code 1907, § 7363, making it an offense to aid in an unlawful sale or purchase or other unlawful disposition of liquor, or to act as agent of the purchaser in procuring an unlawful purchase, etc.; the separation of accused's part of the liquor from that ordered for the other not being a “sale” or “other unlawful disposition of” liquor within the statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 146.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

**3. INTOXICATING LIQUORS (§ 146\*)—OFFENSES —PURCHASES.**

The purchase of liquor by accused without the state as agent for another was not an offense, within Code 1907, § 7363, making it an offense to aid or procure an unlawful sale or purchase or other disposition of liquor, or to act as agent of the purchaser in procuring an unlawful purchase, etc.; the purchase being lawful where made.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 146.\*]

Appeal from City Court of Anniston; Thomas W. Coleman, Judge.

Tom Vernon was convicted of purchasing liquor in violation of law, and he appeals. Reversed and remanded.

T. T. Sensabaugh, for appellant. Alexander M. Garber, Atty. Gen., for the State.

**McCLELLAN, J.** These were the facts developed on the trial: Sargent requested the defendant, and he consented, to order for Sargent, from a dealer in the state of Tennessee, two quarts of whisky. Sargent gave defendant \$1.25, and defendant was indebted to Sargent in the sum of \$1. Defendant ordered four quarts of whisky from such dealer, the total price of which was \$4.50. The whisky (four quarts) was addressed to and received by defendant by express carriage. The shipment was packed in one box. Defendant opened the box, and took therefrom two of the quarts for delivery, and did deliver them to Sargent, in Calhoun county. Under our Keith and Tinker Cases, reported in 91 Ala. 2, 8 South. 353, 10 L. R. A. 430, and 90 Ala. 638, 8 South. 814, respectively, following as they do the Original Package Cases rendered by the Supreme Court of the United States, the holding, on the facts stated, must be that the liquors delivered by defendant to Sargent were denuded of their interstate commerce character and became subject to the unrestricted police power of this state when defendant removed them from the original package, viz., the box.

The original purchase of the four quarts of

liquor was affected in Tennessee, beyond the power of condemnation of our prohibitory statutes, and hence could not have been unlawful within our statutes. Thus far there can be no question, we think, that defendant was acting as the agent of Sargent, and that without interest in the purchase or reward for his services, within the principle declared in Maples' Case, 130 Ala. 121, 30 South. 428, and others of that class. Such having been defendant's relation to the two quarts delivered by him to Sargent, a relation of uninterested and unrewarded agency for Sargent, of what criminal act could he have been guilty under the indictment against him?

Five counts constituted the indictment. Three of them pursued, in substance, the phraseology of the general prohibition law. Acts Sp. Sess. 1907, p. 71. The fourth count charged that the defendant “sold, gave away, or otherwise disposed of” spirituous, etc., liquors without a license and contrary to law. The fifth count charged that defendant “sold spirituous, vinous, or malt liquors without a license and contrary to law.” By Code 1907, § 7363, it is made an offense, among other acts therein forbidden, for any person to “act as agent or assisting friend of the seller or purchaser in procuring or effecting the unlawful sale or purchase of any such liquors.” It is also provided in this statute that a “conviction may be had for a violation of this section under an indictment for selling spirituous, vinous or malt liquors without license and contrary to law.”

Since the defendant, in effecting the purchase outside the state of Alabama, from a nonresident dealer, was acting as the agent of Sargent, and the two quarts later delivered to Sargent by him was the property of Sargent from the moment the sale was effected in Tennessee, it is evident that the defendant did not violate the statute cited (section 7363), for the reason that, under the evidence in this record, the defendant did not aid, abet, counsel, or procure an unlawful sale or unlawful purchase, or unlawful gift, or other unlawful disposition, of liquor of the condemned classes; nor did the defendant act as agent or assisting friend of the seller or purchaser in procuring or effecting an unlawful sale or purchase within the condemnation of the statute.

Whatever may be the whole effect of the statute it is obviously bottomed on acts, within its terms, relating to unlawful, and that only, dispositions of liquors of the forbidden classes. In other words, the statute is, in a sense, ancillary. It in effect condemns aiding, abetting, procuring, assisting, etc., in an unlawful disposition of defined liquors. To violate this statute the liquor involved must be of the classes prohibited by law and the dealing in respect to such liquors must be unlawful. The liquor purchased in this instance became, as stated, the property of Sar-

gent and defendant beyond the limits of this state, and was, accordingly, not unlawful under our statutes. The separation of Sargent's share of the liquor from that of the defendant did not constitute a sale or other unlawful disposition thereof. Maxwell's Case, 120 Ala. 375, 25 South. 235; Amos' Case, 73 Ala. 498. In the Amos Case "otherwise dispose of" was defined. The disposition forbidden was, as here, contexted with the words "sell, give away," etc., and the court applied to the term the rule of ejusdem generis, and hence construed the expression so as not to extend it to any and every act which may be said to be a disposition.

There is no count in the indictment charging a violation of the act approved July 19, 1907 (Acts 1907, p. 488), appearing in, though not a part of, Code 1907, § 7371 et seq. The constitutionality of that act has been doubted because of asserted imperfections growing out of the silence, in some particulars, of the Senate Journal. We do not, of course, consider or determine that question. Section 7363 condemns acts in respect of a sale, purchase, gift, etc., or other disposition of certain liquors, but does not include a delivery thereof aside from effecting a sale, purchase, gift, or other disposition; hence the indictment provided for in that section does not comprehend the acts condemned by the mentioned act approved July 19, 1907.

There is no evidence to support any count of the indictment. The defendant was, hence, improperly convicted.

The affirmative charge, requested for defendant, should have been given.

The judgment is reversed, and the cause is remanded.

SIMPSON, MAYFIELD, and SAYRE, JJ., concur.

### WILLIAMS v. STATE.

(Supreme Court of Alabama. June 17, 1909.)

#### 1. HOMICIDE (§ 156\*)—EVIDENCE—ADMISSIBILITY.

Evidence that defendant had made threats against deceased about an hour or two before the homicide having been admitted without objection, evidence that defendant had a pistol at the time was admissible against him, to show his mental attitude towards deceased at the time of the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 286, 287; Dec. Dig. § 156.\*]

#### 2. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS—REQUESTS.

Requested charges, which are substantially embodied in charges given by the court, are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

#### 3. CRIMINAL LAW (§ 789\*)—TRIAL—INSTRUCTIONS—SUFFICIENCY—REASONABLE DOUBT.

A charge that the jury must be satisfied to a moral certainty, not only that the proof is consistent with guilt, but that it is wholly inconsistent with every other rational conclu-

sion, and asserting defendant's right to an acquittal unless they are so convinced by the evidence of his guilt that they would each venture to act on that decision in matters of the highest concern and importance to his own interest, is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

#### 4. CRIMINAL LAW (§ 815\*)—TRIAL—INSTRUCTIONS IGNORING EVIDENCE.

A charge, in a homicide case, which asserts defendant's right to an acquittal on failure of the prosecution to prove his guilt beyond a reasonable doubt, is misleading, when damaging circumstances are shown by his own testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.\*]

#### 5. CRIMINAL LAW (§ 815\*)—TRIAL—INSTRUCTIONS EXCLUDING ISSUES—DEGREE OF OFFENSE.

A charge asserting defendant's right to an acquittal on failure to prove his guilt as charged, the indictment charging murder and the evidence justifying a conviction of manslaughter, is misleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.\*]

#### 6. HOMICIDE (§ 39\*)—MANSLAUGHTER—PROVOCATION.

Passion suddenly aroused, without more, cannot reduce a homicide from murder to manslaughter; but it must be aroused by nothing less than a blow given or threatened.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 59, 60; Dec. Dig. § 39.\*]

#### 7. HOMICIDE (§ 271\*)—TRIAL—INSTRUCTIONS.

What is sufficient provocation of passion to reduce a homicide from murder to manslaughter should be defined by the court, and not left to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 565; Dec. Dig. § 271.\*]

#### 8. HOMICIDE (§ 116\*)—SELF-DEFENSE—APPREHENSION OF DANGER.

The law requires that a belief of imminent peril and urgent necessity to slay an assailant in self-defense, though it may be based on appearances, must be both well-founded and honestly entertained.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.\*]

#### 9. CRIMINAL LAW (§ 761\*)—TRIAL—PROVINCE OF COURT AND JURY—INSTRUCTIONS INVADING PROVINCE OF JURY—ASSUMPTIONS AS TO FACTS.

A charge assuming as a fact that the accused carried a pistol for defensive purposes is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1767, 1771; Dec. Dig. § 761.\* Homicide, Cent. Dig. §§ 582, 599, 607, 621.]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

John Williams was convicted of murder in the second degree, and he appeals. Affirmed.

The facts made by the evidence are, substantially, that some two or three hours before the killing, the defendant went to the home of the deceased, and in his absence had an altercation with deceased's wife about a matter pertaining to defendant's wife, in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which certain threats were used by defendant as to deceased's wife and all her family. Later on in the same day deceased, with his wife and stepson, came to the dwelling of defendant, and found defendant in his yard, where another altercation followed, in which deceased seems to have been the aggressor. Some of the evidence tended to show that deceased had his right hand in his pocket and in this manner advanced upon defendant, who was standing in the yard with one foot on the doorstep, whereupon defendant backed away several feet and fired three shots, when the two engaged in a hand to hand struggle, in which defendant was thrown to the ground, but recovered and got away from deceased, whereupon the defendant put his hand on deceased's collar and fired the fourth shot into his breast.

The following charges were refused to the defendant:

"(41) Before the jury can convict the defendant, they must be satisfied to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion; and unless the jury are so convinced by the evidence of the defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty."

"(75) The only foundation for a verdict of guilty in this case is that the entire jury shall believe from the evidence beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged in the indictment, and the exclusion of every probability of his innocence and every reasonable doubt of his guilt, and if the prosecution has failed to furnish such measure of proof, and to so impress the minds of the jury of his guilt, they should find him not guilty."

"(49) Unless the jury are convinced beyond all reasonable doubt that the killing was done with malice, and not the result of passion suddenly aroused, then they should acquit the defendant of murder."

"(20) If the jury have a reasonable doubt as to whether the killing was the result of malice, or the result of suddenly aroused passion produced by sufficient provocation, then they should give defendant the benefit of such doubt, and not find him guilty of murder in any degree."

"(21) If the jury have a reasonable doubt as to whether the killing was a result of premeditation and deliberation or the result of sudden passion suddenly aroused by great provocation, then they should give the defendant the benefit of such doubt, and acquit him of murder in the first degree."

"(71) If the jury believe from the evidence that the defendant, without fault on his part, was being attacked by Charlie Williams, and the attack was such as to create in the mind of a reasonable man the impression that it

was necessary for him to shoot in defense of his own life, then you should acquit the defendant.

"(72) If the defendant was free from fault in bringing on the difficulty, and the deceased was making an attack on him in the nighttime, and the attack was such as to create in the mind of a reasonable man the impression that it was necessary for him to shoot in order to save his own life, then you should find the defendant not guilty."

"(19) I charge you, gentlemen of the jury, that if you believe from the evidence that at the time the fatal shot was fired the defendant acted under the honest belief that he was in danger of his life or limb at the hands of deceased, then you should acquit him, provided he was free from fault in bringing on the difficulty."

"(14) I charge you that the defendant was under no duty to retreat in this case, and if he was free from fault in bringing on the difficulty, and was attacked in the nighttime by the deceased, and the attack was such as to create in the mind of a reasonable man the impression that it was necessary for him to shoot his assailant in order to save his own life, then he had a right to anticipate the deceased and fire first, and you should acquit him."

"(53) The court charges the jury that if they believe the evidence in this case it will be their duty to find that the defendant was under no duty to retreat."

"(31) The court charges the jury that the defendant was under no duty to retreat in this case, and if he was free from fault in bringing on the difficulty he had a right to shoot Charlie Williams in defense of himself, if the circumstances were such as to impress the mind of a reasonable man that he was in great danger of life."

"(30) The court charges the jury that under the law of this country the defendant had a right to carry a pistol in defense of himself."

Tate & Walker, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SAYRE, J. The state showed without objection that the defendant, an hour or two before the killing, which occurred within the curtilage of defendant's home, had gone to the home of the deceased and there had an angry conversation with the wife of deceased, during which he had made threats comprehensive enough to embrace the deceased, as well as his wife. The state was permitted, over defendant's objection, to show that defendant had at the time a pistol. This, in connection with the threat, was permissible for the purpose of illustrating defendant's mental attitude towards the deceased when the latter was shortly thereafter slain by the defendant.

It may be that ideas intended to be conveyed to the jury by a number of the charges



refused to the defendant would have been of assistance to the jury in understanding the law of the case and in reaching a righteous verdict; but they had each been stated to the jury substantially in one or more of the 58 charges which were given by the trial court. They, therefore, needed not to be repeated by that court, nor do they call for consideration at length by this. Particularly is this true of those numerous charges which stated so simple a proposition as that the jury must be convinced beyond a reasonable doubt, and defined a reasonable doubt in so great a variety of form and language as probably would lead the jury to the opinion that a doubt of the sort was of delicate and difficult comprehension, and inspire the fear that perhaps, after all, a jury of ordinary men might miss its meaning.

Charge 41, the second of that number to be found in the record, and discussed in appellant's brief, appears to have been given in the court below. The other charge 41, which was refused to the defendant, was properly refused. Charges of similar import have been condemned by this court in *Allen v. State*, 111 Ala. 88, 20 South. 490, and in subsequent cases.

Charge 75 was open to criticism. It was treated as a proper charge in *Brown v. State*, 118 Ala. 114, 23 South. 81, where the defendant had been convicted of burglary. In *Johnson v. State*, 133 Ala. 38, 31 South. 951, the charge was criticised as calculated to mislead the jury to believe that the evidence adduced by the state alone should show the defendant to be guilty, whereas it was the duty of the jury, in determining the question of guilt, to consider also the testimony introduced by the defendant, which in itself proved the homicide, if nothing more. So here the evidence offered by the defendant not only showed the act of killing by the defendant, but the most damaging circumstances against him, to wit, that after defendant had gotten from under the deceased, after they had fallen to the ground in a hand to hand struggle, he held deceased down with his left hand while he put the pistol to the breast of deceased and fired the fatal shot. *Sanders v. State*, 134 Ala. 74, 32 South. 654. This charge was also faulty because it asserted the defendant's right to an acquittal on a failure to prove his guilt as charged. The indictment charged murder. But under it, and under one aspect of the evidence, the jury might have convicted the accused of manslaughter in the first degree. The charge was therefore misleading, and at odds with numerous decisions of this court to the effect that, in cases of this character, instructions predicated the insufficiency of evidence to justify a conviction of a higher degree of homicide, without regard to its sufficiency to justify conviction of an included lesser degree, are essentially erroneous. *Stoball v. State*, 116 Ala. 454, 23 South. 162; *Jones v. State*, 79 Ala. 23.

Charge 49 was properly refused. Passion suddenly aroused, without more, cannot reduce a homicide from murder to manslaughter. It must be aroused by nothing less than a blow stricken or threatened. The case of *Martin v. State*, 119 Ala. 1, 25 South. 255, cited by defendant, recognizes the principle stated. The charges there considered asserted defendant's freedom from guilt of murder where the killing was the consequence of passion suddenly aroused by a blow given. In *Smith v. State*, 83 Ala. 26, 3 South. 551, also cited by defendant, there was evidence going to show that the defendant had overheard the prosecutor making insulting proposals to his wife, and, on entering his own house, was assaulted by the prosecutor with a knife. The court, in dealing with that case, might safely assume the adequacy of such provocation. It was not within the uncontrolled power of the jury to say what should be taken as sufficient provocation. What would be sufficient provocation of such passion as would reduce the grade of the homicide is a question of technical, legal learning, which should be defined by the court, and not left to the jury. *Jones v. State*, supra. Charges 20 and 21 were therefore properly refused.

Charges 71, 72, 19, 14, 53, and 31 seem to have been framed with the purpose to assert the doctrine that if the defendant was free from fault in bringing on the difficulty, and acted on the belief, "well-founded and honestly entertained" at the time of the fatal shot, that he was in imminent danger of life or limb, and must fire in order to save himself, he should be acquitted. They were evidently not refused as faulty in premitting duty to retreat, for the court charged the jury affirmatively that defendant, being at the time within the curtilage of his own home, was not required to retreat. They were refused for the fault with which they are affected, a failure to state that belief of imminent peril, and of an urgent necessity to slay an assailant, to justify, though it may be based upon appearances, must be both well-founded and honestly entertained. *Jackson v. State*, 78 Ala. 471; *Storey v. State*, 71 Ala. 330; *McCain v. State* (at present term) 49 South. 361. Moreover, the substance of these charges was more than once given to the defendant in other charges.

Charge 30, refused to the accused, assumed as a fact that he did carry a pistol for defensive purposes, and was properly refused for that reason.

Charges 5 and 6 were substantial duplicates of charge 4, which was given.

We have scrutinized the record without finding error, and the judgment and sentence of the court will be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

**IRWIN v. LOUISVILLE & N. R. CO.**

(Supreme Court of Alabama. June 10, 1909.)

**1. CARRIERS (§ 284\*)—DUTIES AS TO PASSENGERS ON RAILROADS—PREVENTION OF INJURIES BY STRANGERS—KNOWN AND UNKNOWN DANGERS.**

Where neither the carrier nor its agents know of danger to a passenger, and could not reasonably anticipate or provide against injury, the carrier is not liable for an injury suffered at the hands of a stranger, though it is bound to protect its passengers from all dangers which are known, or by the exercise of a high degree of care ought to be known, whether occasioned by its own servants or strangers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125-1135, 1173, 1222; Dec. Dig. § 284.\*]

**2. CARRIERS (§ 305\*)—INJURY TO PASSENGER—CONCURRING NEGLIGENCE OF STRANGER AND CARRIER.**

If a passenger's injury is the result of the concurring negligence of a stranger and the carrier, the latter is liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1132; Dec. Dig. § 305.\*]

**3. CARRIERS (§ 290\*)—DUTY AS TO PASSENGER—VEHICLES AND APPLIANCES.**

Carriers of passengers must provide vehicles as safe as skill and foresight can reasonably make them, and the various appliances with which they are equipped must be kept in a safe and suitable condition; and if a passenger is injured, owing to any defect or unsafe condition of the vehicles, carriages, or cars, or of the appliances, the carrier is liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1168-1184; Dec. Dig. § 290.\*]

**4. CARRIERS (§ 290\*)—DUTY AS TO PASSENGER—VEHICLES AND APPLIANCES.**

A carrier of passengers must provide cars and appliances of the most approved type in general use by others engaged in a similar occupation, and exercise a high degree of care to maintain and keep them in suitable repair and efficient for their intended purpose.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1168-1184; Dec. Dig. § 290.\*]

**5. CARRIERS (§ 280\*)—SAFETY OF PASSENGERS—DUTY TO ABSOLUTELY WARRANT—LIABILITY FOR UNAVOIDABLE CASUALTIES.**

The law does not impose on carriers the duty of absolutely warranting the safety of passengers, and for casualties against which human sagacity cannot provide, nor the utmost prudence prevent, a carrier is not liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1106; Dec. Dig. § 280.\*]

**6. CARRIERS (§ 302\*)—INJURY TO PASSENGER—MISSILE THROWN THROUGH CAR WINDOW—LIABILITY OF CARRIER.**

Under ordinary circumstances, a railroad company is not required to anticipate that a missile will be thrown through a car window by a stranger and injure a passenger, and is not required to see that the blind is closed or lowered to prevent it, the glass and blinds being intended only to admit and exclude light and air for the comfort and pleasure of passengers; and, in the absence of any showing that such an assault or injury could have been reasonably anticipated at the time and place at which it happened, the carrier cannot be held liable for the injury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 302.\*]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by Roxie Irwin against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Wert & Lynn, for appellant. John C. Eyster, for appellee.

**MAYFIELD, J.** The appellant, as a passenger, sued the appellee, as a railroad common carrier, to recover damages for personal injuries received and suffered by her, while a passenger on its train, as the result of being struck by a missile that came through the window of the car, and also by flying glass knocked from the window by the missile. The missile was evidently thrown through the window from without by some miscreant, a third party.

Railroad companies, as common carriers of passengers, are perhaps not bound to protect their passengers from injuries by third persons to the same extent and degree as from like injuries by their own agents or employes, yet they must use a high degree of care to prevent such injuries by strangers; but if the carrier or its agents have no knowledge of the condition of danger to which the passenger is subjected, and could not reasonably have anticipated the injury, or provided against it, the carrier is not and ought not to be liable for an injury suffered by a passenger at the hands of a stranger. But the carrier is under the duty to protect its passengers from all dangers which are known, or which by the exercise of a high degree of care ought to be known, whether occasioned by its own servants or by strangers. And if the injury suffered by the passenger is the result of the concurring negligence of a stranger and its own, the carrier is liable. *Elliott on Railroads*, § 1639; *Hutchinson on Carriers* (1906 Ed.) § 913.

Carriers are required to provide for passengers vehicles as safe as skill and foresight can reasonably make them, and the various appliances with which these vehicles are equipped must be kept in a safe and suitable condition; and if a passenger suffers an injury in consequence of any defect or unsafe condition of the vehicles, carriages, or cars, or of the appliances thereof, the carrier is liable therefor. The carrier is not, however, charged with the duty of providing or maintaining vehicles or appliances which will absolutely prevent injury to passengers. This would probably be impossible. If not, it is too high a duty to impose upon the carrier. But the carrier is required to provide cars and appliances "of the most approved type in general use by others engaged in a similar occupation," and, having so provided, it must exercise a high degree of care to maintain and keep them in suitable repair and efficient for their intended purpose.

The law is very strict and stringent as to the duties it imposes upon common carriers for the safety of passengers; but there is no absolute warranty of safety imposed. There are certain risks and dangers to which passengers are necessarily exposed, for which the carrier is not, and ought not to be, liable. These are the casualties against which human sagacity cannot provide, nor the utmost prudence prevent. Every passenger must and does assume the risks incident to the mode of travel he selects, when they cannot be avoided or prevented by the utmost care and skill on the part of the carrier. It is common knowledge that passengers on ordinary railroad cars open and shut the blinds to the windows, and raise and lower the windows, near their seats, at their pleasure; that they adjust them to suit their own convenience; that if they cannot do so this is usually done by the employes of the carrier, at the request and in accordance with the wishes and directions of the passengers. While employes of railroads do open and shut the doors to the cars, and raise and lower the blinds and windows, the passengers also do the same, and the employes of the carrier perform these acts at the request of the passengers. While the carrier or its employes probably can control the passengers, as to whether the doors or windows or blinds shall be opened or closed, yet the passengers usually open or close them at their own will, and if restrained or prevented from so doing it is the exception and not the rule.

The facts in this case show without dispute that the car in question was provided with glass windows and wooden blinds such as were in common use by the best regulated railroad carriers for such trains; that the blinds were up, but the window was down; that the missile was hurled through the glass by some unknown person or cause; that it struck plaintiff; and that pieces of the broken glass also struck her, inflicting personal injuries. It is insisted by the plaintiff that if the blind had been closed or lowered, as it should have been, it would have arrested the missile and the broken glass, and have thus prevented the injury. Neither the glass nor the blinds are intended for the purpose of arresting such missiles, but are intended for the purpose of admitting and excluding light and air. They are designed for the comfort and pleasure of the passengers, who usually open and close them, or have it done, at their own pleasure. It is not to be expected or anticipated that miscreants will throw missiles through the windows of cars, or shoot through them, and thus injure or kill passengers, though such things do sometimes happen; but a carrier is not ordinarily chargeable with the duty of providing against such dangers or casualties, and there were no facts to show

that such an assault or injury could have been reasonably anticipated at the time and place at which this happened. The carrier could no more anticipate such an accident than the passenger, and could not provide against it, except at the expense of the comfort and pleasure of its passengers, by removing the glass windows or obstructing them with heavy blinds or bars.

If the closing or lowering of the blind would have prevented the injury, then the plaintiff was equally at fault in not closing it or requesting it to be closed. But the truth of the whole matter, which clearly appears from all the evidence, is that it was an accident or casualty, incident to this kind of travel, that was not to be anticipated or provided against, and for which the carrier is not and ought not to be liable. The court properly gave the affirmative charge for the defendant; and error in any other respect, if such there be, is necessarily without possible injury to the plaintiff.

The judgment is affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

#### ATLAS COAL CO. v. O'REAR.

(Supreme Court of Alabama. June 17, 1909.)

##### 1. PLEADING (§ 430\*)—VARIANCE—ALLEGATIONS AND PROOF.

There was a fatal variance between averments of the complaint describing a contract declared on as between plaintiff and others and proof that the contract was between plaintiff and his brother, operating as partners, and the others, which could not be cured by proof that plaintiff's partner had relinquished any interest in the claim.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 430.\*]

##### 2. PLEADING (§ 245\*)—AMENDMENT BY PLAINTIFF AFTER DEMURRER TO EVIDENCE.

The fact that defendant had demurred to the evidence would not, in view of the liberality of the statutes relating to amendment of pleading, ipso facto deprive plaintiff of the right to amend his complaint.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 245.\*]

##### 3. DISMISSAL AND NONSUIT (§ 25\*)—DISCONTINUANCE—DISMISSAL AS TO ONE DEFENDANT.

Where it appeared that one defendant was acting in the premises only as the agent of the other defendant, plaintiff could dismiss as to the agent on the ground that no cause of action existed against him without effecting a discontinuance as to the other defendant.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 47-59; Dec. Dig. § 25.\*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by G. D. O'Rear against the Atlas Coal Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Bankhead & Bankhead, for appellant. Leith & Gunn and Sherrer & Cooner, for appellee.

**McCLELLAN, J.** The complaint is comprised of counts seeking recovery for the breach of a contract to deliver at an agreed price a certain number of cross-ties and also common counts for work and labor done and for money due on an account. The Atlas Coal Company and Charles A. Buck were the original parties defendant, and the special counts alleged that the contract was entered into between plaintiff, O'Rear, and these defendants.

Aside from other questions, a reversal of the judgment must result because of the variance created by allegation that the contract was with the plaintiff, whereas the proof tended to show only a contract with plaintiff and his brother, operating as partners. The plaintiff sought to avoid the effect of this variance by proof tending to show that his copartner had relinquished his interest in the claim arising from the alleged breach of the contract, or in the contract itself. It is manifest that this, if true, did not affect to alter the averments of the complaint descriptive of the contract declared on, nor to qualify the asserted, by the plaintiff in the proof, fact that the contract was with him and another as partners. The amendment striking out the name of Buck as a party defendant still left the complaint with the averments descriptive of the contract. The affirmative charges as to counts 4 and 5, requested by defendant Atlas Coal Company, were erroneously refused to it on the score of a variance.

Upon the conclusion of the plaintiff's evidence the defendants formally demurred to the evidence. Thereupon the plaintiff asked leave to amend the complaint by striking therefrom the name of Buck as a party defendant, and, over objection, the amendment was allowed. The Atlas Coal Company then moved the court to enter a discontinuance of the action as to it. The motion was over-

ruled. The demurrer to the evidence does not appear to have been ruled on.

It is urged for appellant that the court was powerless to allow the amendment stated after the demurrer to the evidence was interposed. Since our statutes of amendment are so liberal, and have been always so construed and applied in that spirit, we do not think it can be safely or soundly held that demurrer to the evidence *ipso facto* deprives defendant in such demurrer of the right of amendment provided by the statutes. While the statute treating demurrer to the evidence commands the court to require the adverse party to join in the demurrer, yet that duty on the court may be well performed, and the right of amendment still preserved to the adversary in the demurrer. The broad purpose of our liberality in amendments, within the statutes, is to determine the rights of the parties litigant in the pending action. Some strong reason ought to appear before the wholesome purpose is thwarted.

We are of the opinion that a discontinuance was not effected by the dismissal as to Buck. Buck, it appears from tendencies of the evidence, was only acting in the premises as the agent of the defendant; and hence it was permissible for the plaintiff to dismiss as to him without operating a discontinuance, on the theory that "no just cause of action" existed against Buck. *Torrey v. Forbes*, 94 Ala. 140, 10 South. 320.

Since a reformation of the complaint must be had before another trial below, there is no occasion to consider the sufficiency of the special counts as against the demurrers interposed thereto. It will suffice to say that *Tenn. & Coosa R. R. v. Danforth*, 112 Ala. 80, 20 South. 502, appears to announce general principles of law applicable to the rights and liabilities of the parties on the general status evinced by this record.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

**DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.**

**BANK OF GLOSTER v. HINDMAN.**

(No. 13,511.)

(Supreme Court of Mississippi. June 7, 1909.)

**BANKS AND BANKING (§ 109\*)—REPRESENTATION OF BANK BY OFFICERS—POWERS OF CASHIER.**

It is not within the usual course of the business of a bank, or the scope of the cashier's authority, for the cashier to give mortgages on the bank's property and transfer its assets; and such unauthorized acts may be set aside in equity at the instance of the receiver of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 260; Dec. Dig. § 109.\*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Action by E. E. Hindman, receiver of the Central Bank of Mississippi, against the Bank of Gloster. Judgment for complainant, and defendant appeals, and complainant files cross-appeal. Affirmed.

In June, 1907, the Central Bank of Mississippi was organized for the purpose of conducting a general banking business in the city of Jackson, and N. T. Anders was elected president and W. J. Rice was elected cashier. On the 24th day of May, 1907, W. J. Rice and N. T. Anders purchased from one Farish certain real estate in the city of Jackson for the sum of \$31,000. Of the purchase money, \$12,000 was paid in cash and receipt acknowledged in the deed, and the balance of the purchase price, \$19,000, was secured by deed of trust executed by Rice and Anders. On November 15, 1907, Rice and Anders, for a consideration of \$12,000, receipt of which was acknowledged in the deed, conveyed this property to the Central Bank of Mississippi; it being expressly understood that the Central Bank was to pay the balance of the purchase money due Farish. It seems that payment was made as follows: \$10,000 was paid in cash, and the Central Bank was to assume an indebtedness of \$2,000 due by Rice and Anders to the Pensacola Bank & Trust Company. This arrangement was made without the knowledge or consent of the Pensacola Bank, and Rice placed this \$2,000 to the credit of the Pensacola Bank on the books of the Central Bank, and afterwards the Central Bank paid \$500 of this amount. Thereafter, on the 24th day of December, 1907, the Central Bank, by W. J. Rice, cashier, gave to the Pensacola Bank & Trust Company a deed of trust covering the Farish property, which instrument recited the assumption by the Central Bank to pay the balance of \$2,000 due the Pensacola Bank. The Central Bank had never, it seems, collected stock subscriptions exceeding about \$7,500, though it had issued stock amounting to \$104,000, and advertised its authorized capital stock at \$500,000, and had never enjoyed the confidence of the business public. It opened accounts

with numerous banks in other cities, among which number was the Bank of Gloster, Miss., and in its business dealings became indebted to the Bank of Gloster to an amount of about \$11,000 during the fall of the year 1907. On January 10, 1908, the Bank of Gloster drew on the Central Bank for \$5,000, and, when its draft was presented for collection to the Central Bank, payment was refused, though Rice offered to give exchange, stating that he did not have the money on hand. The holder of the draft of the Bank of Gloster then got in communication with the drawer, and after consultation with an attorney they placed this draft with the State Bank & Trust Company of Jackson, Miss., for collection. The State Bank & Trust Company then presented the draft, when payment was again refused; Rice denying that he owed the Bank of Gloster. Upon being pressed, however, he admitted the indebtedness of about \$11,000. It was thereupon agreed that Rice should give the note of the Central Bank for this amount to the State Bank & Trust Company, and secure same by deed of trust covering the property hereinbefore mentioned, or rather the equity in said property after the Farish debt was paid. This deed of trust was executed at night, without authority or knowledge of any of the directors or officers of the bank, except Rice. The State Bank then indorsed the note of the Central Bank to the Bank of Gloster, and the record shows that the State Bank & Trust Company acted merely as a collector for the Bank of Gloster. The giving of this deed of trust seems to have been kept concealed from the directors. In addition to this security, Rice gave the State Bank & Trust Company exchange on various banks, and the next morning it was learned that he had stopped the payment of the exchange. Thereafter the Bank of Gloster insisted on additional security, and Rice turned over to the State Bank & Trust Company, for the Bank of Gloster, \$500 in cash and certain notes, the proceeds of which were to be applied to the reduction of the debt to the Bank of Gloster. Rice stated at the time that the affairs of the Central Bank were in process of liquidation. Thereafter the Central Bank transferred certain other collateral and property to other creditors, and some of the directors, having gained knowledge of these transactions, caused investigation to be made, and as a result a bill for receivership was filed, and E. E. Hindman was appointed receiver and instructed to bring all necessary suits for the protection of the creditors of the Central Bank.

The receiver thereupon filed a suit against the Bank of Gloster for the purpose of canceling the deed of trust in favor of the State Bank & Trust Company covering the Farish

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

property, alleging that this deed of trust was executed without the knowledge or consent of the board of directors, and that Rice, as cashier, had no authority to do so. The receiver likewise filed a bill against the Pensacola Bank & Trust Company to set aside the deed of trust given to that institution and seeking to cancel said instrument for similar reasons. Green, the trustee in the deed of trust to the State Bank & Trust Company, afterwards foreclosed the deed of trust and sold the property; the Bank of Gloster becoming the purchaser. The bill of the receiver prayed that the deed from Green, trustee, to the Bank of Gloster, be canceled. The Pensacola Bank & Trust Company filed a cross-bill, in which it prays to be subrogated to the rights of Anders and Rice to the extent of \$1,500, this being the balance due said Pensacola Bank & Trust Company by said Anders and Rice, and for which said Pensacola Bank & Trust Company claimed a lien upon the Farish property. The cause was tried upon bill and answer, cross-bill, and answers thereto, and after hearing all the evidence and examining exhibits the chancellor entered a decree in which he held that the transfers to the State Bank & Trust Company were not made in the usual course of business, but were made without authority, and were therefore void, and ordered the deeds of trust so executed to be canceled, and ordered, further, that the State Bank & Trust Company and the Bank of Gloster return to the receiver all collateral and money received by them from Rice, and that the trustee's deed be canceled. The chancellor further found that the recital of the deed from Anders and Rice to the Central Bank, acknowledging receipt of payment of \$12,000, was erroneous, and that as a matter of fact only \$10,000 was paid in cash, and that the Central Bank assumed to pay the Pensacola Bank & Trust Company the other \$2,000, of which amount \$500 was afterwards paid, and that there was still due the Pensacola Bank the sum of \$1,500, and entered a decree establishing a lien on the Farish property for that amount. From this decree the Bank of Gloster appeals, and the receiver files a cross-appeal on that part of the decree allowing the Pensacola Bank & Trust Company subrogation.

Green & Green and Coleman & McClurg, for appellant. Watkins & Watkins, for appellee. Alexander & Alexander, for cross-appellee Pensacola Bank & Trust Company.

MAYES, J. The facts of this case settle it, and on the facts the chancellor could have rendered no decree other than the one that was rendered. If during the life of the Central Bank it ever had a solvent moment, it is fairly inferable from the testimony that

it was before W. J. Rice was empowered by the board of directors to take charge of its assets as cashier. It is indisputably shown that all payments made to the Bank of Gloster and the transfer of collaterals and the mortgages of property belonging to the Central Bank was the enterprise of Rice on his own account, and was unknown to the directors and not acquiesced in by them in any way, or ratified either actually or constructively. There are limitations on the power of the cashier of a bank to deal with the assets of the bank, and we think that Rice went clear beyond any power that the courts have yet held a cashier to possess. Giving mortgages on the bank's property, and transferring its assets, and destroying the bank itself, were not acts done by Rice within the usual scope of his authority or in the usual course of business; and this applies not only to the execution of the mortgages without the consent of the directors, but also applies to the \$500 paid to the Bank of Gloster at the time, and to such collaterals as were turned over to the State Bank & Trust Company for the benefit of the Bank of Gloster.

The decree of the chancellor is in all respects correct, and is affirmed on both direct and cross appeal.

McLEOD et al. v. WOMACK et al.  
(No. 13,458.)

(Supreme Court of Mississippi. May 17, 1909.)  
JUDGMENT (§ 251\*)—PLEADING TO SUSTAIN.

A judgment for an item in an account which is not presented by the pleadings cannot be sustained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.\*]

Appeal from Chancery Court, Simpson County; J. L. McCaskill, Chancellor.

"To be officially reported."

Action for injunction by L. E. Magee against J. W. Womack and others. From the decree rendered, defendants McLeod appeal, and plaintiff and defendant Womack each enter a cross-appeal. Affirmed in part, and reversed in part.

L. E. Magee, being indebted to S. P. McLeod, the wife of C. W. McLeod, in the sum of \$1,193.87, executed a promissory note for said amount, payable to S. P. McLeod one year after date, which note was secured by deed of trust on certain land owned by Magee. After the execution of this deed of trust, Magee sold 80 acres of the land covered by said deed of trust to Mrs. Julia Womack, the mother of J. W. Womack, and J. W. Womack purchased 40 acres of this land from his mother; both of the Womacks being in ignorance of the fact that it was incumbered by the McLeod deed of trust. After learning of the McLeod deed of trust,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Womack demanded that Magee pay McLeod the amount secured by the deed of trust. Magee refused to do so, and Womack was compelled to purchase the deed of trust from Mrs. McLeod to prevent foreclosure, paying therefor the sum of \$727.29; this being the amount claimed still to be due. The McLeods indorsed the notes to Womack without recourse. Womack again demanded of Magee the payment of the indebtedness, and Magee again refused to pay anything whatever. Womack thereupon advertised under said deed of trust all the lands embraced in the same, except the land conveyed to Julia Womack by Magee and by Julia Womack to J. W. Womack. Magee thereupon sued out a writ of injunction to enjoin the sale, alleging in his bill that he was entitled to certain credits on the McLeod notes, which would reduce the amount due thereunder, which amount he was ready to pay. Womack answered the bill, and made his answer a cross-bill against the McLeods, alleging that the Magee note had indorsed on it the following credits, to wit: \$182.10, \$200, and \$350, and alleging, further, that according to the credits which appeared on the back of said notes there was only a balance due the McLeods of \$640.98 at the time of his purchase of said notes, instead of \$727.69, and he prayed a decree for the difference. The McLeods answered the bill of Magee, and made their answer a cross-bill, alleging that Womack should have paid \$793.58, being the amount due at the time these notes were sold him. The bill prayed that Womack be enjoined from collecting the difference claimed and for a decree for the amount alleged to be due the McLeods by Magee.

The case, therefore, resolved itself into a three-cornered fight; the real question at issue being the amount of credits which should have been allowed on the notes given by Magee in favor of the McLeods. Womack claimed that credit should have been given according to the indorsements on the notes. Magee claimed the following credits on the notes: A bill of shoes turned over to the McLeods by agreement, \$227; stock in the Mendenhall Mercantile Company, \$300; cash to McLeod, \$350; cash to Womack, \$158. As to the first item of credit, McLeod claims that Magee owed him \$144.90, which would reduce the \$227 to \$82.10, which amount should have been credited on the notes, and that \$182.10 was error. As to the second item, Magee claims that he delivered to McLeod stock in the Mendenhall Mercantile Company of the value of \$300, while McLeod claims that there was to be deducted therefrom, on account of a store account which Magee owed the Mendenhall Mercantile Company, the sum of \$107.63, leaving a balance of \$192.37. The credit of cash, \$350, was admitted by all parties. McLeod claimed that the \$158 credit claimed by Magee was money paid to him by Womack in order to secure a

release as to the 80 acres purchased by the Womacks from Magee, and covered by the deed of trust of the McLeods, and was not to be credited on Magee's indebtedness, but was to be returned to Womack if Magee should fail to pay off the deed of trust and the land should be sold in satisfaction thereof. Magee failed to pay the indebtedness, and McLeod returned the \$158 to Womack.

The chancellor disallowed this latter claim of credit, and entered a decree allowing three credits on the notes secured by the deed of trust, to wit, \$227, \$300, and \$350, and entering a decree in favor of J. W. Womack against Magee for \$560.72. The chancellor further found in his decree that the sum of \$466.81 was the correct amount due the McLeods at the time the note was sold by them to Womack, and entered a decree for \$262.88, being the difference. The chancellor further decreed that the McLeods recover of Magee the sum of \$107, being the amount which Magee was due the Mendenhall Mercantile Company. The decree taxed the costs one-half against Magee and one-half against the McLeods. From this decree the McLeods appeal, and Magee and Womack each enter a cross-appeal.

Hilton & Hilton and Chalmers Alexander, for appellants. R. P. Willing, for appellees. May & Sanders, for cross-appellant Magee.

WHITFIELD, C. J. We have examined this case carefully, and simply note the results arrived at. On the direct appeal of the McLeods, the decree is affirmed, except as stated hereinafter. On the cross-appeal of Womack the decree is affirmed. Indeed, his counsel ask here for an affirmance against their own cross-appeal, recognizing that there is no merit in the cross-appeal. On the cross-appeal of Magee the decree is reversed as to the award of \$107 against Magee in favor of the McLeods. This matter is not presented as an issue by the pleadings in this case at all, nor is there any satisfactory proof that the McLeods have actually paid the amount to the Mendenhall Company. There is a mistake in the final decree of \$2 in the amount awarded by the chancellor to Womack against the McLeods. The amount should be \$260.88, instead of \$262.88.

The only serious contention of the appellants, the McLeods, is that the note was transferred by them to Womack without recourse; but the record distinctly shows, on page 132, that it was agreed by counsel for both complainant and defendant that, if there was a less sum due than was paid by Womack, the difference should be returned to Womack. Indeed, the whole record shows that the McLeods insisted upon just the true amount of the note at the time of transfer being regarded.

The decree is therefore affirmed on the cross-appeal of Womack, and the decree on the direct appeal of the McLeods, with the

modification just stated, of the \$2, is also affirmed in all respects, and the decree on the cross-appeal of Magee is affirmed in all respects, save as to the item above mentioned of \$107. As to that item this decree is reversed, and a judgment will be entered here in favor of Magee, relieving him of that item, and awarding him the costs of his cross-appeal as against the McLeods. A careful scrutiny of the conduct of Magee, as disclosed by the record, causes us to think the action of the chancellor correct in awarding the damages and one-half of the costs against Magee.

**BERESFORD et al. v. MARBLE et al.**  
(No. 13,886.)

(Supreme Court of Mississippi. June 28, 1909.  
Suggestion of Error Overruled July 5, 1909.)

**LIMITATION OF ACTIONS (§ 44\*)—LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS—RECOVERY OF REAL PROPERTY.**

Code 1906, § 3090, provides that a person may not sue to recover land unless within 10 years next after the right of action shall have accrued to some person through whom he claimed; but if, when the right of action accrues, the person having the right is insane, then such person, or one claiming through him, may bring the action at any time within 10 years next after the time when the person to whom the right shall have first accrued shall have ceased to be under such disability, and if such person dies under disability the 10 years within which the land must be recovered begins at the date of such person's death. Section 3108 provides that, where any cause of action accrues in this state, if the person against whom it has accrued be a nonresident and absent from the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action. Section 1801 provides that ejectment may be maintained in all cases where the plaintiff is legally entitled to possession of the land sued for. Complainants alleged that their mother, in 1878, while of unsound mind, conveyed to nonresident purchasers the land in dispute, and that in 1900 the land was conveyed to defendant, and that their mother died in an insane hospital in 1891. Held that, as ejectment might have been brought by complainants when the lands were held by nonresident owners, the statute of limitations began to run in favor of the persons in possession in 1891, and it was not postponed until the year 1900.

[Ed. Note.—For other cases, see Limitation of Actions, (Dec. Dig. § 44.\*)]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

"To be officially reported."

Action by W. F. Beresford and others against J. C. Marble and others. A demurrer was sustained, and bill dismissed, and complainants appeal. Affirmed.

The appellants, who were complainants in the court below, filed a bill in chancery in the year 1908, alleging that their mother was the owner of the lands in controversy in the year 1878, at which time she conveyed said lands to certain nonresidents of the state of Mississippi, and that at the time she execut-

ed such conveyance she was of unsound mind, afterwards dying in an insane hospital in the year 1891, and that the defendant J. C. Marble bought the land in 1900 from said nonresident purchasers. The defendants demurred on the ground that complainants' remedy was barred by the 10-year statute of limitations, as provided by section 3090 of the Code of 1906, since they had not brought suit within 10 years from the date of the death of their mother, Mrs. Beresford. This demurrer was sustained by the court, and the bill dismissed.

On appeal the appellants contend that, inasmuch as the purchasers through whom the title passed were all nonresidents, except Marble, who had bought in the year 1900, they are allowed 10 years from the date of the purchase by Marble in which to bring suit, by virtue of the provisions of section 3108 of the Code of 1906, which is as follows: "3108. If any cause of action have accrued in this state, the person against whom it has accrued be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action, after his return."

Appellee contends that the remedy by ejectment against the tenant in possession could have been pursued in this case under the provisions of section 1801 of the Code of 1906, which provides that: "The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the land sued for and demanded."

Wells & Wells, for appellants. Powell & Powell, for appellees.

WHITFIELD, C. J. We think it is clear in this case that the complainants in this bill might have brought ejectment for the land against the tenants in possession, and that, that remedy being open, the statute of limitations did run against their claim, and that they are barred. This was distinctly held in *Lindenmayer v. Gunst*, 70 Miss. 633, 13 South. 252, 35 Am. St. Rep. 685, and this particular holding was approved in *Robinson v. Moore*, 76 Miss. 100, 23 South. 631. The cases cited in the very able brief of the learned counsel for appellant were cases relating to personal actions, and this statute could not be invoked in those cases, because there never had been, as to the personal action, inability on the part of the plaintiff to sue the defendant in such personal suit. That is not true of an action in rem, like the action of ejectment. The court below took this view of the matter, sustained the demurrer to the plea of the statute of limitations, and, the complainants declining to amend, the bill was dismissed.

The decree is affirmed.



**BERRY et al. v. CUMBERLAND TELEPHONE & TELEGRAPH CO. et al.**  
(No. 13,974.)

(Supreme Court of Mississippi. June 28, 1909.  
Suggestion of Error Overruled July 5, 1909.)

**1. MASTER AND SERVANT (§ 258\*)—INJURIES TO LINEMAN—ACTION—PLEADING.**

The declaration in an action against a telephone company for the death of a lineman resulting from his contact with live wires, alleging that defendant had constructed its line without due regard to its proximity to the high voltage wires of a traction company and had failed to properly insulate its wires, states a cause of action.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.\*]

**2. MASTER AND SERVANT (§ 286\*)—INJURIES TO LINEMAN—NEGLECT—QUESTION FOR JURY.**

Evidence, in an action for the death of a lineman resulting from contact with wires charged with electricity, held to raise for the jury the question of negligence by defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.\*]

Appeal from Circuit Court, Forrest County; W. H. Cook, Judge.

"To be officially reported."

Action by Mrs. S. Berry and others against the Cumberland Telephone & Telegraph Company and others for the death of Frederick L. Berry. From a judgment for defendants, plaintiffs appeal. Affirmed in part, and reversed in part.

The appellants, who are the heirs at law of one Fred L. Berry, brought an action in the circuit court against the Cumberland Telephone & Telegraph Company, the Home Telephone Company, the Hattiesburg Traction Company, and the city of Hattiesburg for damages for the death of said Fred L. Berry, alleged to have been caused by the negligence of said defendants. Deceased, who was a lineman in the employ of the Cumberland Telephone & Telegraph Company, was killed by coming in contact with a live wire while at work on one of the poles of the said Cumberland Telephone & Telegraph Company. The evidence shows that Berry was ordered to locate trouble on the wires, and had climbed a creosoted pole of said Telephone & Telegraph Company, and that while standing on one of the cross-arms, and himself unprotected by insulation, rubber gloves or otherwise, caught hold of a fire alarm wire of the city of Hattiesburg and received a severe shock, which threw him from the top of the pole, causing instant death. It was not clearly shown by the evidence whether death was caused by electricity or by the fall. At the place where the accident occurred there were a number of overhead electrical wires supported by poles. The wires of the Hattiesburg Traction Company were what are known as high-voltage wires, and were dangerous, unless skillfully erected and maintained,

while all of the wires of the other three defendants were "low-power" conductors, and in their normal condition were harmless, unless they came in contact with some high-power wires, from which a dangerous current would be transferred to the low-power wires. The evidence shows that at the time of the accident there had been a storm, and some of the wires of the various companies had come in contact with each other; that the guy wires of the Home Telephone Company had come in contact with the wires of the Hattiesburg Traction Company, and also with the city fire alarm wires, and thus, by conducting the high-voltage current of electricity of the Traction Company wires to the city fire alarm wires, had transformed the latter into dangerous and destructive conductors. It was shown that the fire alarm wires belonging to the city are supported by the poles of the other several companies at different points, and that the other defendant companies owned their own poles, and that at the point where the accident occurred all of these wires crossed the streets. On the trial the Home Telephone Company demurred to the amended declaration, and its demurrer was sustained. The other three defendants filed pleas of the general issue, and also set up contributory negligence of the deceased. After the introduction of the evidence, these three defendants entered a motion for the exclusion of the evidence and for a peremptory instruction, which motion was sustained, and judgment entered against the plaintiffs. A motion for a new trial was overruled, and the plaintiffs appeal.

Appellants assign as error the action of the court in overruling their motion for a new trial, setting up certain newly discovered evidence. Error is also assigned because of the action of the court in sustaining the demurrer of the Home Telephone Company; appellants alleging that the declaration stated a cause of action against said defendant Home Telephone Company. That part of plaintiffs' declaration on this point alleged that said Home Telephone Company had constructed its wires without due and proper regard to their proximity to the wires of the Traction Company, had failed to properly insulate its wires, and that its guy wires were not properly insulated. This defendant's demurrer set up the fact that, inasmuch as the declaration had alleged that this defendant's wire was in itself harmless, it devolved upon plaintiffs clearly to show wherein it became dangerous, and that the pleader had not clearly stated the cause of action, but that it was merely the conclusion of the pleader in alleging that the said Home Telephone Company had contributed to the death of deceased, or that, even if negligence is shown on the part of the Home Telephone Company, still the declaration does not show that such negligence was the proximate cause

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the injury, since the injury was caused by deceased coming in contact with another wire, and that according to the allegations of the declaration the wires of all of the defendants had come in contact one with another, so that the injuries would have occurred, whether the wire of the Home Telephone Company had come in contact with the high-power wire or not. Appellants also assign as error the granting of the peremptory instruction for the other three defendants, since it was shown by witness Foster that some of the wires of the Home Telephone Company attached to the top of a pole on which there was a fire alarm box, the wires of which came through an iron pipe to the ground, had come in contact with the high potential wires of the Traction Company.

Torrey & Logan, for appellants. Stevens, Stevens & Cook, Harris & Willing, T. Brady, Jr., and Sullivan & Tally, for appellees.

**WHITFIELD, C. J.** The demurrer of the Home Telephone Company to the amended declaration should manifestly have been overruled. The averments of that declaration, when the difficulty of locating the responsible party is held in mind in this tangled web of facts, and especially when the death is due to the mysterious and still largely unknown force of electricity, sufficiently stated a cause of action, so far as the declaration is concerned.

The learned counsel for the appellants concede in their brief that they have made no case against the Cumberland Telephone & Telegraph Company.

As to the two remaining defendants, the city of Hattiesburg and the Traction Company, we think the evidence was sufficient to take the case to the jury, looking at the whole evidence and giving the evidence its proper weight, especially the testimony of the witness Foster. It was peculiarly a case, under all the circumstances, for solution by the jury. It is perhaps fair to say that on this record a stronger case is made against the city of Hattiesburg than against the Traction Company; but whether one or the other is liable, or whether either is liable, should be left to the jury to say on the testimony.

The action of the court below was correct on this record with regard to that ground of the motion for a new trial setting up the newly discovered evidence of the witness Coll. Due diligence was not shown in ascertaining this testimony. Since there must be a new trial, we forbear any further comment.

The result is that the judgment of the court below, so far as the Cumberland Telephone & Telegraph Company is concerned, is affirmed, the judgment of the court below in sustaining the demurrer of the Home Telephone Company to the amended declaration is reversed, and the action of the court in

giving the peremptory charge to find for the defendants is also reversed, and the cause remanded for a new trial as indicated.

#### WILSON COTTON CO. v. LOUISVILLE COTTON OIL CO. (No. 13,313.)

(Supreme Court of Mississippi. March 8, 1909. Suggestion of Error Overruled July 5, 1909.)

Appeal from Circuit Court, Holmes County; A. McC. Kimbrough, Judge.

Action by the Wilson Cotton Oil Company against the Louisville Cotton Oil Company. A peremptory instruction was given to find for defendant. From a judgment in defendant's favor, plaintiff appeals. Reversed and remanded.

Plaintiff brought an action to recover an alleged balance due for crude oil shipped under contract. The plea of the defendant set up the inferior quality of the oil, in that it did not come up to specifications, and that a deduction from the contract price was made on this account. After all the evidence for the plaintiff was in, the court excluded same and gave a peremptory instruction to find for defendant; and from a judgment thereon this appeal is prosecuted.

A. M. Pepper, for appellant. McWillie & Thompson, for appellee.

**MAYES, J.** The record in this case is by no means clear, but after giving it the closest attention it is our judgment that the defendants were not entitled to a peremptory instruction. Reversed and remanded.

#### JORDAN v. AUSTIN.

(Supreme Court of Alabama. June 17, 1909.)

##### 1. TRIAL (§ 122\*)—CONDUCT OF TRIAL—IM-PROPER ARGUMENT.

In an action by the seller for the price of a horse, where the defense was breach of a warranty that the horse would work anywhere, and defendant testified that certain persons were working with him when he tried to work the horse unsuccessfully, but did not state that they saw him make the attempt, it was improper for plaintiff's counsel to ask in his argument why defendant did not have at the trial the persons who worked for him and saw him try to work the horse.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 299; Dec. Dig. § 122.\*]

##### 2. EVIDENCE (§ 75\*)—PRESUMPTIONS—EVIDENCE WITHHELD.

The rule that there may be an unfavorable inference where evidence is withheld does not obtain where the evidence is equally accessible to both parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 95; Dec. Dig. § 75.\*]

##### 3. EVIDENCE (§ 77\*)—PRESUMPTIONS—EVIDENCE WITHHELD.

There can be no unfavorable inference against a party failing to produce his wife as a witness to a fact, where he and his daughter had both testified thereto, as the wife's testimony would be merely cumulative.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. § 77.\*]

##### 4. APPEAL AND ERROR (§ 1000\*)—REVIEW—CONDUCT OF TRIAL—ARGUMENT OF COUNSEL.

It was prejudicial error not to sustain objection to counsel's argument commenting on

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the opposite party's failure to produce a witness whose testimony would have been merely cumulative, especially where counsel argued that her testimony related to material facts in the case, and would not merely have supported an examined witness as to an immaterial fact.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1060.\*]

**5. SALES (§ 358\*)—ACTION—ADMISSIBILITY OF EVIDENCE.**

In an action by the seller on a note given for a horse, where defendant defended on the ground of a breach of warranty and testified that he had written plaintiff complaining of the horse, offering to return it and claimed a rescission, plaintiff could show that he had written defendant demanding payment of the note and had received no reply, since such evidence contradicted defendant's contention.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 353.\*]

**6. EVIDENCE (§ 185\*)—SECONDARY EVIDENCE—CONTENTS OF LETTERS—PREDICATE.**

Where plaintiff testified to addressing and mailing letters to defendant, a sufficient predicate was laid for testimony of their contents, without proving notice to defendant to produce them, where he denied having received them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 642-660; Dec. Dig. § 185.\*]

**7. SALES (§ 358\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.**

In an action by the seller on a note given for a horse, where defendant claimed a rescission of the sale for breach of warranty, plaintiff could show by defendant's witnesses that defendant had subsequently traded the horse or permitted his son to do so, that fact being a circumstance in determining whether defendant was entitled to rescind.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 353.\*]

**8. SALES (§ 260\*)—WARRANTIES—FRAUD.**

The guaranty by a seller that an unsound horse sold was sound would not be a fraud unless the seller knew of its unsoundness.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 726; Dec. Dig. § 260.\*]

**9. SET-OFF AND COUNTERCLAIM (§ 59\*)—EFFECT—RIGHT TO JUDGMENT FOR EXCESS OVER PLAINTIFF'S CLAIM.**

If plaintiff, suing for the price of a horse, was also indebted to defendant and the debt was pleaded as a set-off, the jury could find for defendant for the sum due him, even if plaintiff was not entitled to recover anything, under Code 1907, § 5860, providing that if a demand offered to be set off exceed plaintiff's demand, the amount of excess being found by the jury, judgment must be rendered against plaintiff for costs and for defendant for the excess.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 130-132; Dec. Dig. § 59.\*]

**10. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—CURE BY VERDICT.**

Error in failing to charge to such effect was cured by a verdict for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4230; Dec. Dig. § 1068.\*]

Appeal from Circuit Court, Cherokee County; W. W. Haralson, Judge.

Action by S. B. Austin against H. E. Jordan. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The issues presented by the pleadings were that the note was given for the purchase price of the mare, with the guaranty that she

was sound and would work well anywhere, while in fact she was not sound, and would not work to the plow, wagon, or buggy, and was unsafe. Rescission was also set up. In testifying, the defendant stated that Faulkenberry and certain other persons were present when he started to work the mare, and that his wife was present and heard the guaranty given by plaintiff. The defendant denied having received any letters from plaintiff in reference to the matter. In rebuttal thereto, plaintiff testified that he had written certain letters to defendant, stamped them, and mailed them, addressed to defendant at his post office address, and with plaintiff's return card on corner of the envelope. He also testified that he had registered one letter to defendant, and had received his returned registered card signed by defendant. The court permitted him to testify as to the contents of this registered letter. In his argument, the solicitor for the plaintiff said: "Gentlemen of the jury, why did not the defendant have Faulkenberry and the other witnesses here who worked for him and saw him try to work the mare? Gentlemen of the jury, why did the defendant not have his wife here as witness, who he said was present at the time of the contract? Not one word do we hear from Hiram Jordan's wife." Objection was interposed to these statements, and exceptions reserved to the court's declining to rule them out. The following charges were refused to the defendant: "(1) The court charges the jury if Austin guaranteed the mare to Jordan to be sound, and she was not sound, this was a fraud on the part of Austin. (2) The court charges the jury, if the jury believe from the evidence to a reasonable certainty that Austin is indebted to Jordan for board and feed of his horses, the jury should find a verdict in favor of Jordan for the sum due, even if they believe that plaintiff is not entitled to recover anything. (3) The court charges the jury plaintiff had the same right to procure the testimony of Hiram Jordan's wife that defendant had, and the statement of plaintiff's attorney that 'not one word do we hear from Hiram Jordan's wife' was improper, and we should not consider it for any purpose. (4) The court charges the jury, the fact, if it be a fact, that any witnesses do not agree in their testimony as to immaterial facts, will not authorize the jury to disregard their testimony on that account. (5) The court charges the jury that if plaintiff lived at Clinton, Ga., and it was nearly 50 miles from where defendant lived, and it was impracticable for defendant to carry the horse to Austin, the law did not require him to carry it to Austin to rescind."

G. L. Burnett, for appellant. R. C. Hunt and L. H. Lee, for appellee.

ANDERSON, J. The defendant did not testify that Faulkenberry and the other man

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

saw him try to work the mare when she refused. He merely stated that they were working with him at the time. The trial court should have sustained the objection to so much of plaintiff's counsel's argument as stated, "Why did not the defendant have Faulkenberry and the other witnesses here who worked for him and saw him try to work the mare?" *Morris Hotel Co. v. Henley*, 145 Ala. 52, 40 South. 52; *Cross v. State*, 68 Ala. 476; *E. T. V. & G. R. R. v. Bayliss*, 75 Ala. 466. While, as a rule, there may be an inference unfavorable to the withholding of evidence, this rule does not obtain where the evidence is equally as accessible to both parties. *Ethridge v. State*, 124 Ala. 106, 32 South. 320; *Mann v. State*, 134 Ala. 20, 32 South. 704; *Bates v. Morris*, 101 Ala. 282, 13 South. 138. Nor can there be an unfavorable inference against a party for the failure to produce a witness whose testimony would be simply cumulative. *Jones on Evidence*, § 18. The defendant and his daughter had both testified to the warranty and the failure of the mare to work, and the testimony of his wife on the subject would have only been cumulative. Counsel should not have commented on the failure of the defendant to prove these facts by his wife also, and the trial court erred in not sustaining the defendant's objection to this argument. It may be that when the comment relates to a nonproduced witness, who could only support an examined witness as to an immaterial fact, it would be error without injury. *Lide v. State*, 133 Ala. 43, 31 South. 953. The absent witnesses referred to, however, in the present case, and their testimony as charged in the argument, related to material facts in the case.

It was competent for the plaintiff to show that he had written defendant demanding payment of the note, and that he received no reply. Defendant testified that he had written the plaintiff complaining of the mare and offering to restore her, and claimed a rescission. The fact that plaintiff had written defendant to pay the note and he failed to reply was contradictory of defendant's theory of an offer to return the mare and of a rescission of the sale, as well as the contention that she did not come up to the plaintiff's warranty, if any there was. A proper predicate was shown for the proof of the contents of the letters written by plaintiff to the defendant, as the plaintiff testified to addressing and mailing them to defendant, and, as the defendant denied getting them, a notice to produce was unnecessary. 2 *Wigmore on Evidence*, § 1203, subd. "b."

There was no error in permitting plaintiff to show by defendant's witnesses what became of the mare, as the fact that defendant traded her or permitted his son to do so was a circumstance in determining whether or not defendant was entitled to rescind the sale.

Charge 1 was properly refused. The guaranty that the mare was sound would not be a fraud unless the plaintiff knew of her unsoundness.

Charge 2 should have been given (section 5860, Code 1907), but the error in refusing same was cured by the finding of the jury for the plaintiff.

Charge 3 asserts the law, and is fully covered in discussing the argument of counsel.

There was no error in the refusal of defendant's other requested charges.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concurring.

FEAGIN et al. v. CITY OF ATTALLA.  
(Supreme Court of Alabama. June 17, 1909.)

MUNICIPAL CORPORATIONS (§ 642\*)—NATURE—CIVIL OR CRIMINAL—APPEAL IN PROSECUTION FOR VIOLATING ORDINANCES.

Where an appeal was taken to the city court of Gadsden from a conviction in the mayor's court of the city of Attalla of a violation of an ordinance, and an appeal bond was given conditioned to prosecute the appeal to effect, or, failing therein, to pay and satisfy such judgment as the city court might render, it was error for the city court to treat the case as criminal, and interpret the bond as binding defendant to appear in that court, as section 12 of the charter of Attalla (Acts 1900-01, pp. 943, 944) expressly clothes such appeals with the character of civil appeals from judgments rendered in civil cases by justices of the peace, and it is evident from such section that the only possible judgment on failure of defendant to appear in such case is the affirmation of the judgment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 642.\*]

Appeal from City Court of Gadsden; *Alto V. Lee*, Judge.

Tim Feagin was convicted of a violation of a city ordinance, and he appeals. Reversed.

Goodhue & Blackwood, for appellant. *Alto V. Lee, Jr.*, for appellee.

McCLELLAN, J. The appellant was convicted, in the mayor's court of the city of Attalla, of the violation of a city ordinance. He was fined, and a hard-labor sentence was also imposed on him. He appealed from the judgment to the city court of Gadsden, in which court the cause was placed on the criminal docket. The cause being called for trial, the defendant did not appear, and judgment was then rendered for the amount of his appeal bond as upon a forfeiture thereof.

The city court was in error in treating the case as criminal, and also in interpreting the appeal bond as binding the defendant to appear in the city court. So far as is here important, section 12 of the charter of At-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

talla (Acts 1900-01, pp. 943, 944) expressly clothes such appeals as this with the character of civil appeals from judgments rendered in civil cases by justices of the peace. The appeal bond's conditions are required to be, and in this one were, that the defendant "will prosecute the appeal to effect," or, failing therein, he will "pay and satisfy such judgment \* \* \* as the city court may render."

Omitting consideration of the question suggested by the placing of this appeal on the criminal docket of the city court, it is evident, from the charter section cited, that upon the failure of the defendant to appear the only judgment possible of rendition by the city court was an affirmation of the judgment entered in the mayor's court. As indicated, the judgment of the city court must be reversed, and the cause remanded thereto.

Reversed and remanded.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

#### ÆTNA INS. CO. v. KENNEDY.

(Supreme Court of Alabama. June 10, 1909.)

##### 1. INSURANCE (§ 115\*)—FIRE INSURANCE—INSURABLE INTEREST.

A stockholder in a corporation has an insurable interest in its property, which will sustain recovery on a fire insurance policy issued to him thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 151; Dec. Dig. § 115.\*]

##### 2. INSURANCE (§ 375\*)—FIRE INSURANCE—WAIVER OF CONDITION IN POLICY—AUTHORITY OF AGENT.

An agent, authorized to write fire insurance may waive a condition in a policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 948; Dec. Dig. § 375.\*]

##### 3. INSURANCE (§ 115\*)—INTEREST OF INSURED—EXTENT.

The interest of a stockholder to whom a fire insurance policy is issued on corporate property is not necessarily measured by the value thereof, for the reason that the property is liable first for the corporate debts, and the only interest held by him is his right to share in the distribution of the proceeds after payment thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 151; Dec. Dig. § 115.\*]

##### 4. INSURANCE (§ 646\*)—ACTION FOR FIRE INSURANCE—BURDEN OF PROOF.

In a suit on a fire insurance policy, the burden is on plaintiff to show the value of his interest in the property destroyed, and unless he does so he can only recover nominal damages.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1646; Dec. Dig. § 646.\*]

##### 5. INSURANCE (§ 665\*)—ACTION FOR FIRE INSURANCE—INTEREST IN PROPERTY—EVIDENCE.

In an action on a fire insurance policy, evidence held sufficient to raise an inference that plaintiff had some interest in the property.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 645.\*]

##### 6. TRIAL (§ 206\*)—INSTRUCTIONS AS TO EVIDENCE.

A charge that there is no evidence of a certain fact need not be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 495, 500; Dec. Dig. § 206.\*]

##### 7. INSURANCE (§ 95\*)—FIRE INSURANCE—NOTICE TO AGENT AS NOTICE TO COMPANY.

Notice to a soliciting agent, after a fire insurance policy is issued, is not notice to the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 125; Dec. Dig. § 95.\*]

##### 8. INSURANCE (§ 4\*)—REGULATION—VALIDITY.

Code 1907, § 4594, providing that if an insurer shall be a member of any traffic association, or shall have made any agreement with corporations engaged in the business of fire insurance with reference to rates of premium, any stipulation in a policy relating to the giving of notice or proof of loss, etc., shall be void, is constitutional.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 4.\*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by T. J. Kennedy against the Ætna Insurance Company on a fire insurance policy. From a judgment for plaintiff, defendant appeals. Reversed.

Plea 2 was as follows: "Said plaintiff, at the time of the execution of the policy of insurance upon which this action is based, was not the owner of the property described in said policy of insurance and which is described in said complaint."

The replication to which demurrers were filed is as follows: "(6) Comes the plaintiff, and for special replication No. 6 to plea No. 2 says: He was at the time of the issuance of said policy a stockholder in the Union Publishing Company, a corporation, which was the owner of said property. Plaintiff's interest in said policy was more than double the value of the policy; and the fact that said property was owned by the Union Publishing Company was known to L. W. Rorex, the general agent of the defendant, who made said contract, at the time it was made, and expressly waived the matter of a want of sole and unconditional ownership or other interest on plaintiff's part, save as a stockholder in said corporation. (2) The defendant waived the alleged breach of conditions in said plea set forth in this: That at the time of entering into said contract of insurance L. W. Rorex, the general agent of the defendant and who made said contract of insurance, had notice of the alleged breach of such conditions at the time the contract was made, in that he had knowledge of facts leading him to believe, or giving good cause to believe, that the conditions were not met, and with such notice he failed to make inquiry which would have readily discovered all the facts as to such breach of conditions, and without inquiry, and knowing that in all probability the said conditions were not met,

he wrote the contract, and thereby waived such breach of conditions."

The following demurrers were interposed: "(1) Said replication fails to show that plaintiff owned any interest in the property. (2) It fails to show that the plaintiff owned insurable interest in said property. (3) Said replication shows on its face that the policy of insurance sued on is void. (4) It fails to show or aver what, if any, interest the plaintiff had in such property, the subject of said insurance. (5) It shows that the agent of the defendant had no actual knowledge of the breach, but only information which, if pursued, would have led to such knowledge. (6) Said replication does not allege or show that the plaintiff made known to the defendant the facts which constitute a breach of conditions of said policy at the time said policy was issued."

Charge 20 is as follows: "I charge you, gentlemen of the jury, that there is no evidence before you from which you can ascertain the amount of plaintiff's loss or damage."

The property insured was the printing outfit belonging to the Union Publishing Company, a corporation, in which the present plaintiff was principal stockholder, and it seems that the presses were run by a gasoline engine, which appears to be contrary to the terms of the policy. L. W. Rorex was the agent of the defendant insurance company, and was also the cashier of the local bank. It was shown by the plaintiff, over the objection of the defendant, that after the issuance of the policy Rorex was in the building occupied by the printing company and saw the gasoline engine at work. It was further shown, over the objection of defendant, that Rorex was a subscriber to the newspaper and bought job printing supplies from the Union Publishing Company. Gross was permitted to testify over the objection of defendant that the Union Publishing Company and Mr. Kennedy gave his wife notes secured by a lien or mortgage on the property of the Union Publishing Company, and that he turned these notes over to Mr. Rorex as cashier of the bank.

Lawrence Cooper, George P. Cooper, and Brickell & Smith, for appellant. Virgil Bouldin, for appellee.

SIMPSON, J. This action was brought by the appellee against the appellant on a fire insurance policy issued by the appellant. The first assignment of error insisted on is to the action of the court in overruling defendant's demurrer to the fifth replication to plea 2 to the complaint. The substance of plea 2 is that the plaintiff, at the time of the issuance of the policy, was not the owner of the property insured, and the replication is that he was the owner of stock in the company which owned the property, worth more than double the value of the policy, that said fact was known to the general agent of the company who issued the policy, and he ex-

pressly waived the matter of the want of sole and unconditional ownership. It has been expressly held that a stockholder in a corporation has an insurable interest in the property of the corporation, which will sustain a recovery on a policy issued to him on the property. 19 Cyc. 589; *Warren v. Davenport F. Ins. Co.*, 31 Iowa, 464, 7 Am. Rep. 160; *Phillips v. Knox Co. Mut. Ins. Co.*, 20 Ohio, 174; *Sweeny v. Franklin F. Ins. Co.*, 20 Pa. 337; *Riggs v. Com. Mut. Ins. Co.*, 125 N. Y. 7, 25 N. E. 1058, 1060, 10 L. R. A. 684, 21 Am. St. Rep. 718. Our own court has held that an agent with authority to write insurance, etc., may waive a condition in the policy. *Continental Fire Ins. Co. v. Brooks*, 131 Ala. 614, 30 South. 876, and cases cited; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 190, 16 South. 46; *Western Assurance Co. v. Stoddard*, 83 Ala. 006, 611, 7 South. 379. The case of *Cassimus Bros. v. Scottish U. Ins. Co.*, 135 Ala. 258, 270, 33 South. 163, refers only to a notice to the agent subsequent to the issuance of the policy.

There was no error in overruling the demurrer to the sixth replication. The theory upon which it is held that a stockholder may recover on a policy of insurance on the property of the corporation is that he has an equitable interest in the property. It is evident, however, that his interest is not necessarily measured by the value of the property destroyed, for the reason that the property of the corporation is liable first for the debts of the corporation, and the only interest held by the stockholder is a right to his share in the distribution of the proceeds after the payment of the debts of the corporation.

The burden is on the plaintiff, in a suit on an insurance policy, to show the value of his interest in the property destroyed, and unless he produce evidence from which the jury can ascertain the value of his interest he is not entitled to recover more than nominal damages. In this case, the only evidence of the value of his interest is that the property destroyed was worth between \$5,000 and \$6,000; that it belonged to the Union Publishing Company; that the plaintiff owned stock of the par value of \$3,500, while \$380 of stock was owned by other parties; also that the Union Publishing Company did not hold the legal title to the entire property, but said title to a portion of the property was retained by the Dodson Printers' Supply Company, from whom it had been purchased, upon which there was still due \$750; also that there was a lien on the property in favor of Mrs. E. F. Gross for \$432. Although this evidence did not furnish sufficient data from which to ascertain the exact amount of plaintiff's interest, yet it was enough to afford an inference that plaintiff had some interest, and the court properly refused the general charge requested by the defendant.

There was no reversible error in the refusal to give charge 20, requested by the defendant. This court has frequently held that the trial court is not under any duty to give a

and that there is no evidence of a certain fact.

The court erred in overruling the demurrer to the second replication. Said replication does not allege actual knowledge on the part of the defendant's agent, or notice of the alleged breach of the conditions. *Pope v. Glenn Falls Ins. Co.*, 136 Ala. 670, 674, 675, 34 South. 29, 30. According to the case just cited, "the doctrine of implied knowledge from mere notice of facts which, if diligently inquired into and prosecuted, would lead to knowledge, is without application in a case like the one before us." Hence the court erred in overruling the objections to the questions to the plaintiff as a witness, as to whether defendant's agent was a subscriber to the newspaper, and as to whether he bought supplies from the Union Supply Company.

The court erred in overruling the objection to the question to the plaintiff as a witness as to whether defendant's agent was ever in the office of the Union Publishing Company when the gasoline engine was running. Notice to the soliciting agent, after the policy has been issued, is not notice to the company. *Queen Ins. Co. v. Young*, 86 Ala. 431, 5 South. 116, 11 Am. St. Rep. 51; *Cassimus Bros. v. Scottish U. Ins. Co.*, 135 Ala. 270, 33 South. 163.

For the same reasons it was error to admit the testimony of the witness Gross as to his turning over the mortgage notes to said Rorex (defendant's agent), as cashier of the bank.

The second count was demurred to, and also the general charge was asked, in order to raise the question of the constitutionality of section 4594 of the Code of 1907. The constitutionality of that section has been sustained by this court. *Continental Ins. Co. v. Parkes*, 142 Ala. 650, 658, 659, 39 South. 204. We see no reason for departing from that decision, and the action of the court in overruling the demurrer and refusing the general charge as to the second count was without error.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

## TENNESSEE COAL, IRON & R. CO. v. KING.

(Supreme Court of Alabama. June 17, 1909.)

### 1. MASTER AND SERVANT (§ 287\*)—INJURIES TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.

Where a timberman in a mine was injured by the fall of material from the roof, and it was the duty of both the superintendent and the foreman to test the roof before directing hitches to be made in the foot wall of floor to secure

stations for the timber, and no test was made by the superintendent, and that made by the foreman was of no value, it could not be said that as a matter of law the foreman's negligence alone was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1051-1067; Dec. Dig. § 287.\*]

### 2. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ABSTRACT INSTRUCTIONS.

Where, in an action for injuries to a timberman in a mine by the fall of material from the roof, there was no evidence that he knew the rock was likely to fall, a requested charge that if, at the time plaintiff was engaged in digging a hitch in which a timber was to be set to support the rock which fell on him, he knew that the rock was likely to fall, he could not recover, was properly refused as abstract.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 289.\*]

### 3. TRIAL (§ 240\*)—ARGUMENTATIVE INSTRUCTIONS.

An instruction that the law takes into consideration the fact that an employer may conduct his business in the manner that a reasonably prudent man would conduct it, that accidents may happen as the result of which employes may sustain injuries, and does not require the employer to guarantee employes against injuries, but does require the employer to exercise due care that the employe be not injured, and defining due care, was properly refused as argumentative.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 561; Dec. Dig. § 240.\*]

### 4. MASTER AND SERVANT (§§ 206, 216\*)—INJURIES TO SERVANT—ASSUMED RISK.

Where an employe is engaged in remedying unsafe conditions in the plant or premises of his employer, he assumes the risk of injury from such dangers as inhere in the business in which he is engaged; but he does not assume risks incident to the failure of his superiors to guard against dangers which may be guarded against by the exercise of ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 550, 567-573; Dec. Dig. §§ 206, 216.\*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Martin King, by next friend, against the Tennessee Coal, Iron & Railroad Company. From a judgment in the sum of \$400, the defendant appeals. Affirmed.

The facts are sufficiently stated in the opinion. The charge referred to as the basis of the third assignment of error is as follows: "If you believe from the evidence that at the time he was hurt plaintiff was engaged in digging a hitch in which a timber was to be set which was to support the rock which fell on plaintiff, and plaintiff knew it was for that purpose, and knew that the rock which fell on him was likely to fall, you must find for the defendant." The fourth assignment of error is based on the following charge: "The law takes into consideration the fact that, although an employer may conduct his business in the manner that a reasonably prudent man may conduct it, accidents may happen in the conduct of his business, as the result of which his em-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ployés may sustain injuries. It does not require of the employer to guarantee to the employé that in no event will he sustain personal injuries while in the performance of the work. It does require that the employer take due care that the employé be not injured. Due care is not absolute care. It is simply that degree of care which a reasonably prudent man exercises in the conduct of his business." The fifth assignment of error is based on the following charge: "Where an employé is engaged in making safe an unsafe condition in the plant or premises of his employer, and is injured while in the act of making safe such condition, and knows of such unsafe condition, he cannot recover damages of his employer for injuries, sustained by him, caused by the defect he is engaged in remedying."

Percy, Benners & Burr, for appellant.  
Denson & Denson, for appellee.

SAYRE, J. Plaintiff in the court below was a member of the timber gang in appellant's ore mine, and, while engaged in the performance of his duties, was injured by a fall of rock. In the usual course of operating the mine, as its entries or headings were extended by the excavation of ore, timbers were set to shore up and support the roof. These timbers were put at approximately regular intervals of 10 to 12 feet. It was the business of the crew or gang of which the plaintiff was a member to set these timbers. Plaintiff was engaged in cutting a hitch. A hitch is a hole in the foot wall or floor of a mine to secure the station of a timber. The place where the hitch was being cut was just the place where a timber would be set in the ordinary operation of the mine. Eddins was bank boss, or mine foreman, and looked after the mine generally. His duties took him to all parts of the mine, which was composed of 15 or more headings. He directed when and where timbers should be set. Pope was foreman of the timber gang, set timbers as he was instructed by Eddins, and had authority to give orders to the plaintiff in the performance of his work. There was testimony to the effect that it was the duty of Eddins, whenever rock needed propping, before ordering the timber gang to prop the rock, to see whether it was safe to cut the hitch in which the timber was to be placed to support the rock. There was also evidence to the effect that it was Pope's duty to inspect the rock before proceeding to place the timber, to learn whether it could be safely timbered. We understand this evidence as to the duty of the superintendent of the mine and the foreman of the timber gang to mean that they were required by the rule of due care obtaining in the customary operation of similar and well-ordered mines to perform the functions which it ascribes to them. In the state of our knowledge on the subject of practical mining—not much aided by the evidence in the rec-

ord—the facts detailed lead us to infer: the purpose of the superintendent's inspection and test was that he might give direction whether loose rock was to be brought down before effort made to prop the roof; and in view of the discharge of blasts of powder or dynamite, repeated from time to time, we cannot characterize that as an excessive or unreasonable caution which requires the foreman of the timber gang to repeat the test when he comes afterwards to do the work. The method of the tests referred to was to sound the rock with a staff. Loose rock sounds drummy when tapped.

The seventh count charges that plaintiff's injury was caused by the negligence of Eddins in the exercise of his superintendence, in that he negligently caused the timber crew to engage in timbering up the rock without first causing the loose rock to be removed. Eddins gave the order that the timber be placed. He did not test the rock, but saw no indications that it was so loose as to require it to be brought down before the timber was placed. Appellant's argument that it should have had the general affirmative charge as to this count is based upon the undisputed fact that the foreman of the timber gang did test the rock. It proceeds: If the superintendent had tested it, and his test had shown a defective or dangerous condition, it would have been his duty to direct the foreman of the timber gang to have the defect remedied, just as he did direct him; and, it being the duty of the foreman also to make a test, the conclusion is that, on the proof, the negligence of the superintendent became immaterial. Plaintiff's injury must be laid to the negligence of the foreman as its proximate cause. It may be conceded that if the foreman of the timber gang had made such test as due care required when he came to set the timber, without discovering the dangerous condition of the rock, the failure on the part of the superintendent would be immaterial. In that event plaintiff's injury must be laid to inevitable accident. It was an occurrence which could not be foreseen or provided against by the exercise of due care. It was one of the risks of his employment, which he assumed, and for which the employer cannot be held liable. But the evidence in relation to the test made by the foreman was such as left it well open to the jury to find that the foreman's test was applied under circumstances which rendered it of no value—was, in effect, no test—in which case the jury was authorized to ascribe the plaintiff's injury to the successive co-operating negligence of superintendent and foreman, since due care on the part of either would have prevented his being set to work under the loose rock, instead of having it brought down before the hitch was cut and the prop placed in position, and to base its verdict upon the negligence of either. In other words, a case is presented in which there is evidence that due care re-



quired successive tests by two persons, but a test in fact by neither. The contention is that the injury resulting from failure of any test must be attributed as matter of law to the negligence of the last only. But we are of the opinion that as against the defendant, whose duty is was to have both tests made, the injury may be attributed as well to the one as the other, and that there was no error in refusing the general charge as to either the seventh or eighth counts.

There was no error in the refusal to give the charge which is made the subject of the third assignment of error. There is no evidence in the record that plaintiff knew the rock was likely to fall. The charge was abstract.

The charge made the subject of the fourth assignment of error was properly refused. It was argumentative, and tended to distract the attention of the jury from the proper issue; i. e., whether defendant's superintendent or foreman had been negligent.

Where an employé is engaged in making safe an unsafe condition in the plant or premises of his employer, he assumes the risk of injury from such dangers as inhere in the business in which he is engaged; but when superiors are under duty to guard the employé against dangers which may be guarded against in the exercise of due care, he may rely upon the performance of such duty by his superiors, and does not assume the risk of injuries which may be prevented by their exercise of due care. He does not assume the risks growing out of their negligence. The fifth assignment of error is without merit.

There is no error in the record, and the judgment of the court below is affirmed.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

## PHILLIPS v. BIRMINGHAM INDUSTRIAL CO.

(Supreme Court of Alabama. June 17, 1909.)

### 1. PRINCIPAL AND AGENT (§ 78\*)—ACCOUNTING—JURISDICTION OF EQUITY.

The bare relation of principal and agent does not give equity jurisdiction of a bill by the former against the latter for an accounting; but where the relation partakes of a fiduciary character, and the matters of which an accounting is sought are peculiarly within the knowledge of the agent, a bill for an accounting lies.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 162-166½; Dec. Dig. § 78.\*]

### 2. ACCOUNT (§ 17\*)—JURISDICTION OF EQUITY—PLEADING.

A bill alleging that complainant purchased of defendant land in his possession through croppers engaged in cultivating crops, that the parties subsequently agreed that defendant should make settlements with his croppers and should look after the gathering of the crop by wage hands and turn over the proceeds, that defendant disregarded the trust assumed and re-

fused to render an accounting thereof, the details of which rested within his knowledge, and praying for an accounting, states a cause of action within the jurisdiction of equity.

[Ed. Note.—For other cases, see Account, Dec. Dig. § 17.\*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by the Birmingham Industrial Company against Lovick W. Phillips for an accounting. From a decree overruling demurrers to the bill, defendant appeals. Affirmed.

The facts made by the bill are (1) that the complainant, a corporation, purchased of respondent 850 acres of land in Russell county, Ala., and received a deed of conveyance to the same; (2) that at the time of said purchase the said Phillips was in the possession of said land through and by his share croppers, who were engaged in the cultivation of miscellaneous crops, principally cotton, and that at that time the cultivation of the crops had attained to that stage at which little else was left to be done than to properly supervise the needed attention thereto and the gathering thereof; that the said respondent had a full corps of share croppers or supervisors or superintendents, and represented to complainant that, if it became known that the title to the lands had passed out of respondent, it would result in a demoralization of the share croppers and other employés of the said Phillips, and that it would be good policy to keep the transaction secret so far as these employés were concerned, and permit the maturing and gathering of the crop under the ostensible ownership of the respondent, as the relations between him and his employés were cordial, and they would take greater interest in their duties if allowed to remain under the impression that their relation with their old employer continued without interruption; and, realizing the sound argument of said respondent in this behalf, complainant entered into an agreement set forth in the copy of an agreement in writing entered into between them, hereto attached and marked "Exhibit B," with reference thereto; (3) that the crops which were being grown and cultivated on the lands described (Exhibit A) were being cultivated under contract of hire by what are known as share croppers, under the terms of the contract with them; the said Phillips furnishing the lands, the teams, feed for the teams, and farming implements, and said owner of the land to have one-half of the crop gathered, chargeable only with one-half of the guano used (here follows the names of the share croppers); and that as to all of these share croppers the said respondent was to make his own settlement with them as to what they owed him for advances made by him out of their own share of the crop, the remaining half of the crop being the property

of complainant, chargeable only with one-half of the guano used in making the crop, and said respondent was to look after the cultivation and gathering of the crop grown by the wage hands and turn over the proceeds of the crop so grown, chargeable with the wages payable to said wage hands, and in addition with the feed of said wage hands and the feed of the teams used by them only, no charge whatsoever to be made on account of the use of teams or for utensils, or for implements or machinery used in the cultivation of said crop; that as part of the agreement the said Phillips was to set apart and reserve, of the old cotton seed, sufficient to plant a ten-mule farm; and orator shows that not only has respondent neglected his duty in this particular behalf, but orator charges that at the special instance of respondent all of the old cotton seed has been removed from said premises, and that he has done all in his power to thwart the efforts of complainant to put the said land in condition of cultivation during the current year; that he has instigated the former employes of respondent to assert claims to the premises not warranted by any contract made between complainant and them, and that he has taken an active part in preventing the assertion of the legal rights of complainant in the courts of the state whenever complainant attempted to assert those rights in the court; that complainant brought an action for the recovery of the old cotton seed, and that said respondent busied himself in person in the courts to obstruct the progress of the cause and nullify the efforts of the complainant to assert its legal rights; that he has intermeddled personally with every effort made by complainant to assert its legal rights and to exercise acts of ownership over said premises, either in the matter of the employment of labor, or in perfecting contracts, or in trying to dispose of said land, having in every manner most flagrantly disregarded and defied the obligation of the trust assumed by him under said agreement, and has failed and refused to render an account of his stewardship, the details of which rest entirely within the knowledge of respondent, who can be made to give an account of the same only through this honorable court of equity. Then follows the prayer for an accounting, and a delivery of all the vouchers, receipts, and other documents belonging to complainant, together with a full, true, and particular account of all the money which has or ought to have been received by him, or any other person on his order or at his conniving, from any rents, incomes, or property arising from said land, and for such other, further, and general relief. The agreement is substantially as set out in the bill. A plea was interposed to the bill, setting up that the cause of action and every part of it arose in Russell and not in Jefferson county, and that respondent lived at all times in Russell. The

demurrers in various ways take the point that the bill is without equity, because the complainant has an adequate remedy at law, want of mutuality in account, want of entanglement or complication in the account, and because the answers of defendant to the allegations of the bill are not shown to be essential to complainant to ascertain the true state of the account between complainant and respondent.

W. T. Stewart and W. K. Terry, for appellant. A. Latady, for appellee

SAYRE, J. The equity of the bill is to be found in its merits as a bill for an accounting. The bare relation of principal and agent will not give jurisdiction to courts of equity to entertain a bill by the former against the latter; but where the relation partakes of a fiduciary character, and the matters of which an accounting is sought are peculiarly within the knowledge of the agent, a bill for an accounting will be entertained. In *Halsted v. Rabb*, 8 Port. 63, the defendant had been employed as clerk or agent to take charge of a mercantile establishment of complainant, who at sundry times furnished invoices of goods. The defendant had not fully accounted. On bill filed, Goldthwaite, J., said: "It would be difficult to conceive of a matter of account cognizable in equity, if the facts stated in the bill will not authorize the interference of a court of chancery and support its jurisdiction." In the case of *Hall v. McKellar* (Ala.) 46 South. 460, it was shown in the bill that the defendant, being an agent of the complainant's mother, had managed her estate, consisting of plantations, for several years, and at the time of her death had taken possession of a large portion of her personal property, and that complainant had no means of ascertaining how the account of the agency stood. Complainant had made frequent demands for a statement of the account and delivery up of the property. These facts were held to show a fiduciary relation, and it was said: "The accounting by the agent is sufficient to give the court jurisdiction." That bill sought discovery also; but the equity of the bill was unequivocally planted upon the fiduciary character of the relation between the complainant and defendant. And in *Enslen v. Allen* (at this term) 49 South. 430, it was held that an agency to manage an estate created a fiduciary relation between principal and agent.

In *Makepeace v. Rogers*, 11 Jur. (N. S.) 215, the plaintiff had employed the defendant to manage his landed estates. The Vice Chancellor, overruling a demurrer, said: "So far as I understand the law, I am unwilling that there should be the slightest doubt cast upon it. The bill is one by a landowner against a person whom he says he has employed as agent and manager of his estates, and who, he also says, has received moneys in the course of his acting while in that employment, and has not rendered proper accounts.

I conceive that, wherever the relation between the person who seeks an account and the person against whom he seeks it partakes of a fiduciary character, a trust is reposed by the plaintiff in the defendant, and that the trust is not the same as is represented to exist in the ordinary employment of an agent, such as a builder or other tradesman. The fiduciary character of the employment imposes upon the person employed the duty of keeping accounts and of preserving vouchers; and according to the old law, which I trust will continue to be the law of this court, a bill for an account may be filed and sustained." Our appeal that decree was affirmed, it being noted that doubtless, if there had been an account stated between the parties, or if the bill had made no case of general agency, alleging only an isolated agency transaction, such, we note, as was the case in *Knotts v. Tarver*, 8 Ala. 743, and *Crothers v. Lee*, 29 Ala. 337, it would have been necessary to show special circumstances to induce the court of chancery to grant relief. 4 De G., J. & S. 649. In *Foley v. Hill*, 2 H. L. C. 28, a bill was filed against a banker, and Lord Cottenham, after pointing out the trust relation between principal and factor, used this language: "So it is with regard to an agent dealing with any property. He obtains no interest himself in the subject-matter beyond his remuneration. He is dealing throughout for another; and, though he is not a trustee according to the strict technical meaning of the word, he is quasi a trustee for that particular transaction for which he is engaged, and therefore in these cases the courts of equity have assumed jurisdiction." The relation between banker and customer was, however, distinguished, and held not to be fiduciary in its nature.

Mr. Pomeroy, in his work on Equity Jurisprudence, states as among the instances in which the legal remedies are held to be inadequate, and therefore a suit in equity for an accounting proper, those cases where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account. 4 Eq. Jur. § 1421. And in the note, after stating that the mere relation of principal and agent, without more—the relation not being really fiduciary in its nature, and no obstacle intervening to a recovery at law—is insufficient to enable a principal to maintain the action against his agent, he adds: "But where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction"—and to this he cites a number of authorities, among them some of those

which we have noticed. To the same effect are *Thornton v. Thornton*, 31 Grat. (Va.) 212; *Taylor v. Tompkins*, 2 Helsk. (Tenn.) 89.

*Dargin v. Hewlitt*, 115 Ala. 510, 22 South. 128, and *Hulsey v. Walker County*, 147 Ala. 501, 40 South. 311, relied on by the appellant, are to be distinguished from the case in hand. In both the reliance seems to have been on the complication of accounts and the necessity for a discovery. In both it was denied that there was difficulty in the accounting sought such as would confer jurisdiction. In the first-named case there was no intimation that a fiduciary relation existed between complainant and defendant; in the latter that inquiry was expressly pretermitted, though it seems also to have been held that the party whom the bill sought to hold to an accounting belonged to a class of public officers of whom it was said in *State v. Bradshaw*, 60 Ala. 239, that they hold public trusts, but their official trusts are not of the class which we are accustomed to characterize as private or personal trusts.

The question then is whether the bill in this case shows a fiduciary relation between complainant and defendant. Appellant (defendant), being the owner of a large tract of land in Russell county, which he was engaged in cultivating with a full corps of share croppers and wages hands, on June 12, 1907, sold and conveyed the same to the appellee. On June 15th, thereafter, the parties entered into an agreement concerning the completion of the work of making and gathering the crop for the then current year, which will be found in the statement of the facts to be made by the reporter. The bill alleges that the defendant, in flagrant disregard of the obligations of the trust assumed by him, had procured the removal from the premises of all of the old cotton seed, that he had done all in his power to thwart the efforts of complainant to put the land in cultivation during the year current at the time of the filing of the bill (June 20, 1908), and had failed and refused to render an account of his stewardship, the details of which rest entirely within the knowledge of the defendant. An accounting, and other relief, is prayed for, and a decree that defendant pay to complainant what should be found due, and the delivery up of vouchers, receipts, and other documents belonging to the complainant. On consideration of the facts averred, in connection with the principles of law announced, we hold that the decree of the chancery court, overruling the demurrer to the bill, was a proper decree.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

**RUDOLPH v. CITY OF ELYTON.**

(Supreme Court of Alabama. June 17, 1909.)

**1. MUNICIPAL CORPORATIONS (§ 697\*)—USE OF STREETS—OBSTRUCTIONS—REMEDIES.**

At the suit of a city a court of equity will abate an obstruction in a street as a public nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1502; Dec. Dig. § 697.\*]

**2. MUNICIPAL CORPORATIONS (§ 697\*)—USE OF STREETS—ABATEMENT—SUFFICIENCY OF COMPLAINT—CORPORATE CAPACITY OF PLAINTIFF.**

In a suit by a city to abate an obstruction in a public highway, an allegation that plaintiff was a municipal corporation located in a certain county was sufficient, without alleging how or when such corporation was created.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 697.\*]

**3. CORPORATIONS (§ 29\*)—EXISTENCE.**

The existence of a corporation must generally be tested by a direct proceeding for that purpose, as to vacate its charter, oust its officers, etc.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77-79, 2504; Dec. Dig. § 29.\*]

**4. MUNICIPAL CORPORATIONS (§ 697\*)—USE OF STREETS—OBSTRUCTIONS—ACTIONS TO ABATE—SUFFICIENCY OF BILL—ESTABLISHMENT OF STREET—PRESCRIPTION.**

In a suit by a city to abate as a public nuisance obstructions in a highway, a general allegation that the road named had been continuously used as a public highway for more than 20 years was sufficient, in absence of a demurrer thereto for not alleging that it was used adversely.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 697.\*]

**5. PLEADING (§ 406\*)—OBJECTIONS TO PLEADING—FAILURE TO DEMUR.**

Whether an allegation in the bill was objectionable as a conclusion will not be decided on appeal, where the point was not raised by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1360; Dec. Dig. § 406.\*]

**6. DEDICATION (§ 19\*)—ACTS CONSTITUTING—DESIGNATION IN MAPS AND PLATS.**

Where the owner of land adjoining a road within the city limits caused it to be platted, mapped, and laid out in city lots, and sold the lots with reference to the plats, and a subsequent owner had it resurveyed and replatted, and filed the map in the probate office showing the road as a public highway, the road was dedicated to public use, so that one buying lots with reference to such plat cannot question the public character of the highway.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.\*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by the City of Elyton against Z. T. Rudolph. From a decree overruling a demurrer to the complaint, defendant appeals. Affirmed.

Ward & Rudolph, for appellant. Felix D. Blackburn, for appellee.

MCOLELLAN, J. Appeal from decree overruling demurrer. Bill by a municipal corporation to abate a public nuisance created,

it is alleged, by the presence of buildings and fences of respondent (appellant) in a public highway within the limits of such municipality. That the powers of a court of equity may be invoked to such purpose is settled in this state. Jackson v. Snodgrass, 140 Ala. 365, 37 South. 246, and authorities there cited; Demopolis v. Webb, 87 Ala. 639, 6 South. 408; Webb v. Demopolis, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62.

The averments of the bill, in an effort to show a public right in the "Georgia Road," proceed along two lines, viz.: First, continuous use thereof as a public highway by the public for more than 20 years; and, second, the platting by the owner of the territory attinent to the described road, and the sale of lots with reference to that map or platting, whereon said "Georgia Road" was shown, the respondent being one of the purchasers under such circumstances. It is flatly averred in the amended bill that the obstructions mentioned, maintained by respondent, are located within the limits of the "Georgia Road." It is also unequivocally alleged that the "Georgia Road" is and has been for upwards of 20 years a public highway.

Much of appellant's argument is addressed to the proposition that the city of Elyton shows no proper right to invoke this phase of equity's jurisdiction. The bill contained the averment that the "city of Elyton is a municipal corporation, located \* \* \* in Jefferson county, Alabama." Where, how, or when such incorporation was created or established was not required to be specifically averred. We are aware of no rule of pleading requiring such particularity, nor decision of this court so affirming. Generally the existence vel non of a corporation must be tested by direct proceeding to vacate the charter, oust its officers, or proceedings in that nature. Ex parte Moore, 62 Ala. 471, 476. These considerations dispose of several grounds of the demurrer.

The bill is silent in averment that the "Georgia Road" was adversely used by the public for the period indicated. There is, however, no ground of demurrer pointing out this particular defect. The general averment that the "Georgia Road" had been, for more than 20 years, continuously used as a public highway, was sufficient to give the bill equity. Jones v. Bright, 140 Ala. 268, 37 South. 79.

Those grounds of the demurrer taking the point that the buildings and fences were not shown to have been on any part of the "Georgia Road" were expressly met by the averments of the amendment to the bill. There is no ground of demurrer objecting that the stated averment was a conclusion, even if such an objection were tenable—a question not raised, and hence not decided.

According to the averments of the bill the

"Georgia Road" was a "public highway" before the year 1885. In that year, it appears from the bill, the owner of the land touching the "Georgia Road" within the limits of this municipality caused it to be platted and mapped and laid it off in city or town lots; and such owner sold lots with reference to that platting. It further appears from the bill that Miss Margaret Walker, in 1891, then owner of lands described in the bill, caused it to be resurveyed and replatted, and filed the acknowledged map in the probate office of Jefferson county; that on such map the "Georgia Road" was shown as a public highway; and that respondent bought his lots with reference to such platting. *Harn v. Dadeville*, 100 Ala. 199, 14 South. 9. The effect of this action by the owner was a dedication of the Georgia Road to public use, even if it was not previously a public highway; and the respondent cannot, if the averments indicated are sustained, question the public character of such highway. *Roberts v. Mathews*, 137 Ala. 523, 34 South. 624, 97 Am. St. Rep. 56, and authorities therein cited.

If the averments of the bill, in either phase, are sustained, the sole question must be one of fact, viz., whether the space occupied by the buildings and inclosed by the fences is a part of the "Georgia Road." If so, the right of the complainant to the relief prayed cannot be doubted.

There was no error in overruling the demurrers to the amended bill, and the decree appealed from is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

## ST. LOUIS & S. F. R. CO. v. CASH GRAIN CO.

(Supreme Court of Alabama. June 10, 1909.)

### 1. CARRIERS (§ 103\*)—CARRIAGE OF FREIGHT—ACTIONS—DEFENSES.

A plea, in an action against a carrier for failure to deliver freight within a reasonable time, which does not show that the cars referred to therein contained the freight, or that the shipper was responsible for the matters set up, and which does not show that the matters alleged might not have had reference to a different shipment, is bad.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 437; Dec. Dig. § 103.\*]

### 2. CARRIERS (§ 62\*)—CARRIAGE OF FREIGHT—CLASSIFICATION—EFFECT.

A carrier, classifying goods received for shipment with knowledge of their character, and collecting the freight for the shipment and delivery of the goods under such classification, cannot avoid the contract, or its liability for failure to ship according to the contract, on the ground that the goods did not belong to the class named.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 210; Dec. Dig. § 62.\*]

### 3. EVIDENCE (§ 113\*)—VALUE OF PROPERTY.

In an action against a carrier for injury to or destruction of goods received for carriage to J., evidence of the value of the goods at B., to determine their value at J., is admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 259; Dec. Dig. § 113.\*]

### 4. EVIDENCE (§ 472\*)—OPINION EVIDENCE—DAMAGES.

The rule that a witness cannot testify as to his opinion of the amount of damages from a breach of contract or a wrong, but that the witness must testify to the facts and permit the jury to draw the conclusions, is subject to the exception that a shipper, suing for injury to goods delivered to a carrier for shipment, may give his opinion as to the amount of the damages.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2186–2195; Dec. Dig. § 472.\*]

### 5. EVIDENCE (§ 474\*)—OPINION EVIDENCE—ADMISSIBILITY.

Where a shipper, suing for injury to goods delivered to a carrier for transportation, showed in his testimony that he knew the value of the goods before and after the injury, and that he referred to the difference when speaking of the amount of his damages, his testimony was competent on the measure of damages.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2219; Dec. Dig. § 474.\*]

### 6. EVIDENCE (§ 213\*)—ADMISSIONS—ADMISSIBILITY.

That a shipper, suing a carrier for injury to or destruction of goods received for transportation, had presented a claim direct to the carrier in settlement of the controversy, with a view of reaching an amicable adjustment of the dispute, could not be shown as an admission of the extent of the loss.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 745; Dec. Dig. § 213.\*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by the Cash Grain Company against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bankhead & Bankhead, for appellant. Acuff & Cooner, Ernest Lacy, and Leith & Gunn, for appellee.

MAYFIELD, J. The appellee sued the appellant, a common carrier, to recover damages as for conveying and delivery of certain goods described in the complaint. One count claimed damages for failure to deliver, one for failure to deliver in good condition, and one for failure to deliver within a reasonable time.

Plea 2 was palpably bad, and was clearly no answer to the third count of the complaint, to which it was addressed. It did not allege or show that the two cars referred to in the plea contained the goods in question, or that the plaintiff was bound by or responsible for the matters set up in the plea. So far as the plea shows, it may have had reference to an entirely different shipment of goods, and to a different contract from the one made the basis of the complaint.

There was ample evidence to support a verdict for plaintiff under either count of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the complaint. There was certainly no material variance between the proof and all the counts; hence those charges, which were the general affirmative charges, were properly refused.

The bill of lading contained no provisions sufficient to prevent a recovery under the pleadings and proof in this case. The character and the quality of the goods shipped were known, or could and should have been known to the defendant. It knew that they were not all "canned goods" when they were shipped, but by an agreement it engaged to class the whole lot as such, and thus classified and knowingly billed them out, and collected freight for shipment and delivery as such; hence it should not now be allowed to avoid the contract because of the classification which it made itself, nor to avoid liability for its failure to ship and deliver according to its contract. If any one was at fault in the matter, it was the defendant. A party should not profit by his own fault or wrong.

This court does not know that there is such a difference between the value of the goods in question at Birmingham and that at Jasper as to render evidence of their value at either place inadmissible in determining their value at the other. As was said by this court in the case of *Ward v. Reynolds*, 32 Ala. 390: "It is possible that two places may be so remote and the markets so diverse that the value at one place would afford no aid to the mind in determining the value at the other. But such does not appear to have been the case here." There is no evidence that tends to show that defendant was injured, or could have been injured, by evidence as to the value of the goods at any place other than that of the destination. As to some of the goods, it might have been necessary to show their value at Birmingham, as a means of proving their value at Jasper. So there is nothing in the objections as to the venue of the proof of value.

As a rule, a witness or a party is not allowed to testify as to his opinion of the amount of damages suffered in consequence of a breach of contract, or of a wrong the basis of the action for damages. Witnesses in this matter, as in most others, can only testify to the facts, and must leave it to the jury to draw the conclusions from the facts. This is peculiarly the province of the jury, and not that of the witnesses. *Montgomery, etc., Co. v. Varner*, 19 Ala. 185; *Young v. Cureton*, 87 Ala. 723, 6 South. 352; *Alabama, etc., Co. v. Burkett*, 42 Ala. 83. But this rule has limitations or exceptions. It does not exclude all evidence as to the amount of damages in all cases. The case at bar is clearly not within the rule above announced, and, if it were, the evidence complained of was obviously rendered harmless by the subsequent answers of the witness, and consequently it affirmatively appears that no injury resulted. While some of the questions propounded to

the plaintiff, as to the damages suffered, were improper and subject to the objections assigned, and some of the answers thereto (or, at least, parts thereof) may have been subject to defendant's objections thereto, yet all of the questions and all of the answers, as to this matter of damages, taken together, show that no possible injury resulted from the improper question, or from the answer, or a part thereof.

It is conceded by appellant that the proper measure of damages was the difference between the value of the goods as injured or destroyed, and their value if delivered in good order; and it clearly appears from the witness' answer that it was this difference of value, and it alone, to which he referred when he spoke of the damages. He says so in plain and unmistakable language. He was shown to know their value before and that after the injury, and that the difference was what he referred to when he spoke of it as the amount of his damages. So the result was the same as if he had testified first to the value of the goods in the injured condition, and then as to their value in good condition, or the condition in which the defendant received them. It has, however, been held by this court that a witness might give his opinion as to the amount of damages or injury to a mule or to a slave, when the only damage referred to was the difference between the value of the slave or mule before and that after the injury; and thus such evidence was not within the rule first announced in *Varner's Case*, 19 Ala. 185, and subsequently followed. In fact, *Varner's Case* is expressly referred to and distinguished therefrom. *Johnston's Case*, 37 Ala. 459, 460; *Ward v. Reynolds*, supra.

The court properly declined to allow defendant to prove that plaintiff presented a claim for \$150, in settlement of this matter, direct to the railroad company, and that he agreed to settle it for this sum. This is clearly shown to have been in the nature of admissions in view only of an amicable adjustment of the matter in dispute. It is not shown that it was professed to represent the amount of plaintiff's actual damages, or that it was his estimate or opinion thereof. Such evidence should never be admitted; otherwise, it would be dangerous for parties to treat with each other, looking towards compromising or adjusting their differences. The proposition of one might be used against him, by the other, on the final trial. *Collier v. Coggins*, 103 Ala. 287, 15 South. 578; 1 Greenl. on Ev. 192.

There is no reversible error in the record, and the judgment of the court below is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

**O'BYRNE v. HENLEY et al.**

(Supreme Court of Alabama. May 20, 1909.  
Rehearing Denied June 30, 1909.)

**1. LANDLORD AND TENANT (§ 192\*)—LIABILITY FOR RENT—DESTRUCTION OF PREMISES.**

The common-law rule that the destruction of the leased premises by fire, inevitable accident, violence of nature, or the public enemy does not relieve the tenant from an express covenant to pay rent, in the absence of a stipulation to the contrary, or unless the lessor has covenanted to rebuild, is subject to the exception that a complete destruction of the premises releases the liability of the tenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 777; Dec. Dig. § 192.\*]

**2. LANDLORD AND TENANT (§ 192\*)—LIABILITY FOR RENT—DESTRUCTION OF PREMISES.**

An eviction of the tenant by the landlord or any interference which deprives the tenant of the enjoyment of the premises to the extent of the lease authorizes him to abandon the premises and exonerates him from further liability, but an act of a third person which impairs the usefulness of the premises, not amounting to an eviction by the landlord or paramount title or to a breach of the covenants or the repair or removal of the premises by public authority, will not exonerate the tenant from the payment of rent, in the absence of a contract to that effect.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 777; Dec. Dig. § 192.\*]

**3. LANDLORD AND TENANT (§ 199½\*)—LIABILITY FOR RENT—DESTRUCTION OF BUSINESS.**

The destruction of the business which by the lease was to be carried on in the leased premises is as to the liability of the tenant for rent analogous to a destruction of the premises; and, where the business or trade is totally destroyed, the liability to pay rent ceases.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 199½.\*]

**4. LANDLORD AND TENANT (§ 199½\*)—LIABILITY FOR RENT—"SALOON."**

A lease of premises for saloon purposes, made when it was lawful to sell intoxicants, and used by the lessee as a saloon for the sale of intoxicants, soft drinks, cigars, etc., until the prohibition law went into effect, is not terminated by the prohibition law so as to release the lessee from liability for future rent, for the business is not totally destroyed; the word "saloon" as used in the lease including the sale of intoxicants, but not excluding the sale of other things. [Quoting *Words & Phrases*, vol. 7, pp. 6310-6311.]

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 199½.\*]

**5. CONTRACTS (§ 136\*)—EXECUTORY CONTRACTS—ENFORCEMENT.**

An executory contract, unlawful when made, or contracting for the doing of an unlawful act, is not enforceable by either party.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 681; Dec. Dig. § 136.\*]

Appeal from City Court of Birmingham;  
C. C. Nesmith, Judge.

Action by John C. Henley and others against T. W. O'Byrne for the rent of a building for saloon purposes accruing after the going into effect of the prohibition law. From a judgment for plaintiffs, defendant appeals. Affirmed.

Powell & Blackburn, for appellant. R. B. Smyer, for appellees.

**MAYFIELD, J.** There is but one material question raised by this appeal, which is this: Did the prohibition law in this state *ex proprio vigore* terminate leases of premises which were let only for saloon purposes? If it did, the judgment for plaintiff below is erroneous and must be reversed. If it did not, the judgment was correct and must be affirmed.

The rule of the common law was that the destruction of the leased premises during the term by fire, inevitable accident, the violence of nature, the act of a public enemy, did not relieve the tenant from an express covenant to pay rent, unless it was stipulated in the lease that there should be a cessation of the rent in such case, or unless the lessor had covenanted to rebuild in such case. *Chamberlain v. Godfrey's Adm'r*, 50 Ala. 530; *Cook v. Anderson*, 85 Ala. 99, 4 South. 713; *Taylor on Landlord & Tenant*, § 377; 8 Kent, 603. A limitation or exception to this rule is that, if the destruction of the lease or premises is complete—nothing remaining, the subject-matter or thing leased no longer existing—then the liability of the tenant for rent ceases. This because rent is a profit issuing out of the lands or tenements as compensation for the use or occupation. Hence, if the principal is gone, the interest or incident cannot continue to exist. To illustrate: If a farm is leased, and the buildings are during the term destroyed by fire, the tenant is still liable for rent; but if a room only of that house had been rented, or one story only, and the house was destroyed completely, the tenant would not thereafter be liable for rent. If the room or story rented was only partially destroyed or injured, however, the rule would be different. *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Chamberlain v. Godfrey's Adm'r*, 50 Ala. 530. An eviction of the tenant by the landlord, or any interference by the latter which deprives the former of the right of enjoyment of the premises to the full extent of the lease, will authorize the tenant to abandon the premises, and will exonerate him from further liability for rent. *Crommelin v. Theiss*, 31 Ala. 412, 70 Am. Dec. 499; *Chamberlain v. Godfrey's Adm'r*, supra. But the act of a third person which impairs the usefulness of the premises, but which does not amount to an eviction by the landlord or paramount title, or to a breach of his covenants, or where the premises are repaired or removed by public authority, there is no eviction by the landlord which will exonerate the tenant from the payment of rent, in the absence of a contract to that effect. 24 Cyc. pp. 1132, 1133.

Some of the courts of the United States have held that there is no limitation or ex-

ception to the rule that the tenant remains liable for rent notwithstanding there is an entire destruction of the premises and of the lease, even where only a room, a story, or a certain apartment is let, which carries no interest in the land itself. *Helburn v. Moford*, 7 Bush (Ky.) 169. Some of the Western states, however, have adopted an intermediate rule of prorating or apportioning the loss between the vendor and the vendee by abating a part of the contract price. In the case of *Wattles v. South Omaha Co.*, 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am. St. Rep. 554, the majority of the court hold that where a substantial part of the leased premises is destroyed pending the lease, without fault on the part of the lessee, he is entitled to an apportionment of the rent contract to be paid which accrues thereafter, in the absence of an express assumption by him of the risk, and that the common-law rule that the tenant in such case was liable for the contract price after partial destruction of the premises did not prevail in that state. The majority opinion in the above case held that the common-law rule of making the tenant bear the entire loss was a harsh and technical one; that since it was first announced the conditions of the race had changed, that its conscience and intellect had quickened, and, however meritorious the rule originally, that it was now opposed by the genius and spirit of this age, and in conflict with its judgment and conscience. The rule of thus apportioning the loss was first announced by Justice Brewer in the case of *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277, and the Nebraska court approved the rule announced by Justice Brewer, "because it was a magnificent protest against slavish devotion to antiquated rules, and because it breathed the spirit of humanity and equity, and was based on a thought of the nineteenth century." In a dissenting opinion in this Nebraska Case, *supra*, written by Justice Irvine and concurred in by Chief Justice Post and Justice Ryan, the above proposition announced by the majority opinion is answered thus: "It is not for courts to abrogate or reform contracts because of apparent inequity or injustice in the provisions. If the nineteenth century has advanced so far as to require the disregard of established principles merely because they are antiquated, this modern enlightenment must certainly have extended so far as to justify a presumption that the parties to a contract have sufficient intelligence to anticipate probable disaster and provide therefor if they desire. \* \* \* Rules settled by a long and uniform course of judicial decision should not be lightly disregarded." Mr. Freeman, the great annotator and text-writer, commenting on this rule of apportioning the loss, says the rule is asserted "with much charity and some logic."

If we were disposed to follow the Western rule of apportioning the loss (which we do

not decide or consider), we could not do so in this case, because there was no attempt so to do in the lower court, and there is absolutely no pleading or evidence on which to base such a judgment. Where the question or rule is regulated by statute—which is the case in some states—or where it is provided for in the lease, then, of course, the statute or contract will control. In this state we have no statute regulating this subject, and the contract of lease does not attempt to provide against a law prohibiting the sale of intoxicants. The contract or lease in question leases the premises to appellee for two years from October 1, 1907, "for occupation by him as a saloon and not otherwise." It would seem that a destruction of the business or trade which, by the contract, was to be carried on in the premises, should be analogous to a destruction of the premises themselves. While, of course, they may not be and are not strictly analogous in all respects, yet we think that they are so in so far as is necessary to a decision of the questions involved on this appeal.

It is therefore necessary for us to inquire: Was the business for which the premises were leased wholly or partially destroyed? This will depend upon the construction given to the word "saloon," as used in the lease. Webster defines "saloon," as follows: "(1) A spacious and elegant apartment for the reception of company or for works of art; a hall of reception, especially a hall for public entertainments or amusements; a large public room or parlor; as the saloon of a steamboat. (2) Popularly, a public room for specific uses; especially, a barroom or grogshop; as a drinking saloon; an eating saloon; a dancing saloon." Mr. March defines it as "an apartment or hall devoted to some specific use; a place where liquor is retailed." The word as used in the lease in question has, we think, acquired a more particular and restricted meaning than it had when Mr. Webster defined it. It is now often used as synonymous with "barroom," "grogshop," or "dramshop." We think it was used in this contract to include the sale of intoxicants, liquors, but not to exclude the sale of everything except intoxicating liquors. The word appears to have been construed differently, where used in municipal ordinances, and charters, acts of the Legislature, etc., from the interpretation accorded it where used in contracts, leases, etc. 7 Words & Phrases. It has been held by the Supreme Courts of Illinois and Michigan that it may or may not mean a place for the sale of intoxicating liquors; and hence where premises were by the terms of the lease to be occupied as a saloon, and for no other purpose whatever, the word "saloon" in such lease will not be understood as matter of law to mean a place where intoxicating liquors only were to be sold, and not a place for the sale of soda water, etc. *Brewer Cq. v. Boddie*, 181 Ill. 622, 55 N. E. 49. It has been held, also, to include a place



to which persons can go to get refreshments, to eat or drink, and to include a place where ginger ale, cider, etc., are served, and that it does not necessarily import a place where intoxicating drinks alone are sold. *Kitson v. Ann Arbor*, 26 Mich. 325; *State v. Mansker*, 36 Tex. 364; *Snow v. State*, 50 Ark. 557, 9 S. W. 306; *Goozen v. Phillips*, 49 Mich. 7, 12 N. W. 889.

Our construction of the word "saloon," as used in this lease, is borne out by the evidence of the parties in this particular case. The lessee testified that he used the premises for a saloon under the lease from October 1, 1907, until the prohibition law went into effect, January 1, 1908; that the word "saloon," as used in the lease, meant a place for the sale of intoxicating drinks and beverages; that he also sold and dispensed to the public in said premises under said lease other drinks, such as soda water, lemonade, and soft drinks, and cigars, cigarettes, and tobacco. This use to which the lessee put the premises seems to have been known to the landlord, and no objection was made by him; hence we think that the business he is shown to have carried on was the business which the lease contemplated. It is conceded that the sale or dispensing of intoxicating liquors or beverages was prohibited in Birmingham, Ala. (the situs of this property), on and after January 1, 1908, during the life of this lease. It is also conceded that the rent was paid up to this date, and that thereafter the tenant refused to pay rent and offered to surrender the premises to the landlord, which offer the landlord declined, insisting upon payment, but proposed to release the lessee from the provision that the premises should be used only for a saloon, and allow him to use the premises for any other legitimate purpose not more injurious than would be the liquor business, and not constituting a nuisance to other tenants in the same building. The lessee declined this offer, saying that it was a modification of the first lease, to which he did not consent; that the prohibition law terminated the lease and dissolved the relation of landlord and tenant, and released him from further liability for rent. This was evidently a partial, and not a total, destruction of the business for which the premises were leased. If we apply to the destruction of the business the same rule that we invoke as to the destruction of the premises—and we think this would be just and proper in the case at bar—it follows that the tenant was not discharged from liability by reason of the prohibition law. He could in law and in fact have continued to use the premises as a saloon though he could not have sold intoxicating drinks or beverages. His business might not, and, as it was shown by the evidence, would not, have continued to be as profitable as if he could sell intoxicants; nevertheless he could have continued to sell soft drinks, cigars, cigarettes, tobacco, etc., as he did before.

That his business would not be as good after as before the law went effect was no more the fault of the landlord than it was of the tenant. The contract of lease not having provided against such a contingency, which both parties knew could happen, as it provided against other contingencies, we must leave the liability and loss, if any, where the law leaves it, to wit, upon the tenant.

We are referred by counsel for appellant to a recent decision said to have been rendered by some court of Georgia upon this identical question. We have not been furnished with and are not able to see what even purports to be a copy of that decision, but only what purports to be an excerpt from the opinion which may be said to indicate the reverse of what we hold in this case. It may be that the statutes of Georgia regulate or provide for such conditions, or it may be that the contract or facts of that case differentiate it from this case. This, of course, we cannot know without an inspection or examination of the opinion and decision in full. But, if it be different from and holds the converse of this, we would not be willing to follow it or apply the rule in this state while our law remains as it now is. The nearest cases in point which we have been able to find where the question was not regulated by statute are decisions from the state of Texas, and they support the rule as announced above in so far as they are in point. *Houston Ice Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197; *San Antonio Co. v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368. The rule is, of course, different where the parties contract to carry on a business which is unlawful at the time the contract is made, or where they contract to do an unlawful act. So long as the contract is executory, it cannot be enforced by either party. The contract made in the case at bar was not unlawful when made, nor would it be unlawful in toto now because it might authorize the selling of intoxicants as a part of the business of a saloon, and the contract will now, by letter and spirit, authorize the tenant to sell soft drinks, cigars, cigarettes, tobacco, or anything sold or dispensed in a saloon, not intoxicating. The landlord certainly could not have terminated this lease, because the tenant would not or could not sell intoxicants. There was nothing in the lease which required this, though it did allow it. If the landlord was still bound after the law went into effect (and we think he was), then the tenant also ought to be bound. Both parties ought to be bound by the law, or neither. The mere fact that the law might cause the tenant to suffer a loss when without it he would have made a profit is no more reason to annul the contract on that account, or to allow the tenant to avoid it, than the passage of a law which increased the tenant's profits, and thereby made the lease more valuable, would authorize the landlord to

annul the lease, and require a new one under the new law.

On the case as shown by this record, the plaintiff was clearly entitled to recover the judgment rendered. We can find no error in the record, and the judgment must be affirmed.

Affirmed.

DOWDELL, O. J., and ANDERSON and McCLELLAN, JJ., concur.

### GUNTER v. HINSON et al.

(Supreme Court of Alabama. June 17, 1909.)

#### 1. JUDGMENT (§ 525\*)—CONCLUSIVENESS—RECITAL.

A recital in a judgment that the parties interested and sui juris consented to its rendition is, in the absence of fraud, conclusive of the fact recited, and imports absolute verity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 563, 982, 982½; Dec. Dig. § 525.\*]

#### 2. EVIDENCE (§ 56\*)—PRESUMPTIONS—PERSONAL STATUS.

As the presumption is that parties are sui juris, without disability, unless the contrary appears, it must be presumed that a party to a cause was an adult, within the recital of the decree that all the adult parties interested consented to its rendition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 76; Dec. Dig. § 56.\*]

#### 3. JUDGMENT (§ 82\*)—CONSENT TO RENDITION—WAIVER OF IRREGULARITIES.

A consent that a decree be made waives any prior irregularity and is a release of errors.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 82.\*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Bill by W. A. Gunter, Jr., against Evans Hinson and others. Decree for defendants, and complainant appeals. Affirmed.

The case made by the bill is that Laura B. Jones was possessed of a life estate in certain lands in the city of Montgomery, and by proper deed of conveyance and upon a valuable consideration sold the same to complainant in this cause; that complainant paid the purchase money and went into possession of the land, and was so in possession when this bill was filed; that on May 25, 1907, S. S. Belser, then sheriff of Montgomery county, received an execution of fieri facias from the register of Lowndes county against Laura Jones in the sum of \$800, with interest and costs, issued upon what purports to be a judgment against Laura B. Jones, and in favor of Martha E. Hinson and Evans Hinson, which execution the sheriff has levied upon the property described in the bill as the property of Laura B. Jones, and has advertised the same for sale on a given day. It further alleges that orator is a bona fide purchaser without notice of said judgment or lien, and that at the time of the purchase

there was no execution in the hands of the sheriff of Montgomery county, or execution lien thereon. It is then alleged that the judgment is void, because the suit in which the judgment was rendered was by one May and others, creditors of Hinson, against Martha and Evans Hinson, and Laura B. Jones, as administrator of one of the sureties. The facts as to this particular case of May v. Jones et al. are set out in the opinion. This bill further seeks to restrain Belser and Hinson from selling said property and that the injunction on the final hearing be made perpetual.

Gunter & Gunter, for appellant. H. S. Houghton and Evans Hinson, for appellees.

McCLELLAN, J. E. Kirk May and others, in 1898, filed a general creditors' bill seeking equity's aid in their behalf and in behalf of all other creditors similarly situated. The debtor was alleged to be Joseph L. Hinson, who had, as general administrator of Lowndes county, administered the estate of Joseph A. May, deceased, of whom the named complainants were heirs and distributees, and had, it is alleged, wasted the assets of the estate committed to his care. Jane E. Evans was one of the sureties on the bond of Joseph L. Hinson. Among other respondents to the bill were Martha Hinson, individually and as executrix of J. L. Hinson's estate, and Evans Hinson and Laura B. Jones. The purpose of the bill, in the aspect that it touched Laura B. Jones, was to make the assets of the estate of Jane E. Evans in her hands liable for the debts of Jane E. Evans, as surety for Joseph L. Hinson on his administration bond, for misconduct in respect of the Joseph A. May estate. Aside from other matters of ascertainment and adjudication according to equity's practices, following a decree granting the relief prayed in the bill, the court confirmed the report of a special master wherein it was found that Laura B. Jones had received personal property belonging to the estates of Jane E. Evans and Joseph L. Hinson of the value of \$800, that said property was not in existence, and that Laura B. Jones was insolvent. A decree was entered on the 28th day of January, 1902, wherein a personal judgment was rendered in favor of Martha E. and Evans Hinson and against Laura B. Jones. The closing paragraph in said decree was this: "All of the adult parties interested in this cause and in the other causes consolidated herewith, under the previous decrees of this court, agreed and consented in open court to the making of this decree."

Solicitors for appellant admit, as we understand their brief, that the chancery court of Lowndes had jurisdiction of the subject-matter and of the parties in the causes referred to in the above quotation. To avail the appellant in this cause, the decree in

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

question must be void, as he contends, not merely irregular. After a careful review of the whole case, and of the arguments of the solicitors, we feel impelled to affirm the decree dismissing this bill, for the reason the personal judgment against Laura B. Jones was invited by and grounded upon the recited consent of the "adult parties interested," one of whom Laura B. Jones presumptively was, and was, therefore, not void. We think it is settled that a recital in a judgment, rendered by a court of competent jurisdiction, that the parties interested and *sui juris* consented or agreed to its rendition, is, in the absence of vitiating fraud in the premises, conclusive of the fact recited, and imports absolute verity. *Ex parte Rice*, 102 Ala. 671, 15 South. 450; *Deslonde v. Darrington's Heirs*, 29 Ala. 92; 5 Ency. Pl. & Pr. p. 963, and notes; 23 Cyc. p. 728, and notes; *Adler v. Van Kirk Land & Const. Co.*, 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133. The recital here is that all adult parties interested in the proceeding consented to the decree entered. There can be no serious questioning of the fact that Laura B. Jones was a party interested in the cause. Since the presumption is that parties are *sui juris*, without disability, unless something to the contrary appears, it must be here presumed that Laura B. Jones was an adult, within the recital of the decree—a person over the age of 21 years. 22 Am. & Eng. Ency. Law, p. 1285, and authorities cited in note 2; 9 Ency. of Ev. 895. Accordingly it is clear that Laura B. Jones came within the comprehensive description of the parties to the cause whose consent and agreement in open court afforded the highest support and justification for a decree rendered in a cause of which the court confessedly had jurisdiction both of the subject-matter and of the parties.

The controlling purpose and scope of the original bill filed by E. Kirk May and others was that usually attending a general creditors bill. Its broad object was that of administration of the assets of the estate of Joseph L. Hinson. All creditors were invited to propound their claims, and among others accepting the opportunity were Martha E. and Evans Hinson. By the consent decree at least a part of their demand was merged into the personal judgment against Laura B. Jones. She had been the wrongful recipient of assets from Jane Evans, one of Joseph L. Hinson's sureties, and the obligation was on Laura B. Jones to restore in value what she had in property received. Martha and Evans Hinson were evidently due the fruit, at least in part, of this restoral, and because the mode adopted to accomplish the object was by direction, rather than circuitous, cannot, on any theory of the law of which we are aware, or have been able to discover, work an absolute nullity, when the parties concerned consented in open court that the

mode pursued should be so taken. Obviously, Laura B. Jones, even on appeal, could not have avoided the judgment rendered against her by her consent. That consent waived all and every irregularity preceding and was a release of errors. *McNiel and Skinner v. State*, 71 Ala. 71; *Adler v. Van Kirk Land & Const. Co.*, 114 Ala. 551, 560, 561, 21 South. 490, 62 Am. St. Rep. 133.

The purpose of appellant's bill being to restrain the execution of process to enforce the mentioned personal judgment against Laura B. Jones, and that on the theory that such judgment was void. It accordingly results from the considerations stated that the city court's decree dismissing the bill must be affirmed.

Affirmed.

DOWDELL, C. J., and DENSON and MAY-FIELD, JJ., concur.

#### WESTERN UNION TELEGRAPH CO. v. LOUISELL.

(Supreme Court of Alabama. June 10, 1909.)

##### 1. PLEADING (§ 248\*)—COMPLAINT—AMENDMENTS.

Where the original complaint, in an action against a telegraph company for negligence in transmitting a message, alleged negligence in transmitting a message dated "Manistee," etc., an amended complaint striking out the word "Manistee," where it occurred, and inserting in lieu thereof the word "Repton," was not a departure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 701-706; Dec. Dig. § 248.\*]

##### 2. APPEAL AND ERROR (§ 1041\*)—HARMLESS ERROR—PLEADINGS—AMENDMENT.

Where, in an action against a telephone company for negligence in transmitting a message, the original complaint alleged negligence in transmitting a message dated "Manistee," and the evidence showed that the message was sent from Manistee to Repton by telephone and from Repton to its destination by telegraph, the allowance of an amended complaint striking out the word "Manistee" where it occurred, and inserting in lieu thereof the word "Repton," was not beneficial or prejudicial to either party, save that it prevented a variance between the allegations and proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4107, 4109; Dec. Dig. § 1041.\*]

##### 3. PLEADING (§ 253\*)—AMENDMENT OF COMPLAINT—REFILING OF PLEAS.

Where the pleas filed to the original complaint were not filed to the amended complaint not constituting a departure; no ruling was invoked as to the amended complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 745; Dec. Dig. § 253.\*]

##### 4. PLEADING (§ 254\*)—COMPLAINT—AMENDMENT—DEMURRER.

Where an amendment to the complaint, made after the overruling of demurrers, materially changes the complaint, the demurrers should be refilled to test the sufficiency of the complaint as amended.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 753½; Dec. Dig. § 254.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**5. TRIAL (§ 142\*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.**

Where the evidence leaves nothing to inference, and, if believed, is the same thing as the facts sought to be proved, the court may charge that the jury, if they believe the evidence, must find for plaintiff (or defendant) as the case may be; but where the burden of proof is on plaintiff, and any material allegation of the complaint rests on inference drawn from the facts, or where the evidence is conflicting, it is error to so charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.\*]

**6. TELEGRAPHS AND TELEPHONES (§ 66\*)—NEGLIGENT TRANSMISSION OF MESSAGES—ACTIONS—BURDEN OF PROOF.**

A sender of a message, suing the telegraph company for negligence in transmitting it, has the burden of proving every material allegation of the complaint.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 61; Dec. Dig. § 66.\*]

**7. TELEGRAPHS AND TELEPHONES (§ 73\*)—NEGLIGENCE IN TRANSMITTING MESSAGES—EVIDENCE—QUESTION FOR JURY.**

Whether a telegraph company so negligently transmitted a message as to change a name therein held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.\*]

**8. TELEGRAPHS AND TELEPHONES (§ 54\*)—CONTRACT FOR TRANSMISSION OF MESSAGES—RULES AND CONDITIONS.**

Rules and conditions indorsed on a message received and transmitted by a telegraph company are binding only when they become a part of the contract between the sender and the company and the action is for breach thereof.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 45, 46; Dec. Dig. § 54.\*]

**9. TELEGRAPHS AND TELEPHONES (§ 54\*)—NEGLIGENCE IN TRANSMITTING MESSAGES—LIMITATION OF LIABILITY.**

A telegraph company cannot by special contract relieve itself from liability for its own negligence in the transmission and delivery of messages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 39; Dec. Dig. § 54.\*]

**10. ACTION (§ 27\*)—NEGLIGENCE IN TRANSMITTING MESSAGES.**

A complaint, in an action against a telegraph company, which alleges negligence in transcribing the name of a person in the message, states a cause of action in tort based on a breach of duty growing out of contract, or for breach of duty imposed by law.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 177-182; Dec. Dig. § 27.\*]

**11. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—ERRONEOUS RULINGS ON PLEAS.**

Where there was a failure of proof, though the parties were examined fully, erroneous rulings on pleas were not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4079; Dec. Dig. § 1039.\*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by William H. Louisell against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Flitts, Leith & Leigh, for appellant. Gregory L. & H. T. Smith, for appellee.

**MAYFIELD, J.** The appellee brought suit in the lower court to recover damages for the negligence of the defendant telegraph company in erroneously transmitting a certain telegram, which was alleged to be in words and figures as follows: "Manistee, Alabama, May 17th, 1905. City Bank & Trust Company, Mobile, Alabama. Decline payment James J. Manson for two hundred fifty dollars unless advised further by me. William H. Louisell." The negligence alleged was that the name of James J. Manson was erroneously changed in the telegram, as delivered, to James T. Manlson; and it was further alleged that, by reason of this error, the City Bank & Trust Company was misled as to the draft which the plaintiff intended to revoke, and paid said draft and charged the same to the plaintiff's account.

The first count of the complaint was subsequently amended, over the protest and against the objection of the defendant, by striking out the word "Manistee," where the same occurs, and inserting in lieu thereof the word "Repton." The second count, filed on the 29th day of May, 1907, was identical with the first count as last amended. The amendment, by adding the second count, was also made over the protest and against the objection and exception of the defendant. We do not think that this constituted a departure, nor do we see any objection to the allowance of the amendment.

The defendant filed a demurrer to the original complaint, which was overruled, and then filed the plea of the general issue and a great number of special pleas, to which the plaintiff filed demurrers and made a motion to strike the special pleas. The demurrer was overruled as to some of the pleas and sustained as to the others, and the motion to strike was granted as to some of the special pleas and overruled as to the others. To these special pleas as to which the demurrer and motion to strike were overruled the plaintiff filed replications. To these replications the defendant filed rejoinders, to which rejoinders the plaintiff demurred. This demurrer being overruled, the plaintiff filed surrejoinders on the 5th day of December, 1906. To these surrejoinders defendant on the 10th day of December, 1906, filed a rebutter; and on the 17th day of December, 1906, the court granted the motion allowing the plaintiff to withdraw surrejoinders, and set aside a former order overruling the demurrers to the rejoinders and sustaining such demurrers, to which ruling of the court the defendant excepted, and on the same day the defendant filed a motion to restore the pleadings to where they stood prior to the granting of this order, which motion was overruled. After all these rulings and or-

ders, on the 29th day of May, 1907, the plaintiff moved the court to amend his complaint as above set forth by changing the word "Manistee" to "Repton," and by adding count No. 2, which was identical with count No. 1 as amended. This appears to have been upon the very day upon which the trial was had.

It does not appear from the record proper that any pleas were filed to the complaint as last amended. The recital as to the issues upon which the trial was had is as follows: "This day came the parties by their attorneys, and this cause coming on to be heard, and issue having been joined between plaintiff and defendant, thereupon came the jury," etc. So from the record proper it appears that the trial was had upon the general issue to the complaint as last amended. While there were two counts in the complaint, the first count as last amended was identical with the second count added—in fact, considering the evidence in connection with the pleadings, there was no material difference between the original and the amended complaint. While the amended complaint struck out the word "Manistee" and inserted in lieu thereof the word "Repton," yet the evidence shows that the message was sent from Manistee to Repton over a telephone line, and from Repton to Mobile, Ala., over a telegraph line, and that the message, the transaction, the negligent act complained of, the parties, and the time involved, were identical with those in the original complaint. Consequently we can see no possible benefit or injury that either party could derive from the change, other, possibly, than that of preventing a variance between the allegations and the proof. Nor does there appear to be any reason why the rulings of the court upon the amended complaint should have been different from those upon the original complaint; but the pleas were not filed to the amended complaint, and consequently no ruling of the court was invoked as to the amended complaint.

The decisions are not uniform as to the proper practice of refiling demurrers to amended pleadings; but probably the greater number and weight of authority hold that the party who desires the benefit of rulings on pleadings before amendment must refile demurrers to the amended pleadings. See *Mayfield's Digest*, vol. 3, p. 10, subd. 7, for collection of authorities. If the amendment had wrought any material change, unquestionably the demurrers should have been filed to test the sufficiency of the complaint. Whether or not the defendant waived all adverse rulings upon the pleadings prior to the amendment, by failing to plead over as to the amended complaint or to refile special pleas, it is not necessary for us to decide in this case, for the reason that the case must be reversed upon another ground and one conceded to be the material question in the case.

When all the evidence had been introduced, the court in its oral charge practically directed a verdict for the plaintiff. A part of the oral charge of the court was as follows: "Gentlemen of the jury, in this case the only question before you is the amount of the damages." The defendant excepted to all of the oral charge of the court, upon the ground that when the court gives the general affirmative charge there is no function for oral remarks. It appears from the bill of exceptions that a colloquy, unnecessary to notice, occurred between counsel and the judge. The plaintiff requested the court to give the following charge, which was in writing, to wit: "The court charges the jury that if they believe the evidence they should return a verdict for the plaintiff for \$250, with interest thereon from May 21, 1905, to May 29, 1907"—which charge the court gave, and indorsed thereon: "Given. Samuel B. Browne, Judge." The defendant then requested the court to give several written charges, each of which was refused, with the usual indorsement. It is unnecessary to set out these charges, for the same reason that it was unnecessary to pass upon the various rulings of the court upon the pleadings, to wit, because the judgment must be reversed for the giving of the affirmative charge; and we will treat the questions involved, in so far as their discussion will serve to guide the trial court upon another trial, should another trial be had.

There can be no doubt that the trial court was in error in giving the general affirmative charge for the plaintiff in this case, if it should be held that the trial was had upon the second count only of the complaint. There were several material allegations in this complaint as to which there was no direct proof, but which, if proven, were proven only by inference from other facts, and the court was unauthorized to draw these inferences in favor of the plaintiff. The jury only was the proper tribunal to draw these inferences. In fact, after a careful study of this evidence, we are not prepared to say that the weight of it was in support of the verdict—much less that, if the verdict had been found for the defendant, it would not have been supported by the evidence. When the evidence is so direct as to leave nothing to inference, and the evidence, if believed, is the same thing as the facts sought to be proven, the judge is at liberty to instruct the jury that, if they believe the evidence, they must find for the plaintiff (or the defendant), as the case may be; but where the burden of proof is upon the plaintiff, and any material allegation of the complaint rests upon inference to be drawn from the facts proven, the jury must draw this inference, and not the court, and if there is any evidence which in any way tends to establish a plaintiff's cause, or a defendant's defense, it is error for the court to withdraw the case from the jury, be-

cause it is not for the court to judge of the sufficiency of the evidence. An instruction should never be given to find for the plaintiff if the jury believe the evidence provided there is any evidence susceptible of an inference that would hinder the plaintiff's recovery. Proffatt on Jury Trial, § 355 et seq. It was well said by Chief Justice Brickell, in the case of *Smoot v. M. & M. Ry. Co.*, 67 Ala. 16, speaking of the affirmative charge, that "such an instruction cannot be supported when the evidence is conflicting, or when the evidence is circumstantial, or when a material fact rests wholly in inference. It may be given, and should on request be given, whenever the court would sustain a demurrer to the evidence interposed by the party requesting the instruction."

The burden of proof in this case certainly rested upon the plaintiff to prove every material allegation of his complaint. One material allegation of the complaint, as to which there was no direct proof, and of which it is difficult to see how there could be direct proof, or any proof, other than that by the jury drawn as an inference from the facts, is this: "That, had said telegraph [telegram] been duly and properly transmitted, the City Bank & Trust Company would have declined payment of said draft, as instructed by said telegram, but that by reason of the negligence of the defendant," etc. What direct or uncontradicted evidence there was, to prove this allegation, we are unable to find. But it is not conclusively proven that any mistake was made, though probably the weight of the evidence is in the affirmative. The message actually delivered was not shown. It was lost or destroyed by the very party who should have preserved it. A second-hand copy only was introduced. The first copy was shown to be very dim—a tissue paper copy or letter press copy. "The tissue copy was faint, but we could tell what it was—could make it out. We had five or six parties to look at it and read it separately, and each one made it out what we put into the copy which we made." But no one says the tissue copy was an exact copy of the one delivered to and lost by the bank. The officers of the bank—Seldon, cashier, and Tonsmeire, paying teller—both say no copy was made by them of the message originally delivered, and lost, but state that they made or had made a copy of the tissue copy, which was so dim and faded that it required care to read it. The mistake or error complained of could easily have been made in transcribing from the dim and faded copy on the tissue paper. So it was certainly a question for the jury to say whether the mistake alleged was made at all by the defendant or its agents.

We do not think, after a careful examination of this record, that any injury was done the defendant, relative to its pleas setting

up, or attempting to set up, the rules of the defendant telegraph company that all messages received by it should be sent on its blanks and subject to the contract on the back of said blank, and that the company would not be liable, in damages or statutory penalties, in any case where the claim was not presented in writing within 60 days after the message was filed with the company. It is true that this court has decided, as have a number of other courts, that there are cases in which the rules and conditions indorsed upon the message received and transmitted by the telegraph company are binding; but this is only when they become a part of the contract between the sender of the message and the telegraph company, and the action is for a breach of the contract. A common carrier cannot relieve itself of liability for its own negligence by a special contract limiting its liability. *W. U. Tel. Co. v. Crawford*, 110 Ala. 460, 20 South. 111; *Way's Case*, 83 Ala. 542, 4 South. 844; *Henderson's Case*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Daughtery's Case*, 89 Ala. 191, 7 South. 660.

If there was any liability at all in this case, it was in tort, for negligence on the part of the defendant telegraph company or that of its agents. While the complaint seems to have been treated in the court below as one *ex contractu*, for the breach of a contract, it is in fact in tort, and based upon negligent acts of the defendant. It is for a breach of a duty growing out of a contract, or for a breach of a duty imposed by law; but, nevertheless, it is in tort, and not in contract. *Wilkinson v. Moseley*, 18 Ala. 288; *Beavers v. Hardie*, 48 Ala. 95; *White v. Levy*, 91 Ala. 179, 8 South. 563; *Dixon v. Barclay*, 22 Ala. 370; *Howison v. Oakley*, 118 Ala. 215, 23 South. 810; *Mobile Life Ins. Co. v. Randall*, 74 Ala. 170; *Bank v. Jeffries*, 73 Ala. 191.

Furthermore, it clearly appears, from the undisputed evidence in this case, that the rule of the company relied upon in these pleas, under which, as averred, all messages were required to be written and sent on its blanks, and subject to the provisions of the contract, claimed to be indorsed on the blank, to the effect that the company would not be liable for damages where the claim was not presented in writing within 60 days, etc., was not a part of this contract. All the parties to the contract were examined fully, and even if the pleas had been allowed there was still a failure of the proof. Consequently we can see no injury to the defendant either in the ruling upon these pleas, or in the exclusion of evidence tending to prove them. Authorities *supra*.

We do not think that there was variance, sufficient to defeat the action, between the message declared on in the complaint and that which the proof tended to show was sent. The same may be said of this vari-

ance that was claimed touching the error in the name of the payee of the draft, made by the telegraph company in transmitting the telegram. *N. C. & St. L. Ry. v. Cody*, 137 Ala. 597, 34 South. 1003; *L. & N. R. R. Co. v. Landers*, 135 Ala. 504, 33 South. 482; *Southern Ry. Co. v. Lollar*, 135 Ala. 379, 33 South. 32.

We deem it unnecessary to pass upon all the charges refused to the defendant, for the reason that they may or may not be proper upon another trial. For the errors pointed out, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

**BIRMINGHAM BELT R. CO. v. NORRIS.**  
(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

**RAILROADS (§ 446\*)—KILLING ANIMALS—QUESTION FOR JURY.**

In an action against a railroad for the killing of a horse, *held* a question for the jury whether defendant's train did the killing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1628-1632; Dec. Dig. § 446.\*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by F. T. Norris against the Birmingham Belt Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Campbell & Johnson, for appellant. Frank S. White & Sons, for appellee.

ANDERSON, J. It is insisted by counsel for appellant that, while the mare may have been killed by a train on its track, the evidence fails to show that the train that did the killing was a train operated and handled by its servants, as alleged in the complaint; in other words, that the proof did not show what train ran over or against the mare, and that the jury could not infer that it was the defendant's train simply because the mare was killed by a train on its road, inasmuch as the proof shows that the Seaboard Air Line was also operating trains over defendant's road at the place of the accident. True, there is no direct proof as to what train killed the mare. The plaintiff's witnesses claim that the mare was killed about the 2d of February, while the defendant's witness Dunbar says that he saw the mare dead and lying near the track at 6:30 a. m. of February 1st, and that his was the first engine to go over the trestle that morning, and that his train did not kill her. Therefore there is a probability or inference that she was killed on January 31st. Land, the yardmaster of the Seaboard Air Line, testified that no engine

of his company used the defendant's track out to North Birmingham on January 31st. The jury could therefore have inferred from the evidence that the mare was killed on January 31st, and by one of the defendant's trains, and that the Seaboard Air Line train did not pass over the track at this point on that day. Of course, there was evidence affording contrary inferences; but it was clearly a question for the jury as to whether or not defendant's train did the killing, and the trial court properly refused the general charge, requested by the defendant.

The judgment of the city court is affirmed. Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

**WESTERN UNION TELEGRAPH CO. v. GRIFFITH.**

(Supreme Court of Alabama. June 10, 1909.)

**1. TELEGRAPHS AND TELEPHONES (§ 65\*)—DELAY OF MESSAGE—ACTIONS—SUFFICIENCY OF COMPLAINT.**

In an action against a telegraph company for delay in delivering a message to a doctor calling him to plaintiff's wife, a complaint, alleging that the message could have been delivered, by the exercise of reasonable diligence, in time for the doctor to have reached plaintiff's wife on a morning train, but because of delay in transmission and delivery of the message, and as a proximate consequence thereof, the doctor failed to arrive on the morning train, and plaintiff suffered great mental pain, by reason of the doctor's failure to reach and attend his wife while ill, to his damage in the sum of \$1,000, the mental pain so suffered being the proximate consequence of defendant's failure to deliver the message promptly, sufficiently averred that the doctor would have gone to plaintiff's wife had the message been delivered earlier, and that plaintiff suffered in person or estate by the failure to deliver the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 54, 55; Dec. Dig. § 65.\*]

**2. PLEADING (§ 209\*)—DEMURRER.**

Assigning the absence of such allegations as grounds of demurrer was insufficient to raise the question whether the complaint was *ex contractu* or *ex delicto*.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 520; Dec. Dig. § 209.\*]

**3. TRIAL (§ 243\*)—REFUSAL OF REQUEST—INCONSISTENT REQUESTS.**

Where a party had requested a charge that the action was *ex contractu*, which was given, it was not error to refuse to subsequently charge for the same party that the action was *ex delicto*.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 661; Dec. Dig. § 243.\*]

**4. APPEAL AND ERROR (§ 882\*)—REVIEW—RIGHT TO COMPLAIN.**

A party who has invoked a particular action or ruling of the trial court cannot complain thereof on appeal, though it be erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3591; Dec. Dig. § 882.\*]

**5. TELEGRAPHS AND TELEPHONES (§ 73\*)—DELAY OF MESSAGE—ACTIONS—QUESTIONS OF FACT.**

In an action against a telegraph company for delaying a message alleged to have resulted in the failure of a doctor to reach plaintiff's wife on a certain train, whether the doctor could or would have come on that train had the message been transmitted and delivered within a reasonable time, and whether the message was transmitted and delivered within a reasonable time, were questions for the jury, where there was evidence from which they could determine them.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.\*]

**6. TRIAL (§ 139\*)—INSTRUCTIONS.**

There being evidence from which the jury could decide those facts and from which they could infer the existence of all other facts necessary to support a verdict for plaintiff, an affirmative charge for defendant and charges hypothesizing a verdict for defendant upon failure of proof as to either one of those facts were properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332-341; Dec. Dig. § 139.\*]

**7. TRIAL (§ 252\*)—DELAY OF MESSAGE—ACTIONS—REFUSAL OF REQUESTS—CHARGES CONTRARY TO EVIDENCE.**

There being evidence of damages from mental anguish, a charge denying the right to find such damages was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

**8. TRIAL (§§ 194, 240\*)—INVADING PROVINCE OF JURY.**

A charge that the jury could not assess damages for mental pain and anguish was properly refused, as merely an argument and invading the province of the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 431-466, 561; Dec. Dig. §§ 194, 240.\*]

**9. TRIAL (§ 194\*)—DELAY OF MESSAGE—ACTIONS—REFUSAL OF REQUESTS.**

The charge was also properly refused as instructing that the jury were not authorized to infer mental pain from only a part of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 431-466; Dec. Dig. § 194.\*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by R. C. Griffith against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The charges referred to in the opinion as refused to the defendant are as follows:

"(1) You are not authorized to assume conclusively from the relation of the parties that plaintiff suffered mental pain and anguish by reason of Whaley's absence for the part of September 30th. (2) I charge you that the averment of the complaint to the effect that Dr. Whaley failed to reach and attend his wife while ill is not sustained by the evidence." (3) General affirmative charge. "(4) You are not authorized to assess any damages for mental pain and anguish."

Campbell & Johnson, for appellant. Robert N. Bell, for appellee.

**MAYFIELD, J.** This action is by a husband, against a telegraph company, to recover damages for failure to promptly transmit and deliver a telegram sent by him to a physician, summoning the physician to the bedside of plaintiff's wife, who was very ill, by reason of which failure to so transmit and deliver the message the physician was unable to reach the bedside of plaintiff's sick wife as soon as he otherwise would have done, but for the failure.

The complaint is as follows:

"Count One. The plaintiff claims of the defendant corporation one thousand dollars as damages for that on, to wit, the 30th day of September, 1906, plaintiff by his agent delivered to the defendant, and the defendant accepted, at Oneonta, Ala., for transmission from Oneonta to Birmingham, Jefferson county, Ala., the following message directed to Dr. Whaley, % Barber's Drug Store, Birmingham, Alabama, viz.: 'Come on morning train. Bessie is much worse.' Plaintiff avers that defendant is a public telegraph company, engaged in the business of transmitting messages for a reward between said points of Oneonta and Birmingham, Ala., and the plaintiff paid the defendant a reward for the transmission of said message, to wit, twenty-five cents. Plaintiff avers further that said message could have been transmitted and delivered by proper and reasonable diligence in time for Dr. Whaley to have reached Oneonta on the morning train and to have been present with the said Bessie, plaintiff's wife, the person mentioned as sick in the message above set out, and who then needed the presence and assistance of the said Dr. Whaley. Plaintiff avers further that, by reason of the failure of the defendant to transmit said message within a reasonable time and to deliver the same within a reasonable time, and as a proximate consequence thereof, Dr. Whaley failed to reach Oneonta on the morning train, as requested, and plaintiff's wife was without his attention, and plaintiff suffered great mental pain by reason of the failure of the said Dr. Whaley to reach and attend his wife while ill, to his great damage in the sum of one thousand dollars as aforesaid. The said mental pain and anguish so suffered by plaintiff was all the proximate result and consequence of the failure of the defendant to deliver the message within a reasonable time, as it could and should have done."

To this complaint the telegraph company demurred, assigning two grounds of demurrer: (1) For that it was not averred that the physician would have gone to see plaintiff's wife had the message been delivered earlier; (2) for that it was not averred that plaintiff suffered in person or estate by the failure to deliver the message. This demurrer being overruled, the defendant filed two

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



pleas, one the general issue, and the other setting up a special contract for transmission, by way of stipulations printed or written upon the back of the telegraphic blank on which the message was written for transmission, to the effect that the telegraph company would not be liable in damages unless a claim therefor was presented in writing and filed with the company within 60 days from the filing of the message. A trial was had upon those issues, which resulted in a verdict and judgment for plaintiff in the sum of \$400, from which judgment this appeal is prosecuted.

It is first insisted that the court erred in overruling defendant's demurrers to the complaint. The complaint is certainly not subject to any ground of demurrer assigned. *Henderson's Case*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Wilson's Case*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23. The grounds assigned are inapt to raise the question as to whether the complaint is *ex contractu* or *ex delicto*.

The appellant (defendant) requested the court in writing to hold, and to instruct the jury, that it was an action *ex contractu*, and the court granted the request and instructed the jury accordingly. The defendant then requested the court in writing to instruct the jury that the action was *ex delicto*, which the court very properly declined to do. A party who has invoked a particular action or ruling on the part of the trial court will not be heard to complain in this court of such action or ruling, though it be erroneous. We express no opinion as to the ruling of the trial court in holding that the action was *ex contractu* and not *ex delicto*; but what we do decide is that the appellant, having invoked this ruling, will not be heard to complain. *Lucas v. State*, 144 Ala. 67, 39 South. 821, 3 L. R. A. (N. S.) 412; *Ex parte Winston*, 52 Ala. 419; *Vaughn v. Smith*, 69 Ala. 92; *L. & N. R. Co. v. Hurt*, 101 Ala. 34, 13 South. 130.

Whether or not Dr. Whaley could or would have gone on the 8:25 train if the message had been transmitted and delivered within a reasonable time, and whether it was so transmitted and delivered within a reasonable time, were clearly questions to be determined by the jury, from the evidence, under proper instructions by the court. They were questions of fact, and there was evidence tending to show each, and from this evidence the jury could infer the existence of these facts, and of all others necessary to support a verdict and judgment for plaintiff. Hence the general affirmative charge for the defendant, and all other charges hypothesizing a verdict for defendant, upon failure of the proof as to either one of these facts, were properly refused. It would have been palpable error

for the court to take from the jury the determination of these facts under the evidence in this case. 5 Mayfield's Dig. p. 150. Whether the doctor would have received the message in time to go to Oneonta on the first train, and whether he would have so gone had he received the message, provided the company had exercised due diligence, are questions which naturally and necessarily rest in inference from the facts proven, and the jury only is the proper tribunal to draw or fail to draw such inferences.

There was ample evidence from which the jury might have inferred these other facts which rest peculiarly, if not exclusively, in inference, and which were necessary to support a judgment for plaintiff embracing damages for mental anguish. Consequently there was no error in refusing those charges which requested a verdict for defendant, or which denied the jury the right to find damages for mental suffering. *Krichbaum's Case*, 132 Ala. 538, 31 South. 607; *Blount's Case*, 126 Ala. 105, 27 South. 779; *Wilson's Case*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *Crompton's Case*, 138 Ala. 632, 36 South. 517; *Crocker's Case*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398.

The fourth charge was bad, for several reasons: One, for that it invaded the province of the jury; another, for that it instructed the jury that they were not authorized to presume or infer mental pain from only a part of the evidence. The best that can be said of it is that it is nothing more than an argument. *King v. Pope*, 28 Ala. 601; *Marx v. Bell*, 48 Ala. 497; *Miller v. Garrett*, 35 Ala. 96; *Edgar v. McArn*, 22 Ala. 796; *Pritchett v. Munroe*, 22 Ala. 501; *McWilliams v. Rodgers*, 56 Ala. 87; *Callan v. McDaniel*, 72 Ala. 96.

We find no error in the record, and the judgment of the trial court must be affirmed. Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### CLARK v. DUNN.

(Supreme Court of Alabama. May 24, 1909.  
On Rehearing June 30, 1909.)

#### 1. JUSTICES OF THE PEACE (§ 75\*)—PROCEDURE—REMOVAL TO COURT OF RECORD.

Under Code 1896, § 2147 et seq., where an action of unlawful detainer was removed to the circuit court, the title became the issue between the parties.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 244; Dec. Dig. § 75.\*]

#### 2. FORCIBLE ENTRY AND DETAINER (§ 34\*)—QUESTIONS FOR JURY.

On the death of the owner of lands, partition was had among his heirs, and thereafter the records of the partition proceedings were destroyed by fire. Subsequently the several coparceners of all the lands joined in a convey-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ance of a certain 10 acres to M., the surviving widow of one of the coparceners, and it was recited in such instrument that the land in question was allotted to the deceased husband in the partition proceedings, and that he in his lifetime had possession of the land and lived on it as his homestead. Thereafter M. and others of the coparceners executed a conveyance of the land in question to T. for the recited purpose of effecting the partition, and it was set out in the conveyance that the land in controversy was allotted to T. *Held*, in an unlawful detainer action, that the question as to whom the land in question was allotted in the partition proceedings was a question for the jury.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 157; Dec. Dig. § 34.\*]

#### 3. ADVERSE POSSESSION (§ 100\*)—EXTENT OF POSSESSION.

Where one is in the actual possession of land under a conveyance which, though ineffectual to pass title, amounts to color of title, his possession is referred to the boundaries described in the instrument.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 547; Dec. Dig. § 100.\*]

#### 4. ADVERSE POSSESSION (§ 71\*)—COLOR OF TITLE—WHAT CONSTITUTES.

The fact that the acknowledgment of a deed was defective did not render it ineffectual as color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 419; Dec. Dig. § 71.\*]

#### 5. ADVERSE POSSESSION (§ 113\*)—EVIDENCE—ADMISSIBILITY.

On an issue as to defendant's adverse possession, tax records showing payment of taxes by him were admissible in evidence.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 674; Dec. Dig. § 113.\*]

#### 6. WITNESSES (§ 236\*)—EXAMINATION—QUESTIONS.

The "best judgment" of a witness, who took the acknowledgment of a deed, called for by a question as to the correctness of the copy of the deed offered in evidence, was sufficiently apt to elicit his recollection of the similarity between the original and the copy, and an objection to the question was properly overruled.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 817; Dec. Dig. § 236.\*]

#### 7. EVIDENCE (§ 258\*)—DECLARATIONS—DECLARATIONS OF AGENT.

It was proper to disallow an effort to show a declaration by an agent as to the location of a boundary line, where the character and scope of the agency were not indicated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.\*]

#### 8. TRIAL (§ 253\*)—INSTRUCTIONS—APPLICATION TO CASE.

Where adverse possession was an issue to be determined by the jury, an instruction pretermittting the same was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 613; Dec. Dig. § 253.\*]

Appeal from Circuit Court, Marion County; C. P. Almon, Judge.

Action by Pat H. Dunn against Henry T. Clark. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Kirk, Carmichael & Rather and C. E. Mitchell, for appellant. Davis & Fite and E. B. & K. V. Fite, for appellee.

McCLELLAN, J. This was an action of unlawful detainer, commenced by appellee against appellant. It was removed to the circuit court on petition, and thereupon the title became the issue between the parties. Code 1896, § 2147 et seq.

The lands in question originally belonged to E. G. Terrell. In 1886 all of the lands owned by Terrell at his death were partitioned, in the probate court, among his heirs. The courthouse of Marion county burned, destroying the evidence of the action taken in the partition of these lands. On September 12, 1888, the several coparceners of all lands left by E. G. Terrell joined in a conveyance of a quarter section containing the two acres in controversy to Martha Terrell, the surviving widow of R. W. Terrell, deceased, to whom, it was recited in the instrument, the land in dispute was allotted on the partition mentioned. It was also recited in this instrument that R. W. Terrell, in his lifetime, took possession of the land described therein, lived on it as his homestead, and that after his death it was set apart to Martha Terrell, his widow, as her homestead. On November 12, 1888, two months subsequent to the execution of the deed to Martha Terrell, Martha Terrell and others of her original coparceners executed to Mary T. and W. J. Clark, her husband, the former one of the original coparceners, a conveyance of certain of these lands, embracing the 10 acres in dispute, for the recited purpose of effecting the partition previously undertaken in the probate court. In the premise of the conveyance there is set out the respective allotments to the children of E. G. Terrell, deceased, and the 10 acres in controversy appear as having been allotted to both Mary T. Clark and R. W. Terrell. The plaintiff would trace his title and rights back to Mary T. Clark, and the defendant claims his in succession from Martha Terrell, who stood in the place of her husband, R. W. Terrell.

To whom of the two, viz., R. W. Terrell or Mary T. Clark, this mentioned land was allotted on the partition, was an issue of fact for the jury. It is evident that both deeds, in the respect that they recite the original allotment to the one or to the other, or to both, evidence confusion and mistake. Counsel for appellant was given, at his request, a special charge affirming one of the issues to be as we have indicated. This question was submitted to the jury under all the evidence. The predecessor in right of each party claimed to have had possession of the disputed tract from at least as far back as 1888, and there was evidence tending to support each contention. The court therefore erred in charging the jury that adverse possession was not an issue for their decision. Without undertaking to restate the whole evidence bearing on this issue, it will suffice it to say that the plaintiff, himself, testified that a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

part of the 10 acres in dispute had been in the field of defendant and his predecessors for 18 or 20 years, and that defendant testified that a part of the 10 acres had been in cultivation and in the R. W. Terrell field for 18 or 20 years. There was also testimony tending to show that defendant and his predecessors in right had claimed this land for more than 10 years. What was, in truth, the fact, was for the jury to decide. In this connection, the principle that where one is in the actual possession of land under a conveyance which, though ineffectual to pass title, is operative as color of title, such possession is referred to the boundaries described in the instrument, is applicable to this case, provided actual possession of a part of the land described in the instrument was shown in defendant and his predecessors in right. *Black v. Tenn. Co.*, 93 Ala. 109, 9 South. 537; *Goodson v. Brothers*, 111 Ala. 589, 20 South. 443.

The deed from John T. Terrell and others to Mary Clark was admissible as color of title, notwithstanding its acknowledgment was defective, and the court did not err in admitting it. *Jones v. Hagler*, 95 Ala. 529, 10 South. 345.

The tax records offered by defendant should have been received in evidence on the issue of adverse possession. *Gist v. Beaumont*, 104 Ala. 347, 16 South. 20; *Anniston Co. v. Edmondson*, 141 Ala. 366, 37 South. 424.

The "best judgment" of the witness Cooley, who took the acknowledgment, called for by the question as to the correctness of the copy of the deed offered in evidence, was sufficiently apt to elicit his recollection of the similarity between the original and the copy. The objection to the question was properly overruled.

Assignments numbered 9 and 10 are not supported by the record, and hence cannot be reviewed.

The effort to show a declaration by an agent of Mary T. Clark and Wm. Akins as to the location of the line between the Mary Clark and R. W. Terrell land was properly disallowed. The character and scope of the agency imputed to the alleged declarant was not indicated, and hence the inquiry was not brought within the ruling in *Pearson v. Adams*, 129 Ala. 157, 29 South. 977.

The charge set out in assignment 16 was erroneously given for plaintiff, because it pretermitted consideration of adverse possession—an issue to be determined by the jury.

The charge made the basis of the seventeenth assignment might well have been refused, because calculated to mislead the jury; but the giving of it did not constitute error.

There is no merit in the other errors assigned and urged in argument. The appellant expressly waived a number of his assignments.

For the errors indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

#### On Rehearing.

MCCLELLAN, J. It appears from the record that the cause was tried below upon the strength of the respective titles of the parties. The plaintiff (appellee) cannot on appeal invoke a consideration of the case upon any other theory. *Fearn v. Beirne*, 129 Ala. 435, 29 South. 558; *Brown v. French* (Ala.) 49 South. 255.

#### UNITED STATES HEALTH & ACCIDENT CO. v. VEITCH.

(Supreme Court of Alabama. June 10, 1909.)

##### 1. INSURANCE (§ 629\*)—LIFE INSURANCE—ACTION ON POLICY—INSUFFICIENCY OF COMPLAINT.

The complaint, in an action on a life insurance policy, intended to be in the form prescribed by Code 1907, vol. 2, p. 1196, § 5382, form 12, is insufficient for not specifying, in accordance with such form, the time for which the life was insured, nor showing that death resulted during the life of the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 629.\*]

##### 2. INSURANCE (§ 645\*)—ACTION ON POLICY—VARIANCE IN PLEADING AND PROOF.

Where a complaint declares on a life insurance policy, a health and accident policy is inadmissible in support of the complaint.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 645.\*]

Appeal from City Court of Bessemer; Wm. Jackson, Judge.

Action by Mrs. Mary B. Veitch against the United States Health & Accident Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

G. F. Goodwyn, for appellant. Bush & Bush, for appellee.

MAYFIELD, J. The complaint was evidently intended to be in Code form, and declared upon a policy of life insurance (Code 1907, vol. 2, p. 1196, § 5382, form 12). It was as follows: "Complaint in the City Court of Bessemer. Mary B. Veitch, Plaintiff, v. United States Health & Accident Company, a Body Corporate, Defendant. The plaintiff claims of the defendant seven hundred dollars due on a policy, whereby the defendant on the 12th day of April, 1907, insured the life of Richard C. Veitch, who died on the 21st day of November, 1907, of which the defendant has had notice. Said policy is the property of the plaintiff. [Signed] Bush & Bush, Attys. for Plaintiff."

The complaint was insufficient, in that it did not specify the time for which the life in question was insured, nor otherwise show that death resulted during the life of the policy. This much was necessary, because the Code form contains such allegations or averments. The complaint declares upon a policy

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of life insurance, while the policy or contract of insurance introduced in evidence was not a life insurance policy at all. It was a "health and accident insurance policy," an entirely different contract from the one declared on; and, not being the contract declared on, it was, of course, not admissible in evidence. This being the only contract offered in evidence, the court should have given the affirmative charge for the defendant, and should have refused that given for plaintiff. It was by no means conclusively shown that the death of the insured was within the terms of the contract of accident insurance policy offered in evidence. By its terms it only insured against death or injury, when resulting from "external, violent, and accidental means." The evidence was not at all conclusive that the death was thus caused, or thus resulted.

The judgment of the trial court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### LOVELADY v. BIRMINGHAM RY., LIGHT & POWER CO.

(Supreme Court of Alabama. May 13, 1909.  
Rehearing Denied June 30, 1909.)

##### 1. EVIDENCE (§ 527\*)—OPINION EVIDENCE—ADMISSIBILITY OF EVIDENCE.

In an action for death of plaintiff's intestate, evidence by a physician, who treated the wounds of intestate on the night of the injury, that intestate died that night from the effects of the injury, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2334; Dec. Dig. § 527.\*]

##### 2. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where the appellate court cannot say, in an action for causing the death of plaintiff's intestate, that evidence offered as to the time of his death, and that the person injured by defendant's car was plaintiff's intestate, would not have been sufficient evidence to authorize the jury to infer actionable negligence on the part of defendant, the exclusion of such evidence cannot be held harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.\*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Action by James C. Lovelady, as administrator, etc., against the Birmingham Railway, Light & Power Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Pinkney Scott and B. M. Allen, for appellant. Tillman, Grubb, Bradley & Morrow, for appellee.

MAYFIELD, J. This is an action by the appellant against the appellee street car company, brought under the homicide statute, to recover punitive damages for its wrongfully causing the death of plaintiff's intestate.

The complaint contained a great number of counts; some declaring on simple negligence, some on wanton negligence, and some on willful injury. Some of these counts were palpably bad, to which demurrers were interposed, but overruled as to all. To each count the defendant filed a great number of pleas, general issue and special, to which special pleas demurrers were interposed, and sustained as to some and overruled as to others. Many of the rulings on the demurrers to the pleas were erroneous; but no questions as to the pleadings are raised or insisted upon. Hence we need not, and do not, consider them.

A number of assignments of error as to the rulings on the evidence are insisted upon. Some of these are clearly good, to wit, those which go to the question of refusing to allow plaintiff to prove, by the physician who treated the wounds of the intestate on the night of the injury, that intestate died that night from the effects of the injury. This, of course, was material, competent, and relevant evidence, and we can see no reason for refusal to allow it. Hence, in declining to allow plaintiff to make proof of this fact, in the manner and at the time he offered so to do, there was error.

Had the court allowed the plaintiff to prove that the person shown by the evidence to have been run over by defendant's car was plaintiff's intestate, and that he died of the injuries thus received, we are not prepared to say that there would not then have been sufficient evidence to authorize the jury to infer actionable negligence, as alleged; nor are we prepared to say that the evidence conclusively showed negligence on the part of the intestate which proximately contributed to the injury. Therefore we cannot know that the errors, as to declining to allow plaintiff to prove the identity of the person run over by the defendant's car with the intestate, and that this person so run over by the car and treated by the physician died of the effects of the injuries thus received, were without injury to plaintiff.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**PASCAGOULA ST. RY. & POWER CO. v. BRONDUM.** (No. 13,743.)

(Supreme Court of Mississippi. March 8, 1909.  
On Suggestion of Error, June 21, 1909.)

**1. STREET RAILROADS (§ 112\*)—COLLISIONS—PRESUMPTIONS—STATUTES.**

Code 1906, § 1985, providing that, in actions against railroads for damages to persons or property, proof of injury inflicted by the running of locomotives or cars shall be prima facie evidence of want of reasonable care, does not apply to a street railroad.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227, 228; Dec. Dig. § 112.\*]

**2. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

Where, in an action against a street railroad for the death of a child struck by a car, the evidence showed that the child either stumbled over a rail negligently elevated over the surface of the street, and was struck by the car, or was struck by the car without having stumbled, while the car was negligently operated, the error in an instruction that the death of the child by the running of the car was prima facie evidence of negligence, authorizing a recovery, etc., was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.\*]

**3. STREET RAILROADS (§ 36\*)—CONSTRUCTION OF TRACK—NEGLIGENCE.**

The rails of all street railroads ought to be flush with the surface of the ground.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 92; Dec. Dig. § 36.\*]

**4. STREET RAILROADS (§ 114\*)—COLLISIONS—NEGLIGENCE—EVIDENCE.**

In an action against a street railroad for the death of a child struck by a car, evidence held to show negligence in the operation of the car, authorizing a recovery.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 243-247; Dec. Dig. § 114.\*]

**5. NEGLIGENCE (§ 85\*)—CONTRIBUTORY NEGLIGENCE—CHILDREN.**

A child six years of age, killed by a street car, cannot be charged with contributory negligence, so as to defeat an action by the parents for negligent death.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121-129; Dec. Dig. § 85.\*]

Mayes, J., dissenting on overruling suggestion of error.

Appeal from Circuit Court, Jackson County; W. H. Hardy, Judge.

"To be officially reported."

Action by Christian Brondum against the Pascagoula Street Railway & Power Company for the death of plaintiff's daughter, six years old. From a judgment for plaintiff, defendant appeals. Affirmed. Suggestion of error overruled.

The appellant operated an electric car line in the city of Pascagoula and along the public streets thereof, and on one street, called Pascagoula street, it passed directly in front of the public school. On the day of the injury there were something like 200 children around the schoolhouse at noon recess, and several of them were playing out in the

street. Some of these children were chasing each other, and the appellee's daughter ran down the street, and, as she attempted to cross the street car track, stumbled and fell in front of the approaching car and was killed. It was not clear from the record whether she stumbled over the rail or not; but there is testimony tending to show that she stumbled and fell while crossing the track. The street was perfectly straight, and the evidence shows that the motorman could have seen any object in the street for 100 to 200 yards ahead of him. The car which struck appellee's daughter was running at a speed of about 7 miles per hour, certain witnesses testify that one of the brakes was defective, and the proof shows that the motorman did not attempt to stop the car until within about 15 feet of the child and that it took 40 or 45 feet to stop it. The evidence also shows that one of the rails of the track was elevated about 8 inches above the surface, and the other about one inch above the surface, and that the franchise granted by the city required that the rails must be laid flush with the street.

The plaintiff relies for recovery upon the negligence of the defendant, based upon (1) the failure of the railway company to lay its rails flush with the street, so that it was made possible for the child to stumble over the projecting rails in attempting to cross the track; (2) the fact that the car was improperly equipped, there being no fender on the front by which a child or other object might be thrown from the track, and that the brakes were defective, so as to prevent stopping quickly; (3) that the car was running downgrade at a dangerous rate of speed past a schoolhouse where children were known to play on the streets, and that the motorman was reckless and heedless of consequences in driving the car at such a high rate of speed, and in not keeping it under control, and in failing to make an effort to stop the car until within a few feet of the child struck, and in failing to ring the bell or to warn her of the approach of the car.

Upon appeal, among other errors relied upon for refusal, is the granting of the first instruction for the plaintiff. Appellant contends that section 1965 has no application to street railroads, and that this instruction was therefore improper. Section 1965 is as follows: "In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employes of railroad companies."

Flowers & Whitfield and Ford, White & Ford, for appellant, filed the following argument, referred to in the opinion of the court:

We think the court need go no further into this case than is necessary to consider the first instruction given for plaintiff. This instruction is based upon section 1985 of the Code. It was given upon the idea that section 1985 applies to street railway companies; that such companies are included in the general words "railroad companies" employed by the statute. This statute was never intended to be used in actions against street railway companies, and we doubt whether it was ever attempted to be so used before. There are several reasons why it cannot be applied to street railways. In fact, the very life of the statute is jeopardized by extending it to such railways.

(a) In the first place, at the time this rule was adopted into the statutes of this state, the lawmakers knew nothing of street railways. The statute was first enacted in 1876. Laws 1876, p. 34. At that time there was not an electric street railway in the world. It was brought forward as section 1059 of the Code of 1880, and appeared in the chapter on railroad corporations. It was after the adoption of the Code of 1880 that experiments with electricity began to furnish some promise of the use of it as a power to move cars along tracks. It was not until 1888, 12 years after the adoption of our statute, that the first electric railway was successfully operated. The section then came forward into the Code of 1892, appearing there as section 1908. At that time there was not an electric railway in the state of Mississippi, nor was there until several years later. So it appears that the Legislature could not possibly have been aiming at any difficulties found to exist in the prosecution of suits against electric railway companies. There was no evil of that kind to cure. It can hardly be said that they were passing laws with respect to something they had never heard of. When that body used the words "railroad companies," they had in mind only such railroads as they were acquainted with; that is, they used the words with their ordinary meaning.

It is proper, in construing a statute of doubtful meaning, to look to the history of it and find out with what subjects the lawmakers had had experience at the time the law was passed. *Funk v. St. Paul, etc., Railroad Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608; *Lincoln Street Railway Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736. These words "railroad companies" came into this law with a well-understood meaning. They referred to nothing but the ordinary commercial steam railroad company. The statute has not been changed in this regard since electric railways came into use in this

state. The Legislature of 1906 and the authors of the dummy code changed the section at the end so as to make it apply to passengers and employes. There was some change, too, in the act of 1876 when it was brought forward into the Code of 1890; but the words "railroad companies" have been preserved throughout. As far as our books show, this is the first attempt to apply it to street railway companies. It has seemed to be the opinion of the bar of the state that it was intended for use only in suits against the ordinary commercial railroads. The statute mentions "locomotives" and "cars." Street railways do not have locomotives. The use of this term is some evidence of the meaning of the statute. The authors of this statute had in mind the railroad train, made up of locomotives and cars.

(b) Words used in a statute by a Legislature, whose members are taken from the people, are usually given their ordinary well-understood meaning. The words "railroad companies" are ordinarily understood to embrace those companies which own and operate great commercial lines of traffic, and which run over their lines trains of cars drawn by locomotives propelled by steam. While it may not be material what kind of power is used, the general idea is of a heavy locomotive drawing long trains over long distances at a high rate of speed. Our Legislature separates the two kinds of carriers very clearly. When our Legislature is dealing with street railways, it expressly says so. When it deals with railroad companies in general it does not expressly exclude electric railway companies, but assumes that they are not embraced within the general provisions dealing with railroads. Section 328 of the Code authorizes the board of supervisors to permit "street railways" to be constructed along the public roads. Under chapter 24 of the Code corporations for every lawful purpose may be chartered, except those for the operation of railroads and for the carrying on of insurance business. Street railway corporations may be chartered under this general chapter; but there is another and special provision in the chapter on railroads for the incorporation of railroad companies. In the chapter on privilege taxes railroads are taxed in one manner under section 3856 and street railways in another manner under section 3874. Chapter 118 of the Code deals with "Railroads." Practically every section of that chapter refers to steam railroads operated over long distances. In fact, no section up to 4059 has reference to street railways. Sections 4059 to 4062, inclusive, expressly refer to street railways. With the exception of these four, nothing in the said chapter affects the rights, duties, or liabilities of street railway companies. When we come to the chapter on "Revenue," we find, in section 4382, "each railroad company owning and operating a railroad" shall do certain things. But this

is not regarded nor treated as having any application to street railways. The property of railroads in general is assessed by the State Railroad Commission, but that of street railroad companies is assessed by the county authorities; and then the railroad companies supervised by the State Commission under chapter 139 of the Code are those operating the ordinary commercial steam railroads.

The Legislature uses the word "railroad" all through the Code as referring only to the lines which are ordinarily referred to as railroads. In section 4884 we find some slight evidence that the Legislature considered that there might be some uncertainty about the use of this term, or that street railways might be included in the general words "common carriers," and therefore thought it safe to expressly exclude street railways. But it is evidently too plain for argument that the established meaning of "railroad" is a line of iron rails stretching for long distances and over which steam locomotives draw long trains of cars at a great rate of speed, carrying freight and passengers from one part of the country to another. The power of the owners of the said property; the great money value of such property; the hazardous nature of the business of operating such property; the great number of people engaged in its operation; the necessity and constancy of its use by the public—these considerations call for special laws dealing with the rights, duties, and liabilities of railroad companies. In the public mind that class of transportation is entirely distinct and different from that conducted by the class known as street railways. In this state the two kinds of property are clearly distinguished in the mind of the people. When the Legislature deals with street railways, it expressly says so. When it deals with the other class, it uses the general term "railroad."

(c) And our Legislature, in using the words "railroad companies" with the meaning which excludes street railways, not only gave these words their ordinary meaning as employed by the people in this state, but with the same signification recognized in other states. In fact, this is their popular and technical meaning. Text-writers prepare volumes on "Street Railways" and other volumes on "Railroads." The Encyclopedias do not discuss the two subjects at the same time. In *State of Minnesota v. Duluth Gas & Water Co.*, 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63, it was held that under the revenue laws of that state a street railway corporation was not a "railroad company." The court said: "All through our statutes the Legislature has uniformly, so far as we have discovered, used the word 'railroad' or 'railway,' when unqualified, as referring exclusively to ordinary commercial railroads; while, on the other hand, when they have intended to refer to street railroads they have qualified the word 'railroad' by the prefix 'street.'"

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over the road, except in cases where the injury done arises from the criminal negligence of the person injured, or where the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." Section 8, art. 1, c. 72, Comp. St. Neb. 1897. The Supreme Court of Nebraska discussed this section in *Lincoln Street Ry. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 786, and held that it did not apply to street railways. Among other things the court said:

"When this law was enacted there was neither occasion nor demand for legislation of this character in the interest of tramway passengers. The means then employed for their transportation was the old-fashioned lagging horse car, in which the transit was not only safe, but peculiarly free from every suggestion of peril. Cable traction had not yet come into use, and electricity as a propulsive power was not within the dreams of legislative philosophy, and had no existence anywhere save, perhaps, as a dim possibility in the minds of some ardent theorists. In the common understanding, a railroad and a street railway have always been separate and distinct things. One is a graded road over which heavy cars, running on iron or steel tracks and usually propelled by steam, carry passengers, freight, and baggage; while the other is exclusively employed for the transportation of passengers in cities, and is so constructed as to interfere but little with ordinary traffic. Elliott on Roads and Streets, 557; *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608; *Louisville, etc., R. R. Co. v. Louisville City Ry. Co.*, 2 Duv. (Ky.) 175. In the case last mentioned it is said: 'A railroad and a street railroad or railway, are, in both their technical and popular import, as distinct and different as a road and a street, or as a bridge and a railroad bridge.' And in *Bloxham v. Consumers' Electric, etc., Ry. Co.*, 36 Fla. 519, 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. 44, the court say: 'The word "railroad," as generally used, applies to commercial railways engaged in the transportation of freight and passengers for long distances, and, as a general rule, having steam engines for motive power, and making stops at regular stations for the receipt and discharge of freight and passengers. The term "street railroad" applies only to such roads, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public are not excluded from the street as a public highway, which runs at a moderate speed compared with commercial railroads, which carries no freight, but only passengers from one part of a thickly populated district to another.

er in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at street crossings or places irregularly, as the convenience of its patrons may require, for the receipt and discharge of its passengers.”

See, also, *Funk v. St. Paul, etc., R. R. Co.*, supra.

(d) But the consideration, which we think alone sufficient to support our proposition that section 1985 has no reference to street railway companies, is that the Legislature could not regard the business of street railways as being of the same kind or class as railroad business. This section 1985 is class legislation. It may be justified; but it must be upon the ground that it applies to a class of litigants whose inherent nature or whose business warrants the Legislature in placing them in a class to themselves for the purpose of such special legislation. It provides a rule of evidence to be used in the trial of cases against railroad companies which cannot be used in the trial of cases against any other class of defendants. It is really a new rule of evidence, in use in a very few states. It is necessarily of legislative creation. Every classification must be based upon some difference which makes the legislation reasonable. The legislation must deal with a subject which involves the difference. “The classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.” Section 1985 is of the same character as section 193 of the Constitution and section 4056 of the Code of 1906. They are all class legislation. They all apply to railroad companies. They all place railroad companies in a class to themselves for the purpose of such special laws. They recognize an inherent peculiarity of the railroad business which makes it reasonable and necessary to place such companies in a class alone. The peculiarity of the railroad business, which justifies that classification made for the purpose of enacting section 4056, must justify the enactment of section 1985.

In *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 533, 34 South. 532, 62 L. R. A. 407, 95 Am. St. Rep. 476, our court said that the characteristic of the railroad business, which warrants the Legislature in abolishing the fellow-servant rule in certain respects, is the necessary peril attendant upon the operation of railroad trains. So many persons are engaged in the operation of railroad trains. The work is necessarily dangerous under the most favorable conditions. Employés are so placed as to be at the mercy of other employés. They are frequently injured through the negligence of persons whom they cannot watch. The hazardous nature of the work which railroad employés have to perform is held by our court, following the Supreme Court of

the United States, to furnish a basis for the classification for the purpose of passing special laws to protect persons whose safety is imperiled by this inherent peculiarity of the work. The Legislature recognizes these characteristics. Persons employed in the operation of trains on railroads were thought to need more protection from the law than persons engaged in any other business. The courts have examined this special legislation, and have determined that the difference between the operation of railroads and the carrying on of other kinds of business is such as to warrant the classification made.

And in *Bradford Construction Co. v. Heflin*, 88 Miss. 314, 42 South. 174, 12 L. R. A. (N. S.) 1040, the court held that, since railroad companies have been put into a class to themselves for the purpose of this special legislation because the business in which they are engaged is peculiarly hazardous, the reason for the classification must be constantly kept in mind; that employés cannot claim the benefit of this special legislation simply because they are employed by railroads; that where the reason fails the classification must fail; that the employés sought to be helped are such only as are in need of help; that no employé can claim the benefit of the special enactment whose safety is not imperiled by the hazards peculiar to railroading. And the court went further in this last case, and said that the employés of corporations operating dummy lines, or construction roads, or logging roads are not entitled to the protection. The business of such companies may be as hazardous; but it is not so large. The evils are not so general, and do not demand special legislation for the protection of persons engaged by them. So it appears that the courts uphold this special legislation with respect only to employés engaged in the hazardous part of railroading, and in the hazardous part of such railroading only as is general and extensive. Only the employés of the great common carriers owned by railroad corporations can claim the benefit of section 1985. The holding in the *Bradford Construction Co. Case* was explained further and reaffirmed in *Mobile, J. & K. C. R. R. Co. v. Hicks*, 91 Miss. 273, 46 South. 360, 124 Am. St. Rep. 679.

It follows inevitably that our court would never say that the employés of street railways can claim any right under section 4056. In confining that section to railroad corporations proper, the court does not even have to call to its aid the general rule that statutes in derogation of the common law are to be strictly construed, though this in itself would be sufficient, perhaps; but such limitation upon the use of that section is necessary to preserve it. The reason for the classification must be constantly kept in mind. The classification must itself be protected. If the difference used as a basis



for the classification should be disregarded, the classification itself must fail, and the special legislation fall with it.

The Supreme Court of Missouri in *Sams v. St. Louis M. R. R. Co.*, 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475, construed a statute of that state, passed in 1897, reading as follows: "That every railroad corporation owning and operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroads by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence." After a very full consideration it was held that the statute was not intended to apply to street railways. Among other things the court said: "Men engaged in the operation of street railroads are exposed to hazards, but not to peculiar hazards, which distinguish men engaged in operating steam railroads, and which have made them a class for special legislation."

In *Funk v. St. Paul, etc., R. R. Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 808, the court construed a statute as follows: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part, when sustained in this state." The law was passed in 1857 and construed in 1895. The court held that it did not apply to street railways.

See, also, the following authorities: *Lincoln Street Railway Co. v. McClellan*, supra; *Georgia Ry. & Electric Light Co. v. Joiner*, 120 Ga. 905, 48 S. E. 338; *Bridge Co. et al. v. Iron Co.*, 59 Ohio St. 179, 184 et seq., 52 N. E. 192; *State v. Cain*, 69 Kan. 186, 76 Pac. 443; *North Hudson County R. R. Co. v. Flanagan*, 57 N. J. Law, 236, 30 Atl. 476; *Lax v. Railroad Co.*, 46 N. Y. Super. Ct. 448.

It appears that the Georgia Supreme Court has held otherwise. *Railway Co. v. Williams*, 117 Ga. 414, 43 S. E. 751, 61 L. R. A. 249. But it will appear from an examination of the opinion of the court in that case that it is unsound, if our decisions in the *Ballard Case* and the *Bradford Construction Company and Hicks Cases* are correct. The Georgia court recognizes no necessity for any reasonable basis of classification. The court does not even notice the decisions of the Supreme Court of the United States upon which our decisions are based.

Our proposition here is that section 1985 is the same kind of class legislation as 4056; that it must be justified by the same reasoning; that the peculiarity of the business of railroading, which is taken for the basis of the classification to justify section 4056, must also be used to uphold section 1985.

Injuries to persons and property incident to the running of railroad trains and locomotives are so frequent and general, injuries from this cause so far exceed in number injuries from any other cause, railroads traverse wide stretches of territory, and trains are handled by servants of the owners. In section 1985 the Legislature is attempting to mitigate some of the evils of railroading by making it easier to recover damages. The evils sought to be to some extent mollified by this section are those growing out of the distinguishing peculiarity of the railroad business; that is, its well-known dangerous character. There are other occupations which are dangerous; but they are not so prominent and general, and the injuries which they cause to persons and property are not so frequent and serious as to call for special legislation. The classification underlying this special statute is the same as that which underlies section 4056. It certainly can be said with no more reason that street railways may be put in the same class with railroad corporations proper, in order to uphold this section, than that they could be put in the same class with such railroad corporations for the purpose of applying to them the fellow-servant rule adopted by section 198 of the Constitution, and section 4056 of the Code.

Railroad corporations proper own lines extending across states; street railways are usually confined to single municipalities. Railroads cover miles; when street railways cover feet. The street railway usually has a single light car, running alone; while steam railroads have heavy locomotives, drawing from 1 to 40 cars, each of which is many times heavier than a single street car. The railroad train crosses long distances, where no one is present to see an injury but the employes; but street cars ordinarily run only along thickly populated streets. The street car rarely exceeds 10 miles per hour; while the railroad train thunders along at 40 miles per hour. The street car stops at every street crossing; while railroad stations are miles apart. The street car carries at best but three or four dozen people; while the railroad train carries its hundreds. The street car has no great momentum, even at its best, and can be stopped within a few feet; while the heavy railroad train cannot be suddenly stopped in an emergency. The railroad train carries its heavy load of freight and baggage, adding weight and momentum to the moving machinery; the street car has only a few passengers, and no freight and baggage. The railroad proper is constructed on high dumps across valleys, in deep cuts through hills, and on bridges across streams; the street car company has its rails laid level with the streets. The locomotive carries with it danger from fire; but no such danger attends the running street car.

All the above differences show the com-

parative safety of persons and property in the operation of street railways, viewed in the light of experience with railroad operation. There are many occupations more dangerous than the operation of street railways. There are none so generally dangerous, dangerous on so large a scale, as railroading. To hold that section 1985 applies to street railways would be to take out of it the very element which gives it validity and life. To so hold would be to place street railways in a class with railroad corporations proper. To do this would be to say that the operation of street railways is dangerous to persons and property, just as the operation of the great commercial railroads is. This would impair the classification—would destroy the basis.

We have already said that the same basis for the classification must be employed in justifying the enactment of this statute which has been held to justify section 193 of the Constitution. Counsel for appellee suggest that the fundamental reason for the creation of a rule like that contained in section 1985 is that the employes of such companies are always present to testify for the master. If their suggestion is sound, then the basis for the classification would be that peculiarity of the business which makes it necessary to operate it through servants in the absence of the master. The reason for the classification would then be stated somewhat as follows: "The business is conducted by servants who are in the immediate charge of the machinery, ways, and appliances; the master is absent, but always of necessity has employes present on the scene of every casualty who stand ready to testify for him." This may be one reason which prompted the Legislature in passing the law as it originally appeared in 1876. It may be a reason to be used in demonstrating the wisdom of the enactment; but the law cannot be safely based upon this ground and its validity maintained on this ground alone. Whether occupations could be classified by reference to such a basis need not be considered. Whether a law would be good which applied such a rule to all business conducted in the absence of the master need not here be decided. We have no law which attempts to do this.

Besides, if the conducting of business through employes in the absence of the master could be adopted as the basis for classification, the rule would have to apply to all businesses so conducted. The fact is nearly all enterprises are carried on through employes in the absence of the master. Especially is this true as to large enterprises, whose importance compels attention and treatment at the hands of legislators. Again, if such basis were employed, the rule would not be extended to employes themselves, as is attempted to be done by section 1985. The very idea in the mind of the lawmaker

in adopting the general rule would prevent him from extending it to employes. The reason which would move him to vote for a law to create a presumption of negligence on the part of the master under certain circumstances—that is, because the absent master has present witnesses—would impel him to vote against the law which would extend the same rule to the present employes.

If this basis should be used, then logging roads, tramways, electric railways, saw-mills, all sorts of manufacturing plants, steamboats, cotton gins, in fact, every sort of business, would have to be embraced, provided only it is carried on in the absence of the master through employes. But this statute only applies to railroad corporations. We must, therefore, find something inherent in the railroad business, peculiar to it, distinguishing it from every other class, to justify the classification. This inherent peculiarity is found in the use by railroad corporations of ponderous machinery propelled by steam at a high rate of speed over long distances upon a gigantic scale. The magnitude of the enterprise; the frequency of the casualties; the well-known peril of the business; the helplessness of persons and property that may come in contact with the moving machinery—these facts and considerations are held to warrant special legislation applying to railroad corporations only; legislation whose purpose is to protect life and property by making it easier to prove liability.

It may be that the Legislature in passing this law had no such basis in mind. It may be that the authors of the statute did not think of any necessity for classification. It may be that their purpose was as stated by counsel for appellee, and that the only reason which prompted them in passing the law is that accidents from running trains frequently happen when there is no one present but the injured person or property and the employes; but, when the courts come to test such enactments, they must find a basis which will justify the classification for the purpose of such special legislation.

Our position is that any classification for the purpose of special legislation like this in hand must be referred to the same basis upon which the classification is rested, to uphold section 193 of the Constitution; that any other basis would be unsound, and would condemn the statute as arbitrary class legislation. *Connolly v. Union Sewer Pipe*, 188 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, and authorities cited therein. Unless the same basis is used to justify the classification, the said act is violative of the fourteenth amendment of the Constitution of the United States, in that it denies the equal protection of the laws and the "protection of equal laws."

The error of the court in giving instruction No. 1 for the plaintiff is therefore fatal. The case is a close one on the facts.

The testimony of the eyewitnesses is in hopeless conflict. This instruction No. 1 was no doubt controlling. It relieved the jury of the necessity of deciding whether the employees of the appellant company were in any wise at fault. It relieved the plaintiff of his burden of proof. It placed the burden of proof upon the defendant. It saved the jury the trouble of weighing the testimony and carefully ferreting out the truth from conflicting stories. The witnesses were children. No two saw the accident alike. This instruction, however, furnished to the jury a solution of the perplexing question by authorizing them to cast it all aside and simply find that the company had not exonerated itself. It would be difficult to frame up a case for presentation to this court in which the issue could be more squarely and directly presented. If section 1985 does not refer to street railways, then the giving of instruction No. 1 for plaintiff was of necessity a reversible error.

Denny & Denny and Witherspoon & Witherspoon, for appellee.

WHITFIELD, C. J. We are thoroughly satisfied that the first instruction given for the plaintiff is manifestly erroneous. That instruction is as follows: "The court instructs the jury, for plaintiff, that the undisputed evidence that the death of the daughter of plaintiff was caused by the running of the car of defendant is prima facie evidence of negligence on the part of defendant, authorizing a recovery by the plaintiff, unless overcome by testimony exculpating defendant from negligence, to the satisfaction of the jury; that such prima facie proof of negligence or presumption of negligence cannot be overthrown by conjecture, but the circumstances of the accident must be clearly shown, and the facts so proven must exonerate the defendant from blame. And if such facts be not proven to your satisfaction, and the attendant circumstances of the accident remain doubtful in your minds, the defendant is not relieved from liability, and the presumption of negligence controls, and you should thereupon find for the plaintiff, and in such sum as the testimony warrants, not in excess of the amount sued for." Section 1985, Code of 1906, has no application to a street railway. The brief of learned counsel for appellant on this proposition amounts to demonstration of the inapplicability of this section of this statute at this time in this state. The authorities contained in that brief are so directly in point, and the reasoning so clear and satisfactory, that we direct the reporter to set out that part of said brief in full, and content ourselves by referring to it in support of the inapplicability of section 1985 to street railways, as the law now stands. Whether this section ought not to be changed so as to embrace street railways, if it can constitutionally be done, is a matter for the Legislature.

But a careful and repeated examination of the testimony in this record satisfies us thoroughly that the giving of this instruction, whilst error, is not reversible error. Learned counsel of appellant insists that the case is a close one on its facts. We cannot concur in this view. We think the evidence clearly and convincingly shows liability on the part of the defendant company, without regard to this instruction, and that no other verdict than one for the plaintiff could be rendered on any rational basis. It is true that two witnesses for the plaintiff testify that the little girl ran upon the track from the west side; but four witnesses for the plaintiff, and the motorman himself for the defendant, testified that she ran upon the track from the east side. And without regard to the testimony of any of these seven witnesses, the physical facts show, by the position of the girl where found, beyond any controversy, that she must have run upon the track from the east side. This is beyond any reasonable controversy. Learned counsel for appellant misconceive when they say there is no evidence to show that the rail on the west side was higher than the surface of the ground. Two witnesses expressly so testified. In other words, the evidence makes it perfectly clear that the rail on the east side, at the point where the girl was killed, was from one to three inches higher than the surface of the street, and on the west side about one inch higher. Of course, it would be immaterial whether she entered from the east or west side on the track, if the proximate cause of death was the elevated condition of the track on either side, over which she stumbled, if the fact be that she did stumble. But the testimony in this case makes it perfectly plain that she entered upon the track from the east side. That is the overwhelming testimony of the witnesses testifying to what they observed, and it is made absolutely indisputable by the physical facts as to where the girl was found, and the position of her body when found. She must have entered from the east side, and whether she stumbled over the rail and fell, and was thus killed, or whether she was struck by the car, not having stumbled, in either case the appellant was plainly liable for her death.

This car was coming downgrade, at a rate of from 7 to 10 miles an hour, right in front of a public school, on whose grounds nearby, between the rails and the school, some 200 children were playing at noon recess. This motorman knew the railway track was constantly crossed by pedestrians, knew these children were constantly playing out there at all recess hours, knew the children were playing close to the track, and according to his own testimony never applied any brake to stop this car until within 15 feet of the little girl, who was then running parallel with the track and near to it, so near as to advise him necessarily of her perilous po-

sition. There is some testimony that one of the brakes was worn to a feather edge, and could not be of any assistance in his effort to stop the car. There is testimony that he ought to have seen these children 200 feet away. There is evidence that he tried to stop the car, but not until he was entirely too close to the child, and that he could not stop it for some reason. The motorman himself testifies that he stopped once for some little boys. He also testifies that this little girl was only 15 feet from the car and 13 feet from the track when he first saw her; that he was looking down the track on both sides, right ahead of him, and that she (the little girl) was coming toward the track, angling; that he was running about 7 miles an hour, and that after he turned the current off entirely the car ran 45 or 50 feet before he put on the brakes; and that it took the 45 or 50 feet to stop the car, when this little girl was within a distance of 17 feet from the track, and he had waited until that time to apply the brakes, when from the whole testimony it is overwhelmingly manifest that he did see, or ought to have seen, this little girl, at a distance of from 100 to 200 feet, straight down the track ahead of him, as she was running along the side of the track.

It is not to be tolerated, under circumstances such as these, that a street railway company shall be permitted in this reckless and wanton manner to run down and kill a young child. If it be true that she stumbled, there would have been no accident, had the rails been flush, as the rails of all street railways ought to be, with the surface of the ground. If she did not stumble, the rate of speed at which this car was going, downgrade, by a public school, whose grounds near the track were thronged with children, who, to the knowledge of this motorman, were in the habit of crossing the track frequently, coupled with the fact that this motorman was bound to have seen this child from 100 to 200 feet away, whilst she was running alongside the track, within a distance estimated from 8 to 10 feet, and running angling towards the track, and never applied the brakes until within 15 feet of her, and had one brake wholly worthless constituted negligence of the most willful, wanton, and reckless character.

This child was but six years of age, and no contributory negligence is in the case.

We have carefully examined all other assignments of error, and content ourselves, not to protract this opinion uselessly with observing that on the record in this case they are without merit, and that the judgment is affirmed.

MAYES, J. (dissenting on overruling suggestion of error). In this case the testimony would support a verdict for either party, and the court has not yet held that in such a case erroneous instructions, calculated to mislead the jury, would not cause a reversal.

Indeed, in the case of *Brister v. Railroad Company*, 84 Miss. 33, 36 South. 142, the court expressly held that it would cause a reversal. If, on the facts of the case, it is manifest that no other verdict could or should be rendered than the one complained of, this court has held, in a line of decisions too numerous to be cited, that the cause would not be reversed for any mere error in the instructions, when it is manifest that the verdict is as it should be, and that the errors in the instructions were not potent in procuring the verdict. But the sustaining of the verdict in those cases was based by the court entirely upon facts contained in the record, making it impossible for any other verdict to be reached, and upon facts so conclusive in their nature that, if a different verdict had been reached, the court would not have allowed it to stand. This, I think, has been the consistent and correct holding of this court. The case under discussion was not a case where a peremptory instruction should have been given for the plaintiff. Indeed, after a protracted and most careful examination of this record, the facts and circumstances are far from making a case of clear liability on the part of the defendant company, but leave its liability in such doubt as could only be settled by the verdict of the jury. In this state of the proof the instruction complained of is given. I shall not quote the instruction, since it is set out in full in the main opinion. The opinion concedes that this instruction is "manifestly erroneous," but still holds that the giving of the instruction is not reversible error.

Without this vital error in giving this instruction, a verdict in favor of the plaintiff was possible; but on the giving of this instruction, a verdict against the plaintiff was impossible. Can it ever be said, under such circumstances, that such an error in law is not reversible? In the first place, the instruction gives a false probative effect to certain proven facts in the case, raising the comparatively insignificant fact of mere injury by the running of the car to a degree of proof sufficient to warrant the jury in finding a verdict for plaintiff. In other words, the instruction creates a false quantum of proof on which to rest liability and then tells the jury, if they have any doubt as to how the injury occurred, they must find a verdict for plaintiff, resting their verdict on the mere fact of injury by the running of the car. It was the duty of the plaintiff to prove negligence in order to entitle him to recover, and, if he failed to do this he failed to make out his case. If, when all the testimony was in, the jury were in doubt as to how the accident occurred, it was their duty to find for defendant. This instruction subverts the whole law applicable to the case, and its effect is just as though the court had given a peremptory instruction for plaintiff. The rule is general that negligence is not to be presumed from

the mere fact of injury, but must be established by the evidence; and yet the court tells the jury by this instruction that, when the plaintiff has shown that the death was caused by the running of the car, this fact alone was *prima facie* evidence of liability, and warranted a recovery against the defendant company, unless the testimony of the company overcame this presumption. By this portion of the instruction a presumption of liability is created where none exists as a matter of law, and the instruction further requires proof on the part of the company to overcome this false presumption. But the instruction does not stop at this, but goes further and directs the jury that this false presumption of liability cannot be overthrown by conjecture, but can only be overcome by clear proof of such facts and circumstances as would show exoneration from blame on the part of the defendant company. The instruction does not stop here; but, growing more stringent as it proceeds, further tells the jury that if, after the production by the defendant company of all its facts and circumstances introduced to overcome this presumption raised by this instruction, the circumstances of the accident remain doubtful, it is the jury's duty to find for the plaintiff. It was impossible, under this instruction, for the jury to return any verdict save one for the plaintiff, though the testimony in the case fully warranted a verdict for either party. If this instruction was not the potent cause of the verdict in favor of plaintiff, it is certain that it barred the jury from rendering a verdict in favor of defendant. It may be that the jury would have rendered the same verdict without this instruction; but it is possible that, if this instruction had not been given, the verdict would have been in favor of defendant, and in either case, on the facts, the verdict would not have been disturbed.

I have not set out the facts, but direct that the reporter make a full statement of same.

(124 La.)

No. 17,360.

**LITOLFF v. NEW ORLEANS RY. & LIGHT CO.**

(Supreme Court of Louisiana. June 30, 1909.)

**1 EVIDENCE (§ 588\*)—ADMISSIONS—WEIGHT OF TESTIMONY.**

The testimony of a witness as to admissions made by an employé immediately after an accident is not entitled to much weight, especially where the witness at the time labored under great excitement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.\*]

**2 STREET RAILROADS (§ 95\*)—COLLISIONS—NEGLIGENCE—EVIDENCE.**

A child about six years old suddenly started from the sidewalk to run across a street on which street cars were operated, when a car was

approaching. The car according to some witnesses was near, and according to others 10 or 15 feet away. The motorman saw the child start across the street and endeavored to stop the car, which was running at half speed; but he failed to do so, and the car struck the child. The car was stopped within 46 feet. Experienced men testified that a stop of the car within 30 or 50 feet was a good stop. *Held*, as a matter of law, that the accident did not result from the negligence of the motorman.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 179, 180, 202; Dec. Dig. § 95.\*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by Adam H. Litolff against the New Orleans Railway & Light Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Parkerson & Bruenn, for appellant. Dart & Kernan, for appellee.

**PROVOSTY, J.** Plaintiff's little boy, 6 years and 4 months old, who, plaintiff says, was 8 years old in size and 2 years old in sense, ran in front of one of the electric cars of the defendant company and was killed. Plaintiff contends that the motorman could have seen the child in time to stop, but that he was looking to one side, instead of ahead. The car was going down Chippewa street, which is an unpaved narrow street with a single track in the center. The exact width of the street is not stated in the record; but in the photographs, which give a view straight down the street, the space between the car track and the gutter does not appear to be much wider than the car track. The collision occurred about 51 feet before the car reached Eighth street. It had stopped at Ninth street and taken on a passenger; and as it was to stop again for passengers at Eighth street it was coming down at only half speed.

The testimony of the motorman is unsatisfactory in some respects. He says that before seeing the boy running towards his car he had seen a lady hailing him at the corner ahead, and had taken off his power and was winding his brake. He also says that when he saw the boy running towards his car he threw off his power and wound his brake, and that it was after this he noticed the lady at the corner ahead. He does not know whether the boy was running forward or backward, as the boy wore "one of these sun hats." He should have seen a lady and a man at the corner ahead, as both were there. However, his having seen only the lady may possibly be accounted for by her having masked the man, which is made probable by the testimony of the lady, who says the man was looking down the street and saw the car only when, on her speaking to him, he turned to face her. On sharper questioning, the motorman became positive that he had noticed the lady before he

had seen the boy running. As for the apparent contradiction with reference to the time when he took off his power and began winding up his brake, it may possibly be explained by supposing that on noticing the lady he threw off his power and began winding up his brake, and that practically at the same moment he saw the boy begin to run. In fact, that is what he testified to—that his seeing the lady and the boy “occurred at the same time.” The witness is evidently a slow-witted man, who becomes clear and positive only if given time. He produces the impression of an honest witness.

He says he saw the boy on the sidewalk to his left, and saw him suddenly start to run across the street and in a direction slanting uptown or towards his car, without any previous indication of his intention so to do, and so close to the car that he (witness) could see no more of him after he had left the sidewalk. While putting on his brake as quickly as he could, he halloed to the boy. At that moment he heard somebody “hollering.”

A lady, seated on her doorsteps, 64 feet above the spot where the collision occurred, to the right of the motorman—that is to say, on the opposite side of the street from that from which the boy was coming—had been looking down the street at the lady awaiting the car at the corner of Eighth. Her attention was attracted to the scene of the accident just as the car struck the boy. She, however, saw that he was “backing in front of the car.” She screamed. She says the motorman stopped the car “awful quick.”

Two men, Lynch and Leveson, were standing at the corner of Seventh, waiting for the car, both of them motormen of the defendant company, off duty. Both saw boy run from the side of the street in front of the car. One of them says the child ran “pretty close” in front of the car, and the other “couldn’t fix the distance.”

The man standing at the corner of Eighth, whose name is Fabacher, says that the child was playing in the gutter and was seated on the street side of the gutter; does not know how long he had been there; first noticed him when he rose suddenly and ran across. The car was then 10 or 15 feet away. The car was coming pretty fast. Car knocked the boy about 2 feet, several feet, and then it ran upon him again. The conductor was not looking. He applied the brake only after he struck the boy the first time.

This witness says that he was looking at the car from the time it left Ninth street, and that during this entire time the conductor was not looking ahead, but had his face turned to the left side of the street. In his statement of his having been looking at the conductor all this time he is contradicted by the lady who stood on the corner with him, Mrs. Nungesser, who says that he was

facing downtown, or in other words, had his back towards the approaching car, and that he only turned and faced the car when she spoke to him. This lady contradicts the witness on another point. She says that on the day of the accident he was deaf, as the result of sickness; whereas, he says that his deafness on the trial had come upon him since the accident.

Another witness, Jobe, was seated on the steps of the drug store at the corner of Eighth, to the right of the motorman, about 50 feet from the spot of the collision. He was reading the paper. He heard some ladies screaming, and looking up saw the boy plunging forward, going probably 5 feet, when he disappeared under the car. Witness jumped up, and while getting up hollered to the conductor; but before he could yell the child was already under the car. The conductor was facing to his (the conductor's) left, and had both hands on his brakes, and, when witness hollered to him, turned towards witness, and when witness cried out to him, “You’ve got a boy under the car!” he started to put on his brake and to take off the power.

Another witness, Modenback, was standing in the door on the steps of which the last witness, Jobe, was seated. On hearing Jobe cry out to the motorman, “You have got a boy!” he looked in the direction of the car, and saw that “the car had struck the boy and pushed him forward, and then the car came up again on him the second time and went over him.”

On cross-examination he said:

“It was about to hit the child. The child and car was together, and the child was going like this, because it has knocked him about eight feet. His head was going forward, and then he made a somersault.”

He says that at the moment he looked the motorman—

“had his hand on the brake and his face was turned to his left. He was not looking towards the front of the car at all. He did not know of the child until I hollered at him.”

This last witness says that, when the car stopped, the motorman got off, looked underneath the car, and said, “My God, sport! I did not know I had the boy,” and went on walking to Eighth street.

Jobe, the witness who had been sitting on the doorsteps reading the paper, says of the motorman:

“He came back to where the child was, and he said: ‘Well, it was not my fault, sport. I didn’t know I had the child.’”

Fabacher, the deaf witness who stood at the corner with Mrs. Nungesser, says:

“He got off the car, and came back there, and said he didn’t know he had hit anybody at all.”

Mrs. Weber says:

“I heard a terrific scream, and I got up and went right through the hall, when I heard the

car stop with a terrible jolt. I thought it had struck something, because it gave such a terrible bump. Just as I came around the car the motorman stepped down with the handle bar in his hand. He said: 'It wasn't my fault, because I didn't see the child.'"

The motorman says that the witness Lynch told him not to get off the car and that he did not do it until the policeman came; and he denies having said what Jobe, Modenback, Fabacher, and Mrs. Weber say he said. Timpe, a passenger on the car, says he was near the motorman all the time, and did not hear him make the remarks in question; only heard him say he could not help it. Lynch, who was at the corner of Seventh street, says he ran to the car, and when he got there the motorman was on the back platform, and he told him to remain there.

The sole negligence charged against the defendant company is the inattention of the motorman—his not having been looking ahead at the time the child came upon the track.

The only witnesses who pretend to have seen the child go upon the track are the motorman, Fabacher, who was at the corner of Eighth street waiting for the car, and Lynch and Leveson, who were together at Seventh, also waiting for the car. The motorman says that when the child ran upon the track the car was so near that the child could no longer be seen by him after it had crossed the gutter. Fabacher says the car was 10 to 15 feet away. Lynch says "very close to the car." Leveson could not undertake to specify any distance. The car was running at half speed. Lynch, an experienced motorman, testifies that with the car going at half speed the safest and the quickest way to stop is not by using the reverse, but by using the brake, and that a stop in 30 or 40 feet would be a good stop. Lais, defendant's chief instructor of motormen, says that with the car at half speed the use of the brake is the quickest and most effective way of stopping the car, and that a stop in 35 to 50 feet would be a good stop. O'Brien, defendant's superintendent of equipment, says that a stop in 35 to 50 feet would be a good stop. According to this evidence, the accident was inevitable, no matter how attentive the motorman might have been.

The motorman testifies that by means of the reverse a stop from half speed can be made within 10 to 15 feet; but he admits that he has never tried to make such a stop, and that, therefore, he knows nothing about it.

The car made a good stop. According to our computation it stopped within 46 feet. Timpe, a passenger, says the car could not have been going very fast, "or he couldn't have stopped the way he did." Mrs. Diest, the lady sitting on her doorsteps, says: "He

stopped the car awful quick." Mrs. Weber, the lady who ran out of her house: "Heard the car stop with a terrible jolt. It gave a terrible bump."

The reasons for judgment of the learned judge a quo are not in the record; but, doubtless, the witnesses Jobe and Modenback impressed him, as they do us, unfavorably.

Evidently, the harrowing scene of the accident has wrought upon them, and they are straining matters to create a responsibility on the part of the defendant company. If the motorman had begun to put on his brake when they say he did, he could never have made the stop that he did. Again, they saw entirely too much at one glance. Fabacher, too, is pulling hard at the situation when he makes the motorman keep his eyes to the left and not look forward once during the entire time from the stop at Ninth to the moment of the accident. It is hard for us to believe this, especially if we believe Mrs. Nungesser when she says that he had his back to the approaching car and was looking downtown.

The motorman says, on the witness stand, that he did not know he had run over the child until after he got down and saw the child under the car. What he means by this is that until then he did not know for certain but that the child might have escaped. To attribute to his words the meaning that he did not until then know that the child had run towards the car would be to involve him in a contradiction that no intelligent man would fall into; and the witness was not lacking in intelligence though of the slow-moving kind. We have no doubt at all that Jobe, Modenback, Fabacher, and Mrs. Weber heard this motorman make some remarks of that kind, and that they construed it into an admission that he had not seen the child run towards the car. They differ in the words which they attribute to the motorman. Admissions are notoriously a most dangerous kind of evidence, and all the more so when the witness at the time he pretends to have heard them was laboring under great excitement.

The boy is not shown not to have been as active as the average well-grown boy of his age. He had come to the place of the accident a little while before "on the back of an ice wagon." If he traversed the narrow space between the sidewalk and the track at a run, the time it took him to do it must have been so very brief as to have been approximately instantaneous, and certainly not sufficient to allow of the stopping of the car. We think the case is analogous to those of *Campbell v. Railroad Co.*, 104 La. 183, 28 South. 985; *Miller v. Railroad Co.*, 114 La. 409, 38 South. 401; *Cloud v. Alexandria R. R. Co.*, 121 La. 1066, 46 South. 1017, 18 L. R. A. (N. S.) 371. Judgment Affirmed.

**TRAVIS v. SLOSS-SHEFFIELD STEEL & IRON CO.**

(Supreme Court of Alabama. June 10, 1909.)

**1. APPEAL AND ERROR (§ 171\*)—REVIEW—THEORY OF CAUSE IN TRIAL COURT.**

A party trying a cause on the theory that his cause of action is under the employer's liability act (Code 1907, §§ 3910-3913) cannot on appeal urge that the action is under the homicide statute; the rules of law, pleading, evidence, and damages being different under the two statutes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.\*]

**2. MASTER AND SERVANT (§ 269\*)—INJURY TO SERVANT—ACTIONS—EVIDENCE.**

In an action for the death of a miner, any evidence that the accident was caused by an overheated blast fired by an independent contractor, and was not the result of the master's negligence, was admissible.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 269.\*]

**3. EVIDENCE (§ 471\*)—CONCLUSION OF WITNESS.**

It is not error to refuse to compel a witness to state whether a third person had discharged his duties to his own employés.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.\*]

Appeal from City Court of Bessemer; Wm. Jackson, Judge.

Action by Seney Travis, administratrix, against the Sloss-Sheffield Steel & Iron Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Allen & Fort and J. M. Hanby, for appellant. Tillman, Grubb, Bradley & Morrow, for appellee.

**MAYFIELD, J.** This is an anomalous action. Each count of the complaint was evidently intended by plaintiff to state a cause of action under the "employer's liability act." Code 1907, §§ 3910-3913. This is evident, because each count practically follows some part of the language used in the act; second, because plaintiff attempted to prove the value of the life of her intestate to her and his dependents, which is the measure of damages under that statute, where death results and the action is by the personal representative. But each count of the complaint not only fails to show the relation of master and servant, either expressed or implied, but affirmatively shows the contrary—that plaintiff's intestate was a servant of one Sanders, an independent contractor with defendant company. This is a material averment, if it is not the *sine qua non*, of a good complaint under the employer's liability act. It is doubtful if a complaint which fails to show the relation of master and servant, either expressly or inferentially, and shows affirmatively, as does this one, that such relation did not exist between intestate and the defendant, will support a

judgment for the plaintiff under this statute.

The defendant, however, insists that the complaint is under the homicide statute. A pleader might intend to form a complaint under the employer's liability act, and fail therein, but yet state a complaint under the homicide statute. But we do not think that a party should be allowed to proceed under one of these statutes, form his pleadings as if under one, and go through the entire trial proceeding under that statute, requesting rulings and orders as if under one statute, and, when he loses under that statute, say to this court: "I made the trial court err, by insisting that I was proceeding under one statute, when as a matter of law my complaint was under the other statute, so you must reverse this case and let me go back and try it under the other statute." The rules of law, pleading, evidence, and damages are entirely different under these two statutes. One is punitive entirely, and the other compensatory only. Evidence admissible under one might not be admissible, and often is not, under the other. A party is not allowed to mislead the court into error, even unintentionally, and profit thereby. But it is proper here to say that there appears no intention, on the part of counsel for either side, to mislead the court. It was solely a mistake, and nothing more.

We could very well put the affirmance of this case upon the ground of insufficiency of the complaint; but we prefer to put it upon the ground that it clearly appears that the trial court did not err in any of its rulings assigned as error.

There were two assignments of error, which are as follows: "First. That the trial court erred in overruling appellant's objection to the following question, propounded by appellee to the witness Roberts: 'Have you ever known them in this particular entry and by Sanders?' Second. That the trial court erred in sustaining the objection of appellee to the following question, propounded by appellant upon cross-examination to the witness Hanby: 'Now, Captain, going back to the duties of a contractor, when he discovers a bad place in the roof, a place that he thinks is bad, and reports it to the bank boss or timber man, state whether or not he has discharged his duties to his own employés?'"

The first question, together with the answer, was proper and admissible. It might tend to show that the accident was the result of an "overheated blast" fired by Sanders, and not the result of any negligence alleged in the complaint. The only ground of this objection was that there was no evidence of any "overheated blasts." That was no reason why the defendant might not show it by this very witness.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



The other objection is equally without merit. The court very properly declined to compel the witness to state whether or not a third party had discharged his duties to his own employers. It is doubtful if such evidence would ever be competent. It has been held that a witness could not express his opinion as to whether or not he had discharged his duty under a particular contract. *Clark v. Ryan*, 95 Ala. 418, 11 South. 22. If this be true, certainly he ought not to be allowed to give his opinion as to whether a stranger had discharged his duty. Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

### SOUTHERN RY. CO. v. DICKENS.

(Supreme Court of Alabama. June 17, 1909.)

#### 1. JUSTICES OF THE PEACE (§ 6\*)—ELECTION—DE FACTO OFFICERS.

Acts of a de facto justice of the peace are valid and effective.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 9; Dec. Dig. § 6.\*]

#### 2. EVIDENCE (§ 178\*)—BEST AND SECONDARY EVIDENCE.

Where a justice's summons and complaint were shown by parol to be lost, their contents were provable by parol.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 585; Dec. Dig. § 178.\*]

#### 3. JUSTICES OF THE PEACE (§ 64\*)—IMPLIED REPEAL.

Code 1896, § 2663, subd. 3, providing that a justice of the peace shall have the authority to appoint a person to act as a constable when the office of constable in his precinct is vacant, or in case of emergency for the execution of all processes except the collection of executions, did not repeal section 979, declaring that, when the office of constable is vacant or the constable is interested in the cause, or in case of emergency, an execution or attachment may be executed by any constable of the county in whose hands it may be placed, or may be executed by the sheriff as in other cases.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 64.\*]

#### 4. LIMITATION OF ACTIONS (§ 119\*)—SUMMONS—ISSUANCE—COMMENCEMENT OF SUIT—STATUTES—JUSTICES OF THE PEACE—"ISSUED."

Code 1896, § 2667, provides that civil suits before justices of the peace must be commenced by a summons "issued" by him, etc., and section 2814 declares that the suing out of a summons for the commencement of a suit shall have that effect, whether it be executed or not, if the suit be continued by an alias or recommenced at the next term of the court. *Held*, that where there was no constable in the justice's precinct, and the justice was also a deputy sheriff, a summons signed by him as justice while in his hands, whether as justice or deputy sheriff, was not "issued" so as to stop the running of limitations, as the issuance of summons under such circumstances contemplates a delivery to and acceptance by an officer having power to execute it.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 529; Dec. Dig. § 119.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3778-3781; vol. 8, p. 7693.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Charles C. Dickens against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Bestor, Bestor & Young, for appellant. Inge & McCorvey, for appellee.

MCCLELLAN, J. The action is by appellee against appellant for damages for the negligent killing of an animal belonging to appellee. All of the errors assigned and urged relate to ruling on the admissibility of evidence and giving or refusing charges to the jury.

The main contention of appellant is that the statute of limitations of one year forbade a recovery in this action. The undisputed facts in that connection were: Lewis was a de facto justice of the peace in September, 1903. *Thorington v. Gould*, 59 Ala. 461, 463, 469; *Masterson v. Matthews*, 60 Ala. 260. His acts as such justice were therefore valid and binding. The animal was killed on December 17, 1902. On September 14, 1903, Lewis, as justice of the peace, affixed his name to a summons and complaint in an action to recover for the alleged wrong stated above. This paper was shown by proper testimony to be lost. Its contents was then capable of proof by parol. It was also shown without dispute that Lewis was during the period in question a deputy sheriff, and it is well understood that such an officer may serve such process as this. Subdivision 3, § 2663, Code 1896, cannot be taken as repealing Code 1896, § 979. It was further conclusively shown that there was no constable in the precinct wherein Lewis was de facto justice of the peace. Article 16 of the Constitution of 1875 exempted justices of the peace from the inhibition against holding two offices of honor and profit in this state. But, notwithstanding these considerations, it is insisted by appellant that, the justice and the deputy sheriff being the same person, there was no summons issued, operating the commencement of the suit within the provisions of Code 1896, § 2667; and hence that the bar of one year was indisputably sustained.

The word "issued" is the key word of the statute for present purposes of interpretation. And in determining what it comprehends as necessary to the commencement of a suit and the cessation of the running of the statute of limitations, Code 1896, § 2814, should be considered in connection with section 2667. Section 2814 was considered in *West v. Engel*, 101 Ala. 509, 14 South. 333, and, construing the expression "suing out of the summons," it was there held that the summons was not sued out until it "passed from the hands of the clerk, properly signed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

by him, to the sheriff or other proper officer to be executed, or is sent by mail or otherwise to such officer with a bona fide intention to have it served." Many decisions were reviewed in *West v. Engel*, and the conclusion seems to have been largely influenced by *Ross v. Luther*, 4 Cow. (N. Y.) 158, 15 Am. Dec. 341. As interpreted in *West v. Engel*, *Ross v. Luther* held that the commencement of the action was the issuance of the summons, and that issuance comprehended a delivery of the process as ruled in *West v. Engel*. In other words, the expression "issuing out of the summons" was taken to be synonymous with issuing of the summons, and issuing was held to include, to perfect the commencement of the suit, the delivery of the process as stated in *West v. Engel*. We take *West v. Engel* to be authority for the ruling we make that the word "issued," when applied to process commencing a suit, operating on the cessation of the running of the statute of limitations, includes as a prerequisite that the process was delivered, or committed to an agency tending to delivery, to a proper officer for service. The inquiry here then narrows to this: Can a justice who is also an officer authorized to accept delivery and to execute such powers make the essential delivery by himself in one capacity to himself in another capacity? To meet the condition to issue of process, viz., delivery as stated, we do not think the mere mental operation of the individual having two capacities in which he may act can afford the delivery or acceptance necessary to effect the commencement of the suit. He cannot for this purpose be both the deliverer and acceptor. It was the early rule in England, and is so now in some of the states, that service and return of the writ should precede the commencement of the suit. Our statutes are said to have been enacted to avoid that rule. Under the rule, it was said that it allowed the suspension of statutes of limitation in the discretion of a party. If the same individual, having both judicial and executive powers to issue and execute respectively, may effect the necessary delivery by mere mental conclusion hidden from the eye and involving no act whatever, the very purpose for the enactment of our statutes in this regard would be, in effect, defeated. It would be in his power to decide when the suit was commenced. He could say without fear of contradiction, or even investigation, that he did not deliver the process to the executing phase of his official being; and thereby possess an ungoverned discretion in the premises that might be employed to confer or defeat rights of parties concerned.

Nothing can be taken by the assumption that cases may arise where there is no one to whom to commit the process in a civil

suit before a justice for service; because we have statutes that, if availed of, render, for practical purposes, such a condition impossible. Code 1896, §§ 979, 2663. Besides, the whole scheme of process, issuance, and service includes the purpose to not blend the two powers—one judicial, generally speaking, and the other, generally speaking, executive. If a justice of the peace might be both issuer and executioner of processes in civil actions where, as here, the question of limitations may arise, or where other action is dependent upon when the process was, in fact, executed, the court itself might and would become in such case the source of proof of its own jurisdiction or whether the matter complained of had passed the period to remain an enforceable right. A predicament of that character should be avoided where it can be done according to methods provided and readily availed of upon occasion. The plea of the statute of limitations of one year was proven beyond dispute. The judgment is reversed and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

STANFORD v. ST. LOUIS & S. F. R. CO.  
(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

1. NEGLIGENCE (§ 83\*)—LAST CLEAR CHANCE DOCTRINE.

The doctrine of subsequent negligence or last clear chance is recognized in Alabama.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.\*]

2. RAILROADS (§ 351\*)—CROSSING ACCIDENT—INSTRUCTIONS.

In an action for the death of one killed at a railroad crossing, the court instructed that, if the crossing had been closed, the verdict must be for defendant, unless the employé who caused the train to be set in motion knew that his conduct would probably result in injury, and that there could be no verdict for plaintiff unless the servants in charge of the train intentionally, wantonly, or willfully caused it to be backed against decedent. *Held*, that the instructions were erroneous as ignoring the doctrine of "last clear chance," which some of the evidence tended to establish.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1214; Dec. Dig. § 351.\*]

Appeal from Circuit Court, Lamar County; S. H. Sprott, Judge.

Action by Luitia E. Stanford, as administratrix, against the St. Louis & San Francisco Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Walter Nesmith and John S. Stone, for appellant. Bankhead & Bankhead, for appellee.

MAYFIELD, J. Plaintiff's intestate was killed in the town of Sulligent by defendant's freight train at about 1 o'clock in the afternoon of December 16, 1906. The freight train was standing upon a side track at Sulligent just prior to the accident, awaiting the arrival of the passenger train due at that hour. The freight train as it thus stood upon the side track crossed one or more of the public thoroughfares of the town, along which people were wont to pass in considerable numbers, especially to and from defendant's depot upon the arrival and departure of defendant's passenger trains; and, for the purpose of not impeding the travel, the cars composing the train were uncoupled, so that the highway could be opened for travel over and along same while the train was thus waiting. Just as the passenger train whistled for the station of Sulligent, the conductor of the freight train signaled the engineer to couple up the train so that it would be ready to move out as soon as the passenger train had arrived or passed. As the train was thus being coupled up the intestate was in some manner caught by the moving cars and crushed to death.

The evidence was in conflict as to whether deceased was passing along one of these highways and attempting to go through the opening made for that purpose between two of the cars, and was thus caught between the two cars as they were being moved together to be coupled, or whether the passage-way had been closed by the cars being coupled before he reached the line of cars, and he attempted to climb over or crawl under the couplings, or whether he was trying to crawl under one of the cars, midway between the couplings, when he was caught and crushed. The evidence was also in dispute as to whether any of the train crew in charge of the movements of the train consented or signaled to intestate that he could cross the track or the cars at the time and in the manner he attempted so to do.

A great many witnesses were present at the time of the accident, but only a few seem to have been looking at the deceased at the exact time of his attempt to cross, or to know the exact manner in which he attempted to cross—whether he was attempting to cross through the opening between the cars, or over or under the coupling, or under the car, midway between the couplings. The witnesses who profess to have observed the accident differ one from another as to one or more of these details, and also as to whether deceased signaled the train crew for permission to cross, and as to whether any member of the crew signaled consent, and, if so, which member—the flagman, the conductor, or the engineer. For the purpose of this appeal, and such purpose only—that is, of showing the correctness of the principles of law to be announced in this opinion—we will concede that the weight of the

evidence supported the verdict of the jury finding for the defendant, and that there was no liability.

There was, however, evidence which would authorize the jury to infer that, if the plaintiff's intestate was guilty of negligence, such negligence preceded that of the defendant, if such there was, and it was open to the jury to infer from some of the evidence that there was, which proximately caused the injury, and that plaintiff's intestate's negligence, if such there was, did not concur with that of the defendant's which caused the injury, but preceded it, and therefore did not proximately contribute to his death. Some of the evidence would also justify the inference that the plaintiff's intestate was induced to attempt to cross the track or train by the defendant's agents before they were guilty of any negligence, which might relieve the intestate from the onus of being a trespasser at the time of the accident, and that the negligence in consequence of which he was injured was subsequent to that of plaintiff's intestate, and that, therefore, he had no chance to avoid the negligence of defendant, while the defendant did have the opportunity to avoid injuring intestate, after his negligence, which may have been induced by defendant, and that, if the defendant had exercised reasonable care after knowing of intestate's peril and negligence, it could and would have thereby avoided injuring him. Some of the evidence makes a clear and typical case for the application of the doctrine of "subsequent negligence" or "last clear chance." This rule or doctrine, first announced in England, has been adopted and is now well recognized in this state. *Hanlon's Case*, 53 Ala. 70; *Tanner's Case*, 60 Ala. 621; *Cook's Case*, 67 Ala. 533; *Letcher's Case*, 69 Ala. 106, 44 Am. Rep. 505; *Frazer's Case*, 81 Ala. 185, 1 South. 85; notes in 60 Am. Rep. 145; 11 L. R. A. 385; 25 L. R. A. 289; 55 L. R. A. 426; 69 L. R. A. 549. In these cases, *supra*, many on the subject of this and other states, as well as federal and English cases in point, are collected and discussed. See, also, more frequent cases of this state (*Brantley's Case*, 132 Ala. 655, 32 South. 300; *Young's Case* [Ala.] 45 South. 238, 16 L. R. A. [N. S.] 301), in which the same doctrine is announced.

The court, at the request of the defendant in writing, gave the jury a great number of charges, some of which ignored this phase of the evidence; and virtually charged the jury that plaintiff could not recover in the case if they believed from the evidence that the space between the cars had been closed when deceased attempted to cross the railroad track unless they further believed that defendant was guilty of wanton negligence or willful injury—wholly ignoring or disregarding the doctrine of subsequent negligence or "last clear chance," which some of the evidence tended to establish. Similar

charges were held bad in some of the cases of this state, cited above, under like evidence, and for the very reasons herein assigned. Given charges 1 and 34 were typical of this infirmity. These charges were as follows:

"(1) If you believe from the evidence that the crossing had been closed before Clyde entered on the track, you must find for the defendant, unless you are reasonably satisfied that the employé who caused the train to be set in motion was conscious from his knowledge of existing circumstances and conditions that his conduct would likely or probably result in injury, or that he had a design, purpose, or intent to do wrong and inflict the injury."

"(34) The court charges the jury that if they believe from the evidence that the space between the cars at the crossing had been closed before Clyde attempted to cross the track that they cannot find for the plaintiff, unless they further believe from the evidence that the agents, servants, or employes in charge or control of the movements of the train wantonly, willfully, or intentionally backed, or caused or allowed the train to be backed against Clyde."

It is unnecessary to pass upon the other assignments of error, as the same questions will probably not arise upon another trial. However, we may say that in other respects the rulings of the trial court seem to have been correct.

For the errors indicated, the judgment of the trial court must be reversed and the cause remanded.

Reversed and remanded.

SIMPSON, ANDERSON, DENSON, McCLELLAN, and SAYRE, JJ., concur.

#### GUILFORD & DEAL v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Alabama. June 10, 1909.)

TELEGRAPHS AND TELEPHONES (§ 67\*)—MESSAGES—FAILURE TO DELIVER—SPECIAL DAMAGES.

Where no reference was made, in a telegram directing the buyer of certain brick to unload a car on the succeeding Monday, to a sale of 150,000 brick by the sender of the message to the addressee, that would put the telegraph company on notice of the existence of such contract, and there was no claim or evidence that such sale was communicated to the telegraph company's agent, the sale was a collateral circumstance to the contract for transmission of the message, so that, in the absence of notice, the loss of the sale by reason of the nondelivery of the message could not form a basis for recovery of special damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 68; Dec. Dig. § 67.\*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by Guilford & Deal against the Western Union Telegraph Company for damages for failure to deliver telegram. Judgment for defendant, and plaintiffs appeal. Affirmed.

The facts are sufficiently stated in the opinion. The oral charge of the court, excepted to, is as follows: "That if, before the sending of the message in question, the plaintiffs and the sendee of the message made a contract for the sale and purchase of 150,000 brick, conditioned upon the sendee being able to get the car of brick then at Sampson at once, or within a few days, then such contract constituted special facts or circumstances which, in order for the plaintiffs to recover of the defendant for any breach of the contract to deliver the telegram introduced in evidence, by reason of any depreciation in the market value of the brick after the sending of a message, and before they were able to make sale of the 150,000 brick, should have been communicated to the agent of the defendant at the time of sending said message; and as there is no evidence in this case that such communication was made by the plaintiffs, or any one for them, to the agent of defendant receiving the telegram for transmission, the plaintiffs are not entitled to recover any damage for any loss sustained by them by reason of the depreciation in the value of the 150,000 brick." There was a recovery of \$39.90 as to the car of brick not delivered.

W. L. Lee, for appellants. Espy & Farmer, for appellee.

DOWDELL, C. J. This is an action for damages for failure to deliver a telegraphic message. The evidence showed that the message related to a car load of brick, and was as follows: "7/27/07. To A. C. Crawford, Sampson, Ala.: You can unload brick, every thing O. K. Unload Monday. Guilford & Deal." In addition to this particular car load of brick, for which damages are claimed on account of a loss of sale of same to Crawford by reason of the nondelivery of the telegram, the plaintiffs claimed damages in the loss of the sale of 150,000 other brick which Crawford had agreed to purchase of them conditionally upon his getting the particular car load. The only error assigned on the record is based on exception reserved to a certain part of the court's oral charge to the jury, set out in the record, and which related to the measure of damages recoverable under the facts of the case.

No reference is made in the telegram to the sale of the 150,000 brick that would put the defendant company on notice of the existence of any such contract between plaintiffs and Crawford, nor is there any pretense in the evidence that such fact was communicated to the agent of the telegraph company. These were special circumstances collateral

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the contract with the company in the transmission of the message, and unless known or communicated to the defendant, or its agent, could not be made the basis of special damages for the nondelivery of the telegram in question. This principle finds support in the case of *Daughtery v. Am. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435, and 89 Ala. 191, 7 South. 680, and in *W. U. T. Co. v. Way*, 83 Ala. 542, 4 South. 844, cited by counsel for appellant. The part of the oral charge of the court, excepted to, correctly stated the law under the undisputed evidence as to the recoverable damages.

This being the only question in the case, and there being no error shown, the judgment is affirmed.

Affirmed.

SIMPSON, MAYFIELD, and SAYRE, JJ., concur.

ST. LOUIS & S. F. R. CO. v. SAVAGE.  
(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

1. DAMAGES (§ 168\*)—EVIDENCE—ADMISSIBILITY.

In an action for injuries, it was proper to receive evidence of plaintiff's physical condition within a reasonable time prior and subsequent to the injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 480, 482-486; Dec. Dig. § 168.\*]

2. DAMAGES (§ 168\*)—EVIDENCE—ADMISSIBILITY.

In an action for injuries, it was proper to admit evidence that plaintiff suffered loss of weight, that he suffered pain at the time and down to the time of the trial such as he had not suffered before, and insomnia.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 480, 482-486; Dec. Dig. § 168.\*]

3. DAMAGES (§ 173\*)—EVIDENCE—ADMISSIBILITY.

In an action for injuries, it was proper to admit evidence that since the accident plaintiff had done no work, and could do none.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 490-492; Dec. Dig. § 173.\*]

4. EVIDENCE (§ 528\*)—EXPERT TESTIMONY.

In an action for injuries expert professional witnesses may testify as to the cause of plaintiff's impaired physical condition subsequent to the accident.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.\*]

5. WITNESSES (§ 111\*)—COMPETENCY.

In an action for injuries, it was competent for plaintiff to testify on his own behalf as to his physical condition within a reasonable time prior and subsequent to the accident that he had done no work since the accident, and could do none.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 111.\*]

6. WITNESSES (§ 248\*)—EXAMINATION—RESPONSIVENESS OF ANSWER.

In answer to a question as to what caused a railroad wreck, a witness responded: "It was

fast running is all I could account for it." *Held*, that the answer was not irresponsible.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 861-863; Dec. Dig. § 248.\*]

7. CARRIERS (§ 317\*)—INJURIES TO PASSENGER—EVIDENCE.

In an action for injuries to a passenger, evidence that the train was behind time was admissible as tending to show that it was being operated at an unusual and immoderate rate of speed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1302; Dec. Dig. § 317.\*]

8. CARRIERS (§ 297\*)—INJURY TO PASSENGERS—RATE OF SPEED.

With respect to the safety of passengers, a rate of speed may be dangerous and negligent per se.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1204; Dec. Dig. § 297.\*]

9. EVIDENCE (§ 473\*)—OPINION EVIDENCE.

In an action for injuries to a passenger in a wreck, plaintiff claimed that the train was running at a dangerous speed, and defendant asked the engineer whether he could have stopped at a public crossing. *Held*, that defendant was not entitled to an answer to the question, since the conclusion called for was not a permissible shorthand rendering of collective facts.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2220-2223; Dec. Dig. § 473.\*]

10. CARRIERS (§ 317\*)—INJURIES TO PASSENGERS—EVIDENCE.

The evidence called for involved facts and purposes foreign to the issue.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 317.\*]

11. DAMAGES (§ 168\*)—EVIDENCE—ADMISSIBILITY.

In an action for injuries, it was proper to exclude evidence of a physician as to whether he had seen a chance on plaintiff's person, where the question to the witness was not limited to a time somewhere near the date of the injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 482; Dec. Dig. § 168.\*]

12. EVIDENCE (§ 14\*)—JUDICIAL NOTICE—EFFECTS OF DISEASES.

That a nervous condition is a characteristic of syphilis may not be judicially noticed.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 14.\*]

13. DAMAGES (§ 168\*)—EVIDENCE—ADMISSIBILITY.

In an action for injuries, there was no error in refusing to permit a physician to be asked whether plaintiff was a hard drinker, where at that stage of the trial there was no evidence that the injuries might have resulted from drink, and it did not appear to what time the question related, although later developments in the trial of the cause were such as to render the desired testimony admissible as accounting for plaintiff's symptoms at the time of his visit to this witness, if the question was intended to relate to that time.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 480, 482-486; Dec. Dig. § 168.\*]

14. EVIDENCE (§ 315\*)—HEARSAY.

It was proper not to permit plaintiff to be asked whether a physician had told him that, if he did not stop drinking, it would render him insane.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1200; Dec. Dig. § 315.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**15. WITNESSES (§ 240\*)—LEADING QUESTION.** It is within the trial court's discretion to allow a leading question.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 795; Dec. Dig. § 240.\*]

**16. DAMAGES (§ 208\*)—QUESTION FOR JURY.** In an action for injuries, the weight of evidence as to impairment of plaintiff's eyesight after the accident was for the jury in connection with all the evidence.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 208.\*]

**17. CARRIERS (§ 316\*)—INJURIES TO PASSENGER—BURDEN OF PROOF.**

Plaintiff having shown an injury caused by the wreck of defendant's train while he was a passenger thereon, or at least having offered evidence which made it necessary to consider his injury under such circumstances as one hypothesis of the case, that hypothesis proven, cast upon the defendant the burden of reasonably satisfying the jury that the wreck was not due to negligence on the part of defendant.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283-1294; Dec. Dig. § 316.\*]

**18. APPEAL AND ERROR (§ 1078\*)—WAIVER OF ERROR.**

Assignments of error not insisted on in argument will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by John J. Savage against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Campbell & Johnson, for appellant. Gaston & Pettus, for appellee.

SAYRE, J. Plaintiff sued to recover damages for bodily injuries sustained by him while a passenger in the wreck of a train operated by the defendant. As tending to support the allegation that plaintiff was injured, and as showing the extent and character of his injuries, it was proper to receive evidence of his physical condition within a reasonable time prior and subsequent to the injury, that he suffered loss of weight, that he suffered pain at the time and down to the time of the trial such as he had not suffered before, and insomnia, and had done no work since, and had been able to do none, and to all these things it was competent for the plaintiff to testify as a witness in his own behalf, and the opinion of expert professional witnesses as to the cause of his subsequent condition might be received. Alabama G. S. R. R. Co. v. Hill, 93 Ala. 514, 9 South. 722, 30 Am. St. Rep. 65; South & N. A. R. R. Co. v. McLendon, 63 Ala. 266. This disposes of assignments of error numbered 1, 2, 3, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, and 30.

A witness having been asked without objection to state what caused the wreck answered: "I believe fast running is all I could

account for it, the wreck." Defendant moved to exclude "it was fast running is all I could account for it" on the ground that it was not responsive. Whatever may have been the tenable objections to the answer as evidence, that part of it to which the objection was addressed was not open to the particular objection assigned, and there was no error in overruling the motion to exclude. The assignment of particular objection was a waiver of all others. *Jaques v. Horton*, 76 Ala. 238; *Floyd v. State*, 82 Ala. 16, 2 South. 683.

Two counts set out general charges of negligence on the part of the agents or servants of the defendant in operating the train. Plaintiff was permitted to show that the train was not running on time—was behind. We cannot say that the fact that the train was late did not have a tendency to show that it was being operated at an unusual and immoderate rate of speed. There is natural tendency to haste when late, and, while it is generally stated that no mere rate of speed constitutes per se negligence, this rule is in most cases formulated for the purposes of cases in which persons or animals are injured by coming on the track. *East T. V. & G. R. R. v. Deaver*, 79 Ala. 216. "Railway companies being engaged in the business of conveying passengers and property, and that business being regarded of the highest importance, the speed of trains may be regulated with that end in view." 3 Elliott on R. R. § 1204. "There may, however, be peculiar circumstances involved in the particular case which might justify the conclusion that there was negligence in running at a high rate of speed." 4 Elliott, R. R. § 1589. Certainly with respect to the safety of passengers carried upon the train it cannot be denied that a rate of speed may be excessive, dangerous, and negligent. But no parity of reason requires that defendant should have been allowed to have answers to its questions propounded to the engineer in charge of the train as follows: "State whether or not you had your train under control to stop at the public crossing? State whether or not you could have stopped at the public crossing? State whether or not you were running at a rate of speed at which you could have stopped your train at the public crossing?" The witness had testified that the train was running at a rate of about 30 miles an hour. The conclusions which these questions called for were not permissible shorthand renderings of relevant collective facts, but involved, not only the rate of speed of the train, but other facts and purposes which were wholly foreign to any issue in the case.

On the cross-examination of Dr. C. B. Bibb, the defendant asked him whether he had ever seen sores on the plaintiff, and again whether he had ever seen a chancre on any part of the plaintiff's person. On objection made, the court refused to permit these ques-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tions unless they were so framed as to relate to a time somewhere near the date of plaintiff's injury. It would greatly retard the trial of causes of the sort and add nothing to their proper solution if parties were allowed to inquire into every ailment from which plaintiff may have suffered, no matter how remote. Evidence of the kind to come within the requirement of materiality must be so nearly related to the point of time of the injury complained of as to afford an inference of appreciable weight that the accident did or did not effect a change in the physical condition of the plaintiff. These questions are urged on the theory that a disease of the nature indicated is permanent in its effects, and so might account for plaintiff's nervous condition subsequent to the accident. But we cannot judicially know, as counsel seem to suppose, this characteristic of the disease intimated. We are of opinion that the questions were properly limited by the trial court. So also in respect to assignments of error 7 and 8 which are based upon the court's refusal to allow the defendant to ask whether plaintiff was a drinking man, and whether he was not a hard drinker. At the stage of the trial at which these questions were asked there had been no evidence tending to show that the injuries of which the plaintiff complained might have resulted from drink, nor are we able to determine from the record the period of time to which they relate. Under these circumstances, we are not disposed to put the trial court in error, although later developments in the trial of the cause were such as to render the desired testimony admissible as accounting for plaintiff's symptoms at the time of his visit to this witness, if the question was intended to relate to that time.

The court committed no error in sustaining plaintiff's objection to defendant's question propounded to plaintiff as follows: "Is it not a fact that Dr. Young told you that, if you did not stop drinking, it might make you insane?" Of course, the fact that plaintiff was drinking or a drinking man could not be proved by Dr. Young's unsworn statement; nor was it competent in the way of contradiction, for he had sworn to nothing to the contrary nor had he been interrogated in reference to the statement supposed to have been made by him.

Defendant objected to the question which is made the subject of the twenty-seventh assignment of error on the ground that it was leading and suggestive. It was within the discretion of the court to allow a leading question. *Blevins v. Pope*, 7 Ala. 371; *Sayre v. Durwood*, 35 Ala. 247.

There was testimony that among the other troubles alleged to have been suffered by plaintiff subsequent to the wreck his eyesight became bad—worse than it had been before. However weak and inconclusive this evidence

may have appeared to the jury, it was for them to determine its weight in connection with all the evidence. Charges 1, 8, 9, and 10, requested by the defendant, were therefore properly refused.

The plaintiff having shown an injury caused by the wreck of defendant's train while he was a passenger thereon, or at least having offered evidence which made it necessary to consider his injury under such circumstances as one hypothesis of the case, that hypothesis proven, cast upon the defendant the burden of reasonably satisfying the jury that the wreck was not due to negligence on the part of defendant. *Ala. G. S. R. R. Co. v. Hill*, supra. The jury were at liberty under the evidence to refer the injury to either of the causes stated in the complaint, and the general affirmative charges, on the whole case, and upon the separate counts, were properly refused.

Other assignments of error are not insisted upon in argument in such way as to demand consideration. *Hodge v. Rambow* (Ala.) 45 South. 678. They have, however, been considered, and no reversible error found. Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

# BIRMINGHAM RY., LIGHT & POWER CO. v. MOORE.

(Supreme Court of Alabama. May 13, 1909.  
Rehearing Denied June 30, 1909.)

## 1. CARRIERS (§ 321\*)—INJURY TO PASSENGER—INSTRUCTIONS.

In an action for injuries to an alighting passenger from the starting of the car, an instruction that plaintiff would be entitled to recover if the car was negligently started was erroneous, for failing to hypothesize that the starting of the car was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 321.\*]

## 2. TRIAL (§ 295\*)—CHARGE—CONSTRUCTION AS A WHOLE.

The oral charge of the court must be considered as a whole.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

## 3. CARRIERS (§ 320\*)—INJURY TO PASSENGER—QUESTIONS FOR JURY.

If defendant motorman saw plaintiff alighting and started the car with a jerk, whereby she was injured, the question whether the starting of the car was wanton was for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1233; Dec. Dig. § 320.\*]

## 4. TRIAL (§ 250\*)—INSTRUCTIONS.

In an action for injuries to an alighting passenger from the starting of the car, a requested instruction as to "increasing the speed" of the car was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 584-586; Dec. Dig. § 250.\*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Nettie Moore against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The complaint consisted of three counts—the first, in simple negligence of the defendant's servants or agents in control of the car in the negligent manner in which they ran or operated the same; the second, in wanton or willful injuries for starting the car while plaintiff was in the act of alighting, knowing that the plaintiff was in the act of alighting and liable to be injured; the third, in wanton or willful injury, generally stated. The charges are sufficiently stated in the opinion of the court, with exception of charge 5, which is as follows: "Unless you are reasonably satisfied from the evidence that the speed of the car was suddenly increased as plaintiff attempted to alight, and that this was negligently increased, then you cannot find for the plaintiff under the first count of the complaint as amended."

Tillman, Grubb, Bradley & Morrow and L. C. Leadbeater, for appellant. Frank S. White & Sons, for appellee.

**SIMPSON, J.** This action was brought by the appellee against the appellant for damages resulting from an injury claimed to have been received by the plaintiff, who was a passenger on defendant's railway, in the city of Birmingham.

The first assignment of error insisted on is to that part of the oral charge of the court as follows, to wit: "I charge you, further, if you believe, from the evidence, that the car had been stopped, and that the plaintiff was in the act of alighting, and the motorman knew, or by the exercise of reasonable care would have known, that she was in the act of alighting, and that he negligently started the car with a sudden jerk or start, then she would be entitled to recover." This part of the oral charge was erroneous, in failing to hypothesize that the starting of the car by the motorman was the proximate cause of the injury received by the plaintiff. *Birmingham Railway, Light & Power Co. v. Jones*, 148 Ala. 277, 284, 41 South. 146; *Huggins v. Southern Railway Co.*, 148 Ala. 154, 166, 41 South. 856. While it is true that the oral charge of the court must be considered as a whole, yet the oral charge was in the shape of separate distinct legal propositions, laid down for the guidance of the jury, and this part of the charge purported to state a distinct legal proposition in itself; and we cannot see that the other parts of the charge were so connected with or referable to it as to relieve it from this error.

The second assignment of error insisted on is the refusal of the court to give the

charge requested by the defendant, as follows, to wit: "I charge you that you cannot award the plaintiff any damages for the purpose of punishing the defendant." There was no error in refusing this charge. The plaintiff testified that, just as she was placing her foot on the step to alight, the motorman looked over his shoulder at her, and the conductor rang the bell, and the motorman started the car with a jerk. If the motorman did see her in the act of alighting, and started the car with a jerk, and she was thereby injured, it was a question for the jury to determine whether the starting of the car was wanton.

The third assignment of error is to the refusal to give the charge: "If you believe the evidence, you cannot find for the plaintiff under the second count of the complaint as amended." The bill of exceptions does not show that any such charge was requested.

The court properly refused charge 5, requested by the defendant. There was nothing in either the pleading or evidence basing any claim on "increasing the speed" of the car (which implies that it was already in motion), but the claim was that the car "started" with a jerk.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

**DOWDELL, C. J., and DENSON and MAY-FIELD, JJ., concur.**

#### PAGE v. WHATLEY.

(Supreme Court of Alabama. June 10, 1909.)

#### 1. REFORMATION OF INSTRUMENTS (§ 45\*)—DEEDS—MISTAKE—DEGREE OF PROOF.

Equity grants reformation of deeds only when error certainly appears, and never on a mere probability or a mere preponderance of the evidence.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157, 160-164; Dec. Dig. § 45.\*]

#### 2. REFORMATION OF INSTRUMENTS (§§ 36, 45\*)—DEEDS—MISTAKE.

A complaint to reform a deed because of mistake must allege the mistake, which must be proved by clear, exact, and satisfactory evidence.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 144, 157, 160-164; Dec. Dig. §§ 36, 45.\*]

#### 3. DEEDS (§ 69\*)—MISTAKE.

In a suit to reform the descriptions in a deed for mistake, it was shown that the descriptions did not include the lands intended to be described nor those actually sold, and that the lands measured by complainant and witnesses who assisted him, and described in their evidence, was the land contracted to be sold, which plaintiff took possession of and inclosed and continued to possess until the trial. Part of the lands described in the deed in excess of that described in the bill was never intended to be sold, and plaintiff took possession of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



land which both he and defendant intended should be sold; the only mistake being in the measurement of the distance. *Held*, that a reformation of the deed was properly decreed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 156-164; Dec. Dig. § 69.\*]

**4. BOUNDARIES (§ 3\*)—DESCRIPTION—DISTANCES—FIXED BOUNDARIES.**

Distances in a description of land will always yield to fixed boundaries clearly and certainly established.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.\*]

Appeal from Chancery Court, Houston County; W. L. Parks, Chancellor.

Suit by T. J. Whatley against Monroe Page. Decree for complainant, and defendant appeals. Affirmed.

A. E. Pace and R. D. Crawford, for appellant. Espy & Farmer, for appellee.

**MAYFIELD, J.** This is an appeal from a decree in the chancery court of Houston county, reforming a deed made by appellee to appellant, on the ground of mistake.

Equity grants reformation of deeds only when error certainly appears, and never upon a mere probability or a mere preponderance of evidence. *Hough v. Smith*, 132 Ala. 204, 31 South. 500; *Kilgore v. Redmill*, 121 Ala. 485, 25 South. 766; *Dexter v. Ohlander*, 95 Ala. 467, 10 South. 527. A complaint to reform a deed because of mistake must allege a mistake and prove it by clear, exact, and satisfactory evidence. We have carefully examined the evidence shown by the record, and we concur in the finding and decree of the chancellor that the plaintiff was entitled to the relief under the pleadings and proof, and that there was no error in the finding of the chancellor, in the rendition of the decree, or in any other assignment of error, available as a reversal in this case.

We hold that it is shown beyond dispute by the evidence in this record that the description in the deed does not describe the lands intended by the parties to be described, nor the lands that were actually sold by appellee to appellant. While it is uncertain whether the error was the fault of the appellant or of the appellee, it is certain that the description is erroneous, and that it was the fault of one or both. While the proof does not show, beyond a reasonable doubt, that the lands described in the amended bill, and surveyed and measured, and testified to, by the appellee and the witness who assisted in the measuring of the distances, were the lands actually intended to be conveyed and contracted to be sold by the parties, yet it does, in connection with all the other evidence, conclusively show, and furnish sufficiently clear and satisfactory evidence, that the lands they measured, and described in their evidence, were the lands contracted to be sold, which were taken possession of by the grantee and inclosed by

him, soon after the contract of sale, and continued to be possessed and inclosed by him up to the time of the trial.

It also conclusively appears that that part of the lands described in the deed in excess of that described in the amended bill was never by the parties intended to be sold or conveyed. It, moreover, so appears that the grantee took possession of that land which both he and appellee thought to be the land conveyed. There seems to have been no mistake between the parties either as to the particular land sold or as to its extent or the boundaries. The only mistake seems to have been in the measurement of the distance. Whether this measurement, with the computation thereof in feet, was the mutual mistake of both, or of one or the other, is immaterial, as it appears beyond question that there was a mistake in this particular. It certainly appears from the evidence that the grantor understood that he sold to the grantee the lands which the latter took possession of and inclosed. It also, to us, conclusively appears that the grantee understood that the land sold was the land which he took possession of and inclosed, and it also conclusively appears from the evidence that these are the same lands decreed to be sold, and as to which it is ordered and decreed that the deed be reformed in description so as to correctly describe the lands sold.

While there is a conflict in the evidence, it is only as to the measurements of the boundaries, and not as to the boundaries themselves. Of course, distances in description must always yield to fixed boundaries which are clearly and certainly established.

We find no reversible error in the record, the decree of the chancellor is affirmed.

Affirmed.

**DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.**

**STATE LAND CO. v. MITCHELL.**

(Supreme Court of Alabama. June 17, 1909.)

**1. QUIETING TITLE (§ 42\*)—BILL—AMENDMENT.**

A bill which, as originally filed, was strictly within Code 1907, § 5443 et seq., to quiet title, was properly allowed to be amended by adding averments leading to relief from an alleged void mortgage, which constituted defendant's claim to the property.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 83; Dec. Dig. § 42.\*]

**2. TAXATION (§ 415\*)—ASSESSMENT—NAME OF OWNER.**

An assessment of land owned by and in possession of "Jack Mitchell" to "Jacob Mitchell" is void, and fatal to a tax title founded thereon.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 701; Dec. Dig. § 415.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**3. MORTGAGES (§ 25\*)—VALIDITY—CONSIDERATION.**

The assertion of a tax title based on an assessment void because not made against the true owner in possession, and the expression of the purpose to enforce it, afforded no consideration for a mortgage by the owner to the tax title holder.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 25.\*]

**4. TAXATION (§ 623\*)—TAX SALE—PAYMENT OF TAXES.**

A sale for taxes which have been paid is void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1267; Dec. Dig. § 623.\*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by Jack Mitchell against the State Land Company. Decree for complainant, and defendant appeals. Affirmed.

Gunter & Gunter, for appellant. Roach & Chamberlain, for appellee.

**McCLELLAN, J.** The bill as originally filed by the appellee against appellant was strictly within the statutes to quiet title. Code 1907, § 5443 et seq. Latterly an amendment was properly allowed (*Interstate Ass'n v. Stocks*, 124 Ala. 110, 27 South. 500) adding averments leading to relief from an alleged void mortgage, which constituted respondent's claim to the property. The respondent's claim to an incumbrance on the land is based on an alleged tax title thereto. The assertion of this tax title to the complainant and the expression of the purpose to enforce it afforded the consideration for his execution of the mortgage. In *Crawford v. Engram*, 47 South. 712, this court recently held, following previous adjudications, that unless the claim asserted, and inducing the agreement or action of the adverse (to the claimant) party, possessed some reasonable ground for existence, a promise so induced was void. This doctrine was invoked by complainant; and the chancellor, applying it to the respondent's asserted tax title, ruled that the claim was without the pale of the definition stated, and was valueless to sustain, as a consideration, the mortgage executed by complainant.

The assessment of the property to which respondent's title must be traced was of the property here involved, and was against "Jacob Mitchell." At the time this assessment was made, in 1885, complainant, the undisputed evidence shows, was in possession and living upon the land. This alone made the assessment void. In *Crook v. Anniston Land Co.*, 93 Ala. 6, 9 South. 425, it was said: "Where the owner is known, or by proper inquiry or search can be ascertained, the revenue laws require the property to be assessed to him." After adverting to previously existing and more lax statutory requirements in that regard, and declaring that even

under that system an assessment to unknown owner, or to a stranger, when the true owner was in possession, was fatal to a sale consequent upon such an assessment, the court held that under later statutes the assessment to the owner was more imperative than formerly. It does not appear that any such person as "Jacob Mitchell" ever had or asserted any right, title, or claim to this property, or had ever been in possession thereof. It is hardly necessary to add that a claim based on an assessment so patently invalid could not afford a reasonable ground for controversy. Besides, it was shown with reasonable certainty that complainant paid the taxes on the property for the year in question, thereby extinguishing any demand therefor by the state, and hence rendering the tax sale on which respondent relies utterly void. *Pickler v. State*, 149 Ala. 669, 42 South. 1018.

The decree below is affirmed.

Affirmed.

**DOWDELL, C. J.**, and **ANDERSON** and **SAYRE, JJ.**, concur.

**UNITED STATES CAST IRON PIPE & FOUNDRY CO. v. DRIVER.**

(Supreme Court of Alabama. June 10, 1909.)

**1. MASTER AND SERVANT (§ 259\*)—INJURIES TO SERVANT—PLEADING—SUFFICIENCY.**

In an action for injuries to a servant, a count in a complaint alleging that plaintiff was injured as a proximate consequence of the negligence of defendant's master mechanic, in that he knew that plaintiff was a boy and without experience, and that the place where he was put to work was dangerous for one of his age and experience, but negligently failed to instruct plaintiff as to the danger, was insufficient, since, if based on Code 1896, § 1749, subd. 2, giving a cause of action for an injury to a servant received in the service of the master, the same as if the servant were a stranger, where the injury is caused by the negligence of one in the master's employ who has any superintendence intrusted to him, whilst in the exercise of such superintendence, it fails to allege that the master mechanic had "any superintendence intrusted to him, whilst in the exercise of such superintendence," and, if it was under the common law, it fails to allege that the master mechanic was charged with the duty of instructing plaintiff as to the danger incident to the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 837-843; Dec. Dig. § 259.\*]

**2. MASTER AND SERVANT (§ 262\*)—INJURIES TO SERVANT—PLEADING—SUFFICIENCY OF PLEA.**

In an action by a servant for injuries received from the slipping of a casting while standing upon a pipe to work on the casting, a plea that plaintiff was negligent, proximately contributing to his alleged injuries, in that he negligently stood upon the pipe, when he knew that the casting was liable to slip and injure him, was defective in not stating that there was a safe way of doing the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 859; Dec. Dig. § 262.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**3. MASTER AND SERVANT (§ 262\*)—INJURIES TO SERVANT—PLEADING—SUFFICIENCY OF PLEA.**

A plea that plaintiff was guilty of negligence proximately contributing to his alleged injuries, in that he and another employé were engaged in chiseling an end off of a flask which was lying on two pipes, and plaintiff negligently remained standing on the pipes and jarred the flask, until it slipped or fell on the pipes and caught his foot, was insufficient, because no alleging that there was a safer way of doing the work than by standing on the pipes, nor that the danger was obvious, nor that plaintiff knew of it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 850; Dec. Dig. § 262.\*]

**4. EVIDENCE (§ 471\*)—OPINIONS OR FACTS.**

In an action for injuries to a servant while standing on a pipe working on a casting placed thereon, by reason of the casting slipping and injuring his foot, a question to plaintiff whether he could have stood on the ground and done the work was proper as calling for a statement of fact.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.\*]

**5. TRIAL (§ 255\*)—NECESSITY FOR INSTRUCTIONS.**

Where questions asked witnesses did not necessarily seek proof as to permanent injuries of plaintiff, but for matters tending to show the extent of the injury received, if defendant wished to limit the scope of the testimony, so as not to extend to proof of permanent injuries, charges to that effect should have been asked.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 632; Dec. Dig. § 255.\*]

**6. WITNESSES (§ 268\*)—CROSS-EXAMINATION.**

In an injury action by a servant, where the negligence relied on in one count of the complaint was that defendant's master mechanic, to whose orders plaintiff was bound to conform, ordered him to the place where he was injured, it was competent for defendant to ask plaintiff on cross-examination, who told him to go to that place.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.\*]

**7. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—INSTRUCTIONS.**

In an injury action by a servant, where the negligence complained of was not that defendant ordered plaintiff to the place where he was injured, but that another of defendant's employés, to whose order plaintiff was bound to conform, ordered him to go there, a charge that, if defendant ordered plaintiff to go and work there, plaintiff should recover, was erroneous.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.\*]

**8. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING DEFENSE.**

The charge was also erroneous as ignoring the defense of contributory negligence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.\*]

Appeal from City Court of Bessemer; Wm. Jackson, Judge.

Action by Ernest Driver, by his next friend, against the United States Cast Iron Pipe & Foundry Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The third count of the complaint is as follows: "The plaintiff, who is under the age of 21 years, suing by his next friend, Mrs. L. D. Driver, who is over the age of 21 years, claims of the defendant the sum of \$1,900 damages. Plaintiff avers that on, to wit, January 23, 1908, defendant was engaged in the business of making large cast iron pipe and other castings of great weight, or flasks of great weight, and operated its plant near Bessemer, in Jefferson county, Ala.; that on said date, to wit, January 23, 1908, plaintiff, who was a boy of young and tender years, and without experience in and about the business of defendant at its plant, was in the employment of the defendant at said plant; that employés of defendant in said plant had placed three or more large pipe along side by side in said plant, and placed upon said pipe a large and heavy casting or flask, and plaintiff and one of defendant's employés were put to work on said large flask or casting, drilling or chiseling on the same, and plaintiff was instructed to stand upon said casting or pipe and do the sledging. And plaintiff avers said casting or flask had not been safely placed upon said pipe, to prevent or keep the same from rolling off, or moving off or about on said piping, and while he was standing on said casting and pipe, sledging the drill or chisel, said casting or flask moved or dropped down and caught plaintiff's ankle and foot, and as a proximate consequence thereof his ankle and foot were mashed and bruised, from which he suffered great mental and physical pain, was kept from earning money, had to pay doctor's bills, was unable to walk on same and do labor or work, his foot and ankle were disfigured, and he was made to go lame, all to his damage aforesaid. Hence this suit. And the plaintiff avers that he was hurt and damaged as aforesaid by reason of, and as a proximate consequence of, the negligence of defendant's master mechanic or foreman, Ed Niece (or Neace), whose name is otherwise unknown to the plaintiff, in this: Said Niece (or Neace) knew that plaintiff was a boy without experience, and that said place was dangerous and hazardous for one of the plaintiff's age and experience; but, notwithstanding said knowledge on the part of said Niece (or Neace), he negligently failed to notify or instruct plaintiff of the danger incident thereto."

Demurrers were interposed thereto as follows: "Said count does not state facts sufficient to constitute a cause of action against this defendant. It does not appear therefrom with sufficient certainty what, if any, duty defendant owed to the plaintiff. It shows that plaintiff's injuries were caused by a fellow servant of the plaintiff, for whose negligence the defendant is not liable to the plaintiff in this action. It does not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appear from said count that Neace was under any duty to notify or instruct plaintiff of the danger."

The following, among other, pleas were filed: (3) "Plaintiff was guilty of negligence which proximately contributed to his alleged injuries, in that he negligently stood upon said pipe while helping to chisel on said flask, when he knew that said flask was likely to slip and fall and injure him." (5) "Plaintiff himself was guilty of contributory negligence, which proximately contributed to his alleged injuries, in that, while he and another employé of the defendant were engaged in chiseling an end or knot off the end of a flask by means of a chisel and sledge, which flask was lying on two pipes, the plaintiff stood upon said pipes sledging said chisel, and negligently remained there, and negligently jarred said flask until it slipped or fell on said pipe and caught his foot."

Demurrers to third plea: "Too vague, indefinite, and uncertain. Facts are not sufficient to show what same consists of, but are alleged as the mere conclusions of the pleader. There is nothing alleged which shows what the negligence of the plaintiff consisted of, or that he was doing or performing a dangerous work, or performing said dangerous work in a negligent manner."

Weatherly & Stokely, for appellant. Pinkney Scott, for appellee.

SIMPSON, J. This is an action by the appellee to recover damages on account of personal injury received by the plaintiff while engaged in his duties as an employé of the defendant. The first assignment of error insisted on (being the third in number) is to the action of the court in overruling defendant's demurrer to the third count of the complaint. If said count is based on subdivision 2 of section 1749 of the Code of 1896, it fails to allege that the master mechanic had "any superintendence intrusted to him, whilst in the exercise of such superintendence." Consequently the demurrer to said count should have been sustained. If it is under the common law, the damages are claimed because of the failure of the master mechanic to instruct the plaintiff as to the danger incident to the work, and it is not alleged that said master mechanic was charged with that duty.

The third plea is defective, in not stating that there was a safe way of doing the work; but it is not necessary to decide whether it is subject to the causes of demurrer assigned, as the case must be reversed on other causes.

The demurrer to the fifth plea was properly sustained, on the ground that it does not allege or show that there was a safer way of doing the work than by standing on

the pipes, nor is it alleged that the danger was obvious, or that plaintiff knew of it.

There was no error in overruling the objection to the question to the plaintiff, when on the stand as a witness: "Could you stand on the ground here, on either side, and hit the chisel?" This called for a statement of a fact, and the answer of the witness not only stated the fact, but went on to explain the position, which showed that he could not stand on the ground and do the work.

The objections to questions on the ground that they sought proof as to permanent injuries were properly overruled, as they did not necessarily call for such proof, but for matters tending to show the extent of the injury received. Charges could have been requested limiting the extent of the testimony.

The court erred in sustaining the objection by plaintiff to the question to the witness (the defendant): "Who told you to get up there?" The negligence relied on in the second count of the complaint is that Niece (or Neace), to whose orders plaintiff was bound to conform, ordered him to go upon said flask or casting, etc. It was certainly competent for the defendant to ask the witness, on cross-examination, who it was that gave the order to him.

The court erred in instructing the jury in his oral charge: "If, after considering all the evidence, you find this defendant ordered the plaintiff to go and work around there, \* \* \* plaintiff would be entitled to recover." The negligence complained of was, not that the defendant "ordered the plaintiff to go and work around there," but that one Niece (or Neace), to whose order plaintiff was bound to conform, etc., ordered him to go upon said flask, etc. Said charge also ignored the defense of contributory negligence.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, DENSON, and MAYFIELD, JJ., concur.

STATE ex rel. NASH v. SEMMES, Judge. (Supreme Court of Alabama. June 10, 1909.)

1. INDICTMENT AND INFORMATION (§ 2\*)—MISDEMEANORS—INDICTMENT OR AFFIDAVIT—CONSTITUTIONAL PROVISIONS.

Sp. Acts 1907, p. 189, providing that prosecutions for violations of the prohibition law may be by affidavit or indictment, etc., is a valid exercise of the power conferred on the Legislature by Const. 1901, § 8, authorizing the Legislature to dispense with indictments in misdemeanor cases, and to provide for prosecutions before inferior courts.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 2\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. STATUTES (§ 118\*)—TITLE—SUFFICIENCY.

The title of Sp. Acts 1907, p. 189, entitled "an act to regulate prosecutions for violations" of the prohibition law, and the body of the act, providing that prosecutions may be begun by affidavit or indictment, and when begun by affidavit the prosecution may continue thereon, etc., contain but one subject, which is expressed in the title, as required by Const. § 45.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 118\*.]

## 3. STATUTES (§ 23\*) — ENACTMENT — REQUISITES.

Sp. Acts 1907, p. 189, as passed by both branches of the Legislature and signed by the Governor, provides for a jury trial in prosecutions for violations of the prohibition law when "defendant filed in the cause a demand for a jury, \* \* \* or where the case is set for trial \* \* \* such written demand may be made," etc. The bill while considered by the House was amended by striking out the word "written" wherever it occurred. The word "written" was in the bill when enrolled and passed by the Senate and when signed by the Governor. *Held* that, as with the word "written" stricken out, the law requires accused to file his demand for a jury, the amendment adopted by the House does not change the law, and it is not void.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 23\*.]

Petition for prohibition or other remedial writ by the State, on the relation of Reuben Nash, Jr., against O. J. Semmes, Judge of the City Court of Mobile, to require the latter to strike a cause from the docket pending against relator for selling intoxicating liquors. Petition dismissed.

The facts made by the petition are that a warrant was sworn out before the inferior court of Mobile county, charging petitioner with a violation of the prohibition law; that, when the case was called in the inferior court, petitioner made a demand for trial by jury, whereupon the judge of the inferior court required a bond of petitioner to appear in the city court for trial, and forthwith transmitted the affidavit and warrant to the city court, where the judge of said city court, which was then in session, caused the same to be placed upon the docket of said court and set the same down for trial—the petitioner all the time insisting that his demand for a jury trial stopped all further proceedings until his case had been investigated by a grand jury and a bill of indictment signed.

Webb & McAlpine, for petitioner. N. E. Stallworth, for respondent.

ANDERSON, J. Section 8 of the Constitution of 1901 authorizes the Legislature to dispense with indictments in cases of misdemeanor and to provide for the prosecution of same before justices of the peace or such other inferior courts as may be established. Acts 1907 (Special Acts) p. 189, dispenses with indictments for the violation of the prohibition law, and, if said act is valid,

the defendant could not complain because of being prosecuted without indictment.

It is insisted that this act is void because violative of section 45 of the Constitution. We think the subject of the act, as expressed in the title and as dealt with in the body of the act, contains but one subject, and which is clearly expressed.

It was further urged that the act is void because, as passed by the Senate and signed by the Governor, it is not the same law as was passed by the House. It does appear that, when the bill was being considered by the House, and before the passage of same, an amendment was offered and adopted striking out the word "written" wherever it occurred, and that the word "written" was in the bill (line 21 from top, and preceding demand) when enrolled and passed by the Senate and when signed by the Governor. The amendment, as offered and adopted by the House, did not operate to change the law in the slightest, and the bill as amended, by the House, and passed by the Senate and signed by the Governor, was in substance and effect the same bill as passed by the House, as the word "*written*," whether in or out, makes no material change, and its omission or addition would not amount to an amendment, although it was stricken by what may be termed an "amendment." The bill, as it passed both branches and as signed by the Governor, provided for a jury trial when "the defendant filed in the cause a demand for a jury \* \* \* or where the case is set," etc., "*such written demand may be made*," etc. (Italics supplied.) Strike the word "written," and the bill requires the "filing" of a demand in the cause, and subsequently provides that such demand may be made and "filed." The bill requires the demand to be "filed" in either event, and it is impossible to file an oral demand. So with the word "written" stricken, as was intended, by Mr. Pitts, of Dallas, the law would still require the defendant to file his demand, and which must be a written one in order that it can be filed.

The other questions disclosed by the record go to the validity of another law and to questions which might arise upon the trial, upon the merits, but which do not go to the validity of the act in question, and can have no influence upon the action of the judge of the city court, in refusing to strike the cause from the docket or in prohibiting the trial of the cause without an indictment.

The relief sought by the petitioner is, accordingly, denied, and his petition is dismissed.

Petition dismissed.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**SOUTHERN RY. CO. v. CLEVELAND et al.**  
(Supreme Court of Alabama. June 15, 1909.)  
**NEW TRIAL (§ 95\*) — GROUNDS — ACCIDENT — NEGLIGENCE.**

A railroad company, succeeding to the rights of another railroad company, presumptively knows the extent and character of the rights of its predecessor; and its ignorance of a statute conferring rights results from its negligence, and it cannot, because of such ignorance, obtain a rehearing on the ground of surprise, accident, mistake, or fraud without fault, within Code 1907, § 5372.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 95.\*]

Appeal from Law and Equity Court, Walker County; Saffold Berney, Judge.

Application by the Southern Railway Company against Toulmin Cleveland and another for a rehearing under Code 1907, § 5372, after rendition of judgment for the latter. From a judgment sustaining a demurrer to the application, the applicant appeals. Affirmed.

Bestor, Bestor & Young, for appellant.  
Galliard & Mahorner, and Gregory L. & H. T. Smith, for appellees.

**McCLELLAN, J.** The only question presented on this appeal relates to the action of the court below in sustaining demurrer to the application for rehearing, filed by defendant (appellant) under Code 1907, § 5372. The original suit sought a recovery against this appellant for the removal of sand from lands claimed by plaintiffs. There was judgment for plaintiffs, appellees. The defendant, it is said, was the successor in right and title of the Mobile & Alabama Grand Trunk Railroad Company, incorporated by special act of the General Assembly of this state. Acts 1865-66, p. 405. By section 20 therein a right of way 100 feet wide over state lands was, under certain conditions, granted the incorporation. The defendant (appellant here) proceeded to trial, and tried the original suit in ignorance, it is alleged, of the grant set out in section 20. It could not and did not produce any muniment of title otherwise to the land involved in this litigation. After the trial counsel for appellant accidentally discovered section 20 of the act of incorporation cited. The application for a rehearing is based upon this discovery. The demurrer took the point that the stated facts did not bring the application within the prerequisites of the statute (section 5372) to the granting of a rehearing.

We premit, as unnecessary to be now decided, the question whether the title of the act of incorporation was sufficient to comprehend the grant attempted to be effected by section 20. The statute does not authorize the granting of a rehearing in every case of "surprise, accident, mistake, or fraud," but fixes the additional condition that such casualties intervened "without fault" on the part of the complaining party. If the appel-

lant succeeded to the rights and titles of the original company, it cannot be held to have been without fault in not knowing the source, extent, and character of the rights and titles of the kind here involved received by it from the original company. If appellant was ignorant of the provision of section 20 of an act of the General Assembly of this state, it could only be because of its neglect to acquaint itself, not only with its own rights, abstractly considered, but also with rights attempted to be created by governmental action. It must be presumed that the appellant knew of the provisions of the act on which its asserted title and rights rest; and this presumption necessarily convicts it of negligence to its own hurt in not knowing the provisions of section 20.

The demurrer was properly sustained. The judgment below is affirmed.

Affirmed.

**DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.**

#### **FLOYD v. WILSON.**

(Supreme Court of Alabama. May 1, 1909.  
Rehearing Denied June 30, 1909.)

#### **1. TRESPASS (§ 40\*) — PLEADING — CONSTRUCTION.**

A complaint alleging damages for trespass upon certain land, and for knowingly and willfully cutting and hauling off and converting into stock certain timber thereon, and for cutting and hauling off certain other timber, and for cutting up and converting into stock and hauling off certain trees which had been already felled, was in trespass quare clausum, and not for the statutory penalty for cutting trees.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 40.\*]

#### **2. PLEADING (§ 237\*)—AMENDMENT—CORRECTING DESCRIPTION OF SUBJECT-MATTER TO MEET PLAINTIFF'S PROOF.**

Under Code 1907, § 5367, requiring the court to permit amendment of imperfections and defects of form in pleadings, unless injustice will thereby be done to the opposite party, and amendments of the complaint by striking out or adding new statements of the causes of action which could have been included in the original complaint, it was error to refuse to allow amendments to the complaint in trespass quare clausum, intended merely to correct the description of the subject-matter, so as to meet plaintiff's proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.\*]

Appeal from Circuit Court, Barbour County; A. A. Evans, Judge.

Action by J. W. Floyd against J. J. Wilson. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The complaint was as follows: "Plaintiff claims of defendant \$510 damages for a trespass by defendant on the following tract of land, viz.: Part of the S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , section 1, township 9, range 27, in said county, said land belonging to the plaintiff; and

for knowingly and willfully cutting and hauling off, and converting into stock, timber thereon, to wit, seven pine trees, and for cutting and hauling off 42 saplings of oak and hickory variety, and for cutting up and converting into stock and hauling off two pine trees, which had been already cut and felled to the ground; and plaintiff alleges that said damage to said land was done on, to wit, about the months of July and August, 1906." Plaintiff moved to amend the complaint by adding after the figure "27" the following: "And part of the S. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 1, township 9, range 27, and upon which is situated what is known as Mineral Springs. Said 40 acres lies north of the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , section 12, township 9, range 27, being as described above." On objection by defendant, the amendment was not permitted to be filed.

A. M. McLendon and A. H. Merrill & Son, for appellant. Peach & Thomas, for appellee.

ANDERSON, J. Upon the original consideration of this cause, no point having been made and argued as to the character of this action, we treated the counts as being for the statutory penalty for cutting trees; but after considering the counts more carefully we find that they are *quare clausum fregit*. *Blackburn v. Baker*, 7 Port. 284; *Rogers v. Brooks*, 105 Ala. 549, 17 South. 97. We adhere, however, to our former conclusion that the trial court erred in not allowing the amendments offered, as they were intended merely for the purpose of correcting the description of the subject-matter, so as to meet the plaintiff's proof. Section 5367 of the Code of 1907.

The application for rehearing is overruled, the opinion is modified, the judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

#### TENNESSEE FERTILIZER CO. v. CITY COUNCIL OF MONTGOMERY.

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

#### APPEAL AND ERROR (§ 1010\*)—REVIEW—FINDINGS BY COURT.

Findings of the trial court on questions of fact, supported by evidence, will not be reviewed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by the City Council of the City of Montgomery against the Tennessee Fertil-

izer Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Steiner, Crum & Well, for appellant. C. P. McIntyre, for appellee.

McCLELLAN, J. This action was by the city against the appellant to recover on the common counts for water consumed or chargeable to the appellant. The application of appellant for connection with, and the supply of water by, the city's water system, expressly provided that the rules, regulations, and rates providing for or about the city's system should control in the supplying of water to appellant. There was evidence introduced on the trial, which was by the court without jury, tending to establish every material element of the city's claim necessary to enable it to recover, and also to the sum adjudicated below. The issue was of fact. It does not appear to us that the court erred in its conclusion.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

#### SWIFT et al. v. DOE ex dem. WILLIAMS.

(Supreme Court of Alabama. June 17, 1909.)

#### 1. ESTOPPEL (§ 38\*)—BY DEED—AFTER-ACQUIRED TITLE.

A subsequently acquired title by the grantor under warranty deed inures to the benefit of the grantee.

[Ed. Note.—For other cases, see *Estoppe*, Cent. Dig. § 99; Dec. Dig. § 38.\*]

#### 2. APPEAL AND ERROR (§ 909\*)—EVIDENCE—PRESUMPTIONS.

Where a deed, on which plaintiff's right to recover in ejectment depended, was sufficiently definite to permit its further identification by other evidence, it would be presumed on appeal, in the absence of a bill of exceptions purporting to contain all or substantially all the evidence, that the description was properly aided by parol evidence to identify the land.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3675; Dec. Dig. § 909.\*]

#### 3. ADVERSE POSSESSION (§ 7\*)—GOVERNMENT LAND.

Where the certificate or final receipt and patent to land in controversy were issued within 10 years before ejectment was brought, there was no foundation for a claim of adverse possession, unavailable against the government.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 24, 34; Dec. Dig. § 7.\*]

#### 4. APPEAL AND ERROR (§ 1064\*)—REVIEW—AFFIRMATIVE CHARGE.

Where plaintiff in ejectment was in fact entitled to a verdict, though not entitled to recover the entire subject-matter claimed in the complaint, a general charge in his favor was not reversible error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4221-4224; Dec. Dig. § 1064.\*]

Appeal from Circuit Court, Baldwin County; Samuel B. Browne, Judge.

Ejection by John Doe, on demise of John G. Williams, against Charles A. Swift and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Pillans, Hanaw & Pillans and Gallyard & Mahorner, for appellants. Ervin & McAleer, for appellee.

**McCLELLAN, J.** Common-law ejection. There were six demises laid, viz., from John G. Williams, Thomas F. Stickney, Claudia Watkins, Hattie E. Banks, T. E. Green, and Carrie McNulty. The court, at the request of the plaintiff, gave the general affirmative charge, and accordingly the verdict and judgment was for the whole estate in the land claimed in the complaint.

We have been unable to discover in the bill of exceptions any recital that it contains all, or even substantially all, of the evidence introduced on the trial. The deed from Grist to Thomas F. Stickney was a warranty deed, and, upon subsequent acquirement of title to the land in dispute by the grantor, that title inured to the benefit of the grantee, Stickney. *Croft v. Thornton*, 125 Ala. 391, 28 South. 84; *Wagon v. Fairbanks*, 105 Ala. 528, 17 South. 20; 6 Fed. St. Ann. pp. 514, 515, Rev. St. § 2448 (U. S. Comp. St. 1901, p. 1512). Under this conveyance Stickney became entitled to an undivided half interest in the lands described in the deed. The description of the lands in the deed was sufficiently definite to permit its further identification by other evidence, parol or in writing. Since the bill of exceptions does not purport to set forth all, or substantially all, of the evidence before the trial court, we must presume that the description in the deed from Grist to Stickney was properly aided by serviceable evidence to that end. It hence results that unless a jury issue was made by evidence of adverse possession, or that issue was prevented by erroneous rulings of the court in excluding defendant's evidence to that purpose, an affirmance must be entered.

No such errors, to the prejudice of defendant, intervened, because the legal title to this land was in the government, at least until the issuance of the certificate (see *Case v. Edgworth*, 87 Ala. 203, 5 South. 783; *Ledbetter v. Borland*, 128 Ala. 418, 29 South. 579); and hence there could have been no adverse holding thereof (*Stringfellow v. Tenn. Co.*, 117 Ala. 250, 22 South. 997, and authorities therein cited). The certificate of final receipt and the patent were issued within 10 years before this action was instituted. There was, therefore, no possibility of an adverse possession affecting the rights of the parties; and the exclusion of testimony attempting to show adverse possession was harmless to defendant. It follows that the plaintiff was entitled to a verdict as upon the demise laid in Stickney.

However, the right of recovery on that demise was necessarily limited to an undivided interest, the interest vested in Stickney by the deed of John W. Grist to him. On this status appellant insists that the general affirmative charge to find for the plaintiff (the extent of the finding was not stated in the charge) was error. We have recently ruled on this question in *Cochran v. Kimbrough*, 47 South. 709. It was there held that, while the court might well have refused such an instruction, it was not reversible error, since the plaintiff was in fact entitled to a verdict, though not to recover the entire subject-matter claimed in the complaint. The holding in the cited decision has been re-examined, and no good reason appears to require a departure from it.

Accordingly the judgment must be affirmed. Affirmed.

**SIMPSON, MAYFIELD, and SAYRE, JJ.,** concur.

#### **TURNER v. LOUISVILLE & N. R. CO.**

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

**MASTER AND SERVANT (§ 262\*)—ACTIONS FOR INJURIES—PLEADING.**

In an action against a railroad company for injuries, the complaint alleged that plaintiff had been negligently ordered "to knock a hole in the car with a sledge hammer," and the plea charged that plaintiff "negligently allowed his hand to come so close to as to come in contact with the end or side of the car while knocking a hole therein with his tool." Held, that the plea sufficiently set out the negligence of plaintiff, and that by "his tool" was meant the "sledge hammer" referred to in the complaint.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 262.\*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Tom Turner against the Louisville and Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Denson & Denson, for appellant. Tillman, Grubb, Bradley & Morrow, for appellee.

**ANDERSON, J.** The negligence described in the complaint is that Vogt "negligently ordered the plaintiff to knock a hole in the car with a sledge hammer." Plea 2 charges the proximate contributory negligence as being due to the fact that the plaintiff "negligently allowed his hand to come so close to as to come in contact with the end or side of the car while knocking a hole therein with his tool." The plea fully sets out the negligence of the plaintiff and the constituents of same; that is, that he negligently did what he was ordered to do, by permitting his hand to come too close to the car while knocking the hole. We think, "his



tool," as set up in the plea, necessarily meant the "sledge hammer," as set out in the complaint. This plea is clearly distinguishable from those held to be insufficient in the cases cited by counsel for the appellant.

The judgment of the city court is affirmed. Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

### GLOVER v. BASS.

(Supreme Court of Alabama. June 10, 1909.  
On Rehearing, June 30, 1909.)

#### 1. EXECUTION (§ 78\*)—FORM—SUFFICIENCY.

An execution gets its validity from the authority issuing it and from what is written in it, and not by virtue of the mode by which the sheets of paper upon which it is written are fastened together; and as the law does not require it to be on one sheet of paper, and if it be on two sheets does not direct how they shall be fastened together, an execution, embracing two sheets, the second containing only the bill of costs and the constable's indorsements, and planned together, was valid.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 78.\*]

#### On Rehearing.

#### 2. HOMESTEAD (§§ 81, 87\*)—PROPERTY CONSTITUTING.

A homestead right may attach to any possessory interest in land, a fee not being necessary to support it, and a husband may have a homestead right in his wife's lands as against his creditors; and hence he could have a homestead in land belonging to him and used in connection with adjoining lands, which he occupied as his homestead so that it would not be subject to levy on execution, though he had conveyed a one-third interest in the adjoining lands to his wife.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 114-118, 125; Dec. Dig. §§ 81, 87.\*]

Appeal from Circuit Court, Washington County; Samuel B. Browne, Judge.

Action by William F. Glover against Harry Bass. There was a directed verdict for defendant, and plaintiff appeals. Affirmed.

Granade & Granade, for appellant. Charles L. Bromberg, for appellee.

MAYFIELD, J. Appellant brought his action against appellee, on account, in the justice of the peace court of Washington county, obtained judgment, and had execution issued thereon, which execution was placed in the hands of the constable. The execution proper, the writ, was on one sheet of paper, and the bill of costs on another; the two being planned together only. The constable made his indorsement upon the sheet which contained only the bill of costs. A part of this indorsement was to the effect that defendant had no personal property subject to the process, and that levy had been made upon the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section

1, township 8, range 2 W., as the property of the defendant. This process was then returned to the justice court, from where it issued. The justice thereupon transmitted the process, together with all other papers, to the circuit court, as required by section 4681 of the Code. In the circuit court, at the proper time, these papers (so certified) plaintiff made the basis of his motion, praying the sale of the 40 acres of land levied upon.

After the levy, but before the motion or proceeding in the circuit court, the defendant duly made and filed in the probate office of Washington county his claim of exemptions—among other things claiming the particular 40 acres of land upon which the levy was made. The plaintiff thereupon made and filed a contest of that claim of exemptions, which contest was brought into the circuit court, and thus became a part of the motion for the sale. The defendant demurred to several grounds of the contest, which being sustained, the plaintiff took a nol. pros., with a bill of exceptions. This order of nol. pros. was, however, during the term set aside on plaintiff's motion, and a trial of the contest was had; the court giving the general affirmative charge for the defendant. From the judgment rendered, plaintiff appeals.

It is insisted earnestly by the appellee that the levy was void, because the indorsements were a necessary part of it, and that as they were on a sheet of paper separate from the writ proper, being only pinned together, one was no part of the other. There is no merit in this contention. The law does not require the execution to be on one sheet of paper, and not on two. If on two, it does not direct how the two shall be fastened—whether pinned (as was the case here), glued, fastened with library paste, or with any of the numerous patented brads, clasps, or pointed fasteners. The writ gets its validity from the authority issuing it, and from what is written on it, and not by virtue of the mode or means by which the sheets are fastened together. Except as to neatness and durability, the writ gets no efficacy from the glue or fastener by which its sheets are held together.

#### On Rehearing.

On the contest of exemptions, it seems, the plaintiff examined the defendant and proved that the land in question was a part of his homestead, or was used in connection with the 40 on which he resided as a part of his homestead. The plaintiff introduced a deed, executed by the defendant, conveying lands adjoining the 40 in question. This conveyance was void as to the two-thirds interest attempted to be conveyed to his children, because the land was at the time his homestead, and because his wife did not join therein, or acknowledge the same, as required by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the statute. This the defendant sought to avoid by introducing in evidence, over the objection of the plaintiff, a deed, executed after the levy and after the claim of exemptions was filed by him, purporting to convey a part of the lands in question from his wife to himself. The court allowed all this evidence over the objection of the respective parties.

The homestead right may attach to any possessory interest in land. The fee is not necessary to support it. The defendant might have had a homestead right in this land, though he had conveyed a one-third interest in adjoining lands to his wife 10 years before. The case is thus differentiated from the case of *Beard v. Johnson*, 87 Ala. 729, 6 South. 383. None of this evidence could benefit the plaintiff contestant. A husband may have a homestead interest in the lands of his wife as against his creditors. *Reeves v. Peterman*, 109 Ala. 368, 19 South. 512. The evidence in this case, under any phase of it, showed beyond a doubt that the land in question was a part of the defendant's homestead, whatever title he may have had thereto. It was not subject to levy, and consequently the judgment rendered was the only proper one, and no errors of the trial court can be availing to reverse it.

The judgment appealed from must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

**WEINSTEIN v. YIELDING BROS. & CO.**  
(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

**1. EXEMPTIONS (§ 123\*)—CONTEST OF CLAIM—INVENTORY.**

The purpose of allowing plaintiff to demand an inventory of defendant upon the contest of a claim of exemptions is to prevent defendant, while claiming the property levied upon as exempt, from secreting other personal property, money, or choses in action subject to his debts, and which may be reached by appropriate process.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 147; Dec. Dig. § 123.\*]

**2. EXEMPTIONS (§ 123\*)—CONTEST OF CLAIM—INVENTORY.**

Code 1907, § 4178, providing that, on a contest of a claim of exemptions, defendant shall file an inventory on plaintiff's demand of all his personal property, money, or choses in action, and that if he fail to do so judgment by default shall be rendered against him, does not require an inventory of the property levied upon, where defendant denies that he has any other, since that is in the claim of exemptions and inventoried by the officer making the levy.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 147; Dec. Dig. § 123.\*]

**3. EXEMPTIONS (§ 123\*)—CONTEST OF CLAIM—INVENTORY.**

The sworn response of defendant that he has nothing to inventory is good cause for failure to file an inventory, within Code 1907, § 4178, requiring the court to enter judgment for plaintiff on a contest of a claim of exemptions if defendant shall fail to file the inventory demanded by plaintiff, unless good cause be shown to the contrary.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 147; Dec. Dig. § 123.\*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Attachment by Yielding Bros. & Co. against S. L. Weinstein. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Attachment for claim for goods sold levied upon certain personal property as the property of Weinstein. It seems that the defendant had already filed the claim of exemptions to the property levied on in the probate office prior to the levy of attachment. Following the levy of attachment, the plaintiffs required of the defendant to file in the city court of Bessemer duly verified by affidavit, a full and complete inventory of all the personal property, together with the place of location of each item, together with a list of accounts and choses in action belonging to the defendant, and money on hand, whether held by defendant or held for him. This demand was coupled with notice that, if not complied with, an order of court would be asked entering judgment by default against defendant. In compliance with this request defendant answered that at the time of the institution of said suit, and at the time of the filing of this answer, and during said entire period, she has had no personal property, money, debts, choses in action, or other personal property, except that specifically exempt from levy and sale. The defendant also moved the court to dismiss the contest of the claim and discharge the levy on the ground that there was no sufficient affidavit of contest of exemptions and because the affidavit made was insufficient. The plaintiffs moved for judgment by default, because the claim of exemptions filed in the office of the judge of probate showed an aggregate and total sum of property and goods owned by defendant of \$1,173.73, and she has failed to show a complete and itemized list of her property. The inventory filed in the judge of probate's office is not shown by the record. There was judgment by default entered, and defendant appeals.

George Huddleston, for appellant. Pinkney Scott, for appellees.

ANDERSON, J. The purpose of allowing the plaintiffs to demand an inventory of the defendant, upon the contest of a claim of exemptions, is to prevent the defendant, while

claiming the property levied upon as exempt, from secreting other personal property, money, or choses in action subject to his debts, and which may be reached by appropriate legal process. *Decatur Co. v. Deford*, 93 Ala. 347, 9 South. 454. If the defendant has no personal property, money, choses in action, etc., other than what has been levied upon, he can file no inventory, and, when he meets the demand of the plaintiff by a sworn denial in writing that he has none, he can do no more. The law does not require the impossible, and a man cannot give an inventory of property when he has none. Nor does the law contemplate an inventory alone of what property was levied upon, as this is in the claim of exemptions, and is doubtless inventoried by the officer making the levy. If the defendant's denial be untrue, the plaintiff can take issue thereupon, and, if found against the defendant, section 4184, Code 1907, provides for a deduction of same from the amount of exemptions to which the defendant would be entitled.

It is true that section 4178, Code 1907, requires the court to render a judgment for the plaintiff, if the defendant fails to file the inventory, "unless good and sufficient cause be shown to the contrary." We cannot conceive of a better cause for the failure to file said inventory than the sworn response of the defendant that he has nothing to inventory. The trial court erred in striking defendant's answer to plaintiffs' demand, and in rendering judgment by default for the plaintiffs; and the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

#### SEWELL v. BUYCK.

(Supreme Court of Alabama. June 3, 1909.  
Rehearing Denied June 30, 1909.)

#### MORTGAGES (§ 311\*)—DEED AS MORTGAGE—RIGHTS AND LIABILITIES OF PARTIES.

Where a deed absolute on its face was intended as a mortgage, and a bond for title was given by the grantee, conditioned to reconvey on payment of the debt secured, the debt having been paid, the grantor, being in possession, had the right to have the deed canceled as a cloud upon his title, and to have a reconveyance in accordance with the bond for title, or, upon failure of the grantee to so reconvey, to have the deed declared a mortgage, and have a reconveyance executed by the register of the court in accordance with the decree.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 920; Dec. Dig. § 311.\*]

Appeal from Chancery Court, Elmore County; W. W. Whiteside, Chancellor.

Bill by James Buyck against N. B. Sewell. Decree for complainant, and respondent appeals. Affirmed.

H. R. Golson and John V. Smith, for appellant. Frank W. Lull, for appellee.

MAYFIELD, J. This was a bill, filed in the chancery court of Elmore county, to have an absolute deed declared a mortgage, and canceled, upon the ground that the indebtedness secured by the intended mortgage had been paid before the filing of the bill. The answer of respondent to the bill admitted the execution of the deed by complainant to respondent as alleged, and that it was intended as a mortgage—in other words, that the whole transaction was a security for debt, and not a sale, and that at the time of the execution of the deed by complainant to respondent the respondent also executed a bond for title, conditioned to reconvey the title to complainant upon the payment of the debt secured; but the respondent, in his answer, denied that the debt or any part thereof had been paid, and asked that his answer be made a cross-bill, and that, upon final hearing, the court ascertain the sum due for the mortgage debt, and decree that the lands described in the deed or mortgage be sold for the payment of the balance due upon the mortgage debt. The complainant answered this cross-bill, denying all of its allegations which would justify relief, and setting up additional facts and allegations tending to show payment in full of the debt secured or intended to be secured by the mortgage deed.

The depositions of numerous witnesses, and several times examined, were taken by both the complainant and the respondent, to prove and to disprove the allegations of the bill and cross-bill, respectively. The evidence is entirely too voluminous. The case was submitted, upon the respective pleadings mentioned and upon the evidence referred to, for final decree, and by consent of parties was held for decree in vacation, resulting in a decree of the chancellor holding that the complainant was entitled to the relief prayed in his bill. This decree is appealed from by the respondent, and he assigns as error the findings and the decree of the court to the effect that the note secured by the mortgage had been paid, and that the deed should be canceled as a cloud upon complainant's title, and the refusal to grant relief to respondent under his cross-bill—all of which assignments raise but one question for review on this appeal, which is: Was the evidence sufficient to support the decree of the chancellor?

We have carefully reviewed all the evidence in this case, as shown by the record, aided by the full and splendid briefs of counsel for appellant and appellee, and we fully agree with the learned chancellor in his findings and decree. While the burden of proof is originally upon the complainant to establish the averments of his bill, and

while the evidence is very conflicting as to some of the material questions, it indisputably appears from the evidence that the complainant had paid to the respondent an amount largely in excess of the mortgage debt and interest. This is admitted by the respondent; but the respondent claims that these payments were made upon other debts than the one intended to be secured by the mortgage or deed upon the land, to wit, for advances made by the respondent to the complainant and his children, and that it was agreed between the parties that the amount of these advancements should be paid in preference and prior to the debt secured by the mortgage upon the land.

The fact that advances were made by the respondent to the complainant and his children, and that it was agreed that these should be paid in preference to the debt secured by the mortgage upon the land, is without dispute. Consequently the question most seriously disputed, and as to which the evidence was in conflict, was the amount of such advances. As to this the respondent and his witnesses are very indefinite and uncertain. While they testify in general terms that advances were made and the amount of payments made by the complainant, yet, when required to give the exact amount, time, and nature or character of the advancements, they are unable so to do. No books of account seem to have been kept by either party. The respondent was a business man, educated, and a practicing physician, doing an advancing business; but as to this account he seems to have kept no books, and is extremely indefinite and uncertain as to the amount of advancements which he had made to the complainant and his son, while the latter are very positive and certain that he advanced nothing like the amount set up in his claim. It also conclusively appears that sufficient payments were made by the grantor, or mortgagor, with direction that they be applied upon the mortgage debt, to fully extinguish it. While it is not conceded by the respondent that these payments were received as such, or applied by him to the payment of the debt secured by the mortgage, yet he does not sufficiently deny or dispute the fact that they were made, with the request and with the understanding on the part of the mortgagor or grantor that they should be so applied.

There is little doubt in the minds of the court that this debt has been fully paid. Whether it was intended by the mortgagee to be a payment is immaterial, in the absence of any showing on his part that the mortgagor owed him other debts than the one secured by the mortgage to which he could have applied the payments thus made. There being no doubt that this deed, absolute on its fact, was intended as a mortgage, the parties are therefore clothed with

all the rights, subject to all the liabilities, and entitled to all the remedies of ordinary mortgagors and mortgagees; and the amount secured by the instrument having been paid, the mortgagor being in possession, he has the right to have the mortgage canceled as a cloud upon his title, and to have a reconveyance from the mortgagee to him in accordance with the contract and agreement evidenced by the bond for title, or, upon failure of the mortgagee to so reconvey in accordance with his bond for title, to have it declared a mortgage and to have a reconveyance executed by the register of the court in accordance with the decree of the chancellor. *Richter v. Noll*, 128 Ala. 193, 30 South. 740; *Tennessee Co. v. Wheeler*, 125 Ala. 538, 28 South. 38; *Knaus v. Dreher*, 84 Ala. 319, 4 South. 287.

The decree of the chancellor is therefore affirmed.

**Affirmed.**

**DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.**

#### HOLLAND et al. v. COLEMAN.

(Supreme Court of Alabama. June 8, 1909.  
Rehearing Denied June 30, 1909.)

#### QUIETING TITLE (§ 12\*) — POSSESSION OF PLAINTIFF.

To sue under Code 1896, §§ 809-813, providing for the quieting of title to land, the complaining party must be in peaceable possession, either constructive or actual, as contradistinguished from a disputed or scrambling possession, though the deed under which the adverse parties claim be invalid.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 8; Dec. Dig. § 12.\*]

Appeal from Chancery Court, Limestone County; W. H. Simpson, Chancellor.

Bill by Mattie B. Coleman against John T. Holland and others. Decree for complainant, and respondents appeal. Reversed, and decree of dismissal rendered.

W. R. Walker, for appellants. James D. Horton and Erle Pettus, for appellee.

DENSON, J. This bill was filed February 3, 1905, and its averments are sufficient to make a good bill under article 13, Code 1896 (sections 809-813), to compel the determination of claims to land and to quiet title to the same.

The two sides trace title or claim to a common source—Mrs. Paulina Woodward. The complainant claims through a deed executed to her husband and herself by said Paulina Woodward on the 5th day of June, 1890, purporting to convey 120 acres of land, including the 40 acres involved in this litigation. Subsequent to the filing of this bill, complainant's husband, who was a party complainant, died testate, leaving his widow

as the only devisee under his will. The respondents deny the alleged peaceable possession of the complainant of the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 18, township 1, range 3 W., the land in dispute, and set up affirmatively that they, and those through whom they claim, were in the possession of the 40 acres at the time the bill was filed, and had been so in possession ever since May 4, 1890, at which time Paulina Woodward executed to Saffronia E. Johnson a deed to the 120 acres described in complainant's deed.

It is shown in the answer that after the deed was executed to Mrs. Johnson she entered into possession of all of the land, and remained in possession, claiming the land as hers, until February 23, 1892, when she and her husband bargained and sold the 40 acres in question to one John T. Holland; that they made Holland a deed, but through mistake of the scrivener the land was not correctly described. In the answer it is alleged, however, that Holland entered into possession of the 40-acre tract purchased from the Johnsons and intended to be described in the deed—the tract here involved—and has remained in possession ever since, except that he sold a half interest therein to his father, E. H. Holland. The bill as amended seeks to avoid the deed to Johnson on the ground of mental incapacity on the part of Paulina Woodward to make the deed and of undue influence exerted by Mrs. Johnson over the grantor in procuring its execution.

The respondents, Holland, who were the only respondents to the original bill, disclaim interest in any of the land described in the Johnson deed, except the 40 acres here involved, and described as the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 18, township 1, range 3 W. Nothing was said of the Johnson deed in the original bill. It was first brought in view by the answer to the original bill; and then complainant amended the bill by setting up and charging, amongst other matters, the invalidity of said deed, and making Mrs. Johnson a party respondent. The bill, as amended, prays that respondents' claim to the land be determined adversely to them, that the deed from Paulina Woodward to Mrs. Johnson be canceled and be removed as a cloud upon complainant's title, and that complainant's title be quieted.

The statutes under which the bill is filed were enacted December 10, 1892, and the decisions of this court, construing them, are numerous, and emphasize their requirement that the complaining party's possession must be a peaceable one, as contradistinguished from a disputed, contested, or scrambling possession. *Wood Lumber Co. v. Williams* (Ala.) 47 South. 202, and cases there cited and cases cited under section 5443, Code 1907. So it must be true that the present bill is without equity, unless the evidence reasonably satisfies the mind of the court that the complainant was not only in possession, ei-

ther constructive or actual, of the 40 acres involved, but that her possession was a peaceable one; and this is so, notwithstanding that feature of the bill in respect to the execution of the deed from Paulina Woodward to Mrs. Johnson having been procured through fraud. *Morgan v. Lehman*, 92 Ala. 440, 9 South. 314.

The chancellor decreed against the respondents, and we here quote from his opinion found in the record the following: "The land is unimproved woodland, and none of the parties have ever been in actual possession. They prove possessory acts at various times, consisting of having timber cut, warning off trespassers, paying taxes, etc.; but, in the absence of actual possession, the payment of taxes and the occasional cutting of timber is insufficient to establish ownership, and in the absence of such possession the law fixes the constructive possession in him who has the title." And then the chancellor proceeds, in the opinion, to determine the validity of the deeds as determinative of the equity of the complainant under the bill as amended, strikes down the deed from Woodward to Johnson and that from Johnson to Holland, and finally decrees the invalidity of the respondents' claim to the lands. From the decree the respondents have appealed.

In *Crabtree v. Alabama State Land Co.*, 46 South. 450, touching a possession which will defeat a bill filed under the statute upon which the present bill is predicated, this court, through the present Chief Justice, said: "It is not necessary to show such character of adverse possession as would ripen into a title, but such possession as would amount to a disputed possession." By the light of this case, and that of its congeners, it clearly appears that, in his opinion, the chancellor lost sight of the principle that it is as indispensable to relief under the statute that a constructive possession be a peaceable one as that an actual possession be such. The testimony is voluminous, 720 of the 812 pages comprising the record being required for its setting out; but it has been carefully read and considered, and the conclusion of the court is that, even conceding that complainant has the superior legal title, drawing to it the constructive possession, yet the testimony not only fails to show that that possession is peaceable but, to the contrary, affirmatively shows it is seriously disputed and contested. Therefore the chancellor erred in rendering the decree in favor of the complainant. He should have dismissed the bill, for the reason that complainant's possession was not shown to be peaceable, and notwithstanding it may be that the deed from Paulina Woodward to Mrs. Johnson is invalid. Perhaps the cases nearest in point, illustrative of the fact that complainant's possession is not shown to be peaceable, are *Lyon v. Arndt*, 142 Ala. 486, 38 South. 242, and *Randle v. Daughdrill*, 142 Ala. 490, 39 South. 162.

The decree of the chancellor will be reversed, and a decree will be here rendered dismissing the bill.

Reversed and rendered.

SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

### TROTTER BROS. v. BLOUNT.

(Supreme Court of Alabama. May 20, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. CORPORATIONS (§ 255\*)—ACTIONS—GARNISHMENT—BURDEN OF PROOF.

Where a creditor of a corporation sues the corporation and garnishes a stockholder on an unpaid balance on his stock, the burden is on the creditor to show that there is something due on the stock.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 255.\*]

#### 2. CORPORATIONS (§ 255\*)—ACTIONS—GARNISHMENT.

A stockholder, who purchased his stock from the original holder, is not liable to garnishment in a suit against the corporation, unless the original holder has not paid the corporation for the stock; and it is immaterial what the purchaser paid the original holder.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 255.\*]

#### 3. CORPORATIONS (§ 255\*)—ACTIONS—GARNISHMENT—BURDEN OF PROOF—EVIDENCE.

Evidence in a suit against a corporation, in which one of its stockholders was garnished, held insufficient to show that there was anything due the corporation from the original stockholder on the stock, which he had transferred to the garnishee.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 255.\*]

Appeal from Tuscaloosa County Court; Henry V. Foster, Judge.

Action by Trotter Bros., a partnership, against the Bridgeport Coal & Land Company, with garnishment in aid of suit to J. A. Blount and T. R. Ward. From a judgment discharging Blount as garnishee, plaintiffs appeal. Affirmed.

London & Fitts, for appellants.

ANDERSON, J. While the statute authorizes a creditor of a corporation to subject by garnishment any unpaid balance on the stock, the creditor must show that there is something due; and, failing to do so, he does not make out a case against the garnishee. Blount in his oral answer admits buying \$5,000 of the stock held by Gulley in the Bridgeport Company for \$4,200, which said sum went to pay certain notes given by Gulley. The proof does not show that these notes were due upon the stock issued to Gulley, but indicates that they were held for debts contracted by Gulley for the land, etc., put into the Bridgeport corporation. The articles of incorporation of the Bridgeport Company were introduced, and show that Gulley got \$10,000 stock, \$2,500 paid in and the balance

to be paid by a conveyance of property, and there was no proof that the property had never been conveyed, or that Gulley owed the Bridgeport Company anything on the stock he sold to Blount. It matters not what Blount paid Gulley for the stock, as he could not be liable to the corporation, or its creditors, unless it was shown that Gulley had not paid for said stock. The plaintiff not only failed to affirmatively show that there was anything owing the Bridgeport Company for the stock bought by Blount, but the proof afforded an inference that Gulley had paid for said stock. The articles of incorporation recite \$2,500 paid and the other \$7,500 to be canceled by a conveyance of property, and Blount stated that the company had accepted the land. Gulley could, under the statute, pay his subscription in property. Section 3467 of the Code of 1907.

The judgment of the city court is affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

### NASHVILLE, C. & ST. L. RY. v. H. M. LONG & SON.

(Supreme Court of Alabama. June 10, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. CARRIERS (§ 159\*)—CARRIAGE OF FREIGHT—CONTRACTS—VALIDITY.

A stipulation in a bill of lading, limiting the time within which claims for damages shall be presented, is valid, provided the time fixed is reasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 670, 671; Dec. Dig. § 159.\*]

#### 2. CARRIERS (§ 159\*)—CARRIAGE OF FREIGHT—CONTRACTS—VALIDITY.

A stipulation in a bill of lading for the carriage of freight from Alabama for delivery at St. Louis, that claims for damage must be made to the agent at the point of delivery promptly after the arrival of the property, and if delayed more than 30 days after the delivery, or in due time for the delivery, no carrier shall be liable, is invalid, because unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 670, 671; Dec. Dig. § 159.\*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by H. M. Long & Son against the Nashville, Chattanooga & St. Louis Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Walker & Spragins, for appellant. John A. Lusk, for appellee.

SIMPSON, J. This action was brought by the appellee against the appellant, for damages for failure to deliver 19 cords of tan bark received by it as a common carrier, to be delivered, respectively, at St. Louis, Mo., and New Albany, Ind. The defendant's pleas set up the stipulation in the bill of lading as follows, to wit: "Claim for loss or damage must be made in writing to the agent at

the point of delivery promptly after the arrival of the property, and if delayed more than 30 days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event." One plea alleges that no claim was made at the point of delivery within 30 days, and the other that no claim was made at said point before the commencement of this suit.

Stipulations limiting the time within which claims shall be presented are recognized as being valid, provided the time fixed is reasonable. 4 Elliott on Railroads (2d Ed.) § 1512, and notes. The question of reasonableness seems to depend on the opportunities which the party has to know of the loss, and it is said that it is proper that a reasonable limitation be fixed, so that the carrier may be enabled to inform himself of the actual facts while the occurrence is recent. 1 Hutchinson on Carriers (3d Ed.) §§ 442, 443, and notes. Our own court has held that a stipulation requiring claim to be presented within 30 days from the date of the receipt is unreasonable; the court saying that "30 days might elapse before the consignee became aware that anything had been consigned to him." So. Express Co. v. Caperton, 44 Ala. 101, 103, 4 Am. Rep. 118. This was followed in a case requiring presentation of the claim within 32 days from the date of the contract. So. Express Co. v. Bank, 108 Ala. 517, 520, 19 South. 664. Again, we held that 90 days after the receipt is reasonable. Broadwood v. Southern Express Co., 148 Ala. 17, 41 South. 769.

On the other hand, the Court of Exchequer in England held that a stipulation for presentation of a claim within 3 days after delivery of the goods was reasonable. The Supreme Court of the United States, after an exhaustive analysis of previous cases, held that, in view of the fact that the loss occurred within 2 days after the bill of lading was signed and the shippers were notified 3 days thereafter, a stipulation, in a bill of lading by a steamship company, that the claim must be presented within 30 days from the date of the bill was reasonable, saying that the reasonableness depended on the length of the voyage, etc. Queen of the Pacific, 180 U. S. 49, 57, 21 Sup. Ct. 278, 281, 45 L. Ed. 419. The court say, speaking of the rule giving effect to such stipulations: "It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law required; and it is intrinsically just, as applied to the present case." The Supreme Court of North Carolina takes a position different from many other courts, and holds that such stipulations are in derogation of the common law,

and are void unless proved to be reasonable. It accordingly holds that a clause requiring the claim to be presented within 30 days after delivery, or after due time for delivery, is unreasonable. Gwyn Harper Mfg. Co. v. Railroad, 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675.

Considerable time must be allowed for a freight train to travel from Alabama to St. Louis, and a shipper here would have to wait until the time when it might have been delivered, and then ascertain whether the freight had been delivered, and make his claim there. Under the facts of this case, the requirement that the claim shall be presented at the point of delivery within 30 days is unreasonable.

The judgment of the court is affirmed.

DENSON, McCLELLAN, and MAYFIELD, JJ., concur.

### JACKSON v. BADHAM.

(Supreme Court of Alabama. May 13, 1909.  
Rehearing Denied June 30, 1909.)

DEEDS (§ 62\*)—CONDITION—WAIVER.

A deed conveyed land to a trustee, to be held until the formation of a certain construction company, when the trustee was to convey to the company if it agreed to fulfill certain expressed conditions; the grantor to receive a certain amount in cash and the balance in paid-up stock of the company. Held, that the grantor, by receiving the stock which was to be issued to him on the final delivery of the deed, and by attending meetings of the stockholders while the land was being platted, etc., waived a fuller compliance with the conditions, which were to precede actual delivery of the deed to the company.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 128, 129; Dec. Dig. § 62.\*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Mollie J. Jackson against Henry L. Badham. From a decree for defendant, complainant appeals. Affirmed.

George Huddleston, for appellant. Percy & Benners, for appellee.

SIMPSON, J. The bill in this case was filed by the appellant under the statute to quiet title, and also prays that, if it shall be found that the defendant asserts title through any invalid or illegal title, the same shall be canceled and set aside as null and void. It appears, from the pleading and proof, that on October 24, 1887, John Jackson, who was the owner of the land in question, executed a deed (which was joined in by his wife, the complainant) conveying the land to M. T. Sumner, as trustee, to be held by him until "the construction company \* \* \* complies with its contract of December 13, 1886, which said contract is made a part of this deed," and provides that if the construction company fails to comply with its contract the

deed is to be void. The consideration named in the deed is \$80 in hand paid and 5.20 shares in the Clifton Land Company. Said contract is between said Sumner and various landholders, including said Jackson, who agree to deliver deeds to the land company to be formed, at the price of \$75 per acre, \$10 in cash, and \$65 in full-paid, nonassessable stock, and said Sumner is to convey the said property to said land company when formed, "and provided, also, that the construction company \* \* \* agree and bind themselves to fulfill the following terms and conditions of this contract"—and goes on to provide for the purchase of 1,000 acres of land, also the right of way for a railroad, which is to be built and equipped, "work on said railroad to be begun as soon as rights of way are secured, and in no event longer than 60 days from the organization of the land company." A subsequent agreement was made, dispensing with the absolute requirement of securing 1,000 acres of land, and while the name of said Jackson seems to be signed by C. McAdory, to said agreement (which is Exhibit X), yet the agreement of counsel in this case states: "It is agreed that Exhibit X, attached hereto, is a true and correct copy of agreement entered into between John Jackson and others and Sumner, trustee, together with the modification thereof." John Jackson is now dead, and the complainant claims as widow under the homestead exemption statute.

The claim of the complainant is that, according to said agreement, the deed was not to be made by the trustee to the land company until all the provisions of the contract were complied with, and that therefore his act in conveying the property, before such compliance, was beyond his authority as trustee, and the deed void. We understand the agreement to be that the property was to be conveyed to the land company "when it was formed," provided the construction company agree and bind themselves, etc. But, in passing over this question and the question as to whether time was made of the essence of the agreement, we think the evidence is not clear and satisfactory as to what part of the land, beyond the two acres reserved, on which was the dwelling house, was in possession of Mrs. Jackson, either before or at the time of the filing of the bill. The evidence also shows that the agreement was substantially performed, and, if there was any failure, the testimony is not controverted that Mr. Jackson, in his lifetime, received the stock which was to be issued to him on the final delivery of the deed to the land company; that he attended the meetings of the stockholders, while the land was being platted, etc., thus showing a waiver of any conditions which might have been insisted on; and no offer is made to return the stock.

On the whole evidence, we think the chancellor decided correctly, and the decree of the court is affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

#### FIDELITY MUT. LIFE INS. CO. v. SATTERFIELD.

(Supreme Court of Alabama. June 10, 1909.  
Rehearing Denied June 30, 1909.)

##### 1. INSURANCE (§ 654½\*)—PAYMENT OF PREMIUMS—EVIDENCE.

Where, in an action on a life policy, defendant claimed that, though it had issued a receipt for premiums, the same had not been in fact paid, but that insured had only given his notes therefor, the admission of evidence that on the day insured received the policy and the receipt he had \$100 in his pocket was error; that a debtor had means with which to pay not being evidence tending to show that he did pay.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1674, 1686; Dec. Dig. § 654½.\*]

##### 2. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action on a life policy, error in admitting testimony that on the day insured received his policy he had a certain amount of money in his pocket, offered on the issue whether he had paid the premium, was not cured by a charge that the evidence did not tend to show that the premium was paid, but was only a circumstance showing that he could have paid it; the natural tendency of such evidence being to influence the jury in finding their verdict.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1053.\*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Action by Mrs. Ida Satterfield against the Fidelity Mutual Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Cabaniss & Bowie, for appellant. Estes, Jones & Welch, for appellee.

MAYFIELD, J. This was an action on a life insurance policy. The real issue litigated was whether or not the policy was forfeited under its terms, for failure to pay premiums, before the death of the insured. The beneficiary produced in evidence a receipt from the insurance company, which on its face showed payment by the insured of the premiums within the terms of the policy. The insurance company claimed that the premiums were not paid in fact, but that the insured executed his notes for the premiums, payable at subsequent dates, with condition in the notes that the policy should be forfeited if the notes were not paid at maturity, and that the policy provided for such notes and condition therein; that the notes were not paid at maturity, and had never been paid by the insured, or by any other person.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



These notes were introduced in evidence by the insurance company.

The real issue being whether or not the premiums had been paid, the trial court allowed the plaintiff, over the objection of defendant, to prove that the insured, on the day he received the policy and on the day the receipt was issued by the company to him, had \$100, besides some change, in his pocket. This was error. As was well said by the Supreme Court of Massachusetts, in the case of *Atwood v. Scott*, 99 Mass. 177, 96 Am. Dec. 728: "Experience is not sufficiently uniform to raise the presumption that one who has the means of paying a debt will actually pay it." The fact that a debtor had means with which to pay is not evidence tending to show he did pay; but the fact that a party had no means might tend to show that he did not or could not pay. The same court, in the case of *Hilton v. Scarbrough*, 5 Gray, 422, said: "The fact of the reputed worth of a defendant, and his supposed ability to pay, and his dealings with third parties, are incompetent to prove payment of a note in question." The same rule is announced in 1 Wigmore on Evidence, § 99, and we think it the correct one.

There is a dictum in the case of *Insurance Co. v. Bledsoe*, 52 Ala. 550, to the effect that "the ability of the insured to make payment of the premiums would be admissible in connection with legal evidence of an excuse for the nonpayment." In that case the insurance company undertook to prove by letters from the insured his inability to pay, and hence this would have rendered such evidence competent in that case to rebut the evidence offered by the other party. But the evidence offered by the plaintiff in that case was held to be inadmissible, though the inadmissibility was put upon the ground that it was a mere declaration of the insured in his own behalf, capable of being manufactured by himself for the express purpose; and, after holding it inadmissible, the court added that a part of the evidence as to the insured's ability to pay would be admissible in connection with legal evidence of an excuse for the nonpayment. So in that case the dictum was correct, and it is probably a correct proposition of law; but that case is clearly distinguishable from this, in that the defendant's ability to pay, and the excuse for nonpayment, were the disputed issues there, and not, as in this case, payment *vel non*. We have a number of other decisions in this state to the effect that such evidence as this in question is proper and admissible when the financial standing of a party, or the question as to whether or not he owns certain property, or his solvency or insolvency, is an issue in the trial; but we find none holding that evidence that a man had means with

which to pay is admissible to prove that he did pay.

This error was not cured by the charge of the court to the effect that the evidence did not go to show that the premium was paid; that it was only a circumstance showing that he could have paid it. We cannot know that the effect of this evidence did not influence the jury in finding their verdict. Its natural tendency was to do so.

For this error the judgment must be reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, DENSON, and McCLELLAN, JJ., concur.

### BUSH v. THOMAS.

(Supreme Court of Alabama. May 13, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. FORCIBLE ENTRY AND DETAINER (§ 9\*)—PRIOR POSSESSION OF PLAINTIFF.

In an action of forcible entry and unlawful detainer, plaintiff must show such prior actual possession as, if continued for the necessary period, would vest title in him; and his possession must be open, notorious; adverse, and continuous, constructive possession not being sufficient.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 37-51; Dec. Dig. § 9.\*]

#### 2. FORCIBLE ENTRY AND DETAINER (§ 29\*)—EVIDENCE—ADMISSIBILITY OF DEED.

In an action of forcible entry and unlawful detainer, a deed offered by plaintiff is not admissible in evidence to show the extent of possession, unless plaintiff has given evidence of actual possession of the land in question or a part thereof.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Dec. Dig. § 29.\*]

#### 3. FORCIBLE ENTRY AND DETAINER (§ 29\*)—SUFFICIENCY OF EVIDENCE.

Evidence in an action of forcible entry and unlawful detainer held not sufficient to show actual possession in the plaintiff.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Dec. Dig. § 29.\*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by J. W. Bush against John Thomas. A general affirmative charge was given in favor of defendant, and plaintiff appeals. Affirmed.

Bush & Bush, for appellant. John H. Miller, for appellee.

SIMPSON, J. This action of forcible entry and unlawful detainer was brought by the appellant against the appellee, and the general affirmative charge was given in favor of the defendant. The plaintiff's evidence was the testimony of a civil engineer, who testified that about two years before the trial he had made a survey of the land for

the plaintiff; that he located the corners of the land and had stakes put down. He attached a plat of the land, made by him, showing that it was divided into lots, streets, and alleys, and stated that he had put down stakes for the streets and lots; that it was vacant, unimproved, uncultivated, and unoccupied; and that he never went back on it. Another witness testified that he assisted in the survey, and never went back on the land, except to offer the lots for sale. Another, that at the plaintiff's instance he went on the land once or twice, employed laborers to continue to cut out and open up the streets during the year 1907, and walked over the land, saw the stakes, and offered lots for sale. Plaintiff testified that before defendant took possession he told plaintiff that he (plaintiff) had 10 acres of land that belonged to defendant, and plaintiff told him to sue for it if he thought he had a better title, and that shortly thereafter defendant placed a fence around the land. Plaintiff offered in evidence a deed to the land, which was excluded. Plaintiff then offered the deed, "and to limit the evidence of the deed to the possession of the entire tract of land," and the court again sustained the objection to the introduction of the deed.

In the action of forcible entry and unlawful detainer, the plaintiff must show prior actual possession. Constructive possession is not sufficient. *Clements v. Hays*, 76 Ala. 281; *Farley v. Bay Shell Road Co.*, 125 Ala. 185, 192, 193, 27 South. 770. The plaintiff must show such actual possession as, if continued for the necessary period, would vest in him a title. *O'Donohue v. Holmes*, 107 Ala. 490, 18 South. 263. The deed could not be admitted to prove constructive possession, and the question then arises: Was it admissible for the purpose of showing the extent of the plaintiff's possession? A deed is admissible for that purpose only when the party is in actual possession of a part of a tract of land, in order to show the extent of his possession.

"Mere color of title does not draw possession to one who is not in, or does not take, actual possession of some part of the land." *Black v. T. C., I. & R. R. Co.*, 93 Ala. 111, 9 South. 537; *Bailey v. Blacksher Co.*, 142 Ala. 257, 37 South. 827. The evidence in this case was not sufficient to show actual possession in the plaintiff. 1 Cyc. 993; *Livingston v. Pendergast*, 34 N. H. 544, 550; *Dillon v. Mattox*, 21 Ga. 113, 117; *Misslon, etc., v. Cronin*, 143 N. Y. 524, 38 N. E. 964; *Bynum v. Hewlett*, 137 Ala. 334, 34 South. 391; *O'Donohue v. Holmes*, supra; *Elyton Land Co. v. Denny*, 108 Ala. 553, 562, 18 South. 561.

There was no error in excluding the deed. The possession must be open, notorious, adverse, and continuous.

There was no error in giving the general charge in favor of the defendant.

The judgment of the court is affirmed. Affirmed.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

#### COSTELLO v. FEAGIN, Judge.

(Supreme Court of Alabama. May 24, 1909. Rehearing Denied June 30, 1909.)

1. JURY (§ 10\*)—CONSTITUTIONAL GUARANTY. Const. 1901, § 11, guaranteeing a right of trial by jury, extends only to those cases in which the right existed at the time of the adoption of that provision.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 27½; Dec. Dig. § 10.\*]

2. JURY (§ 23\*)—RIGHT TO TRIAL BY JURY—VIOLATION OF MUNICIPAL ORDINANCE.

A municipality is not without power to pass an ordinance prohibiting the giving away or otherwise disposing of intoxicating liquor, on the theory that it cannot convert an offense against the laws of the state into an offense against an ordinance, causing a denial of a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 152, 153; Dec. Dig. § 23.\*]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Petition by Morris Costello for a writ of prohibition to be directed to N. B. Feagin, as Judge of the Inferior Court of Birmingham. Judgment denying the writ, and petitioner appeals. Affirmed.

A. Latady, for appellant. J. Q. Smith, for appellee.

SAYRE, J. This is an appeal from the judgment of the criminal court of Jefferson county denying a writ of prohibition. Petitioner had been arrested on a warrant which was based upon an affidavit charging that petitioner "did give away or otherwise dispose of spirituous, vinous, or malt liquor in violation of the state prohibition law and Ordinance 181, amending section 805 of the City Code of Birmingham, against the laws and ordinances of the city of Birmingham." The affidavit had been taken and the warrant issued by the clerk of the inferior criminal court of Birmingham. Upon his arrest petitioner demanded a trial by jury, and in order to avoid incarceration ad interim gave bail for his appearance on a future day in the inferior criminal court. In that court the petitioner moved that the warrant of arrest be quashed, and for his discharge, on the ground that the case presented was a charge under the laws of the state of Alabama, and that the court there had no jurisdiction to try the same; his theory being, as we understand his statement of it, that it was not within the competency of the city of Birmingham to convert an offense against the law of the state of Alabama into an offense against

an ordinance of the city of Birmingham, with effect to deprive him of the right to trial by jury. The petition averred that the judge of the inferior court, having overruled his motion, proposed to proceed with the trial of petitioner under the affidavit as for a violation of the ordinance of the city. Wherefore petitioner prayed for a writ of prohibition to restrain the judge of the inferior court from proceeding farther to try petitioner as for an offense against the ordinance of the city of Birmingham.

Appellant concedes that section 11 of the Constitution (of 1901) gives no aid to his contention, for the reason that the guaranty of the right of trial by jury, given by that section, extends only to those cases in which the right existed at the time of the adoption of the provision. The petition quotes section 8 of the Constitution, which provides "that no person shall, for any indictable offense, be proceeded against criminally, by information," with exceptions not affecting his case, and the proviso to the same section in language as follows: "Provided, that in cases of misdemeanor, the Legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established"—and complains that, whatever power the Legislature may have to dispense with indictments in cases of indictable offenses, no municipal corporation has such power. The judge of the inferior court was proceeding in conformity with section 4 of the act establishing that court. Acts 1894-95, p. 527 et seq. The validity of that act as a compliance with the proviso of section 8 of the Constitution (of 1901) is not questioned. The true meaning, then, of appellant's contention, is that the municipality was without power to pass the ordinance under which he was being prosecuted, and this lack of power is predicated upon the constitutional provision in question. As sustaining his position, appellant quotes Judge Dillon as follows: "A general grant of power, such as mere authority to make by-laws or authority to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act—for example, an assault and battery—which is made punishable as a criminal offense by the laws of the state." Treating of the constitutional question involved in the quotation from Judge Dillon, Judge Cooley remarks that the clear weight of authority is to the contrary, though the decisions are not uniform. Const. Lim. (7th Ed.) 279, note.

But, whatever view the text-writers may take, the question is not open for debate in

Alabama. The case of *Mayor of Mobile v. Allaire*, 14 Ala. 400, involved the validity of an ordinance of the city of Mobile which undertook to punish, as for an offense against the municipality, an assault and battery, committed within the city. Collier, C. J., said: "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish for an offense against the criminal justice of the country, but to provide a mere police regulation for the enforcement of good order and quiet within the limits of the corporation. So far as an offense has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment, and we are not informed that they have attempted to arrogate it. It is altogether immaterial whether the state tribunal has interfered and exercised its powers in bringing the defendant before it to answer for the assault and battery; for whether he has been there punished or acquitted is alike unimportant. The offenses against the corporation and the state, we have seen, are distinguishable, and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis. The one contemplates the observance of the peace and good order of the city. The other has a more enlarged object in view—the maintenance of the peace and dignity of the state." This case was decided in 1848, and has never been questioned. In *Withers v. State*, 36 Ala. 252, decided in 1860, which we quote as apropos of appellant's contention that he is being proceeded against criminally, it was said: "The tenth section [of article 1 of the Constitution of 1819] declares that in all criminal prosecutions 'the accused has the right to be heard by himself and counsel.' The common-law definition of a crime, as given by Blackstone, is an act committed or omitted in violation of a public law (4 Black. Com. 3), and the term 'criminal prosecutions,' as employed in the Constitution, relates exclusively to prosecutions for violations of the public laws of the state. A city ordinance is not a public law of the state, but a local law of a particular corporation, made for its internal practice and good government. Moreover, if municipal cases before a mayor of a city or town were 'criminal prosecutions' in the sense of the Constitution, they would have to be carried on in the name of the state, and conclude 'against the peace and dignity of the same.'"

These decisions are conclusive of the appellant's case. There was no error in the ruling of the court below.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

**MARX v. KILBY LOCOMOTIVE & MACHINE WORKS.**

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

**1. CONTRACTS (§ 303\*)—CONSTRUCTION.**

Plaintiff, owning a wrecked locomotive, contracted with defendant locomotive works, without fraud, that defendant should overhaul the locomotive thoroughly, put it into first-class order, and furnish all the necessary material, labor, and other items to make it a complete and salable machine, for \$1,250, to be borne share and share alike by plaintiff and defendant on joint account, after which either party might sell the locomotive for \$2,500 on their joint account. *Held*, that defendant was bound to make the locomotive a complete and salable machine for \$1,250 as the maximum price, and was not excused from performance because it subsequently developed that, because of hidden defects, it could not be repaired for that amount.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 303.\*]

**2. CONTRACTS (§ 322\*)—BREACH—EVIDENCE.**

Where defendant was absolutely bound to complete the repairs on a locomotive for \$1,250, and it was admitted that he failed to do so, evidence that the locomotive had defects not discoverable by an ordinarily careful inspection, the cost of making it a complete and salable machine, and defendant's reasons for not making the repairs as required, were immaterial.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 322.\*]

Appeal from Circuit Court, Calhoun County; John Pelham, Judge.

Action by A. Marx against the Kilby Locomotive & Machine Works for breach of a contract. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The contract referred to in the opinion is as follows: "A. Marx agrees to sell for joint account with the Kilby Locomotive & Machine Works one standard-gauge Forney type locomotive, with all parts belonging to same that he might have, and as seen and instructed by their representative this day on barge on the New Basin Canal, for the sum of \$300, delivered on cars at Anniston, Alabama. The Kilby Locomotive & Machine Works agree to take charge of this locomotive on its arrival at Anniston, overhaul same thoroughly, and put it in first-class running order, furnishing all the necessary materials, labor, and whatever other incidental items that may be necessary to make this a complete and salable machine, for the sum of \$1,250, which amount shall be borne share and share alike by the named parties to this joint account. [Here follows an agreement that the selling price shall be \$2,500, and that either may sell at that price, but immediately notify the other, etc.] It is understood and agreed that as the work progresses the Kilby Locomotive & Machine Works will make to said A. Marx an account of the costs advanced, and the said A. Marx in turn is to reimburse the said Kilby Locomotive & Machine Works one-half of such amount as will be furnished by them, but

not until the said A. Marx has been reimbursed with the original cost of the locomotive, which is \$300." The breach declared on is that the defendant has failed and refused to pay plaintiff his share of this agreement.

The pleas are as follows: "Defendant avers that, after it had received said locomotive and proceeded to make repairs upon the same to the extent of about \$300, it was ascertained that there were inherent and hidden defects in said locomotive, which destroyed said locomotive as a commercial proposition and rendered it worthless, except for scrap iron, and that it would have cost more than \$2,500 to have made the necessary repairs and to have made it salable. Defendant further avers that these defects in said locomotive were latent, and could not have been discovered by the exercise of reasonable diligence until the said sum of about \$300 had been expended in repairs, and until the defendant had gotten to see the inside of said locomotive, when it was then ascertained that it was worthless and fit only for scrap iron. Defendant further avers that the expenditure of the maximum sum of \$1,250 in repairs, which was all it was authorized by said contract to have expended in repairing said engine, would not have repaired said locomotive, or made it marketable, or made it more valuable than mere scrap iron, and that it would have taken about \$3,000 or more to have made said engine marketable, and then it would have been worth only about \$2,000 or \$2,250, and would then have been a losing investment for both plaintiff and defendant. And defendant further avers that it notified plaintiff's general manager and agent, Edward Marx, who came to defendant's shops and inspected said locomotive, that it was fit only for scrap iron, and that the defendant intended to sell it for scrap iron for the joint account of both plaintiff and defendant, which defendant did. (4) Each count of plaintiff's complaint is based upon an alleged breach of contract which is therein set forth, and defendant avers that after it began to work upon said locomotive it discovered latent defects in the same, which were unknown and could not have been discovered by defendant at the time of the execution of said contract, or until after it had made certain repairs upon said engine, and that these defects in said locomotive were hidden and undiscoverable by the exercise of reasonable diligence, and rendered said locomotive absolutely worthless except for scrap iron; and defendant avers that, even if it had expended the maximum amount of repairs stipulated for in said contract, to wit, \$1,250, the said locomotive would not have been worth anything like that sum, and hence the expenditure of said amount would have resulted in loss both to plaintiff and defend-

ant, and the locomotive, after defendant had expended about \$300, was found to be valuable only as scrap iron, and it was sold as scrap iron by defendant, after notice to plaintiff, for the joint account of plaintiff and defendant."

Von L. Thompson, for appellant. Willett & Willett, for appellee.

SAYRE, J. The contestation between the parties to this record arises out of variant interpretations given by them to the contract between them. Unquestionably the object of all exposition of written instruments is to determine the expressed intention of the parties. Appellant owning a locomotive which had been injured in a wreck, and appellee having facilities and being engaged in the business of repairing machines of the kind, entered into an undertaking for the repair and sale of the locomotive on joint account. Appellee's theory of the contract, advanced in pleas 3 and 4, is that the stipulation for the repair of the engine at a cost of \$1,250 intends that said sum is the maximum expenditure required to be made for that purpose. In this we think the appellee misconceives the meaning of the contract. The unconditional requirement of the contract is that the appellee should put the engine in first-class running order, furnishing all the necessary material, labor, and whatever other incidental items may be necessary to make it a complete and salable machine, for the sum of \$1,250, which amount shall be borne share and share alike by the parties to the joint adventure. Appellee's contention that the subsequently developed fact that the machine, by reason of hidden defects, could not be made a complete and salable machine for the stipulated cost, will excuse it from further performance of its engagement, seeks to interpolate a condition which has nothing to justify it in the immediate clause or in the context. "One's undertaking, therefore, will bind him to whatever it is within the scope of private exertion to accomplish without violating the law, however inconvenient, however many obstacles he may encounter, and however impossible its doing may be to him." Bishop on Contracts, § 591. *Dermott v. Jones*, 2 Wall. 2, 17 L. Ed. 762; *Brumby v. Smith*, 3 Ala. 123; *Reid v. Edwards*, 7 Port. 508, 31 Am. Dec. 720. The contract in question bound the appellee to make a complete and salable machine of the locomotive at a cost to the joint account of \$1,250, and it cannot be relieved of its duty to the appellant by reason of the fact that its engagement proved to be unprofitable to itself. It was within the possibilities of the undertaking, as expressed, that it might result in profit to appellant while involving loss to the appellee, and this the parties must be held to have

had in contemplation when they entered into the contract. There was error in overruling the appellant's demurrers to special pleas 3 and 4.

On the interpretation of the contract which we have adopted, all those questions propounded by the appellee to the witness Clark, with the purpose and effect of showing that the locomotive had defects not discoverable by an ordinarily careful inspection, the cost of making it a complete and salable machine, and appellee's reason for not completing the repairs as provided in the contract, were, in the presence of the conceded fact that the machine had not been made complete and salable, and in the absence of any charge of fraud on the part of appellant, improperly allowed. They will probably not recur upon a second trial, and we need not consider them in detail.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

#### MORRIS et al. v. FIRST NAT. BANK OF SAMSON.

(Supreme Court of Alabama. May 20, 1909.  
Rehearing Denied June 30, 1909.)

##### 1. PARTNERSHIP (§ 146\*)—LIABILITY OF FIRM TO THIRD PERSON.

Where checks constituting an overdraft were drawn on a firm bank account by the bookkeeper of the firm, under the direction of one of the partners, and paid by the bank, each member of the firm was liable to the bank, though the checks were for the individual debt of the partner at whose instance they were drawn, and though the other partner had instructed the bookkeeper to draw no checks except for firm purposes.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 249; Dec. Dig. § 146.\*]

##### 2. PARTNERSHIP (§ 239\*)—FIRM LIABILITIES—DISSOLUTION.

That a firm had been dissolved when a check was drawn in the firm name by the bookkeeper, at the instance of one of the partners, on a bank which the firm had been dealing with, did not render the partners not liable to the bank, which paid the check, unless it had notice of the dissolution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 655, 656; Dec. Dig. § 239.\*]

##### 3. BANKS AND BANKING (§ 116\*)—AGENTS AND OFFICERS—NOTICE TO OFFICER.

Knowledge of the bookkeeper of a firm of the dissolution of the firm, which he acquired because of being such bookkeeper, was not notice to a bank of which he was assistant cashier and bookkeeper.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 285; Dec. Dig. § 116.\*]

##### 4. PARTNERSHIP (§ 156\*)—LIABILITIES OF FIRM—ESTOPPEL.

A partner at whose instance the bookkeeper of the firm drew a check, constituting an overdraft, for the individual debt of the partner, was estopped to deny the bookkeeper's au-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

thority as against the bank which paid the check.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 281; Dec. Dig. § 153.\*]

**5. USURY (§ 103\*)—ESTOPPEL TO ASSERT.**

Where one connected with a bank loaned money by a usurious note to a firm of which he was a member, the firm was estopped to set up the defense of usury against the bank.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 259; Dec. Dig. § 103.\*]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Action by the First National Bank of Samson against J. J. Morris and W. T. Edge, late partners composing the firm of Samson Live Stock Company. Judgment for plaintiff, and defendants appeal. Affirmed.

The action was on account and for money loaned. The pleas were nonassumpsit, nil debet, and set-off. The Samson Live Stock Company was a firm, composed of J. J. Morris and W. T. Edge. Griggs was the cashier and bookkeeper of the Samson Live Stock Company during its existence, and is also assistant cashier and bookkeeper of the bank. J. J. Morris was one of the members of the firm of the Samson Live Stock Company, and during the years 1906 and 1907 was cashier of the bank. Under the arrangement between the two, checks were drawn by Griggs as the bookkeeper of the live stock company and paid by Griggs as the assistant cashier and bookkeeper of the bank. The account is founded upon overdrafts composed of some of these checks so drawn and paid. The defendant offered to show that the live stock company was not indebted to some of the parties in whose favor the check was drawn, but that Edge individually was indebted to them, and these checks were drawn to pay his individual checks. The court refused to permit this evidence. It was shown by Griggs' testimony, and not disputed by Edge, that these checks were drawn by Edge's direction. Morris offered to testify that Griggs was instructed and authorized to draw checks to pay all debts of the Samson Live Stock Company, but was not authorized to draw any check for any sum not owing by the Samson Live Stock Company. At the time of the dissolution of the firm and the withdrawal of Morris therefrom, Griggs was present and knew all about it. It is not made to appear from the record whether Morris was then connected with the bank or not.

J. J. Morris and Espy & Farmer, for appellants. W. O. Mulkey and Tyson, Wilson & Martin, for appellee.

ANDERSON, J. The checks were drawn for the Samson Live Stock Company, a firm composed of Morris and Edge, by Griggs, the bookkeeper of said firm, and who was also

assistant cashier of the plaintiff bank, and upon the order and direction of one of the partners, Edge. It was therefore immaterial as to the instructions given Griggs by Morris, as between the firm and third persons, as Edge had as much authority to direct the bookkeeper as his copartner, Morris, and, when the checks were drawn upon the direction of one of the partners and were paid by the bank, they became a valid claim against the firm and each member thereof, regardless of the previous instructions from Morris to Griggs.

It was also immaterial that the firm had been dissolved when the last check was drawn and paid by the bank, unless the bank had notice of the dissolution, as it had been dealing with said firm, and the individual partners were liable for the debts contracted, even after dissolution, unless the bank had notice of said dissolution. True, the defendants proposed to show that Griggs had notice of the dissolution; but Griggs occupied a dual position, and the notice he may have acquired as bookkeeper of the defendants could not be imputed to the bank. *Traders' Ins. Co. v. Letcher*, 143 Ala. 400, 39 South. 271; *Cent. of Ga. v. Joseph*, 125 Ala. 319, 28 South. 35; *Patterson v. Irvin*, 142 Ala. 401, 38 South. 121. The defendants did not propose to prove that the bank had notice of the dissolution, or that Griggs got notice while acting for the bank. If he knew of the dissolution because of being bookkeeper for the defendants, notice thus acquired was not binding on the bank. To have put the trial court in error, defendants should have proposed to show that the bank, or that Griggs, as agent of the bank, had notice of the dissolution, as notice to Griggs, who was also bookkeeper of the defendants, was not of itself sufficient to charge the bank with notice. Nor can the defendants complain of not letting Morris testify that the officers of the bank authorized him to lend the money to the stock company at 8 per cent., as that would exonerate the bank from responsibility for the usurious feature of the transaction, inasmuch as Morris was dealing with himself, and, if he saw fit to charge himself or his firm with a greater interest than the officers authorized or required, he is estopped from charging the bank with usury. Not only did Morris have the authority, as a partner, to bind or estop the firm, but Edge was also estopped from questioning Griggs' authority to draw the checks in question, as they were drawn at his instance.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

**SOUTHERN RY. CO. v. HARTSHORNE.**

(Supreme Court of Alabama. May 24, 1909.

Rehearing Denied June 30, 1909.)

**MUNICIPAL CORPORATIONS (§ 873\*) — FISCAL MANAGEMENT — CONSTITUTIONAL RESTRICTIONS—AID TO RAILROAD.**

Under Const. 1901, § 94 (Const. 1875, art. 4, § 55), declaring that the Legislature shall not authorize any county, city, or town to lend its credit or grant public money or anything of value to any individual, association, or corporation, a city cannot purchase land with public funds and have the same conveyed to a railroad company, in consideration that the company will construct and maintain thereon a proper depot and station facilities.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 873.\*]

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Action by Acton C. Hartshorne against the Southern Railway Company. Plaintiff had judgment, and defendant appeals. Affirmed.

Humes & Speake, for appellant. John C. Eyster and Tennis Tidwell, for appellee.

MCCLELLAN, J. Reference to the report of the previous appeal of this cause (150 Ala. 217, 43 South. 583, 124 Am. St. Rep. 68) will afford a satisfactory summary of the facts involved, the theories of the bill for relief, and the ruling of this court in affirmance of the decree below overruling demurrer to the bill and motion to dismiss the bill for want of equity. In due order the cause proceeded to decree on the merits; the chancellor granting in full the relief sought in the premises. As a matter of fact it was correctly found by the chancellor that the real estate in question was conveyed by the Couch heirs to the appellant for a consideration afforded by the diversion of a part of the public revenue of the city of Decatur. The appellant takes the point, and urges as a ground for the denial of the relief prayed by these judgment creditors of the municipality, that a sufficient consideration for the contract between appellant and the municipal authorities, and for the conveyance to it by the Couch heirs—a consideration moving from the appellant to the city—existed in the fact that the construction of a proper depot and station facilities by the appellant would and did result in appreciable benefit to the city of Decatur and its inhabitants. Testimony was offered in support of this contention; but the court disallowed it, thereby affording bases for several of the assignments of error.

There can be no possible merit in this insistence. The Constitution of 1875 and that of 1901, by section 55 of article 4 and section 94, respectively, provided that the law-making branch "shall not have the power to authorize any county, city, town, or other subdivision of this state to lend its credit, or

to grant public money, or thing of value in and of or to any individual, association or corporation whatsoever, or to become a stockholder in any such corporation, association or company, by issuing bonds or otherwise." The comprehensiveness of these provisions of the organic laws and the wholesome reason for their incorporation into them are stated in *Garland v. Board of Revenue*, 87 Ala. 227, 6 South. 402. Brief quotations from the opinion in that case will demonstrate the correctness of the stated conclusion on this point below and of the affirmance of it here. In describing the conditions suggesting the prohibitions of section 55 it was said: "Several of the counties had, by legislative authority, subscribed for stock in railroad corporations, and issued bonds to pay for the same, in anticipation of the future public benefit." (Italics supplied.) And, having described the conditions that came to be a mischief of sufficient importance to command treatment in a Constitution, this court said: "Its [section 55] terms are comprehensive enough to include any aid, by issuing bonds or otherwise, by which pecuniary liability is incurred furnished by the municipalities named to private enterprises." Not content with that broad statement, the opinion appropriates the language of the Ohio court dealing with a similar clause in the Constitution of that state: "In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipalities permitted to participate in such manner as to incur pecuniary liability. They can neither become stockholders, nor furnish money or credit for the benefit of the parties interested therein." Proceeding, this court said: "Operation should be given to the provision in the Constitution coextensive with the evils to be prevented."

This section (55) has, as stated, become section 94 of the Constitution of 1901, and hence is impressed in meaning and effect with the construction put upon it in *Garland's Case*. In the light of that decision we need hardly add that the very motive leading to the creation of the conditions to prevent the recurrence of which the provision was written was anticipated public benefits. If the public benefits were held to be sufficient to take the act without the prohibition, then its ordaining in two Constitutions in this state was wholly vain. In the *Garland Case* a pecuniary liability was attempted to be incurred. The same reason that forbade that course of procedure to aid private enterprises is present to condemn the diversion of public revenue in this instance. The provision is no more explicit against becoming a stockholder or affording credit by the issuance of bonds than it is that money shall not be granted. In all enterprises like railroads, canals, pikes, manufacturing establishments,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

etc., benefits naturally accrue to the community concerned, and it is common experience that this is true. Because it is true the trustees of governments are and have always been amenable to it as an influence to induce the lending of the credit or granting the funds or property of the subordinate governments to the aid of such enterprises as foreshadow public benefits. This disposition, natural and inevitable of gratification if not restrained, cannot be gratified by those who have control. The very existence of this disposition has resulted in the creating of the prohibition. To permit it to yet prevail is to annul one of the wisest of the Constitution's provisions.

Some argument has been addressed to the proposition that prior to the Constitution of 1875 the charter of Decatur permitted such grants as was here attempted, and that in re-enacting or amending that or succeeding charters the power was not impaired. The argument is unsound. It involves the maintenance of the proposition that provisions in statutes in conflict with the Constitution of 1875, and the same is true of the later instrument, not within the exceptions provided by the schedule, were not stricken down by the Constitution. That, of course, is not true. Sections 55 and 94 are self-acting—prohibitory in nature and effect. They bound, and bind, in order, all departments of the state, and no law could, did, or does exist in contravention of their prohibitions.

Under this ruling the price paid Couch's heirs for the lot was a donation, pure and simple. The complainants, judgment creditors of the city of Decatur, were entitled to subject the property to the satisfaction of their demand, as was ruled on former appeal. The chancellor so adjudged, after properly eliminating the illegal testimony proffered in the cause. His decree is without error, and is therefore affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

#### HOLMES v. LAMBERTH.

(Supreme Court of Alabama. June 10, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. STATUTES (§ 241\*)—PENAL STATUTES—CONSTRUCTION.

A statute penal in its nature must be strictly construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.\*]

#### 2. CLERKS OF COURTS (§ 72\*)—LIABILITY FOR MISCONDUCT—ACTION FOR PENALTY.

Code 1907, § 2850, makes the clerk, register, or judge of probate liable to a penalty of \$200 if by reason of negligence or delay the transcript be not delivered to the appellant or his attorney in time to be filed, or if it be so

defective that the Supreme Court cannot proceed thereon. *Held*, that it was the intention to impose the penalty only when the transcript is so defective that the court cannot proceed thereon; and where it could not be said that the transcript was so defective because of the omission of certain words, nor appear that the decision would have been different if the words had been included, the penalty was not recoverable.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 72.\*]

Appeal from Circuit Court, Clay County; John Pelham, Judge.

Action by Delmea Holmes against S. Y. Lamberth. Judgment for defendant, and plaintiff appeals. Affirmed.

D. H. Riddle, for appellant. Whatley & Cornelius, for appellee.

SIMPSON, J. This is an action by the appellant against the appellee for recovery of the penalty prescribed by section 2850 of the Code of 1907. Said section makes the clerk, register, etc., liable to a penalty of \$200 "if, by reason of negligence or delay, \* \* \* the transcript be not delivered to the appellant, or his attorney, in time to be filed, or if the transcript be so defective that the Supreme Court cannot proceed thereon."

It is not claimed that the transcript in the case of *Holmes v. State*, 39 South. 569, was not delivered in time; but the penalty is claimed because, in the bill of exceptions as copied in the record, the words in italics in the following quotation were omitted, to wit: "Here the state put Maggie Stansell back on the stand and asked her the following question: 'State whether or not you were complaining of anything else, except the results of the whipping, at the time Mr. Hardaman was at your house.' The defendant objected to this question, and the court overruled the objection, and the defendant then and there reserved an exception to this ruling of the court, and the witness answered *that she was not*. The defendant objected to the answer and moved to exclude it. The court overruled the objection." This court, in passing upon the case, disposed of other points therein, but stated that it could not review the ruling on this objection, because of the omission.

This statute, being penal in its nature, must be strictly construed, and it cannot be said in this case that the transcript was "so defective that the Supreme Court" could not "proceed thereon," and it does not appear that the decision of the court would have been different if the words had been included.

The appellant claims that the first clause of the statute is not complied with unless a perfect transcript is delivered; but, if that was the intention of the law, it would have been useless to add the second clause. The adding of that clause shows an intention, not to impose the heavy penalty for every



omission, but only when the transcript is so defective that the court cannot proceed thereon.

The judgment of the court is affirmed.

ANDERSON, DENSON, and MAYFIELD,  
JJ., concur.

**REPUBLIC IRON & STEEL CO. v. WHITE.**  
(Supreme Court of Alabama. June 17, 1909.  
Rehearing Denied June 30, 1909.)

**1. NEGLIGENCE (§ 136\*)—DANGEROUS PREMISES—QUESTION FOR JURY.**

Where, in an action for injuries caused by falling into an unguarded hole from which weighing scales had been removed, a witness testified that the scales were removed under the direction of defendant's superintendent, that a hole was left there, that no light or railing was put there as a warning, and that the superintendent was unknown to plaintiff, the liability of defendant was for the jury.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 136.\*]

**2. APPEAL AND ERROR (§ 242\*)—OBJECTIONS TO EVIDENCE—NECESSITY OF RULING.**

Where a party failed to invoke a ruling on some of his objections to the testimony of a witness, or to except when a ruling was made, he could not complain of the overruling of a motion to exclude all the evidence of the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242.\*]

**3. TRIAL (§ 82\*)—RECEPTION OF EVIDENCE—OBJECTIONS.**

Where witnesses testified that a map showed the surroundings, the map, whether official or not, was competent evidence in connection with the testimony, and objections must be made specifically to the parts of the map not relating to the facts testified to by the witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 194, 202; Dec. Dig. § 82.\*]

**4. RAILROADS (§ 355\*)—TRESPASSERS.**

One is not necessarily a trespasser because on a railroad track, if at the point the track is in or on a public highway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220, 1221; Dec. Dig. § 355.\*]

**5. NEGLIGENCE (§ 139\*)—DANGEROUS PREMISES—INSTRUCTIONS.**

In an action for injuries caused by falling into a hole from which weighing scales had been removed and left unguarded, an instruction exonerating defendant from any liability if it maintained the scales solely for the purpose of weighing cars, and premitting liability if the scales had been in a public highway, or at a point used generally as a passageway, was properly refused because misleading.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 139.\*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by William F. White against the Republic Iron & Steel Company for a personal injury resulting from falling into a hole from which weighing scales which had formerly occupied it had been removed and the hole left unguarded without lights or other signals of danger. From a judgment for plaintiff, defendant appeals. Affirmed.

The following charges were refused to the defendant: (2) "If you believe from the evidence that plaintiff was injured while walking along the track or tracks of the Alabama Great Southern Railway Company, or of any other railroad company, then I charge you that plaintiff was a trespasser and cannot recover in this case." (4) "If you believe from the evidence that the platform of the scales was maintained solely for the purpose of furnishing means for the weighing of cars, and was used by the defendant solely for that purpose, then I charge you the defendant would be under no duty of keeping said platform, or the space occupied by it, in a safe condition as a passageway for defendant's employes in going to and from their work." (7) "If you believe from the evidence that the railroad tracks constructed from defendant's rolling mill premises to the track scales were constructed and used by the defendant solely for the purpose of furnishing a way for transporting cars to the scales to be weighed, then I charge you that the defendant would be under no duty whatever to keep said track or any part thereof in a safe condition for foot passengers."

Percy, Benners & Burr, for appellant.  
Bowman, Harsh & Beddow, for appellee.

ANDERSON, J. We do not think that the trial court erred in refusing charge 1, the general charge as to count 7, requested by the defendant. The witness Bowman testified that the scales were removed under the direction of defendant's superintendent; that a hole was left there, and no light or railing was left or put there as a warning or protection. There was also proof from which the jury could infer that said superintendent was unknown to the plaintiff.

The trial court will not be put in error for overruling the motion to exclude all of Schol's evidence "to the effect that the scales were in the alleyway." There were several objections to this witness' testimony, and the defendant failed to invoke a ruling as to some of its objections, or to except when a ruling was made, and could not thus waive its specific objections and put the trial court in error by such a general motion to exclude, in effect requiring the court to go back and seek out all the evidence "to the effect that the scales were in the alleyway."

Nor was there error in permitting the plaintiff to introduce the map marked "Exhibit B." Whether an official map or not, it had been testified to by two witnesses as properly showing the surroundings at the point of the injury, and was competent in connection with their testimony. If any parts of it did not relate to facts testified to by them, objection should have been made to those parts, and not to the map in its entirety.

Charge 2, requested by the defendant, was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

properly refused. If not otherwise bad, the plaintiff was not necessarily a trespasser because on a railroad track, if at the point of the injury the track was in or upon a public highway.

There was no error in refusing charges 4 and 7 requested by the defendant. If not otherwise bad, they are calculated to mislead the jury into exonerating the defendant from any liability for the hole or pit, if it maintained the scales solely for the purpose of weighing cars, thus pretermittting its liability if said scales were in a public highway, or at a point used generally as a passageway. The defendant may have maintained the scales for a sole purpose, yet they may have been at a point where a duty existed to not create or permit the hole or opening in question.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### JENKINS v. MCGEEVER et al.

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. APPEAL AND ERROR (§ 1010\*)—FINDINGS BY COURT—REVIEW.

Where the facts on an application to charge a garnishee are found by the court, an order discharging the garnishee will be affirmed, if there is sufficient evidence to support the judgment, unless the general affirmative charge should have been given in plaintiff's favor if there had been a trial by jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

#### 2. GARNISHMENT (§ 158\*)—DENIAL OF ANSWER—ISSUES.

An issue made on the denial of the answer of a garnishee includes the question whether the garnishee was indebted to the principal defendant at the time of the service of the writ, as well as at the time of answer.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 294; Dec. Dig. § 158.\*]

#### 3. GARNISHMENT (§ 164\*)—ANSWER—AMENDMENT—EVIDENCE.

Where a garnishee's first answer admitted an indebtedness to the principal defendant of \$241.38 and suggested sundry claimants, none of whom ever appeared, and the garnishee subsequently amended his answer, first admitting an indebtedness of \$102.38, and thereafter denying any indebtedness, and testified at the trial that he was not indebted, but there was no evidence that he was not indebted when the writ was served, an order discharging the garnishee was erroneous.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 164.\*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by R. M. Jenkins against P. J. McGeever and others. From a judgment discharging McGeever as garnishee, plaintiff appeals. Reversed and remanded.

George Huddleston, for appellant. John H. Miller, for appellees.

MAYFIELD, J. This is an appeal by the plaintiff from a judgment in the lower court discharging P. J. McGeever, garnishee. The trial was had by the court without a jury. There is but one material question involved in this appeal; that is, whether or not there was sufficient evidence introduced on the trial below to support the finding and judgment of the city court discharging the garnishees. The facts being tried by the court without a jury, no special finding being required, the judgment must be affirmed, if there was sufficient evidence to support the judgment. In other words, unless the general affirmative charge could have been given in favor of the plaintiff, had there been a jury trial, this judgment must be affirmed. We have examined the record very carefully, and we find no sufficient, if any, evidence to support the judgment. Consequently it must be reversed, and the cause remanded.

The trial was had on a contest of the answer. The writ was served on the garnishee November 4, 1904. On November 11, 1904, he answered that he was indebted to the defendant Smith in the sum of \$241.38, and suggested sundry claimants. None of these claimants ever appeared or made claim to the fund, nor is it contended that any part of this indebtedness was ever paid by the garnishee to any one of these claimants, the only reference to any claimants being in garnishee's answer, and no question was raised upon the final contest of his answer as to such claimants. On January 9, 1907, the garnishee filed an amended answer, admitting an indebtedness of \$102.38. The contest to this answer was filed on January 10, 1907. On October 22, 1907, garnishee again amended his answer, and denied any indebtedness whatever. On the same day plaintiff filed contest of this answer, and an issue was made up and the trial had upon this issue. The plaintiff introduced the garnishee's original answer, filed on November 11, 1904, admitting an indebtedness of \$241.38 at the time of the service of the writ of garnishment and at the time of making that answer. Garnishee then offered in evidence a contract, dated September 15, 1904, executed between him and the defendant Smith, by which the defendant agreed to repair certain buildings for a contract price of \$1,100. The contract provided that the work should be completed by October 15, 1904, and that payment should be made as the work progressed. The garnishee, being examined as a witness in his own behalf, testified as follows: "I am the garnishee in this case. I am not indebted to the defendant G. H. Smith. He is indebted to me \$25 or \$30 under that con-

tract. That is the only contract I ever had with him. I have paid defendant Smith all I owe him under this contract."

This was all the evidence in the case, and on this evidence the court rendered a judgment discharging the garnishee. In this we think the court was clearly in error. The issue made up, as provided by the Code, on this contract, was whether or not the garnishee was indebted at the time of the service of the writ upon him, as well as at the time of the making of his answer. There was no evidence whatever to show that he was not indebted to the defendant at the time the writ was served upon him; but it affirmatively appears from his own answer and affidavit that he was indebted at that time. True, he swears positively that he was not indebted to the defendant at the time of the trial and at the time of making his last amended answer; but there is no evidence whatever that he was not indebted to the defendant at the time the writ of garnishment was served upon him. If his answers and his evidence be true (and that was the only evidence in this case), he was indebted to the defendant at the time the writ was served upon him, and would be indebted to him under a contract then existing, but that he had discharged the indebtedness by paying the defendant after the service of the writ of garnishment upon him and before the time of trial. This he could not do and avoid liability.

For the error indicated, the judgment of the lower court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

#### Ex parte STATE ex rel. HIGDON.

(Supreme Court of Alabama. May 20, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. INJUNCTION (§ 216\*)—VIOLATION—SCOPE OF WRIT.

Violation vel non of an injunction is not decidable alone by the letter of the writ, but in many cases its spirit is within the binding and commanding quality thereof.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 216.\*]

#### 2. INJUNCTION (§ 228\*)—VIOLATION—PERSONS LIABLE—THIRD PERSONS.

Where an injunction forbade certain persons to move, molest, damage, or destroy certain property described in the bill, and did not purport to protect the property otherwise than by restraining the persons named, its breach could only be committed by such persons, or by persons conspiring with them.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 495; Dec. Dig. § 228.\*]

Petition for mandamus by the State of Alabama, on the relation of E. L. Higdon, to review the action of the circuit court of

Jefferson County in adjudging relator guilty of contempt in violating a writ of injunction. Petition granted.

E. M. Hamill, for petitioner. Allen & Bell, for respondent.

McCLELLAN, J. The petition for mandamus or prohibition invites the review by this court of the action of the circuit court of Jefferson county in adjudging relator guilty of contempt of that court in respect of the violation by relator of a writ of injunction and the penalizing of him in consequence. A statement of the facts will be made:

George T. Howell filed his bill in the circuit court against the mayor and chief of police of the city of Birmingham, alleging that he was the owner of an iron safe located in a certain numbered house in that city; that said house was used as a restaurant and soft drink stand; that on a date stated one Hunt, an employé of the place, was arrested for violating the prohibition ordinance of the municipality, and the chief of police took charge of said iron safe, the property of complainant, and not that of Hunt; that the chief of police "threatened to blow open said safe, and to remove said safe from said place of business, and otherwise mutilate and injure or destroy said safe and contents"; that said safe contained the private papers and sums of money belonging to complainant; that the mayor and chief of police "will destroy said property and injure same, to the great damage of your orator, unless enjoined by this great court. And your orator shows unto your honor that he is without remedy, except in a court of equity. Orator further shows respondents are insolvent and unable to respond in damages." As presently important, the prayer of the bill reads: "And that your honor will order an injunction restraining the said George B. Ward, mayor and George H. Bodeker, chief of police, from interfering, moving, breaking into, or in any way interfering, mutilating, or molesting said safe, the property of your orator.

The following order, addressed to the clerk and register of the circuit court, was made by the judge of the court: "Upon complainant's entering into bond in the sum of \$100, with sureties to be approved by you, and payable and conditioned according to law, let a temporary injunction issue in accordance with the prayer of the bill of complaint." The bond being approved as required, the writ issued, as prayed in the bill, against Ward and Bodeker, bearing date September 30, 1908. The writ was served by the sheriff, relator being that officer, and it was further conceded that he knew the contents and purport of the writ. Subsequently a search warrant was issued out of the inferior court of Jefferson county, at the instance of W. M.

Burge, and was delivered to the sheriff, commanding him to search the safe, described in the bill filed by Howell, "for the following property, whisky, spirituous or malt liquors held within this county, with the intent to use the same as the means of committing a public offense. \* \* \*" The relator executed the search warrant emanating from the inferior court.

Howell, by affidavit, brought to the attention of the circuit court the alleged fact that Bodeker, Burge, and relator had violated the injunction aforesaid. A rule was thereupon issued to Bodeker, Burge, and relator to show cause why they should not be punished for contempt for misconduct in the failure to obey the mandates, etc., of the circuit court as described in Howell's affidavit. On the hearing of the contempt proceedings it was found on fact, and decided, that Bodeker was blameless, that Burge was misled by his attorney, was given the benefit of the doubt, and was discharged, and that relator was guilty, and a fine was imposed. The adjudication of relator's contempt is thus stated in the judgment: " \* \* \* And that E. L. Higdon, according to his own admission, had notice of the injunction, and that he is therefore guilty of contempt of court; his erroneous supposition that the writ was not binding upon him not justifying his course, but merely extenuating his offense."

We do not discover, from the answer to the rule nisi issued in this proceeding or otherwise, any evidence of a conspiracy or community of purpose, to which relator was a party, to violate or by subterfuge evade the writ of injunction emanating from the circuit court. In short, the guilt vel non of relator must be determined alone on his action, after full knowledge of the issuance and service of the writ of injunction, and that entirely uninfluenced by the acts or conduct of Bodeker, Ward, or Burge. Nothing appears in the original bill, the order for the writ, or the writ itself connecting Burge with the acts of Bodeker and Ward, to prevent which the writ commanded them. Relator does not appear to have known that Burge (if so) was the person instigating (whether legally or illegally is immaterial) Bodeker and Ward to the destructive acts alleged in the original bill to have been threatened by them. Anyway, we do not understand the adjudication of relator's contempt to have rested in any measure on oral statements of complainant's solicitors made to the court or to the judge pending the granting of the temporary writ of injunction. It is well understood that violation vel non of an injunction is not always decidable alone by the letter of the writ, but that, in many cases unnecessary to

undertake to now define, its spirit, broader than its letter, is within the binding, commanding quality thereof. Ex parte Miller, 129 Ala. 130, 30 South. 611, 87 Am. St. Rep. 49; High on Inj. § 1446.

In this instance, the writ possessed no spirit broader than its letter. The command here was addressed to two persons or officers, and forbade them to move, molest, damage, destroy, etc., the safe described in the bill. It did not purport to protect the safe otherwise than by restraint of these two persons or officers from doing the acts defined. Neither the bill the order, nor the writ assume to do more than to restrain Ward and Bodeker as trespassers. The writ operated only in personam. High on Inj. § 2. It did not undertake to create a status effecting to place the safe in gremio legis. The court did not attempt to install any officer in possession of the safe. There was no effort to remove the safe from its location in the business house. It remained where it was, presumably in the control and possession of Howell, unless the mandate was not observed by Ward or Bodeker. Under such circumstances, with a writ of injunction sought and issued as this one was, we think this general statement taken from section 1440 of High on Injunctions apt in decision of the matter in hand: "The obligations of an injunction will not usually be extended to persons who are not named in the writ, and they will not be liable for a breach of a mandate which is not directed to them. Thus, where the writ is simply directed to a defendant, without including his agents or servants, an agent will not be punished for a breach."

The relator was a stranger to the writ. Its obligation was confined to the conduct of Ward and Bodeker. It was not framed and did not assume to protect the safe generally. It did not attempt to maintain the status quo except by restraint of Ward and Bodeker. Its breach could only have been effected by conduct, in respect of the safe, by Ward and Bodeker, or either, or by persons conspiring with them to avoid the mandate of the writ. We are therefore of the opinion that relator did not violate the writ of injunction issuing from the circuit court, and hence was improperly ruled to be in contempt of the court. In consequence, the prayer for the writ of mandamus must be granted. It will not issue, however, since the necessity for its actual issuance is not anticipated.

Petition for writ of mandamus granted.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

## KEILY et al. v. SMITH.

(Supreme Court of Alabama. June 10, 1909.  
Rehearing Denied June 30, 1909.)

## 1. APPEAL AND ERROR (§ 877\*) — HARMLESS ERROR—PERSONS ENTITLED TO COMPLAIN.

An appellant against whom there was no decree as to a mechanic's lien cannot complain as to the rulings thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.\*]

## 2. EQUITY (§ 148\*) — BILL — MULTIFARIOUSNESS.

An owner of lots upon which there was a mortgage contracted for the construction of a house thereon, whereby it was agreed that the contractor should furnish all labor and material and discharge the mortgage debt, he to hold the notes and mortgage as collateral, or to take new notes and a mortgage for both debts. Part of the price was paid when the work was begun, and the balance of the building debt and the mortgage debt was evidenced by notes and a mortgage to be delivered when the house was completed. Disputes arose as to full compliance with the contract, and the owner refused to deliver the notes and mortgage. The contractor filed a statutory claim and affidavit to acquire a mechanic's lien, and then transferred all his interest in the debts, evidences thereof, and the liens to plaintiff, who sued to enforce his claims as assignee. *Held*, that the remedies to enforce the mechanic's and equitable liens were not so different that the two liens could not be set up in the same bill, so that the bill was not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.\*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by V. C. Smith against Lillian Kelly and others. Decree for complainant, and defendants appeal. Affirmed.

J. S. Gillespie and George E. Bush, for appellants. Samuel Wilder, for appellee.

MAYFIELD, J. Appellant owned lots 9 and 10, block 74, in West End, Birmingham. She owned one McClure \$236, which debt was secured by several notes and a mortgage executed by her and her husband. On the 12th of May, 1904, she, through her husband as her agent and one Gillespie as her attorney, entered into a builder's contract with one Owen to build her a dwelling house upon these lots according to certain agreed specifications and at the price of \$537, Owen to furnish all materials, work, and labor, and as a part of this contract Owen assumed to pay off the mortgage debt due McClure, but not as a part of the price of building, he to hold the notes and mortgage as collateral, or pay them off and take new notes and mortgage for both debts. Fifty dollars of the price of building was paid when the work was begun, and the balance of the building debt and McClure's debt, aggregating \$723, were evidenced and secured by several notes and a mortgage upon the house and lots; the same being signed by herself

and husband, and left with their attorney, Gillespie, to be delivered to Owen when the house was completed. The house was completed in June or July, 1904.

After that time disputes and differences arose between appellant's husband, her attorney, Gillespie, and Owen as to the full compliance with the terms of the contract, and as to materials used in and workmanship upon the building; and she, through her agents, refused to deliver the notes and mortgage to Owen, claiming that there was by the contract an agreement that the notes and mortgage were not to be delivered until her husband was satisfied that Owen had completed the contract according to the terms and stipulations of the written agreement. About this time the Heidt-Milner Lumber Company sued Owen, and garnished appellant, obtaining judgment against the defendant and garnishee for \$134. In August, 1904, Owen, as contractor, filed his statutory claim and affidavit, as required by law, in the probate office of Jefferson county, to acquire a mechanic's lien upon the house and lot. On the same day he transferred all his right, title, interest, claim, and demand to the debts, evidences thereof, and the liens to this appellee, who then filed this suit against appellant and McClure in the chancery court of Jefferson county to enforce his claims as such assignee of Owen upon the house and lots in question.

There was quite a deal of pleading and cross-pleading, unnecessary to notice. Motion to dismiss and demurrer to the bill were interposed and overruled. An appeal therefrom appears to have been taken to this court by the appellant, which was dismissed for want of prosecution. Appellant thereafter filed special pleas, and answer, denying all material averments of the bill, alleging also a waiver of mechanic's lien and a failure to comply with the conditions of the escrow as to notes and mortgage, and setting up the bankruptcy of Owen as appellee, and demanding an election as to whether appellee would proceed upon the theory of a mechanic's lien or under the mortgages, and then set up all these defenses in a cross-bill, and sought a cancellation of the notes and mortgages and satisfaction of the mechanic's lien. A great number of witnesses were examined by both parties upon all these issues.

The cause, after long delay, was submitted for final decree upon the pleadings named and testimony noted. The chancellor on this hearing—McClure having disclaimed any interest in the subject-matter—decreed that appellee was entitled to relief, and ordered the register to state an account between appellant and appellee; that appellee, by virtue of the assignment of the notes and mortgages, acquired an equitable mortgage upon the lots of appellant, se-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

curing the following debts: The value of the house thereon built by Owen for appellant, not to exceed the contract price, \$535.27, with interest from July 14, 1904, deducting therefrom \$50 prepayment, with interest thereon from the date it was paid, and \$134, the payment of judgment against garnish-ee, with interest thereon from August 10, 1904. The register stated the account, and reported that the house was worth \$535.27, calculated the interest on debt, and payments, judgments, etc., as directed, and reported a balance due appellee from appellant, on this account, of \$448.04.

The appellant filed some very general objections to the report of the register, which the chancellor very properly overruled on the hearing of the report. The chancellor by decree confirmed the report, rendering final decree in favor of the complainant for \$448.04, the amount reported, with interest from the day it was reported, together with the cost of the proceeding, and directed that, if the decree was not paid within 60 days, the register advertise, as required by law, and sell, the lots mentioned for the payment of the amount of the decree. From this decree appellant appeals, assigning many grounds for reversal.

It is wholly unnecessary to discuss separately these various assignments of error, because many of them are not sufficiently insisted upon in brief or argument, and after a careful examination of the record we are firmly of the opinion that there is no reversible error therein—certainly none of which this appellant can complain.

There can be no doubt that there was equity in complainant's bill, and that he acquired an equitable lien upon the appellant's property. There was no decree against her as to the mechanic's lien, so she cannot complain as to the decree or rulings upon that question. The two remedies to enforce the mechanic's and equitable liens, under the bill of facts in this case, were not so different that the two liens could not be set up in the same bill, as they were. The relief sought in each was practically the same. Consequently the bill was not multifarious. *Buckheit v. Decatur, etc., Co.*, 140 Ala. 216, 37 South. 75; *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 13 South. 948, 46 Am. St. Rep. 56, and authorities cited; *Penny v. Miller*, 134 Ala. 598, 33 South. 668.

There can be no doubt that the assignment and transfer of these notes and mortgages above referred to, under both the averments and proof, showed at least an equitable mortgage or lien upon the property. Authorities supra.

As to the amount of this debt found and decreed to be due, we do not think the appellant has just cause to complain. In the first place, it was for exactly what appellant, her

husband, and her attorney, originally agreed to pay. It is true that the chancellor did not hold her strictly to the contract price, but required the register to ascertain what the house was reasonably worth, the market value thereof, not to exceed the contract price; and the register, we think, probably found it to be worth the contract price.

The appellant having accepted the house—conditionally, as she and her agents testified, and unconditionally, as appellee's evidence tended to show—having occupied it, used and enjoyed the same, and having answered and admitted in the garnishment proceeding that she owed Owen \$693, and allowing, if not soliciting or eliciting, such judgment, and there being no evidence that she owed him anything, except for the house and the debt due McClure, and there being no evidence that she had paid any part of this, except the judgment against her for \$134, the amount Owen owed the plaintiff in attachment, we do not think that there can be any error in the decree, which required her to pay \$448.04. If there be any error, we think this record shows it to be in her favor, and against the appellee.

A judgment in appellant's favor in this case, under the pleadings and proof as shown by this record, would be unconscionable, and could not be awarded by any court of conscience. While we have not discussed every question assigned as error, or argued, we have examined and studied all, and unhesitatingly affirm the decree of the chancellor.

Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### LOUISVILLE & N. R. CO. v. HUFF-STUTLER.

(Supreme Court of Alabama. May 11, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. EXCEPTIONS, BILL OF (§ 39\*)—SIGNING—EVIDENCE.

A special term of court was called for the 28th of October, 1907, for two weeks. A case was tried November 2d, and judgment entry stated that defendant had 60 days from adjournment of the term to sign the bill of exceptions. The order calling the term showed the criminal business was to be disposed of during the week commencing November 4th. *Held*, that a bill of exceptions signed on January 2, 1908, was in time.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 54, 55; Dec. Dig. § 39.\*]

#### 2. RELEASE (§ 52\*)—PLEADING—AVOIDANCE OF DEFENSE.

In an injury case, where a defense was a settlement with plaintiff, a replication alleging that at the time the settlement was made plaintiff did not have the mental capacity to make it sufficiently stated that plaintiff's mind was in

such an unsound condition as to render him incapable of making a binding contract.

[Ed. Note.—For other cases, see Release, Dec. Dig. § 52.\*]

**3. APPEAL AND ERROR (§ 1040\*)—REVIEW—HARMLESS ERROR—OVERRULING DEMURRER.**

If there was error in overruling a demurrer to a replication, it was harmless, where no testimony was offered to sustain the replication.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1040.\*]

**4. RELEASE (§ 17\*)—FRAUD.**

If a railroad company, which obtained a settlement of the claim of an injured person when he was in a weak mental and physical condition resulting from the injuries, and incapable of knowing the extent of his injuries, and when he was alone, without counsel or advisers, knew his condition, and induced and unduly influenced him to make the settlement and accept a check for a sum grossly less than would be a fair compensation, the settlement would be invalid for fraud.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 17.\*]

Appeal from Circuit Court, Blount County; John W. Inzer, Judge.

Action by Hezekiah Huffstutler against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ward & Weaver, for appellant. Allen & Bell, for appellee.

**SIMPSON, J.** A special term of the court was called to be held on the 28th day of October, 1907, "for the term of two weeks, unless the business of the court is sooner disposed of." The case was tried November 2, 1907, and the judgment entry states that "the defendant has 60 days from the adjournment of this term of this court, to wit, the 22d day of November, 1907, in which to prepare, and have signed by the presiding judge, its bill of exceptions." The term of the court could not hold until November 22d, under the order calling it, and this date must be a clerical error. The bill of exceptions was signed on the 2d day of January, 1908. The order calling the special term shows that it was to be for the trial of both civil and criminal business on the docket, and that the criminal business was to be disposed of during the second week, commencing on November 4th. The record does not show when the court adjourned; but as the criminal business was to be taken up on November 4th, and as the bill of exceptions recites that it was presented and signed within the time prescribed, this is a prima facie showing that it was signed within the time prescribed, and it will not be stricken. *Tarver v. State*, 137 Ala. 29, 34 South. 627; *Carroll v. Warren*, 142 Ala. 397, 37 South. 687.

The first assignment of error insisted on is numbered 2, and is to the action of the court in overruling the demurrer to the third replication, which is "that at the time said settlement was made, relied on in said plea,

plaintiff did not have the mental capacity to make said settlement." The ground of demurrer insisted on is that "said replication does not show with sufficient certainty the incapacity, or want of capacity, on the part of the plaintiff to make said settlement." This is a sufficient statement of the fact that the plaintiff's mind was in such an unsound condition as to render him incapable of making a binding contract, and the demurrer was properly overruled. *Milligan v. Pollard*, 112 Ala. 465, 468, 20 South. 620.

The demurrer to the fourth replication, raising the same point, was properly overruled.

If there was error in the overruling of the demurrer to the fifth replication to plea 3, it was error without injury. The replication was that "the defendant, by its servants or agents, fraudulently represented to the plaintiff the extent of his injuries, with the extent of which plaintiff was ignorant, and thereby procured plaintiff to settle said claim." The bill of exceptions shows that no testimony was offered to sustain said replication, and consequently no injury could accrue to the defendant by its lack of more perspicuous allegations. *Scarborough v. Borders & Co.*, 115 Ala. 436, 22 South. 180; *Payne v. Crawford*, 102 Ala. 387, 389, 14 South. 854.

The eighth replication, as amended, alleged that the settlement pleaded "was obtained by fraud, in this: That at the time of the execution thereof \* \* \* plaintiff was in a weak mental and physical condition, resulting from the injuries; \* \* \* that he was incapable of knowing or appreciating the extent of his said injuries; that he was alone, without counsel or advisers"; and that the agent of the company, knowing his condition, "induced and unduly influenced" him to make the settlement and accept a check for a sum "grossly less than would be a fair and just compensation," etc. No question is raised about the failure to allege an offer to return the money received. On the points raised, said replication stated facts which were proper to go to the jury, and from which they would be authorized to find fraud, and the demurrer to said replication was properly overruled. *Union Pac. Ry. Co. v. Harris*, 158 U. S. 326, 331, 15 Sup. Ct. 843, 39 L. Ed. 1003; *Stone v. Chicago, etc., Ry.*, 66 Mich. 76, 33 N. W. 24, 27; *Lusted v. Chicago, etc., Ry.*, 71 Wis. 391, 36 N. W. 857, 859; *Dixon v. Brooklyn City & N. R.*, 100 N. Y. 170, 3 N. E. 65, 68.

If there was error in overruling the demurrer to the ninth replication, as amended, it was without injury, as no testimony was introduced to sustain its allegations.

There was no error in the refusal to give the charge requested by the defendant. It was a matter for the jury to determine, from all the evidence, whether there was sufficient

evidence to justify the disregarding of the settlement.

There being no error in the record, the judgment of the court is affirmed.

DOWDELL, C. J., and DENSON and MAY-FIELD, JJ., concur.

*16th Ala. 129*  
**NAPIER et al. v. ELLIOTT.**

(Supreme Court of Alabama. June 15, 1909.)

**1. DEEDS (§ 200\*)—DELIVERY—ADMISSIBILITY OF EVIDENCE.**

On an issue of whether a deed had been actually delivered, it was competent to show that, at the making of the deed, grantor made other deeds to third persons of all the lands he had left, and that such other deeds were never delivered, in connection with evidence as to the purpose of grantor in the making of the deeds to evade his creditors, and that he was at the time advised that the making of the deeds and the record of the same himself would not constitute delivery, it tended to negative an intention to deliver the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601; Dec. Dig. § 200.\*]

**2. EVIDENCE (§ 230\*)—DECLARATIONS OF GRANTOR—INTENT.**

Declarations by grantor several years after the making of the deed are not competent to show his intention at that time as to a delivery.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 230.\*]

**3. DEEDS (§ 200\*)—DELIVERY—ADMISSIBILITY OF EVIDENCE.**

On an issue of whether a deed had been actually delivered, evidence that subsequent to the making of the deed grantee's husband tried to rent the land from grantor, or that grantor prepared a deed to her husband of a part of the land, was not competent against grantee, as she could not be prejudiced by the acts of her husband.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601; Dec. Dig. § 200.\*]

**4. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Error, if any, in permitting evidence that, after a deed was signed, it was sent to the probate office to be recorded and was recorded, was harmless, where the deed itself was introduced in evidence and bore indorsements of filing and record in the probate office.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

**5. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

There was no reversible error in overruling objections to questions as to who had certain deeds, when plaintiff witness moved to another place, and whether a deed came into her possession, where she had already testified, without objection, that she had the deeds in her possession when she moved and carried them with her.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by Minnie Elliott against B. E. Napier and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Espy & Farmer, for appellants. E. H. Hill, for appellee.

DOWDELL, C. J. / This cause comes here on appeal for the third time. Napier v. Elliott, 146 Ala. 213, 40 South. 752, 119 Am. St. Rep. 17; Napier v. Elliott, 152 Ala. 552, 44 South. 532. The issue has been the same on each trial; and that is, whether the deed in question was ever delivered. The assignments of error relate solely to the rulings of the court on the admission and rejection of evidence.

On the first appeal (146 Ala. 213, 40 South. 752, 119 Am. St. Rep. 17) it was said by this court, speaking through Denson, J.: "It is settled law that the fact of delivery rests in intention, and it is to be collected from all the acts and declarations of the parties having relation to it"—citing authorities. As a circumstance bearing upon the question of intention as to the delivery of the deed, it was competent for the defendants to show that at the time of the making of the deed, and contemporaneous therewith, the grantor made two other deeds to Lem Walden and Josiah Hughes embracing all the lands the grantor had left after the deeds to the plaintiff and her mother, and the further fact that the deeds to Walden and Hughes were never delivered. This evidence when taken in connection with other evidence as to the purpose of the grantor in the making of the deeds to evade his creditors, and that he was at the time advised that the making of the deeds and the placing of the same himself on record would not constitute a delivery, actual delivery of plaintiff's deed being a disputed fact, was both competent and relevant as tending to negative the grantor's intention of delivery of plaintiff's deed. The weight of it, however, and as to whether, in connection with all of the evidence in the case, it was sufficient to negative such intention, was a question for the jury. The trial court erred in not admitting the evidence.

Evidence as to statements and declarations made by the grantor several years after the making of the deed to the plaintiff was not competent to show the intention of the grantor at the time the deed was made. The cases of Scheiffelin v. Scheiffelin, 127 Ala. 35, 28 South. 687, and Law v. Law, 83 Ala. 432, 3 South. 752, cited and relied on by counsel for appellant, were contested will cases. Wills never take effect until after the death of the testator, and any act of the testator in connection with his will accompanied by a declaration would be competent in evidence as to the question of intention. Here the proposed evidence related to a past and completed transaction. If the grantor were living, it would not be competent for him to testify as to what were his intentions at the time. He could only testify as to what was done and said by him at the time of the mak-



ing of the deed illustrative of his intention as to a delivery. We do not regard the cited cases as being applicable here.

The conduct of plaintiff's husband subsequent to the making of the deed in trying to rent the land embraced in the deed from the grantor was not competent in evidence for any purpose against the plaintiff. She could not be prejudiced by the acts and conduct of her husband in respect to her title to the land. The same is true as to the proposed evidence to show that Josiah Hughes prepared a deed to plaintiff's husband of 40 acres of the land embraced in the plaintiff's deed. The court properly excluded this evidence on plaintiff's objection.

The deed itself, which was introduced in evidence, had on it the indorsements of filing and record in the office of the probate judge, and hence, if that was any error in permitting the plaintiff to testify "that, after the signing of said deed, it was sent to Geneva county to the probate office to be recorded and was so recorded," it was harmless error. The witness stated nothing more than what was shown by the indorsements on the deed.

There was no reversible error committed in overruling the defendant's objections to the questions to the plaintiff as a witness: "Who had the deeds when you moved to Florida?" "Did this deed come into your possession?" The witness had already testified without objection that she had the deeds in her possession when she moved to Florida and carried them with her.

For the error pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, MAYFIELD, and SAYRE, JJ., concur.

## BIRMINGHAM RY., LIGHT & POWER CO. v. McLAIN.

(Supreme Court of Alabama. June 10, 1909.)

### 1. STREET RAILROADS (§ 99\*)—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

A driver may cross a street railway track, though he sees a car, if he may reasonably suppose he can cross before it will reach him.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.\*]

### 2. STREET RAILROADS (§ 99\*)—INJURIES TO PERSONS ON TRACK—DUTY OF MOTORMAN.

It is the duty of a motorman to slacken the speed of his car to avoid a collision, where it becomes apparent to him that a driver has miscalculated the distance, or supposed the car was traveling at a lawful speed when in fact traveling faster, or is not aware of the approach of the car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-192; Dec. Dig. § 90.\*]

### 3. STREET RAILROADS (§ 117\*)—COLLISIONS—ACTIONS—QUESTIONS FOR JURY.

Where, in an action for personal injury and injury to a horse and vehicle sustained in a

collision with a street car, there was no proof as to how fast the horse walked, and the testimony was in conflict as to how fast the car was moving, it was for the jury to consider how far the car was away, when plaintiff attempted to cross, whether there was anything to prevent plaintiff from discovering the car, or, if plaintiff did fail to see it, and was traveling not straight across, but "angling," whether the motorman had reason to believe he would not clear the track in time, and had time to slacken the speed and avoid the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 251-257; Dec. Dig. § 117.\*]

### 4. EVIDENCE (§ 471\*)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

There was no error in overruling an objection to the question asked a witness whether any effort was made to stop the car, for it did not call for a mere conclusion, but for a fact open to any one who saw the motorman.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2151; Dec. Dig. § 471.\*]

### 5. EVIDENCE (§ 471\*)—OPINION EVIDENCE—KNOWLEDGE.

There was no error in overruling an objection to the question whether a driver struck by a street car showed any evidence of being injured, as there are many injuries patent to the observation of any one.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2167; Dec. Dig. § 471.\*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by John McLain against the Birmingham Railway, Light & Power Company for personal injuries and injury to a horse and vehicle. Judgment for plaintiff, and defendant appeals. Affirmed.

The pleas interposed to the complaint were the general issue and contributory negligence, for failing to stop, look, and listen, going upon a track when the car was in dangerous proximity, etc. The following charges were refused to the defendant: "(2) If you believe the evidence, the plaintiff was guilty of negligence. (3) If you believe the evidence, you cannot find for the plaintiff under the third count of the complaint." (4) Same as 3 as to the fourth count. "(6) If you believe the evidence, the plaintiff is guilty of contributory negligence."

Tillman, Grubb, Bradley & Morrow and L. C. Leadbeatter, for appellant. Bowman, Harsh & Beddow, for appellee.

SIMPSON, J. The court did not err in refusing to give the general charge in favor of the defendant. While it is true that the traveler across a street railroad is required to look, before crossing, and it is also true that, if the testimony clearly shows that by looking the plaintiff could have avoided the injury, the court would be justified in giving the general charge in favor of the defendant, notwithstanding the testimony of the plaintiff that he did look (Peters v. So. Ry. Co., 135 Ala. 533, 33 South. 332), yet it is

also true that the driver has a right to cross a street railroad track, although he may see a car in the distance, if he may reasonably suppose he can cross before it reaches him, and if it is apparent to the motorman that the driver has miscalculated the distance or has supposed that the car was traveling at a legal rate of speed when in fact it was traveling faster, or is not aware of the approach of the car, and this is evident to the motorman, it is the duty of the motorman to slacken the speed so as to avoid the collision. There is no proof as to how fast the horse walked, and the testimony is in conflict as to how fast the car was moving. Consequently it was a question for the jury to consider how far the car was away, when the plaintiff attempted to cross. Also, was there anything in the light, or the rain, or otherwise, which prevented the plaintiff from discovering the car, or, if the plaintiff did fail to see it, or was negligent in not seeing it, and was traveling not straight across, but "angling," did the motorman have reason to believe that he would not clear the track, in time, and did said motorman have time to slacken the speed and avoid the injury? *Nellis on Str. Surface R. R.* pp. 343-346; *Nellis on Str. R. R. Accident Law*, § 29, p. 339 et seq.

The court cannot say, as a matter of law, that the plaintiff was guilty of contributory negligence. Hence there was no error in the refusal to give charges 2 and 6. For the same reason there was no error in the refusal to give charges 3 and 4.

There was no error in overruling the objections to the question to the witness Roland as to whether or not any effort was made to stop the car. This did not call for a mere conclusion of the witness, but for a fact which was open to the view of any one who saw the motorman. The witness could have been cross-examined as to his knowledge, etc. This was very different from the answer of the witness in the case of *B'ham Ry. & Elec. Co. v. Jackson*, 136 Ala. 279, 34 South. 994, that "he was doing all he could." The court did not hold, in that case, that the question was improper, but that the answer, if it had been responsive to a proper question, would have been improper.

There was no error in overruling the objection to the question to the witness Lucchusi as to whether the plaintiff showed any evidence of being injured. There are many injuries which a man may receive which are patent to the observation of any one. No motion was made to exclude the answer.

The judgment of the court is affirmed.  
Affirmed.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

# TEDESCKI v. BURGER et al.

(Supreme Court of Alabama. June 10, 1909.  
Rehearing Denied June 30, 1909.)

## 1. NUISANCE (§ 72\*)—PUBLIC NUISANCE—INJUNCTION.

Any person suffering damages by a public nuisance may maintain an action to abate or enjoin the same.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.\*]

## 2. NUISANCE (§ 75\*)—INJUNCTION.

That complainant maintained a similar nuisance near her own premises will not prevent the maintenance of an action to enjoin a public nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 178; Dec. Dig. § 75.\*]

## 3. NUISANCE (§ 75\*)—PUBLIC NUISANCE—INJUNCTION—KNOWLEDGE OF DEFENDANT.

In an action to enjoin the maintenance of a disorderly house, evidence held insufficient to establish knowledge of one defendant and concurrence in the use to which the house was devoted.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 182; Dec. Dig. § 75.\*]

## 4. NUISANCE (§ 75\*)—PUBLIC NUISANCE—INJUNCTION—VARIANCE.

In an action to enjoin two defendants from maintaining a nuisance, where plaintiff failed to prove the allegations of knowledge of one defendant, or his consent to the use of the house for the purposes alleged, the variance was fatal.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 181; Dec. Dig. § 75.\*]

## 5. INJUNCTION (§ 130\*)—FAILURE OF PROOF—DISMISSAL.

Where a bill for injunction was brought against two defendants, and as to one the proof failed, the bill should be dismissed without prejudice.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 290; Dec. Dig. § 130.\*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Action by Felicia Tedescki against Louis Burger and another to restrain a nuisance. From a decree dismissing the bill unconditionally, plaintiff appeals. Corrected and affirmed.

D. K. Middleton and E. H. Dryer, for appellant. Kennedy & Ballard, for appellees.

MAYFIELD, J. This is the second appeal in this case. The allegations of the original and amended bills are sufficiently shown in the former report. See 150 Ala. 649, 43 South. 960, 11 L. R. A. (N. S.) 1060. That decision, and a more recent one in the case of the same complainant against Barnett (45 South. 904), fully and we think correctly settled all the equities of this bill, and settled them in favor of the contention of appellant, complainant in the court below. After the former decision in this cause, where in the decree was reversed upon the rulings of the chancellor upon the demurrers of the respondent Burger to the bill, each of the respondents answered the bill separately, denying most of its material allegations. A

number of witnesses were examined, both by the complainant and by the respondents, and the case was submitted for final decree upon the amended bill, answers, and the testimony of witnesses, as shown by the register's note of testimony. The chancellor rendered a final decree, dismissing the bill absolutely and unconditionally, at the costs of the complainant, from which decree the complainant appeals.

This final decree is not accompanied by any opinion of the chancellor. Consequently the record does not inform us upon what ground or for what cause the bill was dismissed finally. We fully agree and concur with the chancellor that as against the respondent Burger the complainant was not entitled to relief, because of the insufficiency, if not entire failure, of the proof to support the averments of the bill, which averments this court held, on a former decision, unquestionably gave it equity as against said Burger. As against the respondent Ruby Davis, however, while we do not think that there was such failure of proof, we are of the opinion that there was such a variance as to prevent the relief prayed. Had the complainant amended her bill, as she had a right to do, by striking out the part thereof directed against the respondent Burger, we think she would have been entitled to relief, notwithstanding the fact that the evidence may show that she maintained or allowed a similar nuisance as near her own residence and property as that alleged to have been carried on by these respondents. This was a public nuisance, and any person suffering damages thereby might have maintained an action to abate or enjoin; nor would the wrongs of the complainant have prevented the injunction of a public nuisance. But in this cause, on account of the variance between the allegations and the proof, no relief could be granted as against either of respondents, and the bill was, therefore, properly dismissed, but should have been dismissed without prejudice.

As was said by this court in a former opinion, section 2 of the original bill averred, not only that Burger owned or had control of the property, but also that Ruby Davis kept and operated a house of prostitution in said premises by and with the permission and consent of said Burger. It was clearly proved that Burger owned and controlled the property; but we do not think that it was shown by the proof that the house of prostitution alleged was kept with the permission and consent of Burger. After a demurrer was sustained to the original bill, the complainant amended her bill by adding at the end of the second paragraph an amendment, which alleged, first, that, if complainant was mistaken in the allegations of paragraph 2 of the bill, she states and she shows that the said Louis Burger and Ruby Davis maintained and operated the disorderly house described in the second paragraph; and,

second, if mistaken in that they operated the house jointly, she alleges that Burger is the landlord of Ruby Davis, and knowingly permitted and permits the premises to be used as a bawdy house, or for the purposes of prostitution; and, third, if mistaken in that, that the respondents did keep a disorderly, public, and ill-governed house, etc.; and, fourth, if mistaken in that, that the said Burger, well knowing that Ruby Davis was a prostitute, and knowing that the premises were kept by the said Ruby Davis for the purposes of prostitution did lease or let the same to the said Ruby Davis as a bawdy house and for public prostitution, etc. Consequently every allegation as to the maintaining or keeping of the house of prostitution was clearly and distinctly to the effect that it was maintained and kept by the respondent Ruby Davis with the knowledge and consent of respondent Burger, or that it was maintained and kept by them jointly, or that he, as landlord, leased or let the same to Ruby Davis for a bawdy house and for the purpose of prostitution. We are of the opinion that the evidence entirely falls as to the proof of either one of these allegations. We think, however, that it does show that such house was maintained and kept by the said Ruby Davis alone, and without the knowledge or consent of the respondent Burger. The only evidence appearing against Burger is the mere presumption that a landlord knows, or ought to know, what is being carried on upon his own premises. Such knowledge, however, was expressly denied by both of the respondents. There is also evidence that Burger was on the premises while they were so occupied by Ruby Davis; but it is not shown that he saw or knew of any facts sufficient to put him upon notice of the use to which the premises were being put. His presence there on these occasions was explained by him; such explanation being accompanied by an express denial that he had any knowledge or notice of such use. It is also shown by the proof that, while he was the owner of the premises, the lease or letting was made, not by him, but by real estate agents. It is true that the witness Burger himself, in answer to a question propounded by his solicitor as to what was the character of tenants that occupied the lot in which complainant's property was located on the 1st of February, 1906, answered that "the whole block was prostitutes, except the complainant's family." It clearly appears, however, that the question was directed toward the character of other houses than that of the respondent, and especially toward those owned or leased by the complainant, and, further, that it was as to the character of the block on the 1st of February, 1906, while the bill in this cause was not filed until October 15, 1906, and by complainant's own evidence it was shown that Ruby Davis only occupied the premises or used them as a house of prostitution three

or four months before the filing of the bill. We cannot agree with counsel for appellant that this is sufficient to establish Burger's full knowledge of and concurrence in the purposes and use to which the house was devoted by Ruby Davis.

There was an attempt by the complainant to prove knowledge or consent on the part of Burger by admissions that he did have such knowledge or gave such consent. In this the evidence also fails. The most, if not all, that these admissions could be said to prove, was that Burger had told certain parties that he had instructed his agent to get the occupants out of his house, that the agent rented the property and that as soon as he (Burger) discovered that the tenants were loose characters he forced them to move. This is far from proving the allegations of knowledge of or consent to the use of the house for the purposes of prostitution. On the contrary, it rather tends to disprove them. We think, for these reasons, there was an entire variance between the allegations and the proof, in which case no relief can be granted. The variance, also, as we have shown, is as to material allegations. Therefore, in such cases, where there is a fatal variance, the bill should be dismissed; but this should be done without prejudice.

The decree of the chancery court is here corrected, so that the bill is dismissed without prejudice to the rights of the complainant. As thus corrected, the decree is affirmed. *Munchus v. Harris*, 69 Ala. 500; *Cameron v. Abbott*, 30 Ala. 416.

Corrected and affirmed.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

#### GRAY v. STRICKLAND.

(Supreme Court of Alabama. April 22, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. APPEAL AND ERROR (§ 2\*)—TIME TO APPEAL.

Where a judgment for plaintiff for false imprisonment was rendered prior to the taking effect of Code 1907, defendant was entitled to appeal within one year.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 6, 1832; Dec. Dig. § 2.\*]

#### 2. BAIL (§ 80\*)—RIGHTS OF SURETIES—ARREST.

Sureties on a bail bond had a common-law right to arrest accused at pleasure without process and surrender him.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 328-334; Dec. Dig. § 80.\*]

#### 3. BAIL (§ 80\*) — ARREST OF PRINCIPAL — RIGHTS OF SURETIES—STATUTES.

Code 1907, § 6351, authorizing bail to arrest their principal on a certified copy of the undertaking, is not cumulative, but exclusive of the common-law remedy, authorizing bail to arrest their principal without process.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 80.\*]

#### 4. FALSE IMPRISONMENT (§ 30\*)—ARREST BY BAIL—EVIDENCE.

In an action for false imprisonment, consisting of an alleged unlawful arrest by bail, the *capias* bond was admissible only in mitigation of damages.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 30.\*]

#### 5. EVIDENCE (§ 472\*)—PURPOSE—CONCLUSION.

In an action for false imprisonment, defendant was not entitled to testify as to his purpose in having plaintiff arrested.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2193; Dec. Dig. § 472.\*]

#### 6. FALSE IMPRISONMENT (§ 27\*) — ARREST — EVIDENCE.

In an action for false imprisonment, evidence that the person who arrested plaintiff was armed at the time was admissible.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 27.\*]

Appeal from Circuit Court, Hale County; B. M. Miller, Judge.

Action by James L. Strickland against J. E. Gray for false imprisonment. Judgment for plaintiff in the sum of \$250, and defendant appeals. Affirmed.

The following charges were given at the instance of the plaintiff: "(1) The court charges the jury that, if they believe the evidence in this case, the detention of the plaintiff from the time he was taken from Wedgeworth's store and brought to Greensboro and placed in jail until he was carried back to the point on the railroad where Wedgeworth's store is situated was in violation of the law. (2) The court charges the jury that the defendant had no authority under the law to place plaintiff, or cause him to be placed, in the jail of Tuscaloosa county; and the court charges the jury that the incarceration of the plaintiff in the jail at Tuscaloosa, Alabama, was an unlawful act. (3) The court charges the jury that, if they believe the evidence in this case, they must find a verdict in favor of the plaintiff, and they shall assess against the defendant such damages as they may believe under the evidence that plaintiff is entitled to. (4) The court charges the jury that, if they believe the evidence in this case, the defendant violated the law in bringing or causing to be brought the plaintiff from Wedgeworth to Greensboro, and in placing or causing the plaintiff to be placed in the jail at Greensboro, and in keeping or causing to be kept the plaintiff in the jail at Greensboro."

McQueen & Hawkins, for appellant. Henry A. Jones and De Graffenried & Evins, for appellee.

ANDERSON, J. The judgment in this case having been rendered before the Code of 1907 went into effect, the appellant had one year, instead of six months, within which to take his appeal. *Poull & Co. v. Foy-Hays Construction Co.* (Ala.) 48 South. 785. The motion to dismiss the appeal is overruled.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Under the common law the sureties upon a defendant's bail had the unquestioned right to arrest him at pleasure and surrender him into the hands of the law, and this could be done without the issuance of process. 3 Am. & Eng. Ency. Law, 708; Bearden v. State, 89 Ala. 21, 7 South. 755; State v. Crosby, 114 Ala. 11, 22 South. 110; Cain v. State, 55 Ala. 170; Hawk v. State, 84 Ala. 466, 4 South. 690. Section 6351, Code 1907, provides for the discharge of the sureties by a surrender of the principal, and also provides for the arrest of the defendant upon a certified copy of the undertaking. Therefore, under the statute, the sureties have the right to procure their discharge by surrendering the principal at any time before a default, just as they had under the common law; the only change being that the arrest must be made upon a certified copy of the bond. The statute does not give any additional rights or powers, but really qualifies the common-law right of arrest, and this method, as prescribed by the statute, must be exclusive. It gives no additional right to arrest, and cannot be said to be in aid of or cumulative to the common law in this particular, and, to give it any meaning or operation whatever, it must be construed as confining the right of arrest by the sureties in the manner therein required. To hold otherwise would render the statute meaningless as to the requirement in making arrests, and in effect stultify the lawmakers. David v. Levy & Son, 119 Ala. 241, 24 South. 589.

The Alabama cases, *supra*, merely reiterate the common law as to the sureties' right to arrest the principal, and did not attempt to construe the statute, in so far as it relates to the point involved in the case at bar, but dealt with the right of the sureties to a discharge and not the way in which they could arrest the principal. True, there may be instances when it might be a hardship upon the bail to not permit an arrest of the principal without a certified copy of the undertaking; but this can be avoided by the procurement of a copy when the bond is made.

The trial court did not err in giving the charges requested by the plaintiff.

The trial court permitted the capias and bond to be introduced in mitigation of damages, and this was the only purpose that they could serve.

There was no error in declining to let the defendant ask the plaintiff how Seales seemed to hold him out, or in not letting Gray state his purpose in having the plaintiff arrested. He could narrate the facts, and it was for the jury to determine his motive or purpose.

There was no error in permitting Seales to testify that he was armed when he arrested the plaintiff. Whether he used the weapon or not, his having it was a circumstance to

go to the jury in ascertaining the animus in making the arrest.

The judgment of the circuit court is affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

# FIRST NAT. BANK OF BIRMINGHAM v. WILKESBARRE LACE MFG. CO.

(Supreme Court of Alabama. June 10, 1909.)

## 1. CARRIERS (§ 58\*)—BILL OF LADING—RIGHTS ACQUIRED BY PURCHASER.

A bill of lading, not being commercial paper, the transferee merely acquires the title of the transferor to the goods described.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 179; Dec. Dig. § 58.\*]

## 2. CARRIERS (§ 58\*)—TRANSFER OF BILL OF LADING.

A seller of cotton, pursuant to instructions from the buyer, shipped it to the buyer under a bill of lading, in which he was named as shipper and a bank as consignee, the bill stating that the buyer should be notified, and the seller drew a draft on the buyer, payable to the bank, and the bill of lading was attached to the draft, which was deposited by the seller. The buyer paid the draft, and subsequently it was ascertained that there was a deficiency of several pounds. *Held*, that the bank was not liable to the buyer.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 58.\*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by the Wilkesbarre Lace Manufacturing Company against the First National Bank of Birmingham. From a judgment in favor of plaintiff, defendant appeals. Reversed and rendered.

Campbell & Johnson, Percy & Benners, and Gregory L. Smith, for appellant. Cabaniss & Weakley, for appellee.

SIMPSON, J. This suit was brought by the appellee against the appellant, and the facts as agreed upon are: That John H. Coughlan, under the firm name of Smith & Coughlan, who is a cotton broker in Birmingham, had sold 100 bales of cotton to Van Leer & Co., cotton brokers in Philadelphia, and in accordance with instructions from said Van Leer & Co. shipped the cotton under a bill of lading in which said Van Leer & Co. were named as the shippers and W. W. Crawford, who is the cashier of the defendant, was named as the consignee, stating, "Notify Van Leer & Company, Consignee, address, Philadelphia, as information only, and not for purposes of delivery;" the destination of the cotton being Wilkesbarre, Pa. Thereupon Coughlan drew a draft on Van Leer & Co. to the order of W. W. Crawford, cashier, for the amount of the purchase price, sent the invoice to Van Leer & Co., and deposited the draft, with bill of

lading attached, with the defendant bank, "with other items and subject to payment; the said defendant crediting the said Smith & Coughlan with the sum of \$4,615.61, the face of the draft, less the exchange charges at \$1.50 per 100. The said Smith & Coughlan were customers and depositors in the defendant bank at Birmingham, Ala., and frequently deposited drafts, with bills of lading attached; the defendant charging back to Smith & Coughlan the amount of the face value of any drafts which were not paid." Said draft, with the bill of lading attached, was sent by the defendant bank to its correspondent, the Fourth Street National Bank of Philadelphia, for collection. Said Van Leer & Co. paid the draft, and received the bill of lading. Said Van Leer & Co. sold the 100 bales of cotton to the plaintiff, drawing a draft upon it, with the bill of lading attached. When the cotton arrived and was delivered to the plaintiff, it was ascertained that there was a deficiency of 24,799 pounds. Several other shipments, which took the same course, are detailed in the agreement, which proved, likewise, to be deficient in weight. Said Van Leer & Co. assigned to the plaintiff "any and all claims and demands and actions of every kind and nature whatsoever which we (they) now have or had at any time, against the First National Bank of Birmingham, Ala., growing out of a certain transaction, or transactions, between us and Smith & Coughlan, of Birmingham, Ala., in and by which the said Smith & Coughlan drew certain drafts on us \* \* \* for the purchase price of certain bales of cotton, agreed to be sold to us, specified in said drafts, which said drafts, with bills of lading attached, were sold to or discounted by the First National Bank of Birmingham."

It was shown: That the plaintiff knew nothing about the transactions between Van Leer & Co. and Smith & Coughlan; also, that the defendant knew nothing about their transactions, nor about what cotton was shipped at any time, except that it had instructions from Van Leer & Co. to have the bills of lading made out as they were when Smith & Coughlan shipped cotton to them. The contention of the plaintiff, which was sustained by the court in rendering judgment for the plaintiff, is that the defendant is liable under two cases heretofore decided by this court, and hereinafter referred to.

In *Eufaula Grocery Company v. Mo. Nat. Bank*, 118 Ala. 408, 24 South. 389, the Eufaula Grocery Company purchased a car load of hay from J. A. B. & Co., of Missouri, who shipped a car load of hay to said grocery company at Eufaula, Ala., and drew on it for the price of the hay with bill of lading attached; the money to be paid "on arrival of the car of hay," and said draft being payable to R. D. C., cashier (he being the cashier of the Missouri National Bank, the defendant in the action). Said Missouri

Bank sent the draft, with the bill of lading attached, to the Eufaula National Bank for collection. The grocery company paid the draft, on receipt of the car load, but, on finding the hay to be "decayed and unmerchantable," commenced suit against the Missouri Bank for the money, while it was still in the hands of the Eufaula Bank. The court says that: "At the time this suit was brought, the money in question was not to be regarded as being in the hands of the Missouri Bank, so far as the rights of J. A. B. & Co., in reference thereto, were concerned." This court held that, as there was nothing on the draft to indicate that any one other than the Missouri Bank had any interest in it, and it was sent to the Eufaula Bank for collection for its own account, the grocery company had a right to consider it as the property of the Missouri Bank, and, as said Missouri Bank had placed itself in that position towards the grocery company, it could not be heard to say that it was not the owner of the draft, when by reason of some equity the plaintiff becomes entitled to reclaim the money. The court concludes that this was money paid in mistake of fact, and therefore recoverable as money equitably belonging to plaintiff.

In the case of *Haas & Co. v. Citizens' Bank of Dyersburg*, 144 Ala. 562, 570, 571, 572, 39 South. 129, 130, 131, 1 L. R. A. (N. S.) 242, 113 Am. St. Rep. 61, Klyce had sold to plaintiff a quantity of meal, drew a draft on plaintiff, with bill of lading attached, payable to the defendant, "and then and there sold and delivered said draft, bill of lading, and account to the defendant" (as alleged in the complaint). The decision is based upon the principle that the defendant, by purchasing the draft and the account and bill of lading, took the place of Klyce and became thereby bound to deliver the goods, just as Klyce was bound. The court, in its opinion, says: "By no rule of construction can the averments of the complaint justify the conclusion that the bill of lading was held by the defendant as collateral security for the draft, or that the defendant was merely Klyce's agent for its collection." The court also adverts to the principle that: "Assignments of bills of lading are not governed by the commercial law. The transferee simply acquires the title of the transferor to the goods described in them." The court also says: "The draft was drawn to the defendant's order, accompanied by the bill of lading and the account, each of which was sold to it. The draft had not been accepted by the plaintiffs before its negotiation to defendant, and until accepted, in the absence of some fact tending to show that defendant was induced by the conduct of the plaintiffs to purchase it, they were not bound by it. When it was paid, the purchase price to be paid for the goods, as well as the goods themselves, belonged to the defendant. The plaintiffs were not parties to

the transaction, by which it acquired the ownership of the goods and the right to receive payment for them."

In the case now under consideration, the plaintiff sues as the assignee of Van Leer & Co., and, as stated in the Haas & Co. Case, the bill of lading not being commercial paper, "the transferee simply acquires the title of the transferor to the goods described." Then what were the rights of Van Leer & Co.? It could not be said, as in the Eufaula Grocery Co. Case, that said Van Leer & Co. had a right to consider it the property of the defendant company, because they had constituted Smith & Coughlan their agents to have the bill of lading made out in their name as shippers, for certain purposes, fully understood by them, and it was, in fact, their bill of lading, made payable to the cashier of the bank, by their own procurement, and with their full knowledge as to who the real shipper was. For the same reason, and because there is no pretense that the defendant was the purchaser of the claim and of the bill of lading, the Haas Case does not apply. The defendant never assumed any obligation with regard to the quantity of the cotton shipped under the bill of lading, nor has it placed itself in any position whereby Van Leer & Co. had any right to look to it for the guaranty of the quantity of said cotton.

These points were presented in various ways, by demurrers to complaint, pleas, and demurrers thereto, and by objection to evidence; but the entire contention is involved in the judgment of the court, and the exception thereto embodied in the twenty-sixth assignment of error, and it is not necessary to particularly consider the others.

The court erred in rendering judgment for the plaintiff.

The judgment of the court is reversed, and a judgment will be here rendered in favor of the defendant.

Reversed and rendered.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

DOWDELL, C. J., while concurring in this conclusion, desires to emphasize the fact that he does not acknowledge the correctness of the case of Haas v. Citizens' Bank of Dyersburg.

#### POLLAK v. GUNTER & GUNTER.

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. EVIDENCE (§ 155\*)—ADMISSIBILITY—ADMISSION OF SIMILAR EVIDENCE FOR ADVERSE PARTY.

Where, in an action for the services of an attorney, he relied in part on a paper in the form of an account rendered defendant,

which recited that the sum due was for services in certain suits, and on which paper defendant had indorsed "Correct" and his name, plaintiff having introduced testimony tending to show what services were not comprehended in the account, it was error not to permit defendant to introduce testimony tending to show what was comprehended.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-458; Dec. Dig. § 155.\*]

#### 2. EVIDENCE (§ 419\*)—PAROL EVIDENCE—CONSIDERATION.

As a general rule the consideration for a promise or obligation may be inquired into, and what in fact the consideration was may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

#### 3. PLEADING (§ 391\*)—VARIANCE.

Where the counts of a declaration allege time after a videlicet, there was no failure of proof because the evidence did not conform to the exact dates.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1306; Dec. Dig. § 391.\*]

#### 4. ACCOUNT STATED (§ 7\*)—OPERATION AND EFFECT.

A payment on an account after it has become stated does not operate to denude it of that character.

[Ed. Note.—For other cases, see Account Stated, Dec. Dig. § 7.\*]

#### 5. PLEADING (§ 385\*)—BILL OF PARTICULARS—FORM AND SUFFICIENCY.

Code 1907, § 5320, relative to bills of particulars, requires a list of the items sued for. Held, that dates set down in a bill of particulars as indicating the times at which the legal services sued for were rendered were not so far binding as to preclude plaintiffs from proof that different dates were the true ones.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 385.\*]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Action by Gunter & Gunter against Ignatius Pollak. From a judgment in favor of plaintiffs, defendant appeals. Motion to strike bill of exceptions overruled, judgment reversed, and cause remanded.

Brown & Kyle, for appellant. Gunter & Gunter, George H. Parker, and F. S. White, for appellees.

MCCLELLAN, J. Action on the common counts by appellees against appellant. The basis for the recovery sought was services rendered by appellees as attorneys for appellant.

The motion to strike the bill must be overruled. While the bill appears to be unreasonably particular and also extended, there is an assignment of error noting practically every page of the bill as transcribed here, and, besides, the affirmative charge involved affords sufficient justification for the extended character of the bill, to save it from being stricken.

In treating the appeal we will undertake to consider only a few of the upwards of 200 errors assigned. Especially is this permissible since the rulings to be stated will, on

the trial to recur, affect to alter in a material degree the posture of the case as now appears, and probably render unimportant much of the matter now the subject of laborious and greatly extended discussion in briefs of counsel.

Among other elements asserted as furnishing a basis for recovery was what purports to be an account stated. This was a paper, in form of an account, whereon the defendant had indorsed "Correct" and affixed his name, with the date of so doing. This paper recites that the sum due was for services in "suits of Billing v. You." There were, as plaintiffs contend, many other services rendered by them for defendant. The defendant's theory was that all of the services for which compensation was sought in this action were embraced in a certain contract he alleges was entered into between himself, on the one side, and plaintiffs and attorneys, Winter and McDonald, on the other, and that he had satisfied by payment the stipulation for compensation in that contract. The plaintiffs introduced testimony tending to show what services were not comprehended in the term "in suits of Billing v. You." The defendant, in his turn, undertook to adduce testimony tending to show what was comprehended in the quoted term; but his efforts in this direction were thwarted by the court's ruling, invited, of course, by plaintiffs' objections, that defendant could not thus, by parol, alter, vary, or contradict the writing mentioned. Not only was it erroneous to so conclude the defendant, in view of the testimony admitted for the plaintiffs in explanation of what services were not comprehended in the term quoted, because such a process was the denial to defendant of what had been previously granted to the plaintiffs (*Wefel v. Stillman*, 151 Ala. 249, 44 South. 203); but the direct effect of the ruling of the court was to deny application of the general and familiar rule that, with a few exceptions not now necessary to state, the consideration for a promise or obligation may be inquired into, and what, in fact, the consideration was may be shown by parol. The consideration for the obligation spoken by the writing was services "in suits of Billing v. You," and no possible reason occurs to us, and none has been presented, why the defendant should not have been allowed, independent of the pertinent testimony already introduced by the plaintiffs, to prove what services were within and what without the category of the services described in the writing. Furthermore, with a large list of services sued for, it was obviously defendant's right to avoid the possibility, as he claimed, of a double recovery for services within the sum shown by the paper and, as he asserted, those listed as not being covered by that sum. The action of the court in this regard was error.

The counts allege time after a videlicet.

Accordingly there is no merit in the assignments complaining of failure of the proof to conform to the exact dates set down in the complaint. 2 Chitty, p. 90; *Carllale v. Davis*, 9 Ala. 358.

There is likewise no merit in the appellant's contention that payment on an account after it has become stated operates to denude it of that character, any more than payment on a note alters its status except as to amount. *Loventhal v. Morris*, 103 Ala. 332, 15 South. 672, dealt with debits as determining when the account became a stated account, and not with a case, as here, where the account was alleged to be stated and subsequently payments were made upon it.

A bill of particulars was demanded by the defendant. The response to the demand was a long itemized list of the services claimed for in this action. Opposite some of these items were dates, while opposite others the place usually containing dates was blank. Our statute (Code 1907, § 5326) in reference to bills of particulars requires, it appears, only a list of the items sued for. No specific mention of dates is therein made. The object sought to be conserved by the requirement of the statute is to prevent surprise and to acquaint the defendant with the matters of claim against him. Whether in a given case the bill of particulars is sufficient might properly be raised at the threshold of the trial. We are not now prepared to hold, under our statute, that dates set down as indicating the point of time at which the legal services sued for were rendered were so far binding as to preclude the plaintiffs from proof that a different date was the true date when the particular service was rendered. Previous considerations of this statute by this court, reference to which may be found in the annotations thereto, do not tend to a construction and practical application of the statute working such an extremely technical effect. The object of the statute, as indicated, rationally refutes the existence of a legislative purpose to make the requirement even more strict than the ordinary rules of pleading.

There was no error in allowing parol proof of the character and contents of papers, documents, court records, etc. In this action, where professional services were alleged to have been rendered, such papers, documents, and records were collateral—incidental—to the issues, and parol evidence was admissible in the premises. *Bulger v. Ross*, 98 Ala. 267, 12 South. 803; *Rodgers v. Crook*, 97 Ala. 725, 12 South. 108.

Pleas of statutes of limitation were interposed. Whether certain charges for services were barred thereby, because separate and distinct, and not items of a running account, were questions of fact. The plaintiffs could not, by the mere act of stating or claiming them as items of a current account, avert the effect of the statutes, if in fact they were



separate and distinct matters, not forming mere items of current account.

For the error indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

### DALLAS MFG. CO. v. TOWNES.

(Supreme Court of Alabama. June 10, 1900.  
Rehearing Denied June 30, 1900.)

#### 1. LIMITATION OF ACTIONS (§ 127\*)—EFFECT OF AMENDMENT OF PLEADING.

Under the direct provision of Code 1907, § 5367, where the original complaint was not barred by limitation, a proper amendment thereof relates back to the commencement of the suit, and is not affected by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

#### 2. MASTER AND SERVANT (§ 258\*)—ACTION FOR INJURY TO SERVANT—PLEADING.

A complaint in an action against the owner of a mill for injuries to defendant's servant, alleging that plaintiff was injured by the lights in the mill going out while, by direction of defendant, he was assisting a contractor in placing machinery in the mill, and that the hours for work were prescribed by defendant, is not subject to demurrer, as failing to show any duty by defendant to furnish lights to the contractor for work after dark.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.\*]

#### 3. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—LIABILITY OF MASTER—EVIDENCE.

Evidence held insufficient to show the master's liability for the servant's injuries.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.\*]

Appeal from Circuit Court, Madison County; D. W. Speake, Judge.

Action for personal injuries by Charles L. Townes against the Dallas Manufacturing Company. Plaintiff had judgment, and defendant appeals. Reversed.

For former reports of this case, see 148 Ala. 146, 41 South. 988, and 154 Ala. 612, 45 South. 096.

The following counts of the complaint were demurred to:

(5) "Plaintiff claims of defendant the sum of \$15,000 damages, for that heretofore, to wit, on or about the 6th day of January, 1903, the plaintiff had been and was employed and engaged by the defendant corporation, as a helper to the servants and employes of the Saco-Pattee Machine Shop, an independent contractor, who was then and there engaged in setting up and equipping carding machines in the mills of defendant, in said county, under a contract with the defendant whereby said machine shops were to erect, equip, and set up certain carding machines.

And the plaintiff was then and there by the direction of the defendant, through its superintendent, engaged as a helper in setting up said carding machine under the immediate orders and direction of one Jackson, who was then and there in the employ of said machine shop. And the plaintiff, while in the proper discharge of his duties as such helper under the said orders and direction of the said Jackson, had his left hand caught in and between the clothing of the cylinder of one of the carding machines, which was composed of fine, sharp wires, and the clothing of the slats of said carding machine, which was also composed of fine, sharp wires, and his hand was thereby so crushed, mangled, torn, and bruised that he was confined to his bed, etc. [Here follows list of injuries and damages.] And the plaintiff avers that at the time of said injuries it was about 6 o'clock in the afternoon, and was dark, and the lights had gone out, or so nearly out, as to render it almost impossible to distinguish objects in the room. And the plaintiff avers that the injuries complained of were caused by the negligence of the defendant or its servants or agents in permitting the lighting apparatus, or lights, which were electric lights, the electricity for which was generated on the premises, to become so defective as to render it unsafe for servants of the Saco-Pattee Machine Shop and for the plaintiff to work around said machinery after dark."

(6) This count alleges the same relation as that alleged in count 5, with the additional allegation that "while engaged in his duties as such helper in said carding room, by the invitation and direction of the defendant, and about 6 o'clock in the afternoon, the electric lights in said carding rooms, the electricity for which was generated upon the premises by the servants and agents of the defendant went out, or so nearly out as to render it difficult to distinguish objects in the said carding room. [Here follows the manner of the injury and the injuries complained of, as set out in count 5.] And plaintiff avers that said injury was caused by the negligence of the servant or agent of the said defendant in charge of the said electric light and the electric lighting apparatus which lighted said carding room, in permitting the same, either said lighting apparatus or said light, one or both, to become so defective that they failed to give sufficient light for plaintiff to discharge his duties in said carding room, and so defective that they frequently went out, or died down low."

Count 8 alleges that plaintiff by invitation or direction of the defendant, through its superintendent was engaged in the work upon the premises under the conditions and for the purposes as alleged in count 5, with the injuries and their result as set out therein. The negligence ascribed to the defend-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ant, its agents or servants, was that the defendant or its agents or servants either failed to furnish a proper and suitable plant for the generation of electricity used for lighting said premises, or failed to keep said plant in a reasonably safe and proper condition, so that the same would generate suitable and sufficient light to enable plaintiff and other employes of said Saco-Pattee Machine Shop, engaged in and about the fulfillment of the contract above referred to, to perform their duty.

Demurrers were interposed to these counts, raising the points discussed in the opinion and also raising other points not discussed.

R. W. Walker and Lawrence Cooper, for appellant. S. S. Pleasants and R. C. Brickell, for appellee.

**SIMPSON, J.** This is an action for damages on account of personal injuries, by the appellee against the appellant, and this is the third time the case has been before this court. *Dallas Mfg. Co. v. Townes*, 148 Ala. 146, 41 South. 988; *Townes v. Dallas Mfg. Co.*, 154 Ala. 612, 45 South. 696. As to the action of the court in allowing the amendment to the complaint, and the effect of that amendment on the operation of the statute of limitations, section 5367, Code 1907, has set that vexed matter at rest, and under it the amendment was properly allowed and relates back to the commencement of the suit.

It is next insisted by the appellant that the demurrers to counts 5, 6, and 8 should have been sustained, because said counts do not show any duty on the part of the defendant to furnish lights for the independent contractor to work after dark. All of the counts allege facts showing that said Saco-Pattee Machine Shop was engaged, at the time of the injury, in setting up machinery in the mill of defendant, under an arrangement between it and defendant, and that the plaintiff was there by the direction or invitation of the defendant. These expressions carry with them the conclusion that the work was being done at the time, either indicated or acquiesced in by the defendant, and the eighth count alleges specifically that the hours of work were prescribed by the defendant. There was no error in overruling the demurrers to said counts.

According to the plaintiff's own testimony there was one slat out of the carding machine, and he had been sent by the person who was over him in the employ of the "Saco-Pattee Machine Shop" to replace this slat; that, after stopping for a while to talk to Anglin, plaintiff stepped into the alley between the cards, made one or two steps, when the lights went down, and then burned up again; that he took another step or two,

and had his foot in the air to make another step, and as his foot came down the light went out, and his foot struck or came down on a card door, which was lying on the floor; that he was walking with his right side to the card, and as he fell he spun around, and placed the back of his left hand against the revolving card cylinder. It appears that the cylinder, with fine wire teeth in it, revolves in one direction, and that the slats, which are outside and around it, with wire teeth in them, revolve more slowly in the opposite direction. The space left open by the slat which was out was from  $1\frac{1}{2}$  to 2 inches wide—the plaintiff saying the slat was 2 inches wide, and another witness  $1\frac{1}{2}$  inches—and was 3 or 4 feet from the floor. Plaintiff says that the card door which was lying on the floor was of iron, about 8 inches square and a quarter of an inch thick. Plaintiff says that there was nothing to prevent his seeing the door, if he had looked, before the light went out; that he would not have fallen if the door had not been there; and that he grabbed at a standard as he fell and spun around. In order to replace the slat, which plaintiff was sent to replace, he would have gone behind the machine, then come in front of it, and, after the cylinder ceased to revolve, replaced the slat. The cylinder was revolving about 170 times in a minute. Two witnesses, who went to plaintiff when they heard him cry out, testify that the belt was off and the cylinder had then stopped. There were others there, when they got there, attending to plaintiff; but they were not examined as witnesses. Plaintiff says that he did not throw the belt.

Passing by the contradictions of the plaintiff's statements by the other witnesses, and also the question of proximate cause, it is difficult to see how the going out of the light could have caused the plaintiff to place his foot on the door, if it went out just as his foot was coming down. Besides, it is a physical impossibility for a man, by placing his foot on (as plaintiff seems to think he did), or striking his feet against, an object a quarter of an inch above the level of the floor, to spin entirely around and place the back of the hand, which was on his opposite side from the card, against a revolving cylinder, through an aperture two or even three inches wide, and three or four feet above the floor. We think the verdict should have been set aside and a new trial granted.

The judgment of the court is reversed, and a judgment will be here rendered granting a new trial and remanding the cause.

Reversed and rendered.

**DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.**

## UNITED STATES CAST IRON, PIPE &amp; FOUNDRY CO. v. GRANGER.

(Supreme Court of Alabama. June 10, 1909.  
Rehearing Denied June 30, 1909.)

## 1. MASTER AND SERVANT (§ 262\*)—INJURIES TO SERVANT—ACTION—PLEA.

In an action for injury to plaintiff while performing his duty, a plea, alleging that the injury occurred while plaintiff negligently occupied a position of danger, was subject to demurrer, where it failed to allege that there was a safer way in which plaintiff could have discharged his duty.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.\*]

## 2. MASTER AND SERVANT (§ 262\*)—INJURIES TO SERVANT—ACTION—PLEA.

A further plea of contributory negligence in occupying a position of danger, when there was obviously a safer way for him to do his work, was subject to demurrer in failing to allege that plaintiff was aware of the danger of the position occupied by him.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.\*]

## 3. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—REPETITION.

Error, in sustaining an objection to a question, was without injury, where the question called merely for a repetition of what witness had just said.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.\*]

## 4. EVIDENCE (§ 472\*)—OPINION EVIDENCE—KNOWLEDGE OF FACTS.

It was proper to exclude testimony of a witness as to whether plaintiff knew all about a certain business; such matter being a question for the jury from the facts shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186–2195; Dec. Dig. § 472.\*]

## 5. EVIDENCE (§ 483\*)—OPINION EVIDENCE.

It was proper to permit a witness to testify as to whether a hook like the one in issue could get out of fix.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 483.\*]

## 6. EVIDENCE (§ 471\*)—CONCLUSIONS OF WITNESS.

The court properly sustained an objection to testimony as to what witness would do with reference to certain appliances by which work was done.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.\*]

## 7. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF TESTIMONY.

There is no available error in sustaining an objection to a question, where the witness subsequently answers the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.\*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Action by John Granger against the United States Cast Iron, Pipe & Foundry Company, for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The following pleas were filed by defendant: (2) "The plaintiff himself was guilty of negligence which proximately caused or contributed to cause his alleged injuries, in that he negligently occupied a position of danger under or near said crane." (3) Same as 2, down and including the words "said crane," and adds: "By which core bars were being hoisted, and where a core bar was likely to strike him if one should fall while being hoisted, and while negligently occupying said position a core bar fell while being hoisted and struck the plaintiff, whereby he was injured." (4) "The plaintiff is guilty of negligence which proximately caused or contributed to cause his alleged injuries, in that he negligently occupied a position under said crane when he knew that the core bars or other objects which were being hoisted would be likely to slip or fall, and were likely to strike him if they should fall." (5) "The plaintiff himself was guilty of negligence which proximately caused or contributed to cause his alleged injuries, in that he negligently occupied a position of danger under or near the said crane, when there was obviously a safer way for him to do his work which he was employed to do, by taking a position out of the path of said crane and at a point where objects falling could not strike him."

Weatherly & Stokely, for appellant. Frank S. White & Sons, for appellee.

SIMPSON, J. This action, by the appellee against the appellant, is for damages on account of a personal injury received by the plaintiff while in the employment of the defendant.

The first insistence of the appellant is that the court erred (as set out in the third, fourth, and fifth assignments of error), in sustaining plaintiff's demurrers to the second, third, fourth, and fifth pleas. The first and second counts of the complaint were eliminated by charge of the court. The claim of the complaint is that, while the plaintiff was engaged in the duties of his employment, a "core bar," which was being moved by a crane, fell on him. Both counts are based on subdivision 1 of section 1749 of the Code of 1896, and the defect alleged in the third count is that: "A hook at the end of a chain which was attached to a crane, used in said work, and which was placed around the end of said core bar for the purpose of removing it, had become defective, or had spread, which caused the hook to slip off of the chain around or over which it was hooked, thereby proximately causing the core bar to fall upon plaintiff." The fourth count is the same, except that it is alleged that said hook "spread or otherwise broke loose from the chain."

Pleas 2, 3, and 4, were subject to the demurrer, because they failed to allege that there was any safer way in which the plaintiff could discharge his duty. *M. & C. R. R. Co. v. Graham*, 94 Ala. 545, 553, 10 South. 283.

Plea 5 was subject to the demurrer, because it did not allege or show that the plaintiff was aware of the danger of the position occupied by him. *Ala. G. S. R. R. Co. v. Brooks' Adm'r*, 135 Ala. 401, 406, 33 South. 181; *K. C., M. & B. R. R. v. Burton*, 97 Ala. 241, 255, 12 South. 88; *L. & N. R. R. v. Orr*, 91 Ala. 548, 554, 8 South. 360.

If there was error in sustaining the objection to the question to the witness Chillison, "You thought it was all right?" it was without injury. The question called merely for the repetition of what the witness had just said, to wit, "I didn't know there was any danger in it."

There was no error in sustaining the objections to the questions to the witness Chillison, on cross-examination, "Knew all about the business, didn't he?" and "He was pretty familiar with everything around there, was he not?" The witness should testify as to facts, and not to the mental operations of the plaintiff. It was for the jury to find, from the facts, whether or not the plaintiff knew all about the business, etc. *Bailey v. State*, 107 Ala. 151, 18 South. 234; *Central of Ga. Ry. v. Martin*, 138 Ala. 533, 547, 36 South. 426.

There was no error in allowing the question to the witness Veltch, as to whether a hook like that can get out of fix at one time, etc.

There was no error in sustaining the objection to the question to the same witness, on cross-examination: "Do you mean to tell that jury that you would trust the whole business of seeing that the chain and hook, by which this work was done, was in proper condition, and you would turn your back on it, and never pay any more attention to it, from that time on?" It was not shown that the witness prescribed the duties of the "shakeouts," and it was irrelevant what he would do. Besides, the witness practically answered the question, in so far as it was not abstract, by saying that it was his duty "to leave the matter of looking after the chains and hooks, and its being in repair, entirely to the 'shakeout.'" Also, he subsequently answered the question further.

From the evidence the court could not say, as a matter of law, whether the hook was in a defective condition before the accident, or whether it was defective by reason of the negligence of some one intrusted with seeing that it was in proper condition. It was a question for the jury to determine as to what caused the core bar to fall, and as to whether the hook slipped because it had previously "spread," or whether it spread at the time of the accident.

Consequently the court erred in giving the general charge in favor of the plaintiff.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

(124 La.)

No. 17,775.

Ex parte RYAN.

(Supreme Court of Louisiana. July 19, 1909.)

HABEAS CORPUS (§ 4\*)—APPLICATION TO SUPREME COURT—DISMISSAL.

In matter of an application for a writ of habeas corpus.

The Supreme Court may refer the application to the court of original jurisdiction, in order that the facts may be taken down and a decision rendered. State ex rel. Condon v. Duson, 36 La. Ann. 855; State ex rel. Bauman v. Sheriff, 44 La. Ann. 1015, 11 South. 541; State v. McColley, 115 La. 406, 39 South. 81.

This is particularly true in a case in which the judgment of a court a qua may be reviewed on appeal.

The case is reviewable. Prieto v. St. Alphonsus Convent of Mercy, 52 La. Ann. 631, 27 South. 153, 47 L. R. A. 656; State ex rel. Lassere v. Michel, 105 La. 741, 30 South. 122, 54 L. R. A. 927.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.\*]

(Syllabus by the Court.)

Application of John F. Ryan for writ of habeas corpus. Dismissed.

John C. Wickliffe, for relator

BREAUX, C. J. Alleging that he is the father and only surviving parent of Frances Elizabeth Ryan, a young girl 13 years of age, relator charges that Edward Peter, residing at Chalmette, in the parish of St. Bernard, illegally confines and detains her without right or authority, by force and against his will.

He asks for a habeas corpus and for a judgment against Edward Peter ordering and commanding him to release Frances Elizabeth Ryan and surrender her to him.

He represents that he demanded his child: that Peter refused his demand.

We are not informed why it is that the application for a writ of habeas corpus has not been made to the judge of the district court having jurisdiction.

The issues of fact should be made up before that court, and a decision rendered both as to law and fact, whenever it is possible for the local court to do so.

If there is the least impossibility of any kind in this respect, we are not informed of it.

On an application for this writ, this court held that it would not grant it if a hearing could be had before a court of the first instance, and no good reason is given why application was not made to that court.

It is not alleged that there is anything making it urgent that the application be passed upon and decided by the Supreme Court.

The following decision is clearly in point: State ex rel. Bauman v. Sheriff, 44 La. Ann. 1015, 11 South. 541.

Applicant's petition does not create the impression that there is necessity to adopt other than the usual steps in this instance.

Undoubtedly the court said in another case under ordinary circumstances the application should be addressed to the court of original jurisdiction.

"When the district judge is absent, the Supreme Court may issue habeas corpus." State ex rel. Condon v. Duson, 36 La. Ann. 855.

Views very similar were expressed in State v. McColley, 115 La. 406, 39 South. 81.

Again, the applicant has a right of appeal.

The constitutional expression is that the Supreme Court "shall have appellate jurisdiction only" in all matters "relating to custody of children." Article 85.

In the cases of Prieto, 52 La. Ann. 631, 27 South. 153, 47 L. R. A. 656, and State ex rel. Lassere v. Michel, 105 La. 741, 30 South. 122, 54 L. R. A. 927, this court entertained jurisdiction on appeal under the above-cited clause of the Constitution.

Generally no appeal lies from an adverse decision in a habeas corpus case. It falls within the original jurisdiction of the court, and is not subject to review.

But in the present case the right of appeal is exceptional under a special clause of the Constitution before cited. The relator might appeal.

The court decided in several of the cited cases, although there was no right of appeal, that the application should be made to the local court. This case is stronger against the applicant than the cited cases, as there is a right of appeal.

Where there is a right of appeal, there should be no hesitation in referring the party to the court of original jurisdiction; for the complainant has the opportunity if he chooses to be heard on appeal in case of an adverse decision.

The court held in one of the cited decisions that the applicant for a habeas corpus could not select the time and place for the hearing, nor could he select his own tribunal as between the court of original jurisdiction and the appellate court.

See decisions cited supra.

Lastly, the Constitution says that the Supreme Court has "original jurisdiction as may be necessary to enable it to determine questions of fact or it may remand the case." Article 85.

By direct implication it may decline to hold an original examination and examine into facts as a court of original jurisdiction and refer the matter to a court of original jurisdiction, particularly where persons have the right of appeal.

Were this court to entertain original jurisdiction in all habeas corpus cases brought before it originally, it would be entirely overburdened with onerous labors. It is advisable to leave them, as far as possible, to be disposed of within the limits of their respective original jurisdiction.

Relator's demand will be dismissed, with-

out trenching upon whatever right the relator may have to the writ.

It is therefore ordered, adjudged, and decreed that relator's petition and demand are dismissed without prejudice.

(124 La.)

No. 17,500.

**STATE v. BOASBERG.**

(Supreme Court of Louisiana. April 26, 1909.

On the Merits, June 30, 1909.)

**1. BAIL (§ 39\*)—IN CRIMINAL PROSECUTIONS—NATURE OF REMEDY.**

If a person convicted of crime is at large under bond, his whereabouts is the concern of his sureties alone, and they may permit him to go beyond the limits of the state.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 139; Dec. Dig. § 39.\*]

**2. CRIMINAL LAW (§ 1144\*)—APPEAL—PRESUMPTIONS—BAIL.**

Where an accused was set at liberty by the trial court, it must be presumed that he was under bond, since the court would be without authority to release him on any other condition, under Rev. St. § 1010, permitting the judge to set at liberty one charged with crime upon his giving bond with approved sureties.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1144.\*]

**3. CRIMINAL LAW (§ 639\*) — ATTORNEY FOR PROSECUTION—DISQUALIFICATION OF PROSECUTING ATTORNEY.**

Acts 1877, p. 35, No. 35, § 2, provides that a district attorney shall be recused by the judge in criminal cases if he be related to accused, or to the person injured by accused, within the fourth degree, or be his father-in-law, son-in-law, or brother-in-law, or if he has been employed or consulted as attorney for accused before his election or appointment as district attorney. Acts 1886, p. 113, No. 74, provides that the district judges may appoint a competent attorney to represent the state, when from any cause the district attorney is recused, necessarily absent, or sick. *Held*, that the judge could not recuse a district attorney in a prosecution for violation of the anti-race track law merely because the attorney believed that no law had been violated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1485; Dec. Dig. § 639.\*]

**4. INDICTMENT AND INFORMATION (§ 39\*)—INFORMATION—WHO MAY FILE.**

An information filed by an attorney appointed by the judge to act in the district attorney's stead was a nullity, when the district attorney was improperly recused by the judge.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 150; Dec. Dig. § 39.\*]

**5. STATUTES (§ 211\*)—TITLES—ENLARGING ENACTING CLAUSE.**

The title of an act, which is no part of the statute, cannot enlarge the enacting clause, where there is no ambiguity therein; and hence Acts 1886, p. 113, No. 74, § 1, providing for the recusation mentioned in Acts 1877, p. 35, No. 35, § 2, with additional grounds of necessary absence or sickness, was not enlarged by the title of the act of 1886, reciting that it authorized the appointment of attorneys to represent the state when the district attorney from any cause "will not act."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.\*]

**6. INDICTMENT AND INFORMATION (§ 2\*)—CONSTITUTIONAL PROVISIONS—"INDICTMENT"—"INFORMATION."**

The provision of the Bill of Rights that prosecutions shall be by indictment or information was intended to secure the citizen against prosecution by private citizen, or by any authority other than a grand jury or a district attorney; "indictment" as used meaning a presentment by a grand jury, and "information" meaning a presentment by a district attorney or other officer constituted by law to exercise the functions which at common law in 1805 were exercised by the law officer of the crown.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 4; Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3551-3555, 3585-3589.]

Breaux, C. J., dissenting.

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; Prentice Ellis Edrington, Judge.

Mark Boasberg, alias J. Sheehan, was convicted of violating the anti-race track law, and he appeals. Judgment set aside, and information quashed.

Frederick Anthony Middleton and Robert Hardin Marr, for appellant. St. Clair Adams, Acting Dist. Atty., and Warren Doyle, Asst. Dist. Atty. (Ruffin Golson Pleasant, of counsel), for the State.

**On Motion to Dismiss.**

**PROVOSTY, J.** A motion to dismiss the appeal has been filed, supported by affidavit. The grounds are that the defendant is a fugitive from justice, and is presently in another state, and has declared his intention not to return to this state and abide the event of the present case. It is further stated in the affidavit that after defendant had been sentenced, and an appeal had been granted him, and after he had removed himself beyond the jurisdiction of the court, he obtained leave through counsel to absent himself from the jurisdiction of the court for 45 days. In the brief it is stated that 1 day prior to the expiration of said 45 days, and while the defendant was still out of the state, and long after the transcript of appeal had been filed in this court, the judge extended said leave of absence until the present appeal should have been decided.

The argument is that, from the moment the appeal was granted, the case passed from the trial court to this court, and the trial court became divested of jurisdiction over it, and that, therefore, the judge was without authority to extend the leave of absence, and, as a consequence, the defendant is out of the state without leave, and ipso facto a fugitive from justice.

The question must be whether the defendant is under bond. If he is, his whereabouts is the concern of his sureties alone, in whose constant custody he is presumed to be. State v. Cunningham, 10 La. Ann. 393. They "may

permit him to go beyond the limits of the state." Taylor v. Taintor, 16 Wall. 368, 21 L. Ed. 287-290.

The inference would naturally be that the defendant is under bond, since the trial court would have been without authority to release him on any other condition. Rev. St. § 1010. But the record does not show it—in fact, does not even show that he was ever under arrest.

The only disposition we can make of the matter, in its present shape, is to enter the following order:

The clerk of the Twenty-Eighth judicial district court in and for the parish of Jefferson is ordered to send up to this court a supplementary transcript, such as, together with the transcript already filed in this court, will contain and show all the proceedings had and all the documents filed, from first to last, in the case of State v. Mark Boasberg, alias J. Sheehan, No. 945 of said court.

#### On the Merits.

An affidavit was made in the parish of Jefferson, charging the defendant with having violated, in said parish, act No. 57, p. 64, of 1908, popularly known as the "Anti-Race Track Law" or "Locke Bill." The district attorney of that parish moved his own recusation, assigning as his reason that the said affidavit had been made, and that others might thereafter be made against other parties, but that he had visited in person the race track in question, and carefully observed and thoroughly investigated the method and manner of betting on horse races there practiced, and had come to the conclusion that the same was not a violation of said act No. 57, p. 64, of 1908, and that therefore he could not honestly and consistently with his sense of duty as district attorney prosecute the defendant on said affidavit, nor any other person against whom a similar charge might be made.

The court granted the motion, and made an order appointing St. Clair Adams, Esq., the district attorney of the adjoining parish of Orleans, as district attorney pro tempore to act in place of the district attorney recused, "to prosecute any violation of act No. 57 of 1908, from the opening day of the Suburban race track to its closing day."

The attorneys for the defendant reserved a bill of exceptions to the said action of the court, which bill recites that the said motion sets forth none of the grounds prescribed by law for which a district attorney may recuse himself, and that the grand jury is still in attendance on the court, and could be convened at any time for the consideration of any matters that might be brought before it.

Mr. Adams, thus appointed district attorney pro tempore by the court, then filed the information upon which the present prosecution is based.

The defendant filed a motion to quash the information, on the ground that the recusa-

tion of the district attorney was not based upon any one of the grounds of recusation prescribed by law, and that therefore the appointment of Mr. Adams was a nullity, and he without authority to file an information, and that, in consequence, the information itself was a nullity.

The facts in that connection, and the contentions of the prosecution, are concisely stated in the brief in behalf of the state, as follows:

"It appears from the record that a race meeting was conducted at the Suburban race track in the parish of Jefferson for a period of about a week, and that gambling on the races obtained during that time under a system which the promoters styled 'individual betting.' From the record it appears that the district attorney visited the Suburban race track and observed the method and manner of betting on said races and came to the conclusion that said system was not in violation of act No. 57, p. 64, of 1908. There was a demand made upon the district attorney and the sheriff of the parish of Jefferson to enforce this statute against race track gambling by the Governor of the state, who under the law is charged with the responsibility for the execution of the law. The district attorney was of the opinion that no law had been violated and refused to act, and thereupon filed a motion asking that he be recused from prosecuting any of the cases that might and did grow out of the operation of said Suburban race track. At the time that this recusation was tendered and accepted by the court, there was pending before the court charges against one Mark Boasberg and one W. R. Ralston for violating act No. 57, p. 64, of 1908. Upon the hearing of the motion to quash the information filed by the acting district attorney upon the ground that the recusation and subsequent appointment of an acting district attorney, the district attorney for the parish of Jefferson was called to the witness stand and testified that he was not related to the prisoner within the fourth degree, nor his father-in-law, nor his brother-in-law, and had never been employed or consulted as an attorney for the accused. On cross-examination by the acting district attorney, he was asked, 'Why did you recuse yourself in this Locke law case?' and he answered, 'Because I did not believe that the law had been violated, and, as the Governor is of the opinion that the law has been violated, I thought it proper to recuse myself, and for the court to appoint somebody else to represent the state.'

"It is contended by defendant that the only grounds upon which a district attorney may recuse himself are set forth in act No. 35, p. 35, of 1877. The pertinent part of this act reads as follows:

"Sec. 2. That any district attorney shall be recused by the judge in criminal cases:

"(1) If said district attorney be related to the party accused within the fourth degree, or be his father-in-law, or his son-in-law, or his brother-in-law.

"(2) If said district attorney be related to the party injured by the accused within the fourth degree, or be his father-in-law, son-in-law, or brother-in-law, injured by the accused.

"(3) If said district attorney had been employed or consulted as attorney for the accused before his election or appointment as district attorney."

"We concede that the district attorney did not recuse himself for any of the reasons set forth in the quoted statute. But we earnestly contend that the causes set forth in said statute are not exclusive, but are, as far as they go, absolute.

"It will be noted that the section begins with

the following language: "That any district attorney shall be recused by the judge in criminal cases—and then sets forth the causes therefor. So that, where any of the causes set forth exist, it is the duty of the district judge, irrespective of the wishes of the district attorney, to recuse him in such cases. But in any other case, where, for reason of public policy or because of interest, a district attorney believes it to be his duty to recuse himself, then, we say, it is a matter within the sound discretion of the court to grant the order of recusation or not.

"For instance, this statute does not provide that, if a district attorney's wife is charged with crime, the judge shall recuse him. It does not provide that, if the district attorney be interested in property whose use might constitute a violation of law, the judge shall recuse him; and if the imagination was exercised numerous other cases would suggest themselves where it would be the duty of a district attorney morally and for reasons of public policy to recuse himself. We suggest that the case at bar is typical, and that public policy absolutely demanded that the district attorney recuse himself. The facts demonstrated that race track gambling in its most flagrant form, with book makers paying daily tribute to the racing association, was conducted at the Suburban track for over a week, and though the old system of betting was simply modified, a little such disguise in method may have convinced the district attorney that no violation of the law had taken place; but the facts remain, cold and stern, that there were daily and hourly violations of act No. 57, p. 64, of 1908, at the Suburban race track, and the district judge of the parish of Jefferson so found when the case was tried.

"We do not question the right of the district attorney to form the opinion which he did, and we think he acted properly when, realizing that the vast majority of the people believed that the law was violated, and when the Governor of the state demanded prosecution, he, holding his opinion, properly recused himself. This was a demand made by public policy. If he had not the right to recuse himself, so that some other officer of the law might prosecute, what would have been the result? Race track gambling could have been conducted day in and day out, from month to month, in the parish of Jefferson, and there would be no one to enforce the plain provisions of the law. Such a condition of affairs could not and would not be tolerated in the bowels of China, much less in a civilized subdivision of the United States.

"That the causes for recusation, set forth in act No. 35, p. 35, of 1877, are not exclusive, is plain, because they do not provide for recusation where the district attorney has an interest in the litigation. We do not suggest or believe that the district attorney had an interest directly or indirectly in the Suburban race track; but, if he did have, in such a case would not recusation be proper? Would not public policy demand such a course of action upon his part? Therefore we say that the causes of recusation set forth in act No. 35, p. 35, of 1877, are not exclusive, and that the judge, in his discretion, has the right to accept a recusation made by a district attorney whenever public policy and public morals so demand.

"But act No. 35, p. 35, of 1877, must be read in connection with act No. 74, p. 113, of 1886. It was under this latter act that the acting district attorney was appointed by the judge. It reads as follows:

"No. 74. An act authorizing the district judges throughout the state to appoint attorneys to represent the state in civil and criminal matters, when the district attorney from any cause cannot or will not act.

"Section 1. Be it enacted by the General Assembly of the state of Louisiana, that district judges throughout the state be and are

hereby authorized and empowered to appoint a competent attorney to represent the state in criminal and civil matters pending before their courts, when from any cause the district attorney is recused, necessarily absent or sick; provided, the compensation for services rendered in such cases shall not exceed the fees now allowed by law to district attorneys for similar services, and said compensation shall come out of the fees which would otherwise go to the district attorney for such services."

"This act certainly extends and modifies the provisions of act No. 35, p. 35, of 1877, and necessarily amplifies the causes for which a district attorney may recuse himself. We call particular attention to the title, which reads:

"Authorizing the district judges throughout the state to appoint attorneys to represent the state in civil and criminal matters, when the district attorney from any cause cannot or will not act."

"And he who runs may read the plain meaning of this provision. The district attorney in the case at bar would not act, and therefore his recusation was accepted and another attorney appointed in his room. It is true that in the body of the act the words 'or will not act' do not appear. But words equally significant do appear, to wit: 'When, from any cause, the district attorney is recused.'

"Whether the words 'or will not act' appear in the body of the act or not, they must be given effect just as if they were written beneath the enacting clause of the statute."

The question presented is simply whether the district attorney may recuse himself on any ground other than one of those prescribed by said act No. 35, p. 35, of 1877, hereinabove quoted. We do not think he can. The grounds of recusation prescribed for judges in the said act have been held to be limitative. Succession of Pinard, Man. Unrep. Cas. 37; State ex rel. v. Judge, 41 La. Ann. 319, 6 South. 22; State v. Chantlain, 42 La. Ann. 718, 7 South. 669. And we think that, on the same principle, the similar grounds prescribed for district attorneys are in like manner limitative.

The recusation of the district attorney in this case, not having been founded on any one of the grounds thus prescribed, was null and void. The district attorney was therefore not recused; and, since he was not recused, nor sick or absent, the judge was without authority, under act No. 74, p. 113, of 1886, hereinabove quoted to appoint an attorney to act in his place, and in consequence the appointment of Mr. Adams was a nullity, and the information filed by him was a nullity.

The contention that the title of said act No. 74, p. 113, of 1886, enlarges the enacting clause of the act can hardly be serious. The title of a statute is no part of the statute. What effect it may have upon the statute is stated by Chief Justice Marshall in U. S. v. Fisher, 2 Cranch, 358, 2 L. Ed. 304, as follows:

"On the influence which the title ought to have, in construing the enacting clause, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parties, it may



assist in removing ambiguities. When the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

There is no ambiguity in this act of 1886. The recusation it speaks of is necessarily the recusation which the law allows as prescribed by the act of 1877; and the words "absent or sick" mean absent or sick, and cannot mean anything else.

The reasons of so-called public policy hereinabove assigned why the recusation of the district attorney is said to have been proper in this case, impress us just the other way. The Bill of Rights provides that "prosecutions shall be by indictment or information." What the object and purpose of this provision is is sufficiently made plain by the simple fact of its being found in the Bill of Rights. It is to secure the citizen against prosecution by private citizen, by Governor, or judge, or by any authority other than a grand jury or a district attorney. Indictment means a presentment by a grand jury, and information means a presentment by a district attorney, or other officer constituted by law to exercise the functions which at common law in 1805 were exercised by the law officer of the crown. To the grand jury and to the district attorney, and not to popular clamor or to the executive, is confided by the Constitution the discretion of determining when the citizen shall be brought before the court. That discretion the district attorney must, upon occasion, exercise, and not divest himself of, as he would of his coat. And the very time when the policy of our law, as embodied in the Constitution and the statutes, requires that he should not shirk this responsibility, is when there is popular clamor, or if judge or executive should ever undertake to dictate in matters of criminal prosecution.

We may add that it goes without saying that the statement hereinabove made that the manner in which the betting was being conducted at the Suburban race track was in flagrant violation of act No. 57, p. 64, of 1908, is the statement of counsel, and not of this court. Whether the said manner of betting amounted, or not, to a violation of said statute, is one of the questions presented in this case, and which this court is glad to be spared the trouble of deciding. The learned counsel for the state did not think the proposition so plain as not to be debatable, since they made elaborate argument upon it. The district attorney and the grand jury are the authorities constituted by law for the primary decision of that question. Until they, or either one of them, shall have decided it in the affirmative, the courts have no concern with it.

Judgment set aside, and information quashed.

BREAUX, C. J. (dissenting). The ground laid down in the statute regarding the recusation of district attorneys is not exclusive of all other grounds.

In the nature of things the district attorney may have to recuse himself on other grounds than those expressed in the statute. Act No. 35, p. 35, of 1877. If a rigid and exclusive construction be followed, then it follows, if the wife of the prosecuting officer is charged with a crime (if prosecuted at all), she would have to be prosecuted by her own husband, or, if that officer be personally interested in property in regard to which a crime has been committed, he alone would have control of the prosecution.

It is fortunate for the state that the wives of prosecuting officers and the prosecuting officers are not inclined to the violation of law, as they might often have things their own way.

Act No. 35, p. 35, of 1877, Act No. 74, p. 113, of 1886, and Act No. 123, p. 209, of 1906, are in pari materia, and can properly be read and construed together.

The first states certain causes of recusation, which are not (as we have before stated) exclusive.

The second statute does not seek to limit the causes of recusation to special reasons: When from any cause the "*district attorney is recused, necessarily absent, or sick.*" (My italics.) If a district attorney finds as a matter of duty, owing to deep laid conviction, that he cannot in a particular case discharge the duties required of him as an officer, and the court finds that his grounds are well founded, no good reason in law suggests itself why he may not be represented by another in the case and the prosecution instituted as required against the alleged violator of the law.

The presiding judge in a similar case is expected to recuse himself. Why should not the district attorney?

The district attorney was unable to act.

The inability to act is defined "as the state of being unable physically, mentally, or morally." In this instance there was inability to act for reason that has often been repeated in this case.

The title of the law (Act No. 74, p. 113, of 1886) states—

"when the district attorney from any cause cannot or will not act."

The title does not denounce an offense. It may none the less be considered as indicating the will of the lawmaker. It expresses the object of the law. Const. art. 31.

The title gives to the words "any cause" a broader meaning than they otherwise would have, if the words were not included therein. By an oversight evidently they do not form part of the text. They none the less may be considered in interpreting the statute.

In the other statute cited above, the third

cited, again the following are the words used:

"Where the judges of the several districts of this state may not be able for any cause to comply with the provisions of Act No. 74 of the General Assembly of this state by the appointment of a competent attorney, then the Attorney General shall designate or appoint."

This is broad, and leaves the district judge for any cause, within the limit of a sound discretion, free to call on the Attorney General. This is referred to only to add that the lawmaker does not seem to have been inclined to hold the authorities down to a technical and close and rigid compliance with the statute first cited, in which several causes are expressed.

In other words, the language is to be understood according to the subject-matter.

When the lawmaker used the words "any cause," reference was made to reasonable causes, rendering it just in every respect to permit the officer to recuse himself.

There was no reason to refer the matter to the Attorney General, as the district judge was fully competent to judge of the necessity of appointing another attorney to represent the state.

This court said, in *State ex rel. Stewart v. Reed*, 113 La. 890, 37 South. 866, that act No. 74, p. 113, of 1886, means "that the business of the state, whether it be actually in, or such as should be brought to the attention of, the court, is not to be suspended by reason of the absence or inability of the district attorneys, but that the machinery of government shall continue to move in the administration of justice under the direction of substitutes for those officers," and in the body of the decision it is stated that the court has authority to appoint when from any cause the district attorney is recused, necessarily absent, or sick.

(124 La.)

No. 16,856.

# **SHEA v. SEWERAGE & WATER BOARD OF NEW ORLEANS.**

(Supreme Court of Louisiana. June 30, 1909.)

## **1. MUNICIPAL CORPORATIONS (§ 374\*) — CONTRACTS FOR PUBLIC IMPROVEMENT—ACTIONS BY CONTRACTOR.**

Where a city forbade the contractor for the construction of sewers to go on with the work, and completed the work at the expense of the contractor under the contract providing that any balance left after completing the work must be paid to the contractor, the latter could sue for the balance without showing that he had completed the work to the satisfaction of the engineer, though the contract provided that no payment should be made until the work was completed to the satisfaction of the engineer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 374.\*]

## **2. PLEADING (§ 36\*)—ANSWER—ADMISSIONS—CONCLUSIVENESS.**

Where a city, sued by a sewer contractor for extra work, admitted in its answer that

more than a specified sum was due for extra work, it could not except to the petition because it failed to allege that the extra work had been ordered in writing as required by the contract.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 81-86; Dec. Dig. § 36.\*]

## **3. MUNICIPAL CORPORATIONS (§ 360\*) — CONTRACTS FOR PUBLIC IMPROVEMENTS — CONSTRUCTION.**

A sewer contractor may recover for extra work rendered necessary for their construction without showing that the extra work was ordered in writing as provided by the contract.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 892; Dec. Dig. § 360.\*]

## **4. MUNICIPAL CORPORATIONS (§ 363\*) — CONTRACTS FOR PUBLIC IMPROVEMENTS—LIABILITY OF CONTRACTOR.**

A sewer contractor is not responsible for failures in the work except so far as they result from his fault.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 363.\*]

## **5. MUNICIPAL CORPORATIONS (§ 374\*) — CONTRACTS FOR PUBLIC IMPROVEMENTS—LIABILITY OF CONTRACTOR.**

Evidence, in an action by a sewer contractor against a city for money due under his contract, held to show that failures in sewers due to the pipes separating or cracking were due to the condition of the soil, etc., relieving the contractor from liability therefor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 374.\*]

## **6. MUNICIPAL CORPORATIONS (§ 358\*) — CONTRACTS FOR PUBLIC IMPROVEMENTS—VALIDITY.**

A stipulation, in a contract to construct city sewers, that the general superintendent of the city shall decide all disputes involving the character of the work, its quantity, and the compensation therefor, etc., is valid and will be enforced.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 890; Dec. Dig. § 358.\*]

## **7. MUNICIPAL CORPORATIONS (§ 358\*) — CONTRACTS FOR PUBLIC IMPROVEMENTS — CONSTRUCTION.**

A stipulation, in a contract to construct city sewers, that the general superintendent of the city shall decide disputes involving the character of the work, its quantity, and the compensation therefor, only authorizes the general superintendent to judge of the manner in which the work shall be done so that it may comply with the specifications, and to condemn all work not coming up to that standard.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 358.\*]

## **8. EVIDENCE (§ 177\*)—BEST AND SECONDARY EVIDENCE—ADMISSIBILITY.**

Where a fact is ascertainable only by the inspection of a large number of documents made up of numerous detailed statements, a competent witness, who has perused all the documents, may state summarily the net results thereof.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 177.\*]

## **9. EVIDENCE (§ 354\*)—BOOKS ADMISSIBLE IN EVIDENCE.**

The rule that a litigant's books are not admissible in evidence in his favor is subject to exceptions, and reports of the labor and materials going into a large public improvement, made with a view of keeping a true record, may be accepted by the court as correct, except as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

to items especially objected to by the adverse party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1433; Dec. Dig. § 354.\*]

**10. MUNICIPAL CORPORATIONS (§ 358\*)—CONTRACTS FOR PUBLIC IMPROVEMENTS — CONSTRUCTION.**

Under a contract for city sewers, stipulating that the general superintendent of the city shall finally decide disputes involving the character of the work, its quantity, and the compensation therefor, the decision of the general superintendent is conclusive, in the absence of fraud or bad faith on his part, and his measurements of the work control as against measurements made by the contractor's engineer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 890; Dec. Dig. § 358.\*]

**11. MUNICIPAL CORPORATIONS (§ 352\*)—CONTRACTS FOR PUBLIC IMPROVEMENTS — CONSTRUCTION.**

A contractor for city sewers, who was paid for constructing manholes, could not in measuring the length of the foundation under the sewer measure from center of manhole to center of manhole, for to do so he would be paid twice for the same work.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 352.\*]

**12. MUNICIPAL CORPORATIONS (§ 356\*)—PUBLIC IMPROVEMENTS—ESTIMATES.**

An estimate of the depth of the cut in the trench for a sewer, based on actual measurements made on the work, controls as against a measurement based on profiles previously made from merely approximate measurements.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 356.\*]

**13. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACTS—LIABILITY OF CONTRACTOR.**

The expense of top sheeting in a sewer trench to overcome a difficulty met with by the sewer contractor in the course of his work falls on him and not on the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892; Dec. Dig. § 360.\*]

**14. MUNICIPAL CORPORATIONS (§ 352\*)—CONTRACTS—CONSTRUCTION.**

Where the contract for city sewers provided that the cost of drop pipes in manholes should be included in the lump price paid for the manholes, the contractor could not charge extra for such drop pipes.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 352.\*]

**15. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACTS—LIABILITY OF CONTRACTOR.**

A contractor for a city sewer must pay the cost of work rendered necessary in doing the work, such as the draining of a street necessary by reason of a pond in existence when the letting of the contract was advertised, and the expense of removing and repairing overhead wires.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892; Dec. Dig. § 360.\*]

**16. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACTS—PERFORMANCE.**

A contractor for a sewer, who repairs a road for his own convenience, and not by order of the city, cannot recover from the city the cost thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892; Dec. Dig. § 360.\*]

**17. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACTS—PERFORMANCE.**

A contractor constructing a sewer, who makes repairs rendered necessary without his fault and under the order of the city, may recover the cost thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892; Dec. Dig. § 360.\*]

**18. MUNICIPAL CORPORATIONS (§ 363\*)—CONTRACTS—LIABILITY OF CONTRACTOR—DEFECTS.**

Where the contract for a city sewer provided that the brickwork should be left smooth, the cost of painting and plastering the sewer made necessary because of projections of cement, etc., must be borne by the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 363.\*]

**19. MUNICIPAL CORPORATIONS (§ 352\*)—CONTRACTS—CONSTRUCTION.**

The cost of lumber used by a sewer contractor in making the forms for the required masonry work is included in the price paid for the masonry work, and the city is not liable therefor.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 352.\*]

**20. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACTS—PERFORMANCE.**

The amount expended by a sewer contractor in diverting water from his work, brought on the work as the result of other work let to other contractors, is recoverable from the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 360.\*]

**21. MUNICIPAL CORPORATIONS (§ 352\*)—CONTRACTS—CONSTRUCTION.**

An agreement between a city and its sewer contractor, made during the progress of the work, which relates exclusively to expenses incurred in the removal of water coming from another sewer on the contractor's work, without covering past expenses, does not preclude the contractor from recovering from the city such past expenses and subsequent expenses incurred for other purposes than for pumping.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 352.\*]

**22. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACTS—PERFORMANCE.**

Where a sewer contractor, required to furnish piles 30 feet long to be driven that number of feet, was, after the piles were on the ground, required to drive the piles deeper than 30 feet, thereby increasing the cost of the work, the contractor should be paid as if longer piles had been furnished; the contract making no provision for such a case.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 360.\*]

**23. MUNICIPAL CORPORATIONS (§ 374\*)—CONTRACTS—REMEDIES OF CONTRACTOR.**

A contractor on a large and protracted work need not preserve as he goes along the evidence sufficient to prove in court every item of expense incurred; but it is only necessary for him to furnish an itemized bill from the books which it was necessary for him to keep, which books were correctly kept and the entries therein made at the time the expenses were incurred.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 374.\*]

**24. MUNICIPAL CORPORATIONS (§ 374\*)—CONTRACTS—REMEDIES OF CONTRACTOR.**

A contractor for city sewers cannot recover from the city the loss occasioned by the idleness of machines while waiting for permission to begin work, in the absence of evidence

that the city was advised of the situation and put in default.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 374.\*]

**25. MUNICIPAL CORPORATIONS (§ 374\*)—CONTRACTS—REMEDIES OF CONTRACTOR.**

Where a sewer contractor, who had devised a successful appliance for the removal of surplus cement by drawing the appliance through the sewer pipe as construction proceeded, was prevented by the city from using the appliance, the contractor could recover the difference between the cost of cleaning the sewers with and without the appliance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 374.\*]

**26. MUNICIPAL CORPORATIONS (§ 374\*)—CONTRACTS—REMEDIES OF CONTRACTOR.**

Where, in an action by a contractor against a city for the balance due for constructing sewers, the city made a reconventional demand for expenses for repairing and cleaning the sewers, the exclusion of evidence of estimate sheets, with the accompanying receipt of the contractor showing payments for regular and extra work, was erroneous.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 374.\*]

**27. MUNICIPAL CORPORATIONS (§ 362\*)—PUBLIC IMPROVEMENT CONTRACTS—LIABILITY OF CONTRACTOR—LIQUIDATED DAMAGES.**

Where a contractor for city sewers abandoned the work after the city had breached the contract by refusing to make payments, and thereafter the city notified the contractor to quit the work, the contractor was not liable for the liquidated damages stipulated for in the contract for delay in completion.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 362.\*]

Appeal from Civil District Court, Parish of Orleans; Frederic Durleve King, Judge.

Action by Thomas J. Shea against the Sewerage & Water Board of New Orleans. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Omer Villere (E. H. Block and Thomas H. Thorpe, of counsel), for appellant. McCloskey & Benedict and Clegg & Quintero, for appellee.

**PROVOSTY, J.** The plaintiff, T. J. Shea, was awarded contracts C and F of the numerous contracts for the laying of sewers and their appurtenances in the city of New Orleans. He completed contract F, and had constructed the sewers under contract C, and had cleaned the most of them, ready for inspection, when differences arose between him and the defendant board, over the responsibility for failures which had developed in the sewers, which led him to abandon the contract and bring this suit. He avers that he fulfilled these contracts, and demands \$145,483.60, which, he alleges, is the balance due him. The claim is divided into amounts for regular work under the contracts, for extras, and for damages. The claims for extras and damages are itemized in exhibits annexed to the petition.

The defenses are a general denial and the special defenses: that plaintiff was paid all

that was due under contract F; that he abandoned contract C incomplete; that there was to his credit at that time on the books of defendant \$79,807.28; but that defendant has since then completed the sewers at the expense of plaintiff, as it had a right to do under the contract, at a cost of \$54,014.92, and has, moreover, expended, in repairing damage caused by plaintiff and in other extra work, as set forth in detail, \$1,564.26; that these expenses offset pro tanto the said credit of plaintiff; and that plaintiff owes, in addition, \$41,100, liquidated damages for delay in the completion of said contract, being 411 days at \$100 per day, as stipulated in said contract, which more than offsets the balance to the credit of plaintiff, leaving him indebted to defendant in the sum of \$16,378.90, for which defendant prays judgment.

Defendant filed in this court an exception of no cause of action based on the grounds that plaintiff has annexed and made part of his petition the contract upon which his suit is brought, and yet has failed to allege that the work for the price of which he sues has been completed to the satisfaction of defendant's general superintendent, or that said officer, in withholding his approval, has been actuated by fraud or bad faith, although said contract provides that no payment shall be due until the work contracted for is completed to the satisfaction of said officer; and, also, that plaintiff is asking payment for extra work, and yet has not alleged that such extra work was ordered in writing, although said contract provides that no extra work shall be paid for unless ordered in writing.

It is needless to consider what merit this exception might have had if filed in limine, while the suit stood on the naked petition. Perhaps defendant might have then contended that it had the right to withhold payment until plaintiff had shown that he had completed the work to the satisfaction of the engineer, and that it owed nothing for extra work not shown to have been ordered in writing; but in its answer defendant alleged that it had forbidden plaintiff to go on with the work, and had, itself, completed it at the expense of plaintiff, and that it had done so under and by virtue of clause 265 of the contract. If so, plaintiff certainly has a cause of action for whatever balance may be left of the money earned by him under the contract after deduction of the expense of completing the work. By going into possession of the work, thereby accepting the benefit of it so far as beneficial, defendant most unquestionably incurred liability to the extent of such benefit; that is to say, to the amount due plaintiff for work done after deduction of the expense of completing the work. More than this, the said clause 265 expressly provides that any balance left over

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

after completion of the work must be paid to the contractor. The suit is for this balance. Whether there is one, and how large it is, is the matter in litigation. In other words, the suit, as it stands on this appeal, is simply one in settlement of accounts.

So far as the petition not showing a cause of action for failure to allege that the extra work was ordered in writing is concerned, the answer expressly admits that more than \$10,000 is due for extra work, and it intimates that a further admission will in all probability be made later. After such an admission there is not much room for an exception of no cause of action.

Touching the necessity of a written order for these extras, we may say here, once for all, that most of the claims are for damages and repair work, and work necessary for the construction of the sewers, such as plaintiff had no discretion about, but had to do, or else abandon the work of construction. For all such extras no written order can be necessary. If among the extras there are some for which a written order would have been necessary, we are not aware of it. The case was not tried on that line in the lower court, and such claims, if any there are, are not specially noted in the briefs. If any such there be, perhaps written orders could have been produced for them, if called for in the lower court.

The main dispute is over the expense of repairing the failures. Of course, responsibility for these expenses follows responsibility for the failures themselves. Hence we pass at once to that question. Plaintiff can be held responsible for the failures only in so far as they appear to have resulted from fault in his work. In that connection we will allude to some general features of the case before coming to the details. Even before mentioning these general features, however, it might be well to give a word of explanation touching the manner of constructing the sewers.

The sewer pipe is laid 12 or more feet underground, and is constructed by joining sections of pipe end to end. These sections are  $2\frac{1}{2}$  feet long, and, of course, of the diameter which it is desired the sewer should be of. The section of pipe is of uniform diameter, except at one end, where it flares, or, rather, has a collar, or enlargement, of sufficient inside diameter to admit freely the end of the section of pipe that is to be joined to it. This collar, or enlargement, gives to that end of the pipe, for a space of about five inches, a greater outer diameter of about four inches, or two inches all around. This collar, or enlargement, is called "the bell." The other end of the section of pipe is called "the spigot." And we may add that the space between is called "the barrel." These sections of pipe we shall hereinafter call "pipes." Preparatory to excavating the trench along the bottom of which the sewer is to be laid, sheeting is driven into the

ground, and the earth is then removed from between the two lines of sheeting. As the excavating proceeds, a rail, or ranger, is added to each side of the trench, and from the rail on one side of the trench to the rail on the other side of the trench braces are inserted across the trench. The sewer pipe starts from a manhole and ends in a manhole, of which there is one at every cross street. The manhole is an independent construction, and, being of heavy masonry, is always provided with a foundation. The sewer pipe is lighter than the soil it displaces. Hence no foundation is necessary for laying it, unless the bottom of the trench happens to be soft. At about every 30 feet occurs what is called a "tee," by which is meant a section of pipe provided with an opening to serve for making connection with the sewer. The opening in this tee is by means of a neck added to the side of the section of pipe. The tee derives its name from its supposed, or real, resemblance to a capital T. When in position, it is inverted, thus  $\perp$ . The cross of the T forms a continuation of the sewer pipe, and the neck, or leg, of the T, or part through which the sewer connection is to be made, points upward. This leg part is only three or four inches long; that is to say, stands only that much above the barrel of the pipe. The tees are incased in concrete after having been placed in position.

Foremost among the general features mention of which we have thought it well to premise is the fact that, although the main accusation against plaintiff's work is that the spigot end of the pipe was not shoved home into the bell of the pipe to which it had to be joined, yet every one of these pipes had to be laid under the eye of the inspector of the defendant, and the inspectors have testified they did see that the pipes were shoved home. The learned counsel for the defendant says that the inspector was not in the bottom of the trench, and could not see whether or not the pipe was thus shoved home; but, as one of these inspectors very well explains, the spigot end of the pipe is marked with lines which the inspector can see from the top of the trench, and from which he can tell whether the pipe has been shoved home or not. Let it be noted that no question is raised as to whether or not the inspectors did their duty, and did it faithfully and well. In a lesser degree, the same thing which is here said of the shoving home of the pipes may be said of the cementing of the joints. The latter work the inspectors did not have so good an opportunity to observe; but it was their duty to observe it as far as they could. They were present for the purpose of doing it, and did do it as far as they could, and they say that, as far as they could observe, it was well done. These inspectors made at the termination of each day's work a minute report of the day's work.

Another of the general features is the fact that 14 months after the first failure on Robertson street had been discovered, and 10 months exactly after it had been repaired, Mr. Earl, the general superintendent of the defendant board, wrote and gave to plaintiff the following letter:

"The Sewerage and Water Board,

"New Orleans, La., July 19, 1905.

"To Whom It may Concern:

"This is to certify that the bearer, Mr. T. J. Shea, has completed one large pipe sewer contract for the sewerage and water board, and is just about completing a second main sewer contract of very considerable magnitude and difficulty, upon which he has been engaged for about two years. Mr. Shea is a thoroughly experienced contractor on sewerage construction, who surrounds himself with an effective organization, and can, I believe, be relied upon to prosecute his work in a competent and business like manner. I believe that he has ample means to handle large contracts, and that he will not undertake or promise more than he can perform.

"[Signed] George G. Earl,  
"Superintendent Sewerage and Water Board, New Orleans."

No better evidence of the competency of plaintiff and his employes could be desired than this. They had had a thorough test. When this letter was written the second contract, embracing some five miles of sewer, was, in the words of the letter, "just about completing," and the other large contract had been completed, to the entire satisfaction of the defendant. If plaintiff's men were competent to do the work, and had theretofore done good work, the probability is that they continued to do good work, especially as they could have had no motive in not doing good work, since they were paid by the hour. So far as plaintiff himself is concerned, his reputation as a contractor was at stake, and it does not appear in what way he could have profited one cent by the pipes not being shoved home, or by the joints being made badly instead of well. No question can be or is raised with regard to the quality of the material furnished by him.

Another significant general feature is that, when the defendant board itself relaid the sewer at the places where it had sunk, it sank again, the trial judge says at all the places from two to six times. We have verified this statement sufficiently to be able to say that the pipe sank two and three times at most of the places and at one place had to be repaired six times because either of sinking or cracking. The circumstance that the work of plaintiff held firm generally, and that at the places where the pipe sank it sank again, and even repeatedly, when relaid, and even when relaid by the defendant board itself, would go to show that the first sinking was more probably to be attributed to the peculiar nature of the soil at these places than to any defectiveness of the work of plaintiff. In accounting for the repeated sinkings of the sewer when relaid, the de-

fendant has offered evidence to show—what is no doubt to a great extent true—that such repair work is more liable to fail than the original construction; one reason being that the bottom of the trench is not so firm as originally, because at the place where the pipe has sunk the water has been attracted and has saturated the soil, and also because the soil at the bottom of the trench has become more or less demoralized, or mucked, by being tramped upon during the original construction, and another reason being that a sewer when laid has to sink more or less in adjusting itself to its position of final rest, and that this inevitable movement is liable to break the joint between the new and the old work. But this feature of the situation is well known, and is met by providing in all repair work a secure and stable foundation. If this foundation itself eventually sinks, the cause must be sought for, we think, in some peculiarity of the soil at that particular place. Such soft places may occur in any part of the city, and were frequently met with in the construction of the sewers all over the city.

Another significant general feature of the case is that in the laying of the sewers in New Orleans it was expected that for want of a foundation the sewers would sink in places, no matter how excellently the work might be done, just as it sank on Robertson and Jourdan streets. It was thought better, or more economical, to take the risk of an occasional repair than to incur the, perhaps unnecessary, expense of putting a foundation under the entire line of sewers. This was wise economy; but it ought to go far towards counteracting any inference which might otherwise arise against plaintiff's work from the fact of the sewers having sunk in places.

And along this same line, as tending to counteract any injurious inference that might arise against plaintiff from the work having failed, may be mentioned the fact that, owing to the unstable condition of the soil in the bottom of the trench in many places, plaintiff found himself compelled to back-fill partially the trench before the cement by which the pipes were joined together had time to set. This method of construction exposed the work to failure; so much so that the specifications of the contract expressly provided against it. But the evidence shows that in the soft places this mode had to be followed, or else a foundation put in. It would have been easier for Shea to have done the work by putting in a foundation; but this foundation would have had to be paid for by the defendant board, and could be put in only by permission of its engineers. Shea says he demanded these foundations constantly. The engineers testify that no such requests were made to them. It is not denied, however, that they were made to the inspectors. Some requests for foundation must have been made of the engineers,

because in a number of places foundations were authorized by them. On the 16th of May, some time before the sewer had been constructed along most of the places where it afterwards failed, Shea wrote to the general superintendent of the defendant board a strong letter referring to his vain requests in the past for better foundations, and protesting against the laying of the sewers without foundations. In his reply to this letter the general superintendent of defendant did not challenge the statement made in the letter that requests had been made in vain in the past for foundations. The engineers of defendant knew of, and acquiesced in, the partial back-filling of the trench before the cement had had time to set. The evidence shows that the weight of the earth thus prematurely piled upon the sewer pipe had a tendency to cause the pipes to creep, or pull apart, to the extent of causing an opening in the joints.

A significant fact in connection with Palmyra street, where the sewer did not sink but developed longitudinal and more or less uniform cracks along its top, sides, and bottom, is that the mode of construction adopted on that street had never been used before and was not used afterwards, and that the uniformity of these cracks is most singular unless accounted for by the peculiarity of the mode of construction. The pipe was laid upon a rigid unyielding foundation, and a conduit built of concrete was placed longitudinally a few inches above it, which, the evidence shows, might have had the effect of concentrating upon it the weight of the back-filling.

Defendant, on the other hand, has offered in evidence a statement purporting to have been made from the records of its office to show that, whereas plaintiff, under his contract C, laid 23,747 feet of sewers of all sizes, there was laid under all the other contracts 36,590 feet of sewers 24 inches and over, and that the comparison between this work of other contractors, and that of plaintiff under contract C, stands as follows:

	By Other Contractors.	By Plaintiff.
Per cent. of sewers repaired.....	2.4	7.8
" " " " laid on foundation .....	10.1	29.6
Per cent. of sewers laid on foundation repaired.....	4.8	15.3
Per cent. of sewers laid on soil repaired .....	2.3	4.9
Per cent. of sewers laid on foundation which had to be repaired on account of cracked pipe.....	3.7	1.3
Per cent. of sewers laid on natural soil which had to be repaired on account of cracked pipe .....	1.6	1.5
Per cent. of sewers laid on foundation which had to be repaired on account of settlement.....	1.0	2.1
Per cent. of sewers laid on natural soil which had to be repaired on account of settlement	0.5	3.4

A comparative statement such as this goes for whatever it may be worth, but could be

very significant only if the mode of construction and the character of the soil had been the same in the execution of all the contracts; whereas, such was not the case. The mode of construction on Palmyra avenue was not tried elsewhere, and it is a conceded fact in the case that the condition of the soil in a street is no indication of what it will be in the next street, or even perhaps a few feet ahead in the same street. Robertson street may have been exceptionally provided with sand pockets and other dreaded soft places.

We come now to the inquiry into the cause of the failures.

#### Palmyra Street.

On Palmyra street 7,000 feet of 30-inch terra cotta pipe was laid. Some time after the work had been completed, longitudinal cracks, more or less uniform in character, were discovered along the top, sides, and bottom of the pipe. These were not all in one stretch, but at different places. They aggregated 848 feet.

The manner of the construction was this: The pipe was laid on a rigid, unyielding foundation consisting of thick wooden sills and boards, securely braced, upon which was placed a six-inch layer of shells. Above the pipe, along its entire length, six inches from the barrel part of the pipe and two inches from the bell part, and resting directly upon the tee, was laid a conduit of concrete, 18x18 inches in diameter.

When the trench was reopened for repair, it was found that for a distance of 125 feet the concrete conduit rested on the wooden pieces laid across the trench for bracing the sheeting, and that these crosspieces, or braces, rested directly upon the sewer pipe, and that for this entire stretch of 125 feet the pipe was cracked longitudinally along its four sides, in the manner already described.

So far as this stretch of 125 feet is concerned, there is no difference of opinion as to what was the cause of the cracks. It was the fact of the crosspieces resting upon the pipe, with the concrete conduit resting upon the crosspieces, whereby the weight of the back-filling was concentrated upon the pipe. The responsibility, then, for the cracks along this 125 feet, depends upon the responsibility for the braces being thus on the pipe and the conduit upon the braces. Plaintiff's foreman, Mulcahey, and defendant's inspector, McHugh, testify positively that the work was done in that manner in obedience to the express instructions of Mr. Eastwood, the engineer in charge. In the brief for defendant it is said that Engineers Eastwood and Fowler deny this. We have not found where Fowler testified on the subject.

Defendant attributed the cracks at the other places to the failure of plaintiff's workmen to tamp and pack the earth under the haunches, or lower sides, of the pipe, up to

its spring line, or middle, so as to afford it proper support; and also to the failure of plaintiff's workmen to make the joints properly, so that the earth under the pipe, which should have served as a support to it, was washed into it. Defendant further contends that this defective condition was made worse by the presence of stumps, roots, and other pieces of wood in the back-filling, which foreign substances came in contact with the pipe and had the effect of producing an uneven strain. Plaintiff, as already stated, attributed them to the peculiarity of the construction—the fragile terra cotta pipe placed between the rigid, unyielding foundation and the concrete conduit with its load of back-filling—between the jaws of a vise, as it were.

We are not informed whether longitudinal cracks of this kind were found at any other places in the more than 175 miles of sewers that were laid in New Orleans except on Broadway street, where the sewer had been laid with a concrete duct above it as on Palmyra.

On Robertson street, between Touro and Frenchman, at station 47+3 to station 57+7, where there was a foundation under the pipe and a piece of wood was resting along the top of pipes 13 to 17, and the cross-brace rested upon this piece of wood, the said pipes 13 and 17, under this piece of wood, were found to have cracked in the same longitudinal fashion.

Mayor B. M. Harrod testified as follows:

"Q. Suppose the concrete duct was separated from the bell of the pipe by only 2 inches of soft new earth, and then had to support 12 feet of earth?"

"A. The pressure of the earth above would be transmitted to the earth below, so that the pressure would be transmitted to the pipe. It would be a mistake to place it within 2 inches of the pipe."

Mr. Ludlow testified as follows:

"Q. What is the effect of introducing into the back-filling foreign material of substances at or near the pipe?"

"A. I think the danger would be of concentrating the load at some particular point of the pipe, instead of having it uniformly distributed."

"Q. Then it is not true that it is not good, proper workmanship or design to permit, in the back-filling of the trench, the introduction of material that will concentrate the load on any part of the pipe?"

"A. I think it is objectionable; yes, sir."

"Q. It is objectionable?"

"A. Yes, sir."

"Q. It is liable, in your opinion, to bring disaster to that sewer?"

"A. It will be apt to, it may or may not, it will be apt to."

Mayor Harrod and Mr. Ludlow were called by defendant. The expert of plaintiff, Mr. Potter, testified to the same effect. The other experts of defendant testified that a thin cushion of earth between the concrete conduit and the pipe would suffice to protect the pipe, that it would distribute the pressure and dissipate it in the surrounding earth, that for this purpose a cushion of two

inches would be ample, and that a cushion of half an inch would answer just as well. One of these experts went so far as to say that a cushion of earth as thin as a sheet of paper would suffice. The opinion expressed by Mayor Harrod accords best with our sense of the matter.

We cannot say that the earth was not properly tamped or packed under the haunches of the pipe. The foreman who was in charge of the work for plaintiff testifies that it was, and defendant has offered no proof to the contrary. The work was done under the supervision of defendant's inspectors. If we are to find that plaintiff's work was defective in the respect in question, we shall have to do it purely as a matter of inference from the fact that the pipe was cracked. This inference would be legitimate if the cracks could be explained on no other hypothesis; but they can be and are fully explained on the hypothesis suggested by plaintiff.

The testimony of the witness Godberry to the effect that when the trench was reopened for repair a quantity of roots and pieces of stumps were found over and around the pipe; and the testimony of the witness McConnell that "the excavation around the pipe was full of roots," does not necessarily contradict the testimony of plaintiff's foreman to the effect that the earth was carefully tamped and packed under the haunches of the pipe. It was on Villere street, and not on Palmyra street, that "a piece of timber 2x8x4 feet was found resting on the pipe." Defendant would hardly contend that in back-filling the trench it was incumbent on the contractor to remove from the back-filling material every piece of root or stump that might be in it. While the expert evidence shows that pieces of wood, or other unyielding or incompressible material, resting on the pipe, might have the effect of causing a crack by concentrating the weight of the back-filling and inducing an unbalanced strain, it also shows that any cracks thus produced would likely have been irregular, or star-shaped, or radial, while those whose cause is being sought after were singularly regular.

We have concluded that the cracks were due to the pressure of the duct over the pipe, and that the responsibility lies with defendant.

Defendant's learned counsel argues that, inasmuch as both the foundation and the conduit were uniform throughout, the cracks would have extended the entire length of the sewer if they had been caused by the conduit, on the principle that like cause produces like effect. This argument would be unanswerable if the foundation and the conduit were the sole conditions; but there are others. There is the soil under the haunches of the pipe which, although it may have received an equal amount of tamping, yet from its character may have offered more



support in some places than in others. There is the pipe, which may have been stronger in some places than others. There is the back-filling, whose weight may have been more directly concentrated upon the conduit in some places than in others.

The suggestion that on Villere street the pipe did not crack, although a duct was laid above it as on Palmyra, would have force if on Villere, as on Palmyra, the pipe had been laid upon an unyielding foundation; but it was laid upon the natural soil, into which it could sink under the pressure. On Palmyra, after whatever resistance the soil under the haunches of the pipe could offer had been overcome, the pipe found itself between two unyielding or incompressible bodies, and had either to sustain the weight or be crushed.

The learned judge a quo did not believe, nor do we believe, the testimony of the defendant's witness Hardy as to joints having been made of clay.

We discover no great significance in the fact, if it be a fact, that, when the broken pipe was taken out and a new pipe put in, a few inches more of pipe was put in than had been taken out; going to show that in plaintiff's work the pipes had not been shoved home. It is not suggested how this could have contributed to the cracking of the pipe. Whatever interstices were thus left were filled by the cement with which the joints were made. Defendant's witness who testifies to this additional length of pipe having had to be put in somewhat overshoots the mark when he makes out that every joint fell short about an inch of being shoved home. The learned counsel for defendant does not himself seem to have had great confidence in the statements of this witness on this subject, as he did not refer the court to the more exaggerated of these statements.

#### Jourdan Avenue.

On Jourdan avenue the pipe sank in two places, both of them between St. Claude and Rampart streets. At one of these places—the one, between stations 1+35 & 1+41—the sinking is attributed by plaintiff to the fact that at that place the wooden foundation was dispensed with for a space of 6 feet, and it is attributed by defendant to a leak which it is said permitted the earth under and around the pipe to be washed into the pipe. The proof is that this leak ran clear water, and that it was caulked with oakum, and nothing shows that it afterwards reappeared. On the other hand, the absence of foundation is an obvious cause of the sinking of the pipe. Defendant criticises the testimony going to show that the leaving out of this foundation was by order of the engineers; but this testimony was not contradicted by the two engineers in question, though they testified minutely upon other points. We conclude that responsibility for this failure cannot be laid on plaintiff.

At the other place, at about station 2+45, the conditions were normal. The bottom of the trench was of hard blue clay, affording a good foundation, and no engineering error can possibly be assigned; whereas, on the other hand, it is shown that shortly after the laying of the pipe plaintiff piled up a quantity of earth at that spot, and that this may well have caused the subsidence. For the latter failure plaintiff is, we think, responsible.

#### Robertson Street.

The sewer sank on Robertson street at eight places. These are known in the record as: Trench AA and trench A, between Touro and Frenchman streets; trench B and trench C, between Frenchman street and Elysian Fields; trench D, between Elysian Fields and Marigny; trench upper E and trench lower E, on each side of the manhole at the intersection of Marigny street; and, finally, trench between Mandeville and Spain.

We shall take up and consider these several failures in regular order.

Trench AA: This trench began 143 feet from the manhole at corner of Touro and Robertson, and extended 43 feet towards Frenchman street. On original construction, when the sewer had been completed to the manhole at corner Frenchman street, Barangue, the inspector, on looking back into the sewer from this manhole, discovered that the sewer had sunk. This was on or about April 16, 1904. As to what had caused this failure, there is not one word of evidence in the record, except the conflicting evidence as to whether the soil at the bottom of the trench had been of such a character as to have afforded the pipe sufficient support if the work had been done well. If we take the report of the inspector, Barangue, we find the following:

"Trench open from station 1+00 to 1+90 [which means beginning 100 feet from the manhole at Touro street and extending 90 feet towards Frenchman street, which would cover the stretch now known as trench AA]. Bottom beginning to show traces of quicksand and water. And indications are will have to use plank bottom from now on."

The same report shows that along this stretch only 17 feet of sewer was laid in one day of 10 hours, and only 25 on the next day, also 10 hours; whereas, on the following day of 10 hours, when pipe was being laid on a bottom which, according to the same report, was of "hard blue clay," 41 feet was laid. This would go to show that along this stretch of quicksand and water the pipe was being laid with great difficulty.

On the other hand, defendant's learned counsel argues that second sheeting and a sandy or soft bottom of trench go hand in hand, and that no second sheeting was found to be necessary on Robertson street, that the first sheeting stops several feet short of the bottom of the trench, and leaves the sides of the trench unsupported from there down

to the bottom, and that these sides, thus unsupported, would inevitably have caved in, if the bottom had been so sandy or soft as not to have been firm enough to support the pipe.

Generally speaking, what is here said is true; but the evidence shows that the thickness of a few inches of clay will suffice to keep down the sand and water and afford a foundation, and that where such a condition was encountered the bottom would continue good until the cradle for the body of the pipe was being made by digging further down, or even until the "bell hole," or cradle for the bell part of the pipe, was being dug, when the stratum of clay would be punctured, and the sand and water would come out. "When I would dig my shovel down," says the colored pipe layer Gordon, "the water would come up just the same as stabbing a hog."

It is also a fact that, in places where the bottom was so bad that the engineers authorized a foundation to be used, the sides of the trench remained in position without second sheeting until the time came to lay the foundation, when second sheeting was put in.

This first failure was repaired by Shea, June 24-September 19, 1904. This time a foundation was put in; but some time afterwards the discovery was made that both foundation and pipe had gone down, the foundation 32 inches further down than the pipe, and that even the upright sheeting had gone down. This second failure would go to confirm the conclusion that the first had been attributable to the insecure character of the soil, and not to bad workmanship.

But defendant contends that this second failure at trench AA was due to bad workmanship, and, in proof thereof, points to the fact that, when the trench was opened the second time, and the repair work was exposed to view, a piece of timber 6x6 was found jammed between the sheeting and the sewer at pipe 20, and another at pipe 13; and that another piece 2x6x16 feet long was found lying along the top of the sewer, over pipes 13 to 19, and was braced down by a horizontal piece 4x6 lying crosswise of it, and by two uprights; and that a brickbat was found jammed between the sheeting and pipe 11; and three pieces of sheeting were found pressed against pipe 12; and that pipes 13 to 17 were cracked on one side.

All of these irregularities, except the presence of the piece of board 2x6x16 lying on the top of pipes 13 to 19, may have been the result of the disturbance and displacement caused by the sinking of the work. We think it is much more probable that this second failure was caused by instability of the soil at this place than by the piece of timber on the top of the pipe.

The presence of the piece of board along the top of the pipe may have caused, and, in fact, probably did cause, the crack on the side of pipes 13 to 17; but it is not shown that this crack contributed to the sinking of

the work, which was the main or serious, damage.

So much for trench AA. Trench A was in the same square between Touro and Frenchman. It began 265 feet from Touro and extended 83 feet in the direction of Frenchman; that is to say, it was just before reaching the manhole at corner of Robertson and Frenchman. On arriving at this place, in the course of the original construction, Shea had refused to proceed with the work unless he was allowed to put in a foundation, and one of the engineers of the defendant had come and examined the spot and decided that a foundation was not necessary, and had ordered the work to go on.

For the 10 feet of trench opened April 8th, being the 10 feet beyond the 300 feet point from Touro street, this being the place where the sewer sank, the report of Barangue, the inspector, reads as follows:

"Bottom showing slight traces of quicksand and water. Bailing out same satisfactorily, and think will have to use planking bottom, if conditions change for the worse. Am nearing the corner Frenchman and indications show quicksand traces."

The report of the next day, April 9th, reads as follows:

"Considerable seepage occasioning much delay on account of bailing out by buckets. Bottom good so far."

The 10th was Sunday. On the 11th no report of bottom. On the 12th report reads as follows:

"Considerable natural seepage. Compelled to use hand pump. Bottom not as bad as expected."

Report of 13th as follows:

"Considerable difficulty experienced to-day in laying pipe on account of watery bottom. Quicksand bottom just below grade and water boiling up compelling use of hand pump. Otherwise work progressing nicely."

Report of next day shows good bottom of blue clay.

On the 13th, when there was "considerable difficulty experienced in laying pipe on account of water bottom and quicksand bottom just below grade, and water boiling," there was laid 31 feet of pipe, from station 3+07 to station 3+38; that is to say, within the stretch now known as trench A.

We conclude that the cause of the failure at this place was the unstable character of the soil, and not any bad work by plaintiff.

To prove the bad workmanship at this trench A and at trenches B and C, defendant has introduced in evidence pieces of pipe purporting to be pieces of the pipe taken out of the trenches when the pipe was being repaired. These samples were offered for the double purpose of showing that the spigot end of the pipes had not been shoved home into the bell of the pipes they connected with, and that the joints had not been properly cemented. The former purpose was express-

ly abandoned by counsel for defendant, who, towards the end of the trial, said:

By Mr. Villere:

"Q. Yes, yes. Now, Mr. Potter, about this gasket and other things—I am going to stop right there, because, in my opinion, it is not important, as my theory really is the same as yours. I believe that all those pipes were originally shoved home. I believe that they subsequently pulled out, and then I believe that then the space was filled in with cement. That is your opinion, isn't it?

"A. Unquestionably.

"Q. Yes?

"A. And that that pulling out took place at various times."

It is attempted to be shown by one of the samples that one of the joints was not cemented at all. Such a thing as that the joints were imperfectly cemented is entirely possible; but such a thing as that one of the joints was not cemented at all is so utterly improbable that we should believe it only if the evidence in that regard was so conclusive as to exclude all possibility of doubt. How could such a thing be? These pipes are 30 inches in diameter, and weigh 360 pounds. The putting in of each one of them is a large piece of work. It requires the co-operation of several men. The foreman and the inspector are looking on. The cementing of the joint is one of the main parts of the work. Only inadvertence could account for its not being done, and, under the circumstances just detailed, such inadvertence would seem to be next to impossible. If the samples produced by the defendant are really pieces of the sewer that was laid by Shea and afterwards taken out by the defendant board, it is unfortunate for defendant that they were not taken out contradictorily with Shea, as was done in the case of the samples of earth. There would then have been no doubt as to their genuineness. We agree with the learned trial judge that two of them are pretty conclusively shown to be spurious; and that the others, if genuine, show nothing more than that the pipes pulled, or crept, apart after having been laid—a thing which the evidence shows is likely to be brought about by the trench being back-filled before the cement in the joints has had time to set firmly.

Passing to trenches B and C. These trenches were between Frenchman and Elysian Fields streets. The sewer sank in trench B between stations 1+70. In trench C it was between station 2+77 to station 2+98. Eventually the intervening space between the two trenches was dug, and the two trenches were connected and made one, extending from station 0+83 to station 3+; that is to say, it began 83 feet from the manhole at the intersection of Frenchman and Robertson streets and extended to a point 300 feet from that manhole towards the manhole at the intersection of Robertson and Elysian Fields streets.

We find no evidence specially relating to the character of the soil at the bottom of this trench, except the daily report of Barangue, the inspector. We find from these re-

ports that from station 0+69 to station 2+27—that is to say, beginning 49 feet before reaching the place where the sewer failed at trench B and extending 57 feet beyond that point—the soil at the bottom of the trench was hard blue clay affording a good foundation for the sewer.

We find no reason for holding that the failure at trench B was from the instability of the soil at the bottom of the trench, and we must therefore attribute it to a defect of some kind in the work of plaintiff.

From these same reports of Barangue we find that the soil was equally good, hard blue clay, along the bottom of trench C, except between stations 2+60 and 3+20, as to which the report reads:

"Looks soft, and will have to double sheet and plank bottom."

At this bad spot an artificial foundation was put under the sewer, and when the trench was reopened for repair no sinking was found to have taken place along where this foundation had been laid. Some of the joints, however, were found to have been imperfectly made.

Upon the evidence as a whole, we think the greater probability is that the failure at this point was not due to lack of foundation.

Plaintiff's learned counsel says a sewer must settle more or less in adjusting itself to its position of final rest, and that uniformity in this settlement is a prime object, as, otherwise, the pipe runs the risk of disruption by an uneven settlement, and that therefore, whenever an artificial foundation is provided, it ought to extend, like the pipe itself, from manhole to manhole, and not be put in by dabs here and there for bridging or getting across the places which prove too soft to admit of the pipe being laid on the natural soil. This is in a large measure true, but not to the extent claimed. In the 200 miles of sewer laid by the defendant board, this mode of construction was followed successfully in any number of such soft spots. This, and the very fact that it was persisted in, would go to show that with proper precautions it could be safely followed. We note, also, that the pipe was laid at this trench C after the trench had been flooded for two days by water coming from the manhole at Frenchman street, for the presence of which water the defendant board was responsible; but the evidence does not show that this water destroyed or impaired the stability of the bottom of the trench where a foundation was not used, or that Shea asked to be allowed to extend the artificial foundation any further than was done.

We find, on the other hand, that at station 2+90, within the stretch of this trench and right over the spot where the pipe sank, Shea piled earth over the sewer to the height of nine feet above the level of the street; and the evidence goes to show that the plac-

ing of this additional weight over the newly laid sewer might well have had the effect of causing it to sink.

Coming to trench D, all that need be said of it is that it is the trench that failed so repeatedly, six or more times, when repaired by the defendant board itself. There must have been something in the character of the soil along this stretch which made failure inevitable unless extraordinary precautions in the way of providing a stable foundation were taken; and before this trench D was reached Shea had already, by his letter of May 16th, protested against being made to lay sewers on soil such as he occasionally encountered on this Robertson street, unless an adequate foundation was provided.

Coming to trench upper E and lower E, we find that there can be no serious dispute but that the cause of the trouble was the sinking of the manhole and its taking the pipe down with it. What caused the manhole to sink is the question. No defect of construction is shown in the manhole. On the other hand, the soil was to all appearances good at the spot over which it was built. Defendant's learned counsel insists that there must have been defects in the neighboring pipe joints which permitted the soil to enter the sewer and thus gradually draw away the soil from under the manhole. We do not think plaintiff can be condemned on an abstract reasoning like this. If he did his work well, he is not responsible for consequences. If the soil on which these sewers were laid was not known to be unreliable, the fact itself of the failure would prove the work to have been defective; but this known unreliability of the soil offers an explanation for this otherwise apparently inexplicable failure, and we have concluded to adopt it. The testimony of one of defendant's engineers that, unless a manhole sinks within a few days of its construction, it does not sink thereafter as the result of the peculiar character of the soil under it, is contrary to the common experience of mankind with reference to heavy constructions upon alluvial soil. These manholes are of brick masonry, and would inevitably sink without a foundation, and that one of them should sink, and thereafter continue to sink, even with its foundation, would be nothing to be wondered at.

Trench between Mandeville and Spain: We are not referred, in the remarkably full, and, we may add, masterly, brief of the counsel for defendant, to anything upon which this court could found itself for reversing the judgment of the lower court in the matter of this trench.

This concludes our discussion of the details of the failures. We will add that, when the trenches were reopened for repairs, samples of the soil were taken and were preserved in glass jars. These samples were submitted to experts for an opinion as to

whether the material was of sufficient consistency to support the sewer unaided by an artificial foundation. This was after the earth had had time to settle in the jars. All this opinion evidence, and the opinion evidence generally as to the causes of the failures, has impressed this court, as it did the learned trial judge. Except that it has afforded some general scientific information as to which there is no difference of opinion, it has not helped the court one particle; and, in the present connection, we might as well dispose here of the contention that the judgment of the defendant's general superintendent is conclusive as to the cause of the failure of the sewers. That contention is based upon the following clauses of the contract:

"Sec. 223. The sewerage and water board shall have the right to appoint its general superintendent or engineers, also assistant engineers and such other employes as are necessary to the proper conduct and inspection of the work and all materials. All explanations or directions necessary for carrying out and completing satisfactorily the different descriptions of work contemplated and provided for under this contract will be given by said engineer, and the general superintendent will finally decide all matters of dispute involving the character of the work, its quantity, and the compensation therefor."

"Sec. 264. It is further agreed that when, in the opinion of the engineer, this contract shall be completely performed on the part of the contractor, the engineer will proceed to take final measurements and estimates of the cost of the work, and will render a certificate of the same to the sewerage and water board, who will, except for cause herein specified, pay the contractor, on or before the fifteenth day of the following month, the balance which shall be due. \* \* \*"

There can be no question but that a clause of this kind is valid and must be enforced as written. *Martinsburg & Potomac R. R. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Ogden et al. v. United States*, 60 Fed. 725, 9 C. C. A. 251; *Kihlberg v. U. S.*, 97 U. S. 398, 24 L. Ed. 1106; *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Railroad Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; *Railroad Co. v. Central Lumber Co.*, 95 Tenn. 544, 32 S. W. 635; *Hot Springs Ry. Co. v. Maher*, 48 Ark. 522, 3 S. W. 639; *Guild v. Andrews*, 137 Fed. 369, 70 C. C. A. 49.

We do not understand, however, that plaintiff is refusing to let the defendant's engineer pass upon the character of his work in so far as the character of his work is known, but that he only refuses to admit that the defendant's engineer can be allowed to attribute to his work a character it does not possess. For instance, to establish, by his ipse dixit, that cement was not put into certain joints, or that certain pipes were not shoved home, etc., etc., when, in point of fact, cement was put in the said joints and the said pipes were shoved home or that the

said engineer can decide that a certain failure was caused by a certain leak which was 50 feet away, and had nothing to do with the failure, and that such judgment shall be conclusive. As we understand those clauses, they mean no more than that the engineer is to be the judge of the manner in which the work should be done in order that it should be in compliance with the specifications, and is to have the right to condemn all work not coming up to that standard. The moment it is established that the cause of a failure was not defective workmanship, but instability of soil, the judgment of defendant's general superintendent, if contrary to the proven facts, ceases to have any authority.

#### Proof of Plaintiff's Demand.

Coming to the consideration of the items which compose the demand of plaintiff, and of the character of evidence and degree of proof which ought to be required of plaintiff, we find that defendant would hold plaintiff to the same strictness of proof as if the case involved but one item and were a mere ordinary case of a plaintiff suing on an open account; but, manifestly, that view cannot be accepted. On that theory the trial of the case, which occupied the lower court some eight months, 128 actual trial days, would have occupied it 8 years. The plaintiff, the members of the defendant board, the judge, the lawyers, and the witnesses would all have had time to die before the evidence could have been taken. As matters stand, the case has monopolized the time of the courts far beyond all reasonable limits. By express terms of the contract the defendant was entitled to have its inspector keep an account of every hour of labor and every piece of material that went into the work, and such an account was kept, and a daily report made of it to defendant, and defendant has these reports in its possession. By means of these reports and of the other data in its office, the defendant could have put its finger upon every cent of overcharge, if any, contained in the exhibits presented by plaintiff. These exhibits are models of clearness and precision. They are easily intelligible even to the nonexpert. They show exactly what every cent is charged for. As a matter of fact, the engineer of plaintiff and the engineers of the defendant board went over these exhibits together and agreed as to most of the items, and have on the witness stand given the reasons why they disagreed as to the others. With respect to the admissibility in evidence of summaries, or compilations, such as these exhibits, the law is stated by Wigmore, as follows:

"Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements—as, the net balance result from a year's vouchers of a treasurer or a year's accounts in a bank ledger—it is obvious that it would often be practically out of the question to apply to the present principle by requiring the produc-

tion of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net results. Such a practice is well established to be proper. Most courts require, as a condition that the mass thus summarily testified to shall, if the occasion seems to require it, be placed at hand in the court, or at least be made accessible to the opposing party in order that the material for cross-examination may be available." Wigmore, Ev. par. 1230, p. 1473.

See, also, Greenleaf, Ev. (18th Ed.) vol. 1, p. 690; State v. Mathis, 106 La. 263, 30 South. 834.

The requirement that the "mass" or data from which such a compilation has been made should be offered in evidence has been complied with in this case. The said data consist of the reports of plaintiff's foremen on the work, of the notes and calculations of measurements made by the engineer of plaintiff, and of the sheets of defendant's monthly estimates. Only in a few unimportant instances are the compilations not based upon the data in the record. Of these foremen's reports alone there are 2,730. Of the estimates there are 47 large sheets covered with small figures, the labor of going through which would be simply stupendous. Of the other data, there is a large number of bound volumes. Of course, the rule is that a litigant's books are not admissible in evidence in his favor; but that rule is not without its exceptions. 16 Cyc. 926; 17 Cyc. 366, 391, 393, 755; Cent. Dig. vol. 20, pp. 2018-2034; Wigmore, vol. 2, p. 1517; Louisville & Nashville R. R. v. Daniels, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190. All these reports, etc., were made at a time unsuspecting, and for the purpose of keeping a true and correct record. We think that, under the peculiar circumstances of this case, and in view of the practical impossibility of trying the case in any other way, the court can accept the said exhibits as correct, except as to the items specially objected to; and the trial court is, accordingly, directed so to do. The items specially objected to, we now proceed to consider and pass on, in so far as the condition of the record will permit.

The principal of these objections is that as to the measurement of the work, or, in other words, as to its "quantity, and the compensation therefor." We do not well understand how plaintiff can raise any contention in that connection when section 223 of the contract, hereinabove transcribed, expressly provides that the general superintendent of the defendant board "shall finally decide all matters of dispute involving the character of the work, its quantity, and the compensation therefor." The authorities hereinabove quoted show that such a clause as this in a contract is binding, and that a decision under it is conclusive, in the ab-

sence of a showing that it was made in fraud or bad faith; and the plaintiff has not made such a showing, but has contented himself with setting up the measurements and computations made by his engineer against those made by the engineer of the defendant board. We have no hesitation whatever in holding that, under the plain terms of the contract, the measurements made by the defendant board must prevail. We shall notice, nevertheless, some specific cases discussed in the briefs.

Concrete at canal crossing: One of defendant's engineers testifies that the allowances made under this head by the estimate of the defendant board are founded upon measurements made by himself, and are correct. Against this, plaintiff had offered no evidence.

Measurements of material in foundation under sewer: For measuring the length of the foundation under the sewer, plaintiff wishes to measure from center of manhole to center of manhole. In this way plaintiff would include in the foundation under the sewer the foundation under the manhole. This foundation under the manhole is seven feet. Plaintiff has already been paid for it as part of the manhole. So that for this seven feet plaintiff would get paid twice if his mode of computation were adopted.

Depth of cut in trench on Burgundy street, between Renes and Forstall: The estimate of the defendant board is based upon an actual measurement made on the work, and is therefore more reliable than that of plaintiff's engineer, which is based on profiles made two years before from merely approximate measurements.

Extra brickwork in manholes: A thickness of eight inches is called for by the plans and specifications, and the actual thickness was verified by defendant's engineer.

Computation of extra excavation for manhole: Defendant's mode of computation, as explained in volume 8 of Ev. pp. 1458 and 1459, appears to us to be entirely reasonable. Plaintiff's mode of computation is not explained.

Depth of trench on Palmyra street and average cut across St. Roch avenue. Here, again, plaintiff's engineer based himself on the profile maps made from approximate surveys dating two years before the work was begun; whereas, for making the same computation, defendant's engineer based himself upon levels taken at the time the work was being done and at every 16 feet.

Computation of depth of manholes: We agree with defendant that the depth of the manhole is to be computed from the top, and not from the bottom, of the plank foundation. Section 14 of the specifications expressly so provides.

Capping and decking: In other words, should the lumber in the foundation of sewer on Palmyra street be charged at \$18

per 1,000, or at \$30. The facts in that connection are fully stated in the opinion of the learned judge a quo, and need not be repeated here. For the reasons there given, we are of the opinion that this lumber should be charged at the higher price, and such higher price is allowed.

Second sheeting left in trench: We agree with defendant that this lumber should be classed as "sheeting and bracing," under section 52 of specifications, and not as "foundation lumber."

Top sheeting in trench from station 15 to Broad street: This sheeting was to overcome a difficulty met with by plaintiff in the course of his work, the expense of which therefore clearly falls upon him.

Drop pipes in manholes: The contract expressly provides that the cost of these drop pipes is to be included in the lump price paid for the manhole. Plaintiff, therefore, is not entitled to charge extra for them.

Manholes at Lafayette and Villere streets and at Robertson and Frenchman: Plaintiff is, of course, not entitled to be paid for these manholes, which were not constructed by him, but by another contractor under another contract.

Five yards of gravel on Robertson, between Marigny and Mandeville: No proof that such gravel was put in. The claim for it is disallowed.

Standpipes on Robertson and Villere streets: Allowed to the amount shown by comparative statement to have been heretofore allowed by estimate of defendant board.

We now proceed to take up and consider, in regular order, item by item, Plaintiff's Exhibits B to P, which set forth in detail the items for the so-called "extra work."

#### Exhibit B.

April 11. Terra cotta pipe..... \$2.83

Disallowed, under sections 100 and 101.

April 12. Draining Sisters' street..... \$55.64

Disallowed. This pond was there when the letting of the contract was advertised, and was one of the difficulties to be overcome by the contractor.

June 1-6. Men and machine kept in idleness through fault of defendant board..... \$539.48

Allowed. We think the defendant was at fault, and that the evidence shows the account to be correct.

June 9, 10. Change radius of curve, Villere and Sisters' streets ..... \$213.06

Allowed for \$50.23. Balance disallowed on testimony of Burns that machine and men went on working and no time was lost. Shea does not say that he was present on work and saw men idle.

June 20. Material and labor, making center of crown, brick sewer. Sisters' and Marais streets ..... \$7.47

Allowed. The form had to be remodeled, and the cost was as here stated.

June 27. Culvert of Villere and Bartholomew ..... \$21.07

Allowed for \$10.53, on testimony of Smythe. Disallowed as to remainder.

June 27. Culverts, Villere and Independence ..... \$23.55  
Villere and Louisa ..... \$59.83

Allowed for \$16.77 and \$20.22 on testimony of Smythe and Crotts. Disallowed as to remainder.

Aug. 25. Repairs to Convent road.... \$23.92

Disallowed. Not ordered by defendant board; merely for convenience of plaintiff.

Oct. 11. Culvert, Villere and Poland... \$9.88

Allowed.

Oct. 23-30. Cleaning out and repairing settlement cracks, Villere between Louisa and Piety..... \$110.69  
Same ..... \$107.43

Allowed. The work became necessary without the fault of plaintiff, and he was ordered to do it. The amount is proved.

Nov. 14. Pointing and plastering sewer ..... \$549.52

Disallowed. This work seems to have been made necessary by the condition in which sewers were left. The projections of cement, and the cement dropped by the workmen, not having been removed while fresh. The expense falls upon the contractor, under sections 135, 254, and 256 of the contract, requiring the brickwork to be left smooth.

April 14-27. Lumber used in forms for concrete ..... \$31.36

Disallowed. Lumber used in making the forms for the masonry work is necessarily included in the price paid for the masonry work.

April 27. Forty and eight-tenths cubic yards back-filling and rolled steel and corrugated bars, \$12.45, \$10.08, and \$20.40 ..... \$42.93

Allowed; but must be disallowed if already credited to plaintiff in general estimate—a fact which this court has been unable to verify, but which the lower court will have to verify before disposing finally of this item.

#### Exhibit D.

April 17, 19. Bottom in foundation to manhole, Rocheblave and Palmyra streets.. \$145.69

Allowed for \$80.24. According to the testimony of Godberry, the inspector, the work of the 17th was original work under the contract, and not extra work. Hence the \$103.70 charged for that day cannot be allowed. That sum being deducted, the amount of

\$80.24, admitted by defendant, is even more than the amount due.

Nov. 10, 11. Diverting drainage, Hagan Avenue Canal..... \$22.58

Allowed. This amount was expended in diverting water brought upon the work of plaintiff as the result of other work which was let to other contractors after the contract with plaintiff had been entered into.

Nov. 23, 24. Crossing Hagan avenue. Setting forms for concrete to protect sewer and conduits..... \$ 9.20  
Same ..... \$14.58

Dec. 5. Same ..... \$14.15

Feby. 27. Moving forms concrete Palmyra and Carrollton avenue ..... \$12.62

Disallowed. The price for concrete work included the making and placing of the forms necessary for doing the work.

We come now to a series of items falling under general title of "Irwin water." Water from the Irwin sewers came upon the works of plaintiff and caused him expenses he would not otherwise have had. We think the defendant board is clearly responsible for these expenses, and it practically acknowledged it by agreeing to pay plaintiff at the rate of \$10 per day not to exceed 100 days for the expenses of pumping this water. Defendant relies upon this agreement as a compromise, and says that the agreement was to accept \$1,000 in full of all claims. We do not so understand the compromise. In the first place, it related exclusively to expenses incurred for pumping, and it looked to the future, and did not cover expenses incurred in the past. It specified a separate payment for expenses incurred in the past for watchmen, but said nothing about expenses otherwise incurred. We shall allow the claims bearing date before the compromise in so far as proved, and also, in so far as proved, those subsequent to the compromise for expenses other than for pumping, and shall disallow all the others, but in lieu thereof shall allow plaintiff \$1,000, or \$10 a day for 100 days, for pumping.

Dec. 8, 23. Irwin water. Extra expenses pumping, etc..... \$635.22

Allowed, as previous to compromise.

Feby. 7. Irwin water. Labor transferring and placing pump on Palmyra St., to relieve sewer of water discharged by sewer of contract L.... \$98.96

Disallowed, as included in compromise.

Mch. 8, 10, 30. Irwin water. Material, pipe and fittings, used for discharge of steam pump, Palmyra and Rocheblave streets on account of excess water from contract L. \$82.11

Disallowed, as included in compromise.

March 31. Irwin water. To expense of pump and boiler, etc. \$280.00

Disallowed, as included in compromise.

March 8. Irwin water. To expense cleaning out sewer, etc. \$79.07

Allowed; the defendant board having been responsible for the presence of the water which necessitated this expense, and the compromise having had reference only to pumping, and not to expenses for other work.

April 30, 6. Irwin water. To operating engine, etc. \$300.00

Disallowed, as included in compromise.

May 31. Irwin water. Pumping water, etc. \$310.00

Disallowed, as included in compromise.

June 30. Irwin water. Operating pump, etc. \$145.00

June 30. Irwin water. Operating pump, etc. \$140.00

Both these items disallowed, as included in compromise.

March 8. Labor removing sheeting, etc. \$12.77

Allowed. The charge is not for the sheeting, but for cutting it in obedience to orders. This cutting plaintiff was not by his contract bound to do.

April 7. Labor and material, etc. \$15.64

Disallowed on testimony of McBridge and Crotts.

April 13. Repairs to curbing, etc. \$165.78

Allowed. Defendant allows for the materials used in this work, but not for the labor. We think that if sections 217 and 218 have no application to the lumber, neither have they to the labor.

May 29. Cutting off sheeting, etc. \$10.46

Allowed. The bill is not for the sheeting, but for cutting it off—a work plaintiff was not bound to do under his contract.

June 12. Repairs to overhead wires. \$7.02

Disallowed. This was one of the difficulties plaintiff had to overcome in his work.

July 1-11. Bridge crossing Broad street \$104.88

Allowed for \$58.75, unless already credited. Disallowed for balance under section 196.

July 31. Culvert, Palmyra, etc. \$8.58

Disallowed, on testimony of Crotts.

Nov. 27-Dec. 8. Curbing, etc. \$35.62

Allowed. If section 217 did not apply to materials, it did not apply to labor.

#### Exhibit E.

Aug. 3, 1903. Moving steam pump... \$112.81

Disallowed. The pumping is not shown to have been by order of the defendant board, nor is the defendant board shown to have had anything to do with it. The necessity for it seems to have resulted from a certain sluice gate having been left shut, for which, from the testimony of Anderson, plaintiff himself seems to have been responsible. The work is shown to have been a part of the work of cleaning the sewer, the expense of which falls upon plaintiff. Plaintiff might have testified on the subject and did not.

Sept. 11-Oct. 31. Materials and labor St. Bernard Ave. brick sewer. \$ 66.42  
Pointing, finishing, etc. \$390.03

Nov. 13-29. Plastering and pointing \$240.07

Dec. 2-9. Plastering and pointing \$ 65.20

Disallowed. This work seems to have been made necessary by the condition in which the sewers were left, the projections of cement, and the cement dropped by the workmen not having been removed while fresh. The expense falls therefore upon plaintiff, under sections 135, 254, and 256 of the specifications, which require the brickwork to be left smooth.

April 6. Resetting stub. \$33.75

Allowed for \$9.78, on Seymour's testimony. Disallowed for balance.

Sept. 12-19. Material and labor, etc. \$ 58.36

Sept. 29. Labor, etc. \$141.91

Allowed. This work seems to have been unavoidable.

It was done and should be paid for.

Oct. 13. Footbridge, etc. \$513.11

Allowed. If, as contended, the plaintiff has been already credited with \$306.11, the present allowance must be only for the difference, namely, \$207; but, in the contrary event, plaintiff must have credit for the entire \$513.11.

April 30-May 3. Repairing brick sewer \$14.26

Disallowed. Richardson does not testify from his own knowledge.

Feby. 26, 27. Labor, etc. \$51.98

Allowed. Admitted by engineer.

Oct. 31-Nov. 7-10. Repairing, etc. \$93.95

Disallowed. The question is simply one of quantity, upon which the decision of the engineer of the defendant board is final, under section 223.

May 18. Followed piles. \$65.25

Allowed. Mr. Crotts does not say that the piles were not followed, or that the number of feet is not correct, but that under the specifications nothing was due for the extra work.



The difference between the parties on this question of followed piles is this: Plaintiff contends that if he is required to furnish a pile of 30 feet to be driven down that number of feet for a work requiring a pile of that length, and after the piles are on the ground the engineer requires him to drive them down deeper than 30 feet, he is entitled to be paid the cost of this extra driving. On that proposition there would not seem to be much room for difference of opinion. As the contract makes no provision for such a case, plaintiff proposes to deal with the situation as if piles of the requisite length had been ordered, inasmuch as the cost of driving the short piles beyond their depth is greater than the difference between their cost and that of the longer piles. Under these circumstances, we can find no reason why plaintiff should not be paid as if the longer piles had been furnished, since the shorter piles, when thus driven beyond their depth, answer every purpose of the longer piles, and the driving of them this extra depth costs plaintiff more than what the difference between their cost and that of the longer piles would have been.

May 19. Ducts in Independent trench \$673.62

Disallowed. Eastwood and Webb are positive that Shanahan, plaintiff's superintendent, solicited permission to lay the duct later, and that he assigned as his reason that in that way he could back-fill the trench with his machine and not be delayed.

To some extent Eastwood is corroborated by Lee and Crotts. This testimony we think overbears that of Shanahan.

#### Exhibit F.

April 6. Extra labor, etc..... \$424.67

Allowed for \$300 on testimony of Crotts, and disallowed as to balance.

April 6, 7 & 8. Taking up, and relaying, extra lumber... \$10.36

Disallowed. Oliviera testifies there was a good, hard blue clay bottom when pipe was first laid.

June 24-Sept. 19. Repairing first failure trench AA.. \$708.29

Allowed. Defendant having been held responsible for this failure, this bill is allowed. The items of labor and material are given in minute detail, and no error is pointed out in them.

We consider the items sufficiently proved. In a case of this kind, involving a thousand items, every item cannot be dwelt upon with evidence as if only one item were involved. There would then be no end to the case. We have already adverted to this feature of the case, but will here add that a contractor on a large and long protracted work of this kind cannot be expected to preserve as he goes along the evidence by which to prove in

court every item of expense, should same come to be thereafter contested. The cost of preserving the proof of the item might in a great many instances exceed the amount of the item. All that can be expected of him is that he will furnish an itemized bill from the books, or records, which it was necessary for him to keep, and that those who kept the accounts shall testify that the entries were made at the time the expenses were incurred, and that the account is correct to the best of their knowledge and belief; and also that he will submit the data from which the account has been made in case they are called for, and will prove in the ordinary way any item that is specially contested. Especially is such proof sufficient in a case of this kind, where the same items, in so far as correct, ought to figure in the accounts and books kept by defendant. The several exhibits presented by plaintiff have been made out and testified to in that manner. They are fair upon their face, containing only such expenses as are likely to have been incurred, and as are more or less admitted to have been incurred, in the prosecution of the work.

Sept. 19. Laying conduits, etc..... \$1,549.84

Disallowed. For same reasons as for items May 19, Ducts in Independent Trench, \$673.62, in Exhibit E.

Sept. 14-28. Repair trench, between Mandeville and Spain, and incidental expenses .....	\$239.81 \$ 86.25 \$ 40.40 \$146.97 \$150.00 \$333.00
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Allowed, for same reason as for trench AA, supra.

Sept. 21-28. Sundry bills, for expenses incident to repair work, supra ..... \$86.25

Allowed, for same reason as for the repair work itself.

The remaining items of this Exhibit F are set down generally as expenses incurred in repairing the failures on Robertson street. We hold that the exhibit shows correctly the amount of the expenses, and further proof in that regard will not be required; but it does not contain, and the briefs do not refer the court to, the data which would enable the court to ascertain which of these expenses were incurred for those of the failures for which defendant has been held responsible. The trial court will have to make this apportionment as best it can. Doubtless the work can be done from the books in evidence; but, if so, this court does not feel called upon to do this mere clerical work.

#### Exhibit G.

Jan. 7. Extra labor, etc..... \$20.24

Disallowed.

Sept. 19. Extra material, etc..... \$24.00

Allowed, if not already credited, as contended; otherwise, disallowed.

The other items on this Exhibit G are for the expenses of repairing the two failures on Jourdan avenue, for only one of which failures the defendant board has been held responsible. Here, again, we are confronted with the difficulty of ascertaining which, or what proportion, of these expenses must be attributed to that one of the failures for which the defendant board has been held responsible. As with the like expenses under Exhibit E, the court finds that the exhibit correctly sets forth the amount of the expenses, and leaves to the trial court to apportion to that one of the failures for which the defendant is held responsible the parts of these expenses incurred upon it.

#### Exhibit H.

Allowed for \$999.17, amount admitted; otherwise disallowed.

#### Exhibit I.

Nov. 11. Followed piles..... \$343.00

Allowed. We do not find that the defendant's engineers contested the amount of this bill, but only its being a proper charge under the specifications.

Dec. 4. Repairing leaks..... \$6.00

-Disallowed. Part of construction work.

Dec. 7. Removing braces, etc..... \$31.00

Disallowed. The engineer is right in his construction that the expense of removing such braces, etc., as had to be removed in course of construction fell to contractor.

Dec. 15. Removing braces, etc..... \$26.45

Disallowed. No proof that it was through the fault of the engineer that these braces, etc., were originally put in wrong.

Dec. 16, 17. On forms, etc..... \$26.81

Allowed, unless trial court should find that it has already been credited.

Dec. 23, 6. Putting oyster shells..... \$4.70

Allowed, unless already credited.

Dec. 24. Removing braces, etc..... \$32.56

Disallowed. Same reason as for item December 7th.

Dec. 29. Painting I-Beams, etc..... \$26.05

Allowed. Admitted.

Jan. 16. Taking out braces..... \$26.82

Disallowed. Same reason as for item December 7th.

Jan. 26-Mar. 14. Removing, etc.... \$890.36

Allowed for \$703.55. Disallowed for balance.

Aug. 1-17. Force acct., etc..... \$79.47

Allowed for \$66.55. Disallowed for balance.

Sept. 19-Nov. 3. Grading, leveling, etc. .... \$117.65  
 \$151.52  
 \$ 15.64

Allowed for \$229.00 on testimony of Grotts. Not to be credited again if already credited. Disallowed for balance.

#### Exhibit J.

June 14. Followed piling..... \$108.50

Allowed. Same reasons as for item May 18th, \$65, Exhibit E.

July 2. Lumber, etc..... \$389.03

Allowed, unless already credited.

July 15. Cast-iron plates..... \$19.75

Allowed, unless already credited.

June 15-Dec. 15. Force account, etc... \$334.29

Allowed, unless already credited.

Aug. 25. Removing forms, etc..... \$20.47

Disallowed. Same reasons as for item December 7th, Exhibit I.

#### Exhibit K.

Followed piling..... \$53.75

Allowed. Same reasons.

Feb. 25. Lumber in forms for concrete ..... \$362.23

Allowed, less \$73.70, unless already credited. The \$73.70 is disallowed.

April 11. Miscellaneous, etc..... \$97.55

Allowed, unless already credited.

The other items of this Exhibit I, amounting, with those hereinabove considered, to \$1,664.13, are allowed, unless already credited, with the exception of those which will now be considered specially.

The evidence shows that the water came suddenly into this pumping station, and hence that it could not have come by seepage. Mr. Crotts saw it only the day after it had "broke in," at which time there was not so good an opportunity for knowing in what manner it was coming.

The cleaning charged for was not ordinary cleaning out of sewers under the contract, but extra work brought upon plaintiff by fault of defendant.

April 5. Making and setting forms... \$ 8.75  
 " 18. Removing braces..... \$ 9.20  
 April 17. Removing braces..... \$ 7.00  
 " 22. " "..... \$12.75  
 May 4. " "..... \$19.86

Disallowed. For same reason as for item December 7th, Exhibit I.

May 2. Switchboard, etc..... \$3.82

Allowed, unless already credited.

#### Exhibit L.

Followed piling..... \$137.50

Allowed, for reasons already stated.

June 6. Shells ..... \$5.00

Allowed. They were ordered.

The other items of this exhibit are allowed, unless already credited, except that the following are disallowed for reasons already stated:

June 16. Removing braces ..... \$ 4.15

May 20. " " ..... \$10.25

June 7. " " ..... \$21.30

#### Exhibit M.

Damages to adjoining property paid by plaintiff ..... \$2,499.16

Disallowed. Contract expressly provides such damages must be made good by the contractor.

Increase cost of laying sewer ..... \$8,441.39

Disallowed. Not proved.

Jan. 2-Mch. 3. Idleness of equipment \$510.00

Allowed. Compromise included only pumping.

Delay on Palmyra ..... \$260.00

Disallowed. Not proved, and no putting in default.

For idleness of machines while waiting for permission to begin work on pumping station ..... \$3,240.00

The plaintiff, no doubt, suffered heavy loss in this connection; but, for all that appears, the defendant board was not aware that the delays were thus injurious to plaintiff. Plaintiff should have advised the defendant of the situation, or, in other words, put it in default.

Disallowed.

The next item, \$22.80, is disallowed.

Delays occasioned by neglecting to operate the drainage pump, etc. .... \$530

Allowed. It is not very clear why defendant considered itself under the obligation to keep the water down to 13 on the gauge; but there can be no denying that it and plaintiff acted upon that assumption, and it certainly failed to do so, and thereby caused plaintiff damage to the said amount.

Delay in securing right of way in Sisters' street ..... \$1,110.00

Disallowed. For reasons assigned by trial judge. No putting in default.

Expense, etc. .... \$650.00

Disallowed. Abandoned.

#### Exhibit O.

Aug. 18. 3 Cu. yds. .... \$4.35

Allowed, unless already credited.

Aug. 18. Replacing masonry, etc. .... \$42.00

Allowed. This was work done a second time, because of error of engineer, and

therefore not covered by the specifications invoked.

Aug. 28. 7 men, etc. .... \$26.74

Allowed, unless already credited.

Aug. 30. Louisiana Ave., etc. .... \$4.00

Allowed. Wrong grade of engineer.

Aug. 31. Cutting, stup. .... \$10.75

Allowed.

Sept. 3. Replacing masonry, etc. .... \$17.40

Allowed. Work done a second time.

Sept. 22. Toledano street, etc. .... \$35.00

Allowed.

Sept. 3 & 30. Aline street, etc. .... \$136.03

Allowed. Section 207 does not apply.

Oct. 3. Relating, etc. .... \$7.25

Allowed, if not already credited.

Oct. 26. Extra excavation ..... \$4.35

Allowed, unless already credited.

Dec. 9. Extra excavation, etc. .... \$29.00

Allowed for 10 yards, instead of 20, unless already credited. Engineer's measurement conclusive. Disallowed for remainder.

Dec. 12. Extra excavations, etc. .... \$2.90

Allowed, unless already credited.

Dec. 15. Concrete, etc. .... \$18.00

Allowed for \$6, unless already credited. Engineer's measurement, conclusive. Disallowed for remainder.

Dec. 15. Extra labor, etc. .... \$10.70

Disallowed. Not proved.

Dec. 23. Extra labor, etc. .... \$7.45

Allowed, unless already credited.

Dec. 30. Extra labor, etc. .... \$22.92

Allowed, unless already credited.

Feby. 15. Cutting, etc. .... \$2.88

Allowed, unless already credited.

Feby. 25. To taking up; etc. .... \$12.00

Mch. 1. .... \$23.00

" 21. .... \$ 6.33

" 28. .... \$ 9.20

April 1. .... \$11.17

" 1, 4. .... \$ 2.48

May 25-June 2. .... \$19.53

Allowed, unless already credited.

May 30. Replacing masonry. .... \$14.70

Disallowed. Under specifications 196, 197, and 217.

June 2. Repairing ..... \$11.83

" 24-25. Cinders, etc. .... \$31.50

Allowed, unless already credited.

July 25. Repairing, etc. .... \$113.59

Allowed, unless already credited.

Sept. 4. Labor, etc..... \$90.70

Allowed for \$63.20. Disallowed for balance, on testimony of Crotts.

Sept. 12. Labor, etc..... \$103.80

" 24. Labor, etc..... \$ 71.32

Allowed, unless already credited.

Oct. 31. Material, etc..... \$655.69

Disallowed. Already paid.

Nov. 30. Difference, etc..... \$12.98

Disallowed. Already paid.

Mar. 17-31. Gravel, etc..... \$ 23.00

May 9. Labor, etc..... \$ 15.53

May 1. Oyster shells..... \$159.00

Allowed, unless already credited.

May 1, 1905. Increased cost of cleaning sewer, by reason discontinuance of Jumbo..... \$2,877.71

The Jumbo was an appliance devised by Shea. It was simply a wooden disk of nearly the same diameter as the sewer, with a flexible rubber edge. By drawing it through the sewer pipe, as construction proceeded, and while the cement was yet soft, all surplus cement was removed, and the pipe was left smooth. The evidence shows that it worked perfectly, and that the order for the discontinuance of its use was simply arbitrary. Plaintiff is clearly entitled to recover the difference in the cost of cleaning the sewers with or without this appliance; but what that difference is, the evidence does not show. This claim is therefore not allowed, but merely as in case of nonsuit.

May 26. Taking up, etc..... \$13.25

The remaining items of this exhibit are not discussed in defendant's brief. Hence we assume are not opposed. They are allowed, unless already credited, except the items for interest, on page 12 of the exhibit, which are disallowed.

#### Exhibit P.

Expenses of removing overhead wires in the way of plaintiff's construction machines. Disallowed.

These overhead wires were part of the difficulties which the contractor must be assumed to have known he would have to meet with in the execution of his work.

#### Reconventional Demand.

The learned trial judge would not admit proof of the reconventional demand of \$54,014.92, for expense of repairing and cleaning sewers, on the ground that it was not set forth with sufficient detail, and when defendant filed a separate suit, setting forth the demand more in detail, and consolidated it with the present suit, he relegated the trial

of said separate suit to some future time, to all of which defendant duly excepted.

Again, when defendant offered in evidence certain estimate sheets marked "D. Exhibits 602 & 604," with the accompanying receipt of plaintiff, showing payments for regular and extra work, the learned trial judge refused to allow defendant's witness to explain what items the payments were attributable to.

These rulings were erroneous, since, in the absence of the evidence thus sought to be introduced by defendant, it is now impossible to ascertain from the record what amounts are to be deducted for expenses of repair and cleaning and what amounts now claimed by plaintiff have already been paid.

Defendant's reconventional demand for repair of failures, and for correction and repair of minor defects and imperfections in the sewers is rejected, except as we now proceed to specify. Subject to due proof, the said demand is allowed, as follows: For the cost of repairing those of the failures for which plaintiff is held responsible in this judgment; also, for the cost of correcting and repairing minor defects and imperfections, as set forth in exhibit marked "Deft. 549" offered at page 2747, defendant, vol. 6; also, for taking mud out of pumping station B, as testified at page 2134, vol. 5 of record; also, for work done by Omner in cleaning Palmyra street sewer, and calking and cementing in said Palmyra street sewer; also, the cost of taking cement out of brick sewer on Villere street and Poland avenue crossing, and replacing bricks, as testified to at pages 2135 to 2138, Record, vol. 5.

The amount of \$456.45 paid by defendant to Dowdle & Windett for repairing the man-hole and sewer opposite pumping station No. 15, "Deft. 544 and 566," is fully proved, and must be debited to plaintiff; and so likewise the bill of Camden Iron Works, "Deft. 551," \$225.12; and so likewise the bill of Camden Iron Works for cleaning conduits, "Deft. 550," \$254.46; also the amount of \$192.70 for certain terra cotta pipe dispensed with. Except as here expressly allowed, the reconventional demand of defendant for \$1,564.28 is rejected, for want of proof.

The question of whether plaintiff abandoned the work before or after notification to do so is unimportant in so far as regards the right to maintain this suit, for, as already explained in connection with the exception of no cause of action, the present suit, as it stands on this appeal, is simply in settlement of accounts. That question is important only in connection with the demand for liquidated damages. We find that the abandonment was before the notice; but we find, at the same time, that the defendant gave the example of breaching the contract, by refusing to pay plaintiff for the cost of the first repair of trench AA. Defendant was responsible for said failure, and yet refused

to pay the expenses of repairing it. This was a violation of clause 263 of the contract. Defendant was further in fault by insisting that plaintiff should bear the expenses of the repair of those of the other failures for which defendant was itself responsible. At that time plaintiff was not behindhand with his work more than was fully offset by the loss of time which defendant had caused—notably by the delay in furnishing the plans for pumping station B, and in procuring a right of way in Sisters' street. By the notice to abandon the work, plaintiff was deprived of the right to go on with the contract, and, as a consequence, was relieved of the obligation of doing so, and the delays for failing to do so ceased to run against him. Perhaps, if plaintiff were held to have breached his contract, he might be held for whatever loss was thereby brought to defendant; but he cannot be held for liquidated damages for delaying to perform the contract after he had been deprived of the right to perform it. Whether defendant would be in a position to sue for breach of contract is a question we need not consider. We think the whole trouble between the parties has come from the dispute over the responsibility for the failures, and that but for this dispute no claim for damages would ever have been thought of, no more than would several of the exaggerated claims which plaintiff has put forward, and we think that for that dispute defendant is as much, if not more, to blame than plaintiff. The demand for liquidated damages is therefore rejected.

As already stated, it will not be possible to cast the final account between the parties in this suit, owing to the rejection of defendant's evidence in support of its reconventional demand for \$54,014.92, and in explanation of the estimates theretofore furnished to plaintiff, "Defendant Exhibits 602 & 604," going to show what amounts now claimed by plaintiff have already been credited to him; and the case will have to be remanded for that purpose. But so far as a fixed amount of indebtedness to plaintiff is absolutely and finally established in this suit, we shall render judgment for plaintiff. This fixed and absolute indebtedness we arrive at by—

Deducting from the amount admitted by defendant to be due, namely.....	\$79,607.23
The amount claimed by defendant in reconvention.....	\$54,014.92
And the several amounts allowed on the \$1,564.36 reconventional demand, viz.:	
D. 544-568. Dowdle & Windett	456.45
D. 551. Camden Iron Works	225.13
D. 559. " " "	864.46
Terra cotta pipe....	192.70
Leaving an established indebtedness of.....	\$24,353.63

The reason for here deducting in its entirety the \$54,014.92 is that it is not possible to ascertain at present what is the exact amount of it that is due. The deduction, we

need hardly add, is made only temporarily, until further trial, simply as a manner of casting the account, and not by way of giving judgment for the amount.

To the foregoing amount of.....	\$24,353.63
Add Irwin water on Palmyra as per compromise .....	1,000.00
Also those of the claims which have heretofore not been admitted by defendant either in whole or in part, and which therefore cannot by any possibility have been included in the admitted credit of \$79,607.23, to wit:	

## Exhibit B.

June 1-6. Men and machine, etc....	559.48
June 27. Material, etc.....	7.47
Oct. 23-30. Cleaning out, etc.....	110.69
	107.43

## Exhibit D.

Nov. 10-11. Diverting drainage.....	22.58
Dec. 8-23. Irwin water.....	635.22
Mch. 8. " " expense, etc.	79.07
" 8. Labor removing, etc.....	12.77
Apr. 13. Repairs, etc., already credited for \$55.73, now additionally credited for	110.05
May 29. Cutting off, etc.....	10.46
Nov. 27. Curbing, etc.....	35.62

## Exhibit E.

Sept. 12. Material and labor.....	53.36
" 12. " already credited for \$125.81. Now additionally credited for....	16.10
Oct. 12. Foot bridge, etc., already credited for \$306.11, additionally credited for..	207.00
May 12. Followed piles.....	65.25

## Exhibit F.

June 24. Repairing .....	708.29
Sept. 14-23. Repair, etc.....	996.23
Sept. 21-23. Sundry bills.....	86.25

## Exhibit I.

Nov. 11. Followed piles.....	\$43.00
Dec. 29. Painting I-beams.....	26.05

## Exhibit J.

June 14. Followed piles.....	108.50
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## Exhibit K.

Followed piling.....	53.75
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## Exhibit L.

Followed piling, etc.....	127.50
June 6. Shells, etc.....	5.00

## Exhibit M.

Idleness of equipment, etc.	510.00
Delays, etc.....	530.00
Aug. 13. Replacing masonry.....	42.00
" 30. Louisiana Ave. ....	4.00
Sept. 3. Replacing, etc.....	17.40
" 3 and 30. Aline St., etc.....	126.03

Total for which executory judgment is now given..... \$30,095.18

Except in so far as otherwise decided in this opinion, and except such items as defendant shall show have already been paid, the lower court will allow the items of plaintiff's exhibits Shea 13, and B, D, E, F, G, H, I, J, K, L, M, and O, changing, however, the classifications of material therein so as to conform with the views expressed in the present opinion, and changing the measure-

ments and estimates of material therein so as to conform with those of the defendant board; and will allow plaintiff such part of the expenses of repairing sewer on Jourdan avenue, as set forth in Exhibit G, as plaintiff shall show is attributable to that one of the failures on that street for which the defendant has been held in this opinion to have been responsible. It will try with this suit defendant's reconventional demand in so far as allowed in this opinion, only requiring that proof be made that the expenses therein claimed were actually incurred, and will give defendant credit for the amount of the present judgment, \$30,095.18, and for \$1,238.73, allowed in this opinion on the reconventional demand. Interest from judicial demand, and the 15 per cent. called for by the contract, will be allowed pro and con. For greater facility in recasting, the judgment of the lower court will be set aside.

It is therefore ordered, adjudged, and decreed: That the judgment appealed from be set aside, and that there be judgment in favor of plaintiff, T. J. Shea, and against the defendant, the sewerage and water board of the city of New Orleans, for the sum of \$30,095.18, with 5 per cent. per annum interest thereon from judicial demand; that this case be remanded for further trial on the points left undetermined by the present decision, in accordance with the views expressed in this opinion; and that the defendant pay the costs theretofore incurred in the lower court, except those of the separate suit filed by the defendant and consolidated with this suit, the costs of which, as well as the future costs of the present suit, are to abide the result of this suit on further trial. Plaintiff to pay costs of appeal.

BREAUX, C. J. I concur in the decree.

#### FIDELITY & DEPOSIT CO. OF MARYLAND v. ART METAL CONST. CO.

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

##### 1. DETINUE (§ 25\*)—JUDGMENT.

The judgment in detinue is in the alternative, either for the property and for the value of its detention to the time of judgment, or for the value of the property as assessed by the jury and the amount for the detention up to the time of judgment.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 47-50; Dec. Dig. § 25.\*]

##### 2. ELECTION OF REMEDIES (§ 14\*)—EFFECT.

The adoption of one of two or more inconsistent remedies by one cognizant of the facts is a bar to a resort to the alternative remedy.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 16; Dec. Dig. § 14.\*]

##### 3. DETINUE (§ 19\*)—JUDGMENT—ELECTION—EFFECT.

A plaintiff, obtaining a judgment in detinue, who elects to take the assessed value of the property, cannot recover for the use of the

property pending the affirmance of the judgment on appeal, though a bond was given to secure him for all damages resulting from the taking of the appeal.

[Ed. Note.—For other cases, see Detinue, Dec. Dig. § 19.\*]

##### 4. TRIAL (§ 194\*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

A charge, on the court's own motion, that the jury, if they believe the evidence, must find for plaintiff as to a claim, is a charge on the effect of the evidence, in violation of Code 1907, §§ 5362, 5364.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-463; Dec. Dig. § 194.\*]

##### 5. COSTS (§ 159\*)—ATTORNEY'S FEES—RIGHT TO INTEREST.

One cannot recover interest on the amount of attorney's fees sought to be recovered, where there is no proof that the fees have been paid or that interest is claimed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 578; Dec. Dig. § 159.\*]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Action by the Art Metal Construction Company against the Fidelity & Deposit Company of Maryland. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Willett & Willett, for appellant. Blackwell & Agee, for appellee.

SIMPSON, J. This is an action by the appellee against the appellant on a supersedeas bond given on appeal to this court from a judgment in a detinue suit. The judgment in the detinue suit (March 22, 1905) was for certain property therein described, valued at \$1,264.09, and for the detention thereof \$126.40. The judgment was affirmed in this court on November 14, 1907, and it was adjudged that the appellant and surety "pay the amount of the judgment of the city court, and 10 per centum damages thereon, and interest on the damages for the detention," and costs. After the affirmance of the case the plaintiff elected to take the alternate value of the property, together with the damages for the detention, and on the 11th of December, 1907, the defendant paid the same as follows:

Alternate value of property as assessed .....	\$1,264 09
Judgment for use or detention, March 22, 1905 .....	126 40
Interest on same to December 11, 1907 .....	27 52
Ten per cent. damages on alternate value and judgment .....	139 04
Interest on \$139.04. November 14 to December 11, 1907 .....	84
Also costs .....	\$1,557 89
Total .....	\$1,699 54

The claim for damages, in the complaint, is based on complainant's being deprived of the use of the property from April 8, 1905, to December 12, 1907, and also for attorney's

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fees, for services in this court. Judgment was rendered for \$447.09, and from that judgment this appeal is taken.

The gist of the defense made by the pleas is that the plaintiff, having elected to take the alternate value in place of the property itself, cannot now claim for the use of the property since the judgment was rendered. The judgment in the action of detinue is in the alternative, either for the property and for the value of the detention up to the time of judgment, or for the value of the property as assessed by the jury and the amount for the detention up to the time of judgment. "The definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy." 7 Ency. Pl. & Pr. 364. The Supreme Court of Kentucky has said, in a detinue case: "If they elect to take the assessed value, \* \* \* surely they should not be allowed for his hire since the judgment." *Ellis v. Gosney's Heirs*, 7 J. J. Marsh. 109. It needs no authority or argument to show that the plaintiff can take but one of the alternatives.

The plaintiff says, however, that the bond was given to secure it from all damages resulting from the taking of the appeal, and that it has not been placed in as favorable a position as it would have been in if the appeal had not been taken. That may be; but it does not necessarily follow that it may combine its remedies by taking the alternate value and the use of the property also. At the time this supersedeas bond was given, the plaintiff had a judgment for the property or the alternative value. The question then would be: What damage has it suffered by reason of the fact that it has been postponed in the realization of that judgment? If the claim had been for the difference between the money which it would be entitled to at the time of settlement, on the money judgment, which it elected to take, and the total amount which it did receive, we will not say that it would not be entitled to recover. But the complaint claims only for the use of the property, which it is not entitled to; so the court erred in instructing the jury that plaintiff was entitled to recover for the use of the property.

The court's oral charge, which was given *ex mero motu*, and not on written request, that "if they believe the evidence they must find for the plaintiff as to the claim for attorney's fees," was a charge on the effect of the evidence, and erroneous. Code 1907, §§ 5362, 5364; *Gaynor, Adm'x, v. L. & N. R. R. Co.*, 136 Ala. 244, 258, 33 South. 808.

It was also error to instruct the jury that plaintiff was entitled to recover interest on the amount of attorney's fees, as there was no proof that the same had been paid, or that it was claimed.

It is unnecessary to discuss specially the points raised by the pleadings, as the same general principles herein announced run through them all. The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and MCLELLAN and MAYFIELD, JJ., concur.

#### VARY v. SMITH et al.

(Supreme Court of Alabama. June 17, 1909.  
Rehearing Denied June 30, 1909.)

##### 1. ESTOPPEL (§§ 38, 39\*)—PROPERTY CONVEYED—AFTER-ACQUIRED PROPERTY.

Where land is conveyed with a warranty, an after-acquired title of the grantor inures to the benefit of the grantee; but where it is conveyed by quitclaim of the interest, then owned by the grantor an after-acquired title does not pass.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 109; Dec. Dig. §§ 38, 39.\*]

##### 2. ESTOPPEL (§ 39\*)—PROPERTY CONVEYED—AFTER-ACQUIRED PROPERTY.

A mortgage, reciting that the mortgagor bargains, sells, and conveys the title he may have, and containing no express covenant of warranty, conveys only the title the mortgagor has at the time, and does not pass an after-acquired title, notwithstanding Code 1907, § 3421, providing that in conveyances in fee the words "grant," "bargain," "sell," or either of them, must be construed an express covenant.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 108, 109; Dec. Dig. § 39.\*]

##### 3. MORTGAGES (§ 142\*)—TITLE OF MORTGAGEE—DENIAL BY MORTGAGOR—ESTOPPEL.

As a general rule a mortgagor is estopped from denying his mortgagee's title; but, where there is no warranty in the mortgage, the mortgagor may set up a subsequently acquired title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 280; Dec. Dig. § 142.\*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by John Vary against R. D. Smith and others to foreclose a mortgage executed to the Birmingham National Bank and assigned to complainant. From a decree dismissing the bill, complainant appeals. Affirmed.

A. Leo Oberdorfer and C. E. Elder, for appellant. Frank S. White & Sons and Tillman, Grubb, Bradley & Morrow, for appellees.

ANDERSON, J. The bill seeks to foreclose a certain mortgage given by R. D. Smith to the Birmingham National Bank in the year 1893. There is no pretense in the pleading or proof that Smith owned the property, now sought to be subjected to said mortgage, at the time of the execution of same, but acquired the same about eight years subsequent to the execution of the said mortgage. If the mortgage is a warranty, it would be fed by the subsequently

acquired title. *Tillotson v. Kennedy*, 5 Ala. 407, 39 Am. Dec. 330; *Chapman v. Abrahams*, 61 Ala. 108; *Chambers v. Ringstaff*, 69 Ala. 140; *Parker v. Marps*, 82 Ala. 543, 3 South. 5; *Hargrave v. Melbourne*, 86 Ala. 270, 5 South. 285; *Prewitt v. Ashford*, 90 Ala. 294, 7 South. 831; *Olds v. Marshall*, 93 Ala. 138, 8 South. 284. On the other hand, if it was a mere quitclaim, and was intended to convey only the right, title, or interest then held or owned by the mortgagor, it did not operate to include a subsequently acquired title.

It is not contended that the mortgage is a warranty under the common law, but that, because of the use of the words "grant," "bargain," or "sell," it was converted into a warranty under and by virtue of section 3421, Code 1907. Said section provides that, "In all conveyances of estates in fee, the words 'grant,' 'bargain,' 'sell,' or either of them, must be construed, unless it otherwise clearly appears from the conveyance, an express covenant," etc. The mortgage in question contains the words "bargain" and "sell"; but does it otherwise clearly appear from the terms of the instrument that no covenant of warranty was intended? The mortgage says: "I also bargain, sell, and convey to the Birmingham National Bank, for the purpose aforesaid, all right, title, and interest that I may have in and to the mineral land described in the deed above set forth." "The right, title, or interest that I may have" (now have) and not "that I may acquire." The right, title, or interest conveyed is confined to what the mortgagor then had, and not some future or subsequently acquired interest. The words "may have" evidently refer to a potential, and not a future, right, title, or interest. The mortgage being without express covenants of warranty, notwithstanding it contained the words "grant," "bargain," or "sell," cannot become a warranty under the statute, as it clearly appears from the instrument that it only conveyed such right, title, or interest that the mortgagor had in and to the mineral land at the time. *Derrick v. Brown*, 66 Ala. 162; *Reynolds v. Shaver*, 59 Ark. 299, 27 S. W. 78, 43 Am. St. Rep. 36; *Wightman v. Spofford*, 56 Iowa, 145, 8 N. W. 680; *Cummins v. Dearborn*, 56 Vt. 441; *Frink v. Darst*, 14 Ill. 304, 58 Am. Dec. 575.

It is true, in the *Derrick Case*, supra, the word "quitclaim," as well as the "right, title, or interest," was used; but the court emphasized the fact that the use of these last words indicated an intent to only quitclaim, notwithstanding the statutory words of warranty may have been used. In the case of *Reynolds v. Shaver*, supra, the operative words of the conveyance were that the grantor bargained and sold all right, title, claim,

and interest. The word "quitclaim" was not used, and the deed also contained a clause in warranty as follows: "And do, \* \* \* for ourselves and our heirs and assigns, warrant and defend the same." It was held that the use of the words, "right, title, claim, and interest," notwithstanding the use of the words "bargain and sell," had the legal effect of converting the instrument into a mere quitclaim, and, further, that the legal import of the warranty was to warrant and defend only such right, title, claim, and interest as the grantors had in the land at the date of the conveyance. In the case of *Jones v. Reese*, 65 Ala. 134, the statutory words were used, but nothing else appeared to limit or qualify what was being conveyed. And in the case of *Chapman v. Abrahams*, 61 Ala. 108, there not only was no qualification, but the conveyance, in addition to the statutory words "bargain, sell," etc., contained an express covenant of warranty.

As a general rule a mortgagor is estopped from denying his mortgagee's title; but when there is no warranty in the mortgage it does not preclude the mortgagor from setting up a subsequently acquired title. *Jones v. Wilson*, 57 Ala. 122. The question upon which the case now turns was not discussed or considered upon the former appeal, as the opinion says: "The only question insisted on in argument by counsel for appellant is that raised by the ground of demurrer which challenges the sufficiency of the description, in the bill, of the land as to which the mortgage is sought to be foreclosed."

We are of the opinion that the bill of complaint was properly dismissed, and the decree of the chancery court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### LOUISVILLE & N. R. CO. v. WILSON.

(Supreme Court of Alabama. June 8, 1909.)

##### 1. MASTER AND SERVANT (§ 153\*)—INJURIES TO SERVANT—WARNING—INEXPERIENCED AND YOUTHFUL EMPLOYEES.

Here minority alone does not fix upon the master the absolute duty of warning the servant as to danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.\*]

##### 2. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—ACTIONS—COMPLAINT—"YOUTHFUL."

"Youthful" is a quality that may well be ascribed to a young man even above 21 years of age, and the averment of youth in an injured employé in connection with the allegation that he is a minor may be consistent with the fact that he is fully matured for one of his age, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



competent to appreciate dangers obvious to an adult.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.\*]

**3. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.**

The question whether the master ought to have known of the necessity of warning a youthful employé as to danger is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1044-1050; Dec. Dig. § 286.\*]

**4. MASTER AND SERVANT (§ 91\*)—INJURIES TO SERVANT—WARNING—YOUTHFUL EMPLOYÉ.**

If ~~from~~ the appearance of a youthful employé the master is put on notice of his immaturity, incapacity, or inexperience, and fails to institute an inquiry thereto, he is chargeable as with actual negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 141; Dec. Dig. § 91.\*]

**5. PLEADING (§ 8\*)—FACTS OR CONCLUSIONS.**

A general averment of negligence is sufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8; \* Negligence, Cent. Dig. §§ 182-184.]

**6. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—ACTIONS—COMPLAINT.**

An averment of the master's knowledge of the inexperience of a youthful employé, or of the existence of facts from which negligence would be inferred, is indispensable to a count charging negligence in failure to warn him as to danger.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.\*]

**7. MASTER AND SERVANT (§ 262\*)—INJURIES TO SERVANT—ACTIONS—PLEA.**

An averment that the servant knew of the danger arising from the defect complained of is not indispensable to a plea of assumption of risk in the language of Code 1896, § 1749, subd. 5; it not being required by statute.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.\*]

**8. APPEAL AND ERROR (§ 917\*)—PRESUMPTIONS—RULING ON DEMURRER.**

Where a judgment sustaining a demurrer to a plea is not limited to any particular ground, the court cannot be put in error for sustaining it if the plea is subject to any one of the grounds of demurrer assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. § 917.\*]

**9. PLEADING (§ 12\*)—MATTERS WITHIN KNOWLEDGE OF ADVERSE PARTIES.**

Matters properly within the knowledge of a party need not be alleged in the pleadings by his adversary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 33; Dec. Dig. § 12.\*]

**10. MASTER AND SERVANT (§ 262\*)—INJURIES TO SERVANT—ACTIONS—PLEA.**

A plea of assumption of risk under Code 1896, § 1749, subd. 1, exempting the master from liability if the servant knew of the defect, and failed in a reasonable time to give information thereof to the master, unless he was aware that the master already knew of such defect, need not negative the master's knowledge of the defect, and, to be available, such knowledge should be brought forward by replication.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.\*]

**11. TRIAL (§ 258\*)—FURTHER AND MORE SPECIFIC INSTRUCTIONS—REQUEST.**

A charge that, if the jury find for the plaintiff, it will be their duty to award such damages as in their sound discretion will compensate plaintiff for the injuries claimed, if any, which the jury may be reasonably satisfied from the evidence plaintiff suffered, as the proximate consequence of the wrong complained of, is at most merely misleading, and, if defendant desired protection against this tendency, an explanatory charge should have been requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

**12. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.**

A charge submitting the question of negligence on the part of defendant's superintendent in failing to warn a youthful employé of danger, which does not hypothesize knowledge or notice on the part of the superintendent of the employé's inexperience, is erroneous.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.\*]

**13. MASTER AND SERVANT (§ 295\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.**

A charge that in passing on the question of assumption of risk on the part of a youthful employé the jury may consider his inexperience is not objectionable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1173; Dec. Dig. § 295.\*]

**14. MASTER AND SERVANT (§ 270\*)—INJURIES TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE.**

Evidence of the condition of the machine eight months before an injury to an employé is admissible when it is shown that the condition had not changed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 916; Dec. Dig. § 270.\*]

**15. MASTER AND SERVANT (§ 270\*)—INJURIES TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE.**

Testimony as to the condition of a machine three months after an injury to an employé is admissible when it is shown that the condition had not changed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 917; Dec. Dig. § 270.\*]

**16. APPEAL AND ERROR (§ 969\*)—REVIEW—DISCRETION.**

The court's ruling in granting or refusing a view of the place where an injury happened will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8845; Dec. Dig. § 969.\*]

Denson, McClellan, and Mayfield, JJ., dissenting in part.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by William H. Wilson, pro aml, against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The following charge was given at the instance of the plaintiff: "(3) If the jury find for the plaintiff, no matter on which count they may base their verdict, it will be their duty to award such sum as damages as in their sound discretion and judgment will compensate plaintiff pecuniarily for that part of the injuries and damages, claimed in the complaint, if any, which the

jury may be reasonably satisfied, from the evidence, plaintiff suffered as a proximate consequence of the wrong complained of."

Error is assigned on the following portions of the court's oral charge: "Now, under the law, it was the duty of the defendant, if the plaintiff was an inexperienced boy in the business or work that defendant was putting him to, or of some person acting for it, exercising superintendence, or who had authority to do so, to instruct the plaintiff of any danger in the running of that machine, if it was dangerous; and that is a question for you to determine."

In response to a request for counsel to make suggestions as to his charge, counsel for appellee stated to the court: "I suggest right there, if an inexperienced man takes the unsafe way, by reason of not being instructed, or not knowing of the defects which render it unsafe, he would not assume the risk." To which the court said, by way of reply: "Yes."

Tillman, Grubb, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

DENSON, J. The plaintiff, a minor, was an employé of the defendant. On the 10th day of February, 1905, while engaged as such employé in operating a bolt-cutting machine in defendant's shops in Birmingham, plaintiff's clothing was caught in or by said machine or the appliances connected therewith, resulting in an injury to his arm so serious as to necessitate its amputation. The second count of the complaint is framed with reference to subdivision 2 of the employer's liability statute. Section 1749 of the Code of 1896. The count ascribes plaintiff's injury to the negligence of the defendant's superintendent (one Madden), who, it is alleged, had superintendence over plaintiff, in that he "negligently failed to properly and sufficiently warn or instruct plaintiff of the danger to him in or about working at or with said machine, though, by reason of the youth and inexperience of plaintiff, it was dangerous for him to work at or with said machine without proper and sufficient warning or instruction as to the danger thereof, and though plaintiff in said service or employment was working at or with said machine." Objection was taken to this count in the court below by demurrer for that it fails to aver that Madden knew of plaintiff's youth and inexperience. The court overruled the demurrer, and one of the grounds in the assignment of errors challenges this ruling of the court. So far as we are advised, the precise question now presented for determination has never been before this court for decision; and its solution is not free from difficulty.

In the case of Alabama Mineral Railroad Co. v. Marcus, 115 Ala. 389, 22 South. 185, one of the counts upon which the cause was tried charged negligence upon the defend-

ant's superintendent in running and operating a hand car at "so great, dangerous and negligent rate of speed that \* \* \* plaintiff, who was a minor nineteen years of age and had had only five days' experience as a section hand, all of which was known to said foreman (superintendent), fell from said hand car," etc. No question of procedure arose for discussion or consideration on that appeal; and we have quoted from the complaint only to show that knowledge on the part of the defendant of plaintiff's inexperience was averred. The discussion of the case on that appeal related to the oral charge of the court excepted to by the defendant and to two written charges given at plaintiff's request, one of which (the eighth) was in this language: "The court charges the jury that the care to be observed by an employer which would be ordinary care when applied to persons of mature judgment and discretion might be gross negligence toward minors." Justice McClellan, who wrote the opinion for the court in that case, said: "A minor upon entering contractually upon a given service assumes the risks thereof as fully as does an adult; and the mere fact of minority does not of and in itself necessarily impose upon the master any other or greater degree of care in respect of the minor than would be upon him had the servant attained full age. It is the immaturity of mental and physical faculties and capacity which is incident to some minors, but not all, but not the mere fact of minority, which the master must have special regard for; and, where in a given instance of minority this immaturity is wanting, the minor stands upon the plane of adults. On this view charges 8 and 11 given for plaintiff \* \* \* were faulty." On the remandment of the cause for new trial in the court below the plaintiff amended his complaint by adding counts 7, 8, 9, and 10. The cause came here again (128 Ala. 355, 30 South. 679), and Justice Dowdell (delivering the opinion of the court), touching the counts added by amendment, then said: "The seventh, eighth, ninth, and tenth counts have been added to the complaint since the cause was here on a former appeal, and manifestly for the purpose of meeting what was then said by this court upon the question of plaintiff's minority. Each of these counts avers the plaintiff's minority at the time of the employment and of the injury sustained, and that he was immature and undeveloped mentally and physically, and was without experience in working on a railroad, or in running or propelling a hand car, and that these facts were well known to said Holmes, the section foreman or boss, who had the superintendence or control of the work in which plaintiff was employed, and of the running of the hand car or lever car on which plaintiff was riding at the time of his injury, and while in the regular performance of his (plaintiff's) service under

said employment. It is also averred in the seventh count that the work in which plaintiff was engaged under said employment was a dangerous one, and one in which he had no experience, and that defendant negligently failed during the time of said employment or at any time to give plaintiff any warning as to the dangers attendant upon the operating said hand car, or instruction or explanation as to the safest way of riding and propelling the same. \* \* \* Under these averments of the plaintiff's minority, inexperience, physical and mental immaturity, all of which being known to defendant's superintendent or section foreman, it was clearly the duty of the defendant to have warned the plaintiff of the perils of the employment, and to have instructed him as to the safest mode of riding upon and propelling said car while in the performance of his duties." We have quoted thus freely from the two reports of the case because the appellant cites and relies on the case as reported in 128 Alabama as authority supporting its contention that the count is bad for not averring knowledge on the part of the defendant's superintendent of plaintiff's inexperience, and because appellee's counsel hark back to the first report of the case to show that the question of pleading was not involved in the case on either appeal. We think it is true that the question was not raised on the pleadings—for the reason, among others, that the averment which the defendant contends should be in the complaint here considered was in the complaints in the cases cited. And yet it would seem that the case reported in 128 Alabama—inferentially at least—supports the defendant's contention. Whether so or not this case as well as that reported in 115 Alabama is valuable as showing that mere minority alone does not fix upon the defendant the absolute duty of warning or instructing as to danger. We remark that perhaps the reason why the question as one of pleading has never been decided by this court is the fact that averment of knowledge on the part of the defendant has hitherto always been embraced in the causes of this character which have come before this court for determination.

In all cases touching this point found by the writer the complaint averred knowledge on the part of the master or of the person representing him. We cite many of them: Worthington v. Geforth, 124 Ala. 656, 26 South. 531; King v. Woodstock, 143 Ala. 632, 42 South. 27; Moss v. Moely, 148 Ala. 168, 41 South. 1012; Reaves v. Anniston Knitting Mills (Ala.) 45 South. 702; Brammer v. Pettyjohn, 45 South. 646. The acute question to be determined, then, is whether lack of averment of knowledge on the part of the master in this instance renders the complaint defective in its statement in respect to the duty with which it is contended defendant was chargeable—the duty to warn or instruct.

We have seen from our decisions adverted to that it is the immaturity of mental and physical faculties and capacity attributable to some minors, but not to all, and not the mere fact of minority, for which the master must have special regard. And Justice McClellan, concluding the opinion on this subject in the case supra, reported in 115 Alabama, says: "Where in a given instance of minority this immaturity is wanting, the minor stands upon the plane of adults." Decatur Car Wheel Co. v. Terry, 148 Ala. 674, 41 South. 839; Levey v. Bigelow, 6 Ind. App. 677, 696, 34 N. E. 128; Laporte v. Sullender, 165 Ind. 290, 75 N. E. 277; Evans v. Lake, etc., Co., 12 Hun (N. Y.) 289. The inquiry naturally arises, What from the count of the complaint under consideration was the status of the plaintiff in respect to age, maturity, and intelligence? The only hint at his status in these respects consists in the averment that he was at the time of his employment a minor, and that, by reason of his youth and inexperience, it was dangerous for him to work at or with said machine. Employing the rule that pleadings must be construed most strongly against the pleader, we assume that the plaintiff was more than 14 years of age; and, so far as the complaint goes, he may have been of any age between 14 and 21 years. Lovell v. De Bardelaben, 90 Ala. 13, 7 South. 756. Following the same rule of construction of pleadings, we must presume that the plaintiff was not less mature than are average boys between the ages of 14 and 21—the mere averment of youth adding nothing to the strength of the complaint in this respect. From the bare averment of youth—unaccompanied by any allegation as to the appearance of the plaintiff—we could not say that he was removed from the "plane of adults" at the time he entered into the contractual relations with the defendant under which he was put to work at the machine. This is made clear by one of the definitions of "youth" given by Webster, viz.: "A young person; especially a young man." So youth is a quality that may well be ascribed to a young man even above 21 years of age; and the averment of youth in the plaintiff in connection with the allegation that he is a minor may be consistent with the fact that he is 20 years (or more, up to 21) of age, and fully matured for one of such age. In this view there is ample authority in support of the proposition that the master was at liberty to assume that plaintiff when he offered himself for employment at the machine was possessed of ordinary intelligence and would exercise ordinary care to protect himself, that he was competent to appreciate the ordinary or obvious dangers incident to the operation of the machine, and capable of performing the required duties—that is to say, all this, in the absence of averment in the complaint to the contrary. Dresser's Employer's Liability, § 98; 1 Labatt, Master & Servant, 456. Now, we apprehend that it

cannot be said of the count under consideration that it anywhere negatives the fact that the danger incident to the operation of the machine was obvious to an adult of ordinary intelligence, or that it avers the danger was latent. Indeed, the meaning of the averment in the count is that the dangers existed by reason of plaintiff's "youth and inexperience." Then it may have been a danger obvious to an adult and where the master had the right to assume that it was known to the plaintiff; there being nothing, so far as the count averred, in the appearance of the plaintiff to put the master on notice of extreme youthfulness and consequent immaturity or incapacity. The rule is thus stated in *Dresser's Employer's Liability*, p. 459: "When a person of apparently sufficient age, physical ability, and mental caliber to perform the service seeks an employment at the hands of a railway company or other master, he ought to be held to an implied representation that he is competent to perform the duties of the position he seeks, and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence. In such a case we know of no good reason or rule of law that would compel the master to pass him through a critical examination to discover his competency for the place, or that will convict the master of negligence for not doing so." 1 Labatt, Mas. & Ser. 456; 2 Bailey's Personal Injuries, §§ 2710, 2712, 2718, 2810. "Undoubtedly, when one of apparent maturity and of average capacity solicits a particular line of work, the master has the right, in the absence of information, to assume that the applicant is qualified for the particular work applied for. It is only when such facts are brought to his notice of the disqualification of the servant to safely encounter dangers known to him, and presumptively unknown to the servant, that the duty of cautioning and instructing the servant arises." *L. & N. R. R. Co. v. Miller*, 104 Fed. 124, 43 C. C. A. 436; *P. C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 168, 5 N. E. 187; *Felton v. Glrardy*, 104 Fed. 127, 130, 43 C. O. A. 439; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Louisville, etc., Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *O'Neal v. Chicago, etc., Co.*, 132 Ind. 110, 31 N. E. 669. Again *Dresser* says: "When the master is not actually informed of the servant's ignorance, the chief consideration which should put him upon inquiry is the age of the applicant. The appearance and apparent age and capacity are facts upon which the master may proceed, and which the court and jury may themselves consider." Page 460. And we have no doubt that this statement is peculiarly applicable in respect to proof of knowledge when the fact has been averred, for it is only natural justice to require of a master who knows of or is put upon notice of facts relating to the capacity of his servant to do the work required to warn and instruct

him if there is danger incident to the doing of the work. *Crowley v. Appleton*, 148 Mass. 98, 18 N. E. 675.

In *Labatt on Master & Servant* it is said: "In cases where there is specific evidence tending to show that the master having knowledge of the servant's inexperience employed him in hazardous work which required the exercise of peculiar skill, the failure to give adequate instructions may properly be found to be negligence. On the other hand, unless the defendant knew, or ought to have known, of some occasion for instruction, his omission to give it cannot be regarded as the proximate cause of an injury which the plaintiff received owing to the want of such instructions. The mere fact that he was injured because he was inexperienced and ignorant of the danger and hazard will not suffice to charge the defendant. The question whether the master at the time of engaging the servant or afterwards ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party, is a question for the jury." 1 Labatt, 547, 548. The concluding sentence of the above excerpt from *Labatt* is quoted by appellee's counsel, who thereupon argue as follows: "If it is a question for the jury to determine whether the master ought to have known of the necessity of instructions, then it necessarily follows that plaintiff, especially a minor plaintiff, is not required to aver that the defendant did in fact know; for, if there was necessity to aver knowledge, then, plaintiff would have to prove it." Of course, he would have to prove it. It is that (the knowledge of the servant's inexperience) upon which *Labatt* plants the duty to impart instruction; and certainly, without the existence of the duty, negligence is not predicable. As we apprehend the meaning of the sentence quoted and relied upon by appellee's counsel, it has naught to do with averment proper or necessary to show the duty of the master, but rather seems to be an effort to hold clear the distinction between the province of the court and that of the jury in respect to the weight to be given to the evidence. We further apprehend from the quotation in question that, if knowledge be averred, positive evidence of such knowledge would not be indispensable to proof of it, but that if the evidence tends to show that from the appearance of the servant the master was put upon notice of his immaturity, incapacity, or inexperience, and failed to prosecute an inquiry in respect thereto, he would be chargeable as with actual knowledge; the law on the question of knowledge being that facts known to the party sought to be charged sufficient to put a prudent person upon inquiry which (followed up) would elicit information are the equivalent of knowledge. The part of the

quotation from Labatt used by the appellee is perfectly consistent with what immediately precedes it, as set out above, of which former part we think the clear meaning is that averment of knowledge or of the existence of a state of facts from which knowledge would be inferred is necessary to show the duty of warning. It must be borne in mind that the bone of contention here is not whether the master knew or should have known of the danger for of that the presumption is he had knowledge, but (underlying questions touching danger, and averment of negligence) is the question of duty. It is simply a question of averment necessary to show duty upon the breach of which when shown negligence may be predicable. Duty being shown—as we have stated above, and have frequently decided—general averments of negligence are sufficient. From what has preceded it is the judgment of the court that the court below committed reversible error in overruling the demurrer to the second count, which presents lack of averment (in that count) of knowledge on the part of the master, or that of Madden, of plaintiff's inexperience. *Klochinski v. Shores Lumber Co.*, 83 Wls. 417, 67 N. W. 934; 2 *Bailey's Personal Injuries*, relating to M. & S. § 2707.

The next assignment of error calls in question the ruling of the trial court sustaining the demurrer to plea 3 addressed to the first count of the complaint. Count 1 is predicated upon subdivision 1 of section 1749, Code 1896, and alleges a defect in the condition of the ways, works, machinery, or plant of the defendant, etc. The third plea is as follows: "(3) Defendant for further answer to the first count of the complaint says that the plaintiff himself was aware of the defect or negligence complained of therein, and failed within a reasonable time to give information thereof to the defendant or some person in its service superior to himself." The demurrer contains several grounds, two of which only are discussed by appellant's counsel, and one only is argued by counsel for appellee. We think it must be conceded that the fifth ground of the demurrer is not well assigned. Indeed, appellee's counsel do not in brief contend for the correctness of the point made thereby, to wit: "The plea fails to aver or show that plaintiff knew of the danger arising from said defect or negligence." The plea was framed with regard to the statutory qualification of the right of an employé to recover under subdivision 5 of section 1749 of the Code. That part of the statute is in this language: "But the master or employer is not liable under this section if the servant or employé knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service of the master or employer, unless he was aware that the master

or employer, or such superior already knew of such defect or negligence." In the case of *Birmingham, etc., Co. v. Allen*, 99 Ala. 359, 374, 13 South. 3, 14, 20 L. R. A. 457, the court, speaking of this clause of the statute, used this language: "The qualifying clause was not intended to enlarge the rights of the employé, or extend the liability of the employer, or take away the defense of contributory negligence. It is obscure and involved, but its terms would indicate an intention to restrict the employer's liability. \* \* \* It does not provide for an additional liability under certain conditions; but the employer is not liable, notwithstanding he may have been culpably negligent in failing to discover certain defects, and negligence, if the servant or employé knew of the defect or negligence and failed, in a reasonable time to give information," etc. We note the very material amendment of this qualifying clause by section 3910, Code 1907. In the case of *Columbus, etc., Co. v. Bradford*, 86 Ala. 574, 6 South. 90, it was held that this provision of the statute relates to purely defensive matter—"the contributory negligence of the plaintiff." *Broslin's Case*, 114 Ala. 398, 404, 21 South. 475. It will be noted that the statute or the qualifying clause of the statute does not provide that, in order to make a good defense to the action, it must be shown that the plaintiff, besides possessing knowledge of the defect, should have known of the "danger arising from the defect or negligence," as is ordinarily requisite to make safe from demurrer a plea of assumption of risk. It not being required by the statute, the court is without authority to hold that such averment of knowledge is indispensable to a plea such as plea three.

But notwithstanding the fifth ground of the demurrer is not well taken, and notwithstanding the further fact that the plea, after being amended to meet that ground of the demurrer merely, was not further challenged by the plaintiff and issue was joined thereupon, yet the judgment sustaining the demurrer not being limited to any particular ground, the court cannot be put in error for sustaining the demurrer to the plea if it is subject to any of the several grounds of the demurrer assigned. The first ground of the demurrer is as follows: "Said plea fails to show or aver that defendant or said superior did not already know of said defect or negligence." It is obvious that this ground of demurrer is based upon the last clause of the qualification to the statute above quoted—which, for convenient reference, we here repeat: "Unless he was aware that the master or employer or such superior already knew of such defect or negligence." The defendant (appellant), while conceding that knowledge on the part of the employer would be an answer to the defense set up in the plea, at the same time contends that it is not necessary to negative such knowledge in the plea, but that, to be available, it should be

brought forward by replication. This contention proceeds upon the theory that matter more properly within the knowledge of a party need not be alleged in the pleadings by his adversary. Generally speaking, this is a correct statement of the law, but, for obvious reasons, it is inapplicable here. In the first place, it is difficult to understand how the servant could possibly know better than the master himself could know that the master possessed information of the defect. And in the second place, according to our decisions cited, *supra*, all matters contained in the qualifying clause of the statute are matters of defense, and must be brought forward by plea. *Columbus, etc., Co. v. Bradford*, 86 Ala. 574, 6 South. 90; *Broslin's Case*, 114 Ala. 398, 21 South. 475; *Reno Emp. Liability Acts*, § 25, pp. 35, 36; *Connolly v. Waltham*, 156 Mass. 368, 31 N. E. 302. On these considerations the writer and Justices McCLELLAN and MAYFIELD are of the opinion that the demurrer to the third plea was properly sustained; but the CHIEF JUSTICE and Justices SIMPSON, ANDERSON, and SAYRE entertain the opinion that the matter involved in the point in controversy should have been brought forward by replication, and that the demurrer should have been overruled.

There are other assignments of error relating to pleadings, but these are not insisted upon.

There is nothing substantial in appellant's criticism of charge 3 given for the plaintiff. At most, it is merely misleading; and, if defendant desired protection against this tendency, an explanatory charge should have been requested. *Hall v. Posey*, 79 Ala. 84, 90. From the discussion of the action of the trial court in overruling the demurrer to the second count of the complaint (in the opening of this opinion), it follows that the court erred in that part of the oral charge excepted to by the defendant (record, p. 43) in not hypothesizing knowledge or notice on the part of defendant's superintendent, Madden, of plaintiff's inexperience. It appears, too, that the only count submitted to the jury in which failure to instruct is made the basis for recovery charges such failure to Madden. This being true, it would seem that the court erred in its charge in not confining the duty to Madden. The court did not charge the jury that mere inexperience would relieve the plaintiff from the doctrine of the assumption of risk; but the clear meaning of the charge excepted to in this respect is that in passing upon the question of assumption of risk the jury might consider the inexperience of the plaintiff. This is not objectionable.

The affirmative charge was refused to the defendant, and it is insisted here that the court committed error in its refusal; but as the complaint will in all probability be amended on remandment, and it cannot be

known what the evidence on another trial will be, we deem it inexpedient at this time to enter upon a discussion of the evidence which would be necessary to the proper determination of the question of the correctness or not of the court's action in refusing the charge.

This brings us to the consideration of certain rulings of the court on questions of evidence assigned for error. The court cannot be put in error for allowing witness Dugger to testify that he had reported the bad condition of the clamps to Penzler, whose duty it was to look after the machine, eight months before the accident complained of; for the reason that there is evidence in the record tending to show that such bad condition continued up to and after the time of the accident. While witness York did not know whether the clamps were in the same condition when he went to work with the machine that they were in when the plaintiff's injury occurred, yet there is evidence in the record which tends to show such identical condition; and the court did not err in allowing plaintiff to prove by York that he found the clamps dull when two or three days after plaintiff was hurt witness went to work with the machine. Whether or not a jury should be sent out to view the place where the injury happened or the features of which are involved in the controversy seems to be a matter which rests in the sound discretion of the trial court; and the court's rulings in granting or refusing a view will not be reviewed on appeal. 2 Elliott on Ev. § 1242, and cases cited in notes to the text; 22 Ency. Pl. & Pr. 1054.

For the errors pointed out, the judgment of the city court must be reversed, and the cause remanded.

Reversed and remanded. All the Justices concur in the reversal of the judgment; and DOWDELL, C. J., and SIMPSON, ANDERSON, and SAYRE, JJ., concur in holding that the demurrer to plea 3 should have been overruled, while DENSON, McCLELLAN, and MAYFIELD, JJ., are of the opinion that the demurrer to plea 3 was properly sustained, and dissent on that point.

#### PHILLIPS v. STATE.

(Supreme Court of Alabama. June 10, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. CRIMINAL LAW (§ 996\*)—APPEAL—AMENDMENT OF JUDGMENT BELOW.

A judgment may be amended at a subsequent term, *nunc pro tunc*, even pending an appeal therefrom; and the amendment, being properly certified to the Supreme Court, will relate back to the rendition of the original judgment and be considered to cure the defects in the record as it originally appeared in the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2545; Dec. Dig. § 996.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. CRIMINAL LAW (§ 996\*) — JUDGMENT — AMENDMENT.**

A judgment entry may be amended nunc pro tunc from entries on the docket, as quasi record evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 996.\*]

**3. CRIMINAL LAW (§ 1166\*)—APPEAL—HARMLESS ERROR—JURY LIST.**

Notwithstanding that an order that the sheriff serve defendant with a copy of the names of the special jurors drawn, together with a copy of the names of the regular petit jurors drawn "and summoned," for the second week of the term, was not in conformity with Code 1907, § 7265, declaring that the special jurors drawn, together with the regular petit jurors "drawn" for such subsequent week, shall constitute the venire, yet a reversal is not required, as by section 6264 it is declared that a conviction shall not be reversed because of error not prejudicial, where, if the sheriff did conform to the order, then he left off of the list served upon defendant a person drawn as a juror, but who was returned as not summoned, because he had moved out of the county, and, had he been included in the list and appeared, he would not have been competent.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1166.\*]

**4. CRIMINAL LAW (§ 1166\*)—APPEAL—HARMLESS ERROR—VENIRE.**

In a venire for petit jurors, which venire was set out in the record, the name of a juror appeared but once, while in the sheriff's return upon the venire, which was also set out in the record, the name appeared twice. *Held*, that the error might be that of the sheriff in making the return, or of the clerk in making the record, but, at any rate, was self-correcting and harmless to defendant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1166.\*]

**5. JURY (§ 116\*)—MOTION TO QUASH VENIRE — GROUNDS.**

A motion to quash a venire because the list of jurors served on defendant was not certified by the clerk, or any one else, to be a correct list of the jurors to try the case, and because the clerk did not sign the notice at the head of the list, that it constituted the venire from which to draw the jury, is without merit, as there is no law imposing any such duty upon the clerk or any one else.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 116.\*]

**6. HOMICIDE (§ 170\*) — EVIDENCE — ADMISSIBILITY.**

A witness having testified to circumstances tending to show that the person who killed decedent did so from ambush, and to finding tracks peculiarly marked, and to tracing them to within a short distance of defendant's home, and that he had seen defendant make tracks in a cotton patch two or three days before the homicide, it was entirely competent to permit him to describe the tracks made by defendant in the cotton patch.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 305; Dec. Dig. § 170.\*]

**7. HOMICIDE (§ 156\*) — EVIDENCE — ADMISSIBILITY—MOTIVE.**

A letter written by defendant, which, in connection with other evidence, tended to show defendant's disposition toward decedent and a motive to kill him, decedent being a witness in a criminal prosecution pending against defendant, was properly received in evidence, though it may have been of slight weight.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 156.\*]

**8. HOMICIDE (§ 174\*) — EVIDENCE — ADMISSIBILITY.**

On a trial for murder, it was shown that, the morning after the homicide, defendant boarded a train and left the community. A witness for defendant testified that she lived in another town than defendant, and was then asked if defendant had an engagement to visit her the day after the homicide, to which question objection was sustained. There was no offer, before the court ruled, to show that the engagement was made before defendant started from the town where he lived, nor that he went to the town where witness lived, or started to, or in the direction of, that town. *Held*, that the objection was properly sustained.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 174.\*]

**9. WITNESSES (§ 236\*)—EXAMINATION—GENERAL QUESTION.**

Where a question is so general that irrelevant evidence would be responsive thereto, the trial court cannot be put in error for sustaining an objection to it.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 821; Dec. Dig. § 236.\*]

**10. CRIMINAL LAW (§§ 807, 809\*)—TRIAL—INSTRUCTIONS.**

A requested charge, that the fact that the jurors had said on oath they would convict on circumstantial evidence, did not mean that the jury must convict, was argumentative and misleading, and was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 807, 809.\*]

**11. CRIMINAL LAW (§ 785\*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESS.**

Where no effort was made to impeach a witness, and it cannot be said that defendant's guilt was dependent upon his testimony, a requested charge that if defendant's guilt depended upon his testimony, and the jury believed that it was willfully false as to any material particular, then the jury might disregard all of his testimony, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774-1781, 1889-1894; Dec. Dig. § 785.\*]

**12. CRIMINAL LAW (§ 789\*)—TRIAL—INSTRUCTIONS.**

A requested charge that, unless the jury was so convinced that a reasonable man would venture to act on that decision in matters of the highest importance to his own interest, they must find defendant not guilty, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 789.\*]

Appeal from Circuit Court, Randolph County; S. L. Brewer, Judge.

Bill Phillips was convicted of murder, and he appeals. Affirmed.

The original judgment sent to this court contained, among other things the following: "The court also ordered the sheriff to serve on defendant one entire day before the day fixed for the trial a copy of the indictment, together with a copy of the names of the fifty special jurors drawn, together with a copy of the names of the regular petit jurors organized for the second week of this term of this court, and said fifty special jurors, together with the regular petit jurors organized for the second week of this term of the court, shall constitute the venire from which to select a jury to try this case." The cause

was submitted, but on motion of the Attorney General the submission was set aside, for the purpose of amending the judgment in the lower court nunc pro tunc, with certiorari to bring up the judgment entry as amended nunc pro tunc at the succeeding term of the court. The submission was set aside and certiorari awarded on February 4, 1909. On May 13, 1909, an alias writ of certiorari issued to bring up the judgment entry as amended nunc pro tunc. As amended, the judgment entry shows that the sheriff was ordered to serve a copy of the indictment, together with a copy of the names of the 50 special jurors drawn, together with a copy of the names of the regular petit jurors drawn and summoned for the second week of the term. The motion set out that the clerk omitted the word "legally" before the word "arraign," where it appears therein, and inadvertently wrote the word "organized," instead of "drawn and summoned," all of which errors are shown by the bench notes of the presiding judge, made and entered on the trial docket of said court at the time of arraignment. Demurrers were interposed, because it is an attempt to amend the order of the court setting the case for trial after the venire was served and the jury drawn and the case tried; (2) it is an attempt to revise the judgment of the court rendered at a former term of the court, and because the motion shows on its face that the circuit court is without authority to make the amendment asked for in the motion. The facts as to the jurors sufficiently appear in the opinion.

The following portions of the oral charge were excepted to: "The defense of alibi is that the defendant was at another place at the time the crime was committed. If, in view of all the evidence, you have a reason to doubt as to whether the defendant was at the place the crime was committed at the time of its commission, then you should acquit; but if you believe from the evidence that the accused is not so far away from the place where the crime was committed but that he could with ordinary exertion have reached the place where the crime was committed, then you will consider that fact to prove or disprove the alibi. It is not necessary to prove the defendant guilty by testimony of witnesses who have seen the offense committed; but such guilt may be established by proof of facts and circumstances from which the jury believe it beyond a reasonable doubt."

The following charges were refused to the defendant: (9) "I charge you, gentlemen of the jury, that a person charged with a felony should not be convicted on circumstantial evidence alone, unless it excludes to a moral certainty every reasonable hypothesis but that of his guilt. No matter how strong the circumstances may be, they do not come up to the full measure of proof which the law

requires if they can be reconciled with the theory that another person was the guilty agent." (8) "The court charges the jury that the provision of the law is that upon the evidence there shall not be a conviction unless to a moral certainty it excludes every reasonable hypothesis than that of the guilt of the accused. No matter how strong may be the facts, if they can be reconciled with the theory that some other person may have done the act, then the guilt of the accused is not shown by that full measure that the law requires." (20) "If, under the evidence in this case, it is uncertain whether or not some other person may have killed Van Wright, then the jury must acquit the defendant." (23) "The jury must indulge every reasonable presumption arising from the evidence in favor of the defendant's innocence; and if the evidence fails to satisfy the jury that some other person may not have killed Van Wright, then the jury must find the defendant not guilty." (19) "The court charges the jury that the fact that the jurors said on oath that they would convict on circumstantial evidence does not mean that the jury must convict the defendant in this case." (14) "If the guilt of the defendant depends upon the testimony of the witness A. J. Browning, and the jury believe from the evidence that the evidence of said witness was willfully and maliciously false as to any material part of his testimony, then the jury may disregard all of the testimony of the said witness and find the defendant not guilty." (26) "Unless the jury is so convinced from the evidence of the defendant's guilt that a reasonable man would venture to act on that decision in matters of the highest concern and importance to his own interest, they must find the defendant not guilty."

Lackey & Bridges, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

DENSON, J. A judgment may be amended at a subsequent term, nunc pro tunc, and pending an appeal therefrom; and the amendment, being properly certified to the court, will relate back to the rendition of the original judgment and be considered as curative of the defects in the record as it originally appeared in this court. *Seymour & Sons v. Thomas Harrow Company*, 81 Ala. 250, 1 South. 45; *Independent, etc., Co. v. American, etc., Co.*, 102 Ala. 475, 481, 15 South. 947. It is also settled by the decisions of this court that a judgment entry may be amended nunc pro tunc upon entries on the dockets, as quasi record evidence. *Farmer v. Wilson*, 34 Ala. 75. By the light of the decisions cited, it will be seen that the demurrer to the motion to amend the judgment was properly overruled. The judgment as amended has been properly certified to this court by the clerk of the circuit court, in his return



to the certiorari, and it must be considered as the true entry.

The statute under which the special venire was formed provides that, when the day set for the trial is a day of a subsequent week of the term, the special jurors drawn by the presiding judge, together with the jurors drawn for such subsequent week, shall constitute such venire. Code 1907, § 7265. The statute is an amendment to the former statute (section 5005 of the Code of 1896) in the particular that the former prescribed that the jurors drawn and summoned for the subsequent week should be a part of the special venire. Under the statute as it stood in the Code of 1896, the name of the jurors drawn for the subsequent week, but not summoned, could not properly be placed upon the list of jurors served upon the defendant, and the placing of such names on the list constituted sufficient ground for quashing the special venire. *Smith's Case*, 133 Ala. 73, 31 South. 942. It must be conceded that the order in the instant case is not in conformity with the statute; and probably the presumption should be indulged that the sheriff, in making his list of the names that were served upon the defendant, conformed to the order of the court (*Spicer's Case*, 69 Ala. 159) and included only the names of jurors drawn and summoned. If he did conform to the order, then he left off of the list the name of C. B. Martin, who was drawn as a juror for the second week, but who was returned as not summoned, because he had moved out of the county. If Martin's name had been included in the list, and he had appeared, he would not have been a competent juror; and, he having removed from the county, the sheriff properly returned him not served.

By section 6264 of the Code of 1907, this court is required to "consider all questions apparent on the record or reserved by the bill of exceptions, and render such judgment as the law demands. But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant." Upon the facts relating to the point under consideration, the court is satisfied that no injury resulted to the defendant from the making of the order with respect to the special venire.

The name of S. P. Burrow appears in the venire facias for petit jurors for the second week, which venire is set out in the record, but it appears there only once; while in the sheriff's return upon the venire, which is also set out in the record, that name appears twice—thus, "S. P. Burrow, S. P. Burrow." This the court regards as a self-correcting clerical error, involving no prejudicial effect upon defendant. The error may be that of the sheriff, in making the return, or may be that of the clerk in making the record. At any rate, it is self-correcting and harmless to defendant.

Motion to quash the venire is based upon

two grounds: First, for that "the list of jurors served on the defendant is not certified, by the clerk, or any one else, to be a correct list of jurors to try the case"; second, "because the clerk did not sign the notice at the head of the list of jurors, giving notice to the defendant that the list served would constitute the venire from which to draw the jury." There is no law imposing the duty assumed in the motion, upon the clerk or any one else. Consequently the motion to quash is without merit.

The proof of the defendant's guilt depended upon circumstantial evidence. After witness A. J. Browning had testified to circumstances tending to show that the person who killed the deceased did so from ambush, and after describing the place of the killing and its surroundings, and after testifying to finding there human tracks peculiarly marked, and to tracing these tracks up to within a short distance of defendant's house, and that he had seen defendant make tracks in a cotton patch two or three days before the deceased was killed, he was asked by the solicitor to describe "these tracks made by the defendant in this cotton patch." The defendant made a general objection to the question and excepted to the overruling of the objection by the court. Aside from its positive vice of generality, the objection is without merit, for the reason that the evidence sought and obtained was entirely competent to go to the jury, upon the question of whether or not the tracks found at the place of the killing were made by the defendant. Hence the court committed no error in overruling the objection to the question, nor in refusing to exclude the answer thereto. *Walters' Case*, 118 Ala. 654, 24 South. 1005; *Hodge's Case*, 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145; *Riley's Case*, 88 Ala. 193, 7 South. 149; *Busby's Case*, 77 Ala. 66.

The court committed no error in sustaining the state's objection to the question propounded to the witness Carter on cross-examination.

The letter of July 28, 1908, written by the defendant to the clerk of the circuit court, was properly received as evidence. The testimony showed that the deceased, Van Wright, was a witness in a criminal prosecution that was pending against defendant, and that defendant was anxious to dispose of Wright, or of his testimony. The letter, in connection with other evidence, tended to show defendant's disposition towards Wright, and motive to kill Wright. It may be that it was slight in its tendency and weight; but nevertheless it was competent.

The evidence showed that on the Sunday morning after Van Wright was killed (the killing occurring on Saturday), but before his body was found, the defendant boarded the east-bound train at Wadley, "and left the community," carrying a suit case and a gun case. Miss McGinty, a witness for the de-

defendant, testified that she lived in the town of Langdale, in Chambers county, Ala., and that she knew the defendant. Defendant's counsel then asked Miss McGinty this question: "Did he have an engagement to visit you on the Sunday he was arrested?" The purpose of the testimony sought to be elicited by the question, it may be conceded, was to explain the testimony tending to show flight; but the court cannot be put in error for sustaining the objection to the question. For aught that is revealed by the question or what had preceded the asking of it, the defendant may have had an engagement to visit the young lady, and yet the engagement might have been made after defendant reached Langdale; and, if so, it is obvious that the testimony in answer to the question would have been wholly immaterial and irrelevant. Where a question is so general that irrelevant evidence would be responsive to it, the trial court cannot be put in error for sustaining an objection thereto. Ross' Case, 139 Ala. 144, 147, 36 South. 718. There was no offer, before the court ruled, to show that the engagement was made before defendant started from Wadley. Moreover, at the time the question was propounded to the lady, there was no proof, nor offer to prove, that Phillips went to Langdale, nor that he had started to Langdale, or in the direction of Langdale.

The recital as to what the evidence of Bell showed—construing the bill of exceptions most strongly against the defendant (McGehee's Case, 52 Ala. 224)—occurred after the question was propounded and ruled upon. The court has examined the portions of the general charge of the trial court excepted to, and has found no reversible error therein.

Charges 9, 8, 20, and 23 are of the same class, and may be considered together. The reasons of their condemnation may be found in the cases cited below, and it is unnecessary now to repeat them. Thomas' Case, 106 Ala. 19, 17 South. 460; Bowen's Case, 140 Ala. 65, 69, 37 South. 233; Turner's Case, 124 Ala. 59, 27 South. 272; Barnes' Case, 111 Ala. 56, 20 South. 565; Bohlman's Case, 135 Ala. 45, 33 South. 44; Dennis' Case, 112 Ala. 64, 20 South. 925.

Charge 19 is argumentative and misleading, and the trial court therefore cannot be put in error for refusing it.

No effort was made to impeach witness A. J. Browning, nor can it be said, from the evidence disclosed by the record, that the guilt of the defendant was dependent upon his testimony. Hence charge 14 was properly refused to defendant. Jackson's Case, 136 Ala. 22, 34 South. 188.

In refusing charge 26 no error was committed by the trial court. Rogers' Case, 117 Ala. 9, 15, 22 South. 666 (ch. 7); Amos' Case, 123 Ala. 50, 54, 26 South. 524 (ch. 4); Neville's

Case, 133 Ala. 90, 32 South. 596; Allen's Case, 111 Ala. 80, 89, 20 South. 490.

This record affirmatively shows that charge 6 requested by defendant was "accidentally misplaced," thereby not only negating any purpose to withhold it without action thereon, but affirmatively showing that no such purpose existed. Moreover, construing the bill of exceptions most strongly against the defendant, according to the rule (McGehee's Case, supra), defendant's counsel may have been the person who found the charge; and, if so, there was ample time, as shown by the record, within which he could have called the attention of the court thereto, before the jury rendered the verdict; but, aside from this condition of the record, the charge is argumentative and might properly have been refused.

There is no reversible error, and the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

BIRMINGHAM RY., LIGHT & POWER CO.  
v. MORRIS.

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

1. PARTIES (§ 95\*)—AMENDMENT—PARTIES IN PARTICULAR CAPACITY.

The caption of plaintiff's original complaint described plaintiff as "administrator of the estate of P.," and the body stated that plaintiff acted as such administrator. The caption of the count added by amendment described plaintiff as "M., Admr., etc.," and in the body of the count reference to the actor was as "plaintiff" and otherwise referred to the deceased as "plaintiff's intestate." Held, that both the original and amended complaint indicated that the suit was brought by plaintiff in a representative capacity, and that the amendment was therefore not objectionable as a departure.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 165; Dec. Dig. § 95.\*]

2. STREET RAILROADS (§ 110\*) — INJURY TO TRAVELERS—CROSSING TRACK—NEGLIGENCE—PLEADING.

A count against an electric railway company for the death of a child while crossing the tracks was framed to assert that intestate was killed by one of defendant's cars under control of defendant's servants. It also recited that her death was caused by defendant's failure to use reasonable care to avoid the injury after discovering the danger. Held, that such allegation of defendant's negligence was a mere recital of defendant's ultimate responsibility, and that the count was therefore not objectionable as imputing negligence to defendant's servants in one part and alleging defendant's corporate negligence in another.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. § 110.\*]

3. STREET RAILROADS (§ 113\*) — DEATH OF TRAVELER—ACTION—EVIDENCE.

Where, in an action for the death of a traveler while crossing an electric railroad track, one of the material issues was at what distance, under the surrounding circumstances, the

motorman of the colliding car first saw deceased and her companion as they approached the track after leaving a car from which they had alighted, the court did not err in permitting a witness to testify that the car from which intestate alighted was not "going very fast" at the time of the accident.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 287; Dec. Dig. § 113.\*]

#### 4. STREET RAILROADS (§ 111\*) — DEATH OF TRAVELER—PLEADING—EVIDENCE.

In an action for death of a traveler who had just alighted from a street car as she passed behind it on to an adjoining track, where she was struck by a car traveling in the opposite direction, evidence of a custom and rule of the railroad company requiring the motorman of cars passing standing cars to ring the gong, and bring the passing car to a stop with the front end opposite the rear end of the standing car, was admissible on a count alleging negligence generally, not as a standard of care required, but as evidence of what was considered ordinary prudence under such circumstances.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 225; Dec. Dig. § 111.\*]

#### 5. EVIDENCE (§ 450\*) — TYPOGRAPHICAL ERRORS—EXPLANATION BY PAROL.

An electric railroad rule provides that, when passing standing cars, the gong must be rung and car stopped with front "and" opposite the rear end of the standing car. *Held*, that the word "and" was a typographical error for "end," and, the rule being admissible, evidence was competent to explain the error.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 450.\*]

#### 6. STREET RAILROADS (§ 111\*) — DEATH OF TRAVELER—PLEADING AND PROOF.

In an action against an electric railroad company for the death of a traveler in crossing double tracks behind a standing car, a rule requiring cars passing standing cars to sound the gong and stop with the front end opposite the rear end of the standing car was inapplicable to a count alleging negligence of the motorman of the passing car in failing to stop after having discovered decedent's peril, or to defendant's plea of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 225; Dec. Dig. § 111.\*]

#### 7. STREET RAILROADS (§ 93\*)—RULES—CONSTRUCTION—"STANDING."

An electric railroad rule provided that, when passing standing cars, the gong must be rung and the car brought to a stop with the front end opposite the rear end of the standing car. *Held*, that the word "standing" did not limit the application of the rule to the passing of cars absolutely at rest, but included cars that had stopped and had just started to continue their journey from which passengers might have alighted.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 93.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6624.]

#### 8. PLEADING (§ 380\*)—ISSUES—EVIDENCE ADMISSIBLE—WITHDRAWAL OF COUNTS.

The trial court cannot be put in error for the admission of legal testimony within the issues made by some of the counts in the complaint though not within issues made by other counts by subsequently withdrawing those counts, as to which only the evidence in question was admissible.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1237; Dec. Dig. § 380.\*]

#### 9. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against an electric railroad company for the death of a traveler while crossing the tracks, defendant was not prejudiced by evidence of the number of cars operated over the line about the time of the accident.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.\*]

#### 10. APPEAL AND ERROR (§ 1050\*)—EVIDENCE—PREJUDICE.

In an action for the death of a traveler while crossing an electric car track, evidence as to the number of people traveling on defendant's cars at certain hours was without prejudice to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.\*]

#### 11. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—EXCLUSION OF ADMITTED EVIDENCE.

Exclusion of evidence previously erroneously admitted cures the error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4178; Dec. Dig. § 1053.\*]

#### 12. DISCOVERY (§ 79\*) — INTERROGATORIES — NONRESPONSIVE ANSWERS—EXCLUSION.

Where plaintiff in answer to interrogatories submitted by defendant added certain non-responsive matter concerning intestate, plaintiff, on defendant offering the answers in evidence, was entitled to the exclusion of so much of the answers as was improper.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 90-101; Dec. Dig. § 79.\*]

#### 13. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR.

Subsequent allowance in substance of a question erroneously excluded cures the error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4200; Dec. Dig. § 1058.\*]

#### 14. TRIAL (§ 251\*)—REQUESTED CHARGE—APPLICABILITY TO PLEADING.

Requested charges not applicable to the issues made under the only count of the complaint submitted to the jury were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 587; Dec. Dig. § 251.\*]

#### 15. STREET RAILROADS (§ 118\*) — DEATH OF TRAVELER—INSTRUCTIONS.

Where, in an action for death in a collision with an electric car, the only issue submitted was based on a count charging negligence after discovery of intestate's peril, a requested charge that, even though the jury believed that an experienced motorman might have been able to stop the car sooner, yet, if the motorman in charge thereof did all he could to stop the car after he saw intestate, the jury should find for defendant, was properly refused, as eliminating intestate's peril, and as misleading the jury to differentiate between the care required of an experienced motorman and that of the motorman in question.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 238; Dec. Dig. § 118.\*]

#### 16. STREET RAILROADS (§ 93\*) — DEATH OF TRAVELER—CARE OF MOTORMAN.

In an action against an electric railroad company for the death of a traveler while crossing the track, based on discovered peril, the question was whether after discovery of intestate's peril the motorman used all means at his command, skillfully and in proper order, to avert the injury, thereby doing all he could to stop the car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 199; Dec. Dig. § 93.\*]

**17. STREET RAILROADS (§ 118\*) — DEATH OF TRAVELER—INSTRUCTIONS.**

A requested charge that, if the motorman did all he could to stop the car after he saw intestate, the jury should find for defendant, was properly refused, as eliminating the motorman's duty to warn intestate of her danger.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 260; Dec. Dig. § 118.\*]

**18. TRIAL (§ 131\*)—MISCONDUCT OF COUNSEL—REMEDIES.**

Objections to argument of counsel must be taken when the statements were made, and not by requests to charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 313; Dec. Dig. § 131.\*]

**19. TRIAL (§ 260\*)—REQUESTS—REFUSAL.**

It is not error to refuse a requested charge substantially covered by other requests given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by W. C. Morris, administrator, against the Birmingham Railway, Light & Power Company for wrongful death of a child on the track. Judgment for plaintiff, and defendant appeals. Affirmed.

The ninth count of the complaint is as follows: "Plaintiff claims of the defendant corporation \$35,000 as damages, for that on, to wit, the 20th day of May, 1905, defendant was engaged in the business of a common carrier of passengers for hire in Jefferson county, Ala., and in propelling cars by means of electricity in said county and state, and while so engaged as said common carrier defendant's agents and servants in charge of one of its cars, after discovering that plaintiff's intestate was in danger of injury, which danger consisted in being in danger of being run over or killed by a car on defendant's track or railway, which car was under the control and management of defendant's servants or employes and operated by them, and plaintiff's intestate was on defendant's said railroad track crossing the same, and said servants or employes negligently failed then and there, to use reasonable and proper care and diligence to avoid injuring said intestate, when the use of said such reasonable care and diligence would have prevented an injury, whereby plaintiff's intestate was then and there injured by one of defendant's street cars striking or running upon her, and her death was caused by a failure of defendant to use reasonable care and diligence to avoid injuring said intestate after discovering her danger of injury, when the use of such reasonable care and diligence would have avoided said intestate's injury; hence this suit." The caption of the complaint is "W. C. Morris, as administrator of the Estate of Evanda Pearson."

The following special charges, requested by the defendant and refused, are deemed necessary to be set out: "(9) I charge you that

Mr. Bell's argument that the defendant's employes are poorly paid has no foundation of fact in this case. (10) I charge you that Mr. Bell's argument in this case to the effect that defendant hires new men to run its cars because it is cheaper to do so is improper and unsupported by the evidence. (11) Even though you may believe that an experienced motorman might have been able to stop the car sooner, yet if you believe, from all the evidence in the case, that Busler did all he could to stop the car after he saw plaintiff's intestate, you must find a verdict in favor of the defendant."

Tillman, Grubb, Bradley & Morrow, for appellant. Allen & Bell and Frank S. White & Sons, for appellee.

McCLELLAN, J. Counts 1, 3, 4, and 7 of the complaint were stricken on demurrer. Counts 2, 5, 6, 8, and 10 were eliminated from the jury's consideration by charges requested by the defendant. The trial was had alone on count 9. The reporter will set out the count.

The plaintiff's intestate was Evanda Pearson. At the time of her death she was 11 years and 5 months of age. She, with a younger sister, had taken a car of the defendant for Cain Station in Avondale on defendant's line, had been carried by the station. The conductor's attention was called to the fact. The car was stopped about 200 yards beyond the station, and the children permitted to alight. It was raining, and Evanda immediately upon leaving the car raised, or had raised for her, an umbrella. The car from which she with her sister had alighted moved on. As it did so, a train of the defendant going in an opposite direction approached, and the children, evidently oblivious of the fact and of their danger, crossed the track on which the car they had just left had come, crossed the space between that and a parallel on which the other train was moving, and, with the view to crossing it, went upon the latter track. The younger sister, being slightly in front of Evanda, escaped with comparatively slight injuries. Evanda was killed. The ninth count sought to charge the defendant with responsibility for intestate's death upon the theory of negligence after discovery of her peril.

By appropriate demurrer two main points of objection to the count were urged below, and, being overruled, are again pressed here. One is that Morris sues in his individual, and not in a representative, capacity. The caption to the count, which was altered by amendment, describes the plaintiff as "W. C. Morris, Adm'r, etc." In the body of the count the reference to the actor is as "plaintiff," and otherwise, referring to the deceased, as "plaintiff's intestate." The cap-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of the original complaint described Morris "as administrator of the estate of Evanda Pearson" and in the body of the first count it is stated Morris sues as administrator of the estate of Evanda Pearson. The status is not materially different from that ruled upon in *K. C., M. & B. Ry. v. Matthews*, 142 Ala. 298, 39 South. 207. It was there held that the action was in a representative capacity. We do not understand *Bryant v. Sou. Ry. Co.*, 137 Ala. 488, 34 South. 562, to be opposed by the *Matthews* Case, though it is expressly ruled in the latter that original counts may be looked to in determining whether a departure has been wrought in the count added by way of amendment. The objection stated was properly disallowed.

The other objection is that in the count the imputation of the negligence alleged is confused. In one averment, it is imputed to the servants of the defendant, and in another to the defendant; the appellant ascribing to the latter averment the meaning of corporate negligence. We do not think the allegations susceptible of the construction appellant would put upon them. The count must be construed as a whole. Nor should it be construed entirely without reference to the idea patent on its face intended to be expressed. The count was framed to assert that plaintiff's intestate was killed by a car of the defendant, and that, when the injury was suffered, the car was under the control and management of the defendant's servants, etc. After alleging the negligence of these servants, etc., in the premises and the death of intestate resulting therefrom, it is then written that "her death was caused by the failure of defendant to use reasonable care and diligence to avoid" the injury "after discovering her danger of injury." This latter averment had been made before in the count in connection with the negligence ascribed to the servants, etc. It is evident that the tautological, latter, averment, referring the result to the defendant's want of care and diligence, was no more than the expression by the pleader of the ultimate responsibility of the defendant whose representative had occasioned, after discovering her peril, the alleged culpable wrong to plaintiff's intestate. In the scope of the servants', etc., duty their knowledge of peril was that of the defendant. Their eyes were its eyes in an action of this character. *B. R. L. & P. Co. v. Glover*, 142 Ala. 492, 38 South. 836, dealt with a count (fifth) purporting to charge a wanton, etc., injury, and this court held that the count did not impute the requisite knowledge to the motorman, but to the defendant, and thereby failed to charge an essential to wantonness, etc., viz., knowledge of the agent or servant whose act produced the movement of the car from which the injury was alleged to proximately result. The *Glover* Case is not akin to that at bar in the particular under consideration. Aside from the construction given the count by us,

the recent decision in *B. R. L. & P. Co. v. Moore*, 151 Ala. 327, 43 South. 841, is authority for the unsoundness of appellant's objection. It accordingly results that the defendant was not due the affirmative charge on the theory that the conjoint charge of negligence by the servants, etc., and by the defendant were not proven as alleged, since there was testimony tending to show the negligence averred after discovery of peril, and, if credited, availed to render the defendant liable, unless contributory negligence relieved it. The count is not otherwise objectionable.

The witness Shelly was asked how fast the car from which intestate had alighted was going just previous to the injury. He answered that he did not know. He was then asked whether it was going fast or slow.

Objection was made to the question because it sought immaterial, irrelevant, incompetent, and illegal testimony. One of the vital issues under the ninth count was at what distance, and the surrounding circumstances, the motorman of the car inflicting the injury first saw the children as they approached or were upon his track. To determine that issue, it was necessarily pertinent to inquire how rapidly or slowly the first train cleared and uncovered, from the viewpoint of the motorman on the car producing the injury, the children as they started across the two tracks. This brief statement will suffice to show that none of the grounds of objection were well taken. The answer was: "Not very fast, I don't think." The motion to exclude was properly overruled, because the answer was the equivalent of his best judgment between the two alternatives, fast or slow. The previous statement that he did not know how fast that car was then running referred obviously to the rate of speed, and not to its motion of fast or slow.

The court permitted plaintiff to introduce rule 204, shown by some of the testimony to be in force on the occasion in question; and also admitted testimony of a custom of like character to the requirements of rule 204 prevailing in the operation of defendant's cars and trains. Rule 204 reads: "When passing standing cars going must be rung and car brought to a stop with front and opposite rear end of standing car." It is too evident for doubt that the italicized (by us) word should be "end" and not "and"; that the error is typographical. The rule would be senseless otherwise. Evidence was properly admitted, if the rule was admissible, to explain the patent error in printing. We think, in the first place, that this rule was without legitimate bearing on the issues arising from the averments of the ninth count or those raised by the one plea of contributory negligence to this count, alleging want of proper care, etc., on the part of intestate after discovery of her own peril. The breach of the rule could not avail one who concurrently with such breach or subsequent thereto negligently went upon the track of the

car driven thereon in violation of the rule. Such conduct by the injured party would have at least neutralized the negligence of the defendant's servant in violating the rule, and therefore defeated recovery for the injury suffered. In such case the injury could not be ascribed for proximate cause to the breach of the rule. Indeed, the conclusion cannot be avoided, though the rule may have been negligently breached and also the intestate might be conceded for the argument to have negligently put herself in a position of peril even subsequent to the breach of the rule; yet, under the averments of negligence in the ninth count, the defendant might be held liable for negligent failure in duty arising out of the condition created by both the negligences stated, unless the imperilled intestate was then, after she became aware of her peril, contributorily negligent in conserving her own safety. Accordingly, it is clear that if only the ninth count had been in the case at the time the testimony as to the rule, and the custom like it, was admitted, error to the prejudice of defendant would have obtained. But the tenth count, though later charged out, was in issue when this testimony was admitted. That count, though within our rule, was as comprehensive and indefinite in averment of negligence to injury as our practice in such cases allows. Under the allegations of the tenth count, we think both the rule and the like custom were admissible. They tended to show negligence. The argument opposed to the action of the court below in admitting evidence of the rule and of the custom is largely based upon the decision in *A. G. S. R. R. v. Clark*, 136 Ala. 462, 34 South. 917. The action there was for negligently setting fire to cotton. Rules of the defendant were admitted, over objection, whereby precautions were enjoined upon enginemen in the operations of their locomotives near or about cotton platforms. The decision took the admitted rule to require every precaution to prevent the destruction of property by fire; whereas the legal standard, as therein declared by the court, was such care as the ordinarily prudent man, likewise stationed, would exercise in the premises. The reasoning on which the holding was rested (and it is unassailable) was that the exaction of legal duty could not be raised to an uncontracting plaintiff's advantage by a rule of the carrier requiring greater care than the law commanded. The standard of negligence, it was held, could not be altered—contracted or expanded—by a rule of the carrier under such circumstances. But that is a totally different matter from the proposition contended for by appellee as determinative of the admissibility of the rule and custom in question. His insistence is that the rule and custom were admissible to show what was negligence, as tending to show what would have been proper care under the circumstances of one ordinarily prudent in the operation of the car inflicting the injury. The law has

not defined, for it cannot, what is proper care in such cases. The issue of negligence *vel non* in such cases is as generally a mixed question of law and fact; and the law alone is inadequate to solve the matter. It must therefore be solved by recourse to proof tending to establish what was the care one ordinarily prudent would have exercised under the circumstances; and, if that care was not exercised by the party charged, then the law pronounces that dereliction to be negligence. The distinction to which we have adverted, viz., between the inadmissibility of the rule and custom to establish a standard of negligence and their admissibility as evidence of what was or was not ordinary prudence under the circumstances present, is stated, elaborated, and approved by Wigmore, § 461, first book. After setting down the distinction, that writer thus continues: "This distinction is patent enough, but it is sometimes judicially ignored. Such evidence is sometimes improperly excluded on the erroneous supposition that the mere reception of it implies that it is to serve as a legal standard of conduct. The proper method is to receive it with an express caution that it is merely evidence, and is not to serve as a legal standard." He then illustrates with two apt quotations from decisions treating the exact question.

This court in *Helton v. Ala. Mid. R. R.*, 97 Ala. 276, 283, 12 South. 276, 284, held that a rule giving defined significance to a certain act was properly admitted in evidence "as shedding light on the question of negligence on the part of the engineer on the occasion of the plaintiff's injury." The plaintiff was sent forward with red and white lights to stop a coming train. He fell sick or unconscious on the track, it was alleged, and the train coming on, ran over him, severing an arm. Negligence *vel non* of the engineer was the issue, and his asserted conduct in not stopping his train upon seeing the white light was held a jury question, as bearing upon which the rule was admitted. We are not prepared to say that the *Helton* Case is in direct point, but it is clear that the doctrine announced by Wigmore was recognized and applied in the ruling made by this court in *Helton's Case*. In several cases decided here, some of which are noted in brief of counsel for appellee, it was ruled that breach of a reasonable rule by the plaintiff proximately contributing to his injury forbade a recovery by him therefor. The doctrine announced in Wigmore, *supra*, appears to be widely approved and applied in many other jurisdictions, though it has been said that there are decisions to the contrary. The Massachusetts court, in *Stevens v. Boston R. R.*, 184 Mass. 476, 69 N. E. 338, is in accord with the declaration by Wigmore. In that case the Chief Justice admits the entire want of harmony in decision elsewhere on the point; but, notwithstanding, reaffirms the view of that court as indicated, and

that upon a long line of adjudications there and elsewhere. And in discussing the question an analogy is stated to exist between it and the case where an ordinance enjoins a duty. In the course of the opinion it is said: "So a rule made by a corporation for the guidance of its servants in matters affecting the safety of others is made in the performance of duty by a party that is called upon to consider methods, and determine how its business shall be conducted. Such a rule made known to its servants creates a duty of obedience as between the master and servant, and disobedience of it by the servant is negligence as between the two. If such disobedience injuriously affects a third person, it is not to be assumed in favor of the master that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to be held an implication that there was a breach of duty towards him, as well as towards the master who prescribed the conduct that he thought necessary or desirable for protection in such cases. Against the proprietor of a business the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety." The Minnesota court in *Fonda v. St. Paul R. R. Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341, is opposed to the views above stated. It appears to be against the weight of authority and also to be subject to the criticism that the learned court confused the clear distinction pointed out by Wigmore. In argument the decision in *Fonda's Case* is largely rested on the idea that to allow in evidence a rule intended for the safety of third parties as tending to show negligence in the act or omission complained of is, in effect, to penalize the promulgation of such rules—wholesome as they may be—and thus discourage, rather than, as should be done, encourage such a course. It is obvious that these observations are not arguments against the rule there repudiated, but refer only to a mere consequence which is itself denied in the very act of promulgating the rule for the conduct of the business pursued. The rule may be rescinded at the pleasure of the institution, and, when it promulgates the rule, it is an admission that due care requires the course of conduct enjoined by the rule. The Minnesota Case is not sound, we think, and is also against the weight of authority. These cases may be read with profit on the question: *Lake Shore R. R. v. Ward*, 135 Ill. 511, 26 N. E. 520; *Chicago R. R. v. Lowitz*, 218 Ill. 24, 75 N. E. 755; *C. & B. R. R. v. Krayenbuhl*, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920, 926; *Hobbs v. Eastern R. R.*, 66 Me. 572; *Frizzell v. Omaha R. R.*, 124 Fed. 176, 59 C. C. A. 382; *Nassau v. Corliss*, 126 Fed. 355, 61 C. C. A. 257; *G. & S. F. R. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614; *Ga. R. Co. v. Williams*, 74 Ga. 723; *Atlanta Ry. v. Bates*, 103 Ga. 333, 30 S. E. 41; *Chicago Ry. v. Low-*

*ell*, 151 U. S. 209, 217, 14 Sup. Ct. 281, 38 L. Ed. 131; *Warner v. B. & O. R. R.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491. As stated before, under the broad averments of negligence in the tenth count, the negligent breach of the duty, if found, in respect of the observance of proper care on the part of the motorman in control of the car approaching on a parallel track to that occupied by the car just left by the intestate, was, of course, an issue; and at the stage of the trial at which the question of the admissibility of rule 204 and of evidence of a like custom arose the court could not assume and anticipate that a condition would later prevail at the conclusion of the whole testimony warranting the affirmative charge against a recovery under the tenth count. If the defendant had properly sought the exclusion of such testimony when the affirmative charge as to count ten was given, all testimony anent the rule and the custom would doubtless have been excluded. The trial court cannot be put in error for the admission of legal testimony within issues made by some of the counts, and not within those made by others, by the act of latterly charging the jury in denial of their right to predicate a recovery on certain counts to which only the testimony complained against could be legally referred or legally admitted to support. Some of the argument for appellant proceeds on the idea that, when the rule and custom were admitted there was no tendency in the evidence to the effect that the car was standing within the rule. The object of the rule being to render more safe the alighting of passengers from one car by requiring the gong of an approaching car, on the other track to be rung, and also by stopping it opposite the car from which the passengers had alighted, we think the question whether the east-bound car was a standing car within the rule was for the jury. There was testimony tending to show that the east-bound car was moving very slowly, and had only moved a short distance when the rapidly moving west-bound car passed it. If this be true, and there was other testimony having a like tendency, the motorman of the approaching west-bound car may have seen the east-bound car when it was standing, and that in such nearness as to require of him as an ordinarily prudent operative observance of the rule with respect to the ringing of the gong and preparation to stop his car opposite the then standing car. The track at that point was, as appears from at least some of the testimony, unobstructed for many hundreds of feet in the direction from which the approaching car came. We do not think the rule or the custom can be circumscribed in effect and controlling operation to that exact moment of time when one car is perfectly still, and when the opposite car is so related to the stationary car as that, if the opposite car's movements were unhindered, it would pass a standing car. If the contrary was the effect of the rule or cus-

tom, the very reason of their existence would be ignored. If the ringing of the gong and the stopping of the car were by the rule or custom required only when one car was perfectly at rest and when the moving car was exactly opposite the former, the rule or custom could not possibly serve its object, because it is hardly possible, much less probable, that a car running 20 miles an hour could be gotten under control within the length of another motor car and trailer. Giving the rule or custom their only rational construction, it must be held that their observance comprehends the exercise of ordinary prudence in view of their object as to when, at what point, before the moving car reaches the stationary car, the gong should be sounded and the preparation to effect the required stop opposite the standing car should be entered upon. And, if the standing car proceeds upon the passage thereby of the opposite car, a like prudence, in keeping with the object inspiring the rule or custom must be exercised. There was no error admitting the rule or custom under count 10. The exclusion of both later was not sought. We are unable to see how the testimony as to the number of cars operated over that line about the time of the event was, if error, prejudicial to defendant. We are not at all sure but that such testimony was admissible in proof of the averment that the defendant engaged in operating cars, etc., as a common carrier of passengers for hire. If error at all under the issues then in the case, the question to the witness Brown as to the number of people traveling on defendant's cars at certain hours was without prejudice to defendant. The court excluded all rules save 204; hence their original admission was rendered harmless, if then erroneous.

The defendant propounded under the statute interrogatories to the plaintiff. In the answer by the plaintiff, and not called for by any interrogatory propounded to the plaintiff, this sentence appears: "And she was considered by her schoolmates and teacher as very bright." The next and concluding expression in the answers was: "She was my wife's sister's child, and I knew her to be very bright." On the trial, when the defendant offered these answers as a whole, plaintiff moved to exclude the first quoted expression, and over defendant's objection the court granted the motion. It has been several times held here that the purpose of this statute—discovery in action at law—was to elicit legal testimony. The statement excluded was palpable hearsay. The privilege of offering the answer was entirely with defendant. The status then was that the court excluded illegal testimony offered by the opposite party. We see no reason to deny the respondent to such interrogatories the right to eliminate illegal evidence he has incorporated in his answers. Such was the early view of this court in *Pritchett v. Munroe*, 22

Ala. 501, 509. The twenty-ninth assignment of error was robbed of its point by the subsequent allowance by the court of the same question, in substance, previously disallowed.

This brings us to the consideration of the errors assigned on special charges refused to defendant. The court at the instance of the defendant charged the jury that only one count, the ninth, was submitted to the jury for their consideration; and also on like request instructed the jury, in the strongest terms, what was essential to be shown by the evidence in order to sustain the averments of that count for negligence after discovery of intestate's peril. Among the refused charges are those numbered 1, 2, 3, 4, 8, 12, 13, and 14. These charges related to matters that could not have had any bearing upon the issues made by the ninth count, nor upon the issues made by the pleas thereto. They evidently related to matters thought to be pertinent to the issues raised by other pleadings. Since the court eliminated all counts save the ninth, no injury to appellant, if error at all, could have attended the refusal of such charges. Besides, it does not appear that the refusal of these charges was previous to the action of the court in restricting the right of possible recovery to the negligence charged in the ninth count.

Charge 11 was properly refused because it was aside the issue, and because it was misleading. The issue was due care and diligence vel non after discovery of peril. The charge deals only with his acts after seeing the intestate without regard to her peril. Furthermore, the charge was calculated to mislead the jury, in that a distinction might be taken between an experienced motorman's ability to stop the car and that of this motorman, and the latter to the exoneration of defendant from liability. The question was, not whether this motorman did all he could to stop the car, but whether, after becoming aware of intestate's peril, he used all means at his command, skillfully, and in proper order to avert the injury. *Louisville & N. R. R. v. Young*, 153 Ala. 232, 45 South. 238, 16 L. R. A. (N. S.) 301. Additionally the charge takes no account of the duty dependent for existence and character of performance upon the circumstances attending the event to warn the imperiled party. *L. & N. R. R. v. Young*, *supra*.

The charges 9 and 10 affirm the absence of evidence to justify statements made by plaintiff's counsel in argument. The objection should have been made when the statements were made. Special charge is not the proper method for obviating the effect of argument asserted to be improper. There was no error in the refusal of these charges.

The general affirmative charge, and also that confined to count 9, were properly refused to defendant.

Refused charge 5 finds substantial dupli-



cate in several of the charges given at the instance of the defendant.

The issues in the case on the ninth count, and the pleading to it, were for the jury. The evidence on the trial is elaborately set out in the bill. We will not attempt a rehearsal of it. A careful consideration of it must convince that the testimony, either as matter of conflict apparent or as matter of reasonable inference, required the jury's service to determine the facts under the law.

We discover no error in the record, and the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

# NEW CONNELLSVILLE COAL & COKE CO. v. KILGORE.

(Supreme Court of Alabama. June 10, 1909.)

## 1. MASTER AND SERVANT (§ 256\*)—INJURY TO SERVANT—COMPLAINT—SUFFICIENCY.

A complaint alleging that defendant operated a coal mine, that plaintiff while employed as a miner and in the discharge of his duty was injured because of defects in a skidway, etc., shows that plaintiff was engaged in the duties of his employment at the time of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-815; Dec. Dig. § 256.\*]

## 2. MASTER AND SERVANT (§ 118\*)—INJURY TO SERVANT—"WAYS, WORKS, MACHINERY, OR PLANT."

A signal rope in a coal mine which extends from the hoisting engine on top of the ground into the mine, used to signal the engineer, is a part of the ways, works, machinery, or plant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 118.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7420, 7421.]

## 3. NEGLIGENCE (§ 117\*)—CONTRIBUTORY NEGLIGENCE—PLEADING.

A plea of contributory negligence must allege the facts constituting the negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. § 117.\*]

## 4. MASTER AND SERVANT (§ 262\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action for injury to a coal miner caused by defects in a skidway, a plea alleging that the injuries were the proximate result of plaintiff's own negligence, in that he gave a signal to the hoisting engineer to pull a bucket out of the shaft at full speed, knowing that the bucket was apt to jump from the skidway and injure him, sufficiently alleged contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 859; Dec. Dig. § 262.\*]

## 5. MASTER AND SERVANT (§ 262\*)—INJURY TO SERVANT—NEGLECT OF FELLOW SERVANT—PLEADING.

In an action for injuries to a coal miner caused by defects in the skidway causing a bucket to jump out of it, a plea alleging that plaintiff's injuries were the proximate result of the negligence of a fellow servant, in that a timber was negligently loaded in the bucket causing the injury, is sufficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 857; Dec. Dig. § 262.\*]

## 6. MASTER AND SERVANT (§ 262\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a coal miner caused by defects in the skidway, resulting in a bucket jumping out of it, a plea which alleges that plaintiff was guilty of contributory negligence, in that he directed and aided in the construction of the skidway, signal, and apparatus, and that the unsafe condition was known and obvious to him, and that he remained in the service after such knowledge, is sufficient.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.\*]

## 7. MASTER AND SERVANT (§ 262\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—PLEADING.

A plea alleging assumption of risk in the servant suing for a personal injury, but alleging facts relating to contributory negligence, is insufficient.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.\*]

## 8. MASTER AND SERVANT (§ 262\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—PLEADING.

A plea of contributory negligence of the servant suing for a personal injury, which does not allege that the negligence contributed proximately to the injury, is insufficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 859; Dec. Dig. § 262.\*]

## 9. MASTER AND SERVANT (§ 262\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—PLEADING.

In an action for injuries to a coal miner caused by defects in a skidway, causing a bucket to jump out of it, a plea alleging that plaintiff was guilty of negligence proximately contributing to his injury, in that he had knowledge of the defect and remained in the employ for an unreasonable length of time with such knowledge, etc., sufficiently pleads assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 858; Dec. Dig. § 262.\*]

## 10. MASTER AND SERVANT (§ 262\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—PLEADING.

In an action for injuries to a coal miner caused by a defective skidway causing a bucket to jump out of it, a plea which alleges that the injuries were the proximate result of plaintiff's own negligence, in that he stood near the skidway knowing of its defective condition and thereby exposed himself to danger, sufficiently charges contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.\*]

## 11. MASTER AND SERVANT (§ 243\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—DISOBEDIENCE OF INSTRUCTIONS.

Where an injury to a servant occurred as the proximate result of his own negligence in failing to obey the master's instructions, he cannot recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 759-775; Dec. Dig. § 243.\*]

## 12. MASTER AND SERVANT (§ 262\*)—INJURY TO SERVANT.

In an action for injuries to a coal miner caused by defects in the signal wire extending from the hoisting engine into the mine, a plea which alleges that plaintiff constructed and superintended the construction of the signal wire, and that by reason of his contributory negligence the wire became defective, proximately causing the injury, is good as against a demurrer on the ground that it does not allege that plaintiff was intrusted with the duty of

seeing that the ways, works, and machinery, or plant were in proper condition, etc.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.\*]

**13. MASTER AND SERVANT (§ 262\*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — PLEADING.**

In an action for injuries to a coal miner caused by defects in the signal wire from the hoisting engine into the mine, thereby preventing the instant transmission of signals to the engineer, a plea alleging that at the place where plaintiff was injured there was no place fixed on the wire for signaling, and the custom was to do all the signaling from the top and bottom of the shaft, and that plaintiff should have used the accustomed places to do his signaling, etc., is insufficient.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.\*]

**14. MASTER AND SERVANT (§ 118\*)—INJURY TO SERVANT—WAYS, WORKS, MACHINERY, OR PLANT.**

A skidway built of timbers in a coal mine on which a bucket is operated to hoist coal and timber out of the mine by a rope attached to the bucket from a hoisting engine on top of the ground, pursuant to signals given to the engineer by a wire connected with the engine and extending down into the mine, is with the bucket, a part of the plant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 118.\*]

**15. TRIAL (§ 194\*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.**

The court cannot be required to give a charge that there is no evidence of a particular fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 459-466; Dec. Dig. § 194.\*]

**16. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—EVIDENCE—QUESTION FOR JURY.**

Where, in an action for injuries to a coal miner caused by defects in a bucket used to hoist materials out of the mine, there was no evidence as to how long before the accident plaintiff had discovered the defect, the question of reasonable time was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.\*]

**17. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.**

Where, in an action for injuries to a coal miner caused by defects in the skidway, hoisting bucket, and rope, plaintiff testified that he had had no trouble with the rope until the night of the accident, the question whether the rope was defective was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.\*]

**18. EVIDENCE (§ 127\*)—RES GESTÆ.**

Expressions of pain made by a person injured forming a part of the res gestæ of the accident are admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.\*]

**19. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR — ADMISSION OF FACTS OTHERWISE ESTABLISHED.**

It is not error to overrule an objection to a question asked a witness who had previously without objection practically answered the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

**20. EVIDENCE (§ 474½\*)—OPINION EVIDENCE — ADMISSIBILITY.**

Whether a hoisting bucket in a coal mine is more liable to jump out of the skidway when going fast, and whether it is dangerous to stand by the skidway when the bucket is traveling up, and whether the bucket running at a certain speed is liable to jump out relate to matters of common observation; and it is not error to exclude the opinion of a witness thereon.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 474½.\*]

Appeal from City Court of Bessemer; Wm. Jackson, Judge.

Action by Robert Kilgore against the New Connellsville Coal & Coke Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The cause was tried on the following counts:

(3) "Plaintiff claims of the defendant the sum of \$10,000 damages, for that, to wit, heretofore, on March 6, 1908, and prior thereto, the defendant was a body corporate, and engaged in the business of mining coal at or near Connellsville, in Jefferson county, Ala.; and plaintiff avers that on said date he was in the employment of defendant in said coal mine as a miner and laborer in and about the operation of said mine, and while so employed he was engaged in cutting a brace through or opening between the air shaft and slope; and plaintiff avers that while in the discharge of his duties, and in the line and scope of his employment as such miner and laborer, it was necessary for him to be near the said air shaft to give signals to the engineer in charge of the hoist in said shaft in and about the hoisting of timbers to the place where plaintiff was at work. Plaintiff further avers that in said air shaft there was a skidway built of timbers on which a bucket was operated for the purpose of hoisting coal and timber and other things in and out of the mine, there being a rope attached to said bucket from a hoisting engine on top of the ground, and that signals were given to the engineer in charge of said engine by means of a wire connected with said engine room and extending down into the mine. Plaintiff avers that while near said shaft, having timbers hoisted to his work, said bucket jumped off, or was jerked off, said skidway, and caught plaintiff between the timbers of said mine, breaking, mashing, and bruising his right shoulder, cutting, mashing, and bruising his face, and otherwise bruising, injuring, and lacerating his body severely, injuring him internally, which resulted in permanent injuries to his right shoulder and arm; that he has paid out or obligated himself to pay out large sums of money for medicine, medical attention, nursing, and proper diet; that he has lost his earning power; that he was confined to his bed for a long space of time; that he has sustained great mental agony and physical suffering, and was made sick, sore, and

lame; that he was permanently injured and disabled. And plaintiff avers that his said injuries were proximately caused by reason of a defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the defendant, and that said defect consisted in this: That the timbers out of which the skidway was built were not evenly joined together, and the said skidway was rough and uneven, thereby proximately causing said bucket to jump out of said skidway and injuring the plaintiff as aforesaid. And plaintiff avers that said defect arose from, or had not been discovered or remedied owing to, the negligence of defendant, or of some person intrusted by the defendant with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

(4) Same as 3, except that the defect is alleged to have consisted in the fact that the bucket used in lowering and hoisting timbers was broken, and the edges thereof rough and uneven, thereby proximately causing said bucket to catch at the joints of said skidway and jump out, or be jerked out, of said skidway.

(5) Same as 3, except that the defects are alleged to consist in this: "That the signal wire from the bottom of the mine to the engine room was rough, crooked, and knotted, thereby preventing signals being instantly transmitted to the engineer, and thereby proximately causing said bucket to jump out of said skidway when it caught in said skidway, and injuring plaintiff," etc.

(6) Same as 3, except that the defect is alleged to have consisted in this: "That an iron bank around said bucket, and upon which said bucket slid up and down, was broken, thereby proximately causing said bucket to catch in said skidway, and jump out, or be jerked out, of said skidway."

The following pleas were filed to the complaint originally:

(5) "As a further answer to the first count, defendant says that the plaintiff's alleged injuries were the proximate result of his own negligence, which consisted in this: That he gave a signal to the hoisting engineer to pull the bucket out of the shaft at full speed, well knowing and obvious of the fact that said bucket was apt to jump from said skidway and injure him at the place alleged."

(7) "That plaintiff's said injuries were the proximate result of the negligence of his fellow servant, in that said timber was insecurely and negligently loaded on said bucket, in that it was not tied or fastened, and by reason thereof said timber became loose, causing the injury as aforesaid by falling against or upon plaintiff, as a proximate result of the said negligence of plaintiff's fellow servant, viz., Coe, in loading said timber."

(9) "That plaintiff was guilty of negligence which proximately contributed to his alleged

injuries in this: That he had control and direction and aided in the construction of said skidway, signal apparatus, and place wherein he was injured, and that said unsafe place or condition thereof were known and obvious to the plaintiff, and that plaintiff negligently remained in the service of the defendant after such knowledge."

All these pleas were filed to the first and second count.

(C) "That plaintiff voluntarily went to the place where he is alleged to have been injured near or at said skidway, when he knew that the timber on the bucket was approaching and that it would probably strike plaintiff. Nevertheless he negligently remained in such dangerous place, and he thereby assumed the risk of being injured when the said bucket containing the timber reached the place or point where he was standing."

(D) "Plaintiff ordered one of his fellow servants, viz., T. E. Coe, to go to the bottom of said mine and there load timbers or timber on said bucket to be hoisted to the place where plaintiff was at work; that such order was given with the knowledge that it was dangerous and unsafe to so hoist such timbers from the bottom of the shaft; and that the said fellow servant, in conforming to the said order of the plaintiff, loading said timber on said bucket of said skidway, and in so loading said timber, he negligently failed to tie or fasten the same in said bucket, upon and in accord with the signal of the plaintiff, negligently given said engineer in charge of the engine used to hoist said bucket, to hoist said bucket; and the said engineer hoisted said bucket on said skidway at a great and dangerous rate of speed, and the said timber, being improperly and negligently loaded on said bucket as aforesaid, became loose and swung around, causing said bucket to jump from said skidway, injuring the plaintiff as aforesaid."

The last two pleas were filed to counts 1, 2, 3, 4, 5, and 6.

The following demurrers were filed to the pleas:

(5) "Because said plea fails to show wherein the act of the plaintiff proximately contributed to the injury complained of. Because said plea fails to set out facts which would make it obviously dangerous to give signal to the hoisting engineer to pull the bucket out of the shaft at full speed. Because said plea fails to show wherein the pulling the bucket out of the shaft at full speed was obviously dangerous."

(7) "Because said plea fails to allege in what way the timber, being loose, proximately caused the injuries complained of. Because the averments are a mere conclusion of the pleader, unsupported by the facts alleged. Because said plea fails to give the name of the fellow servant who caused the injury complained of. Because it does not appear from said plea that a fellow servant of the plaintiff did any act which in any

manner contributed to or caused the injury complained of."

(9) "Because said plea fails to allege that the plaintiff continued in the service or employment of defendant after he knew of the defects complained of, and appreciated the danger thereof, for an unreasonable time. The averments in said plea to the effect that the plaintiff was guilty of contributory negligence are mere conclusions of the pleader."

(10) "Said plea fails to aver that defendant provided a reasonably safe place in which the plaintiff could do his work. Because the delegation of the maintenance of the place where the plaintiff worked to a competent person is no excuse or defense for not furnishing plaintiff with a reasonably safe place in which to work."

(C) "Because it does not allege that there was any other place at which plaintiff could have done his work under his employment. Because it does not allege that there was a safer place for plaintiff to do his work. It is not shown that the risk assumed by the plaintiff was one of the risks reasonably incident to his employment. Because it is not shown that plaintiff knew of and appreciated the danger to which he was exposed."

(D) "Because it does not appear that the injury resulted proximately from any fault or negligence on the part of the plaintiff."

Additional pleas to the third count are as follows:

(2) "Plaintiff was guilty of negligence which proximately contributed to his alleged injury in this: That he had a full knowledge of said defect, and remained in the employ of defendant for an unreasonable length of time with such knowledge."

(4) "Defendant says the plaintiff ought not to recover in this action, because his injuries were the proximate results of his failure to obey a rule or instruction of the defendant in this: That he was not to load or cause to be loaded any timbers on said skidway at the bottom of said mine; that plaintiff, notwithstanding his knowledge of such rule, caused the bucket on said skidway to be loaded with timber at the bottom of said mine and improperly fastened in said bucket; hence plaintiff's injuries."

(5) "Defendant says that plaintiff's alleged injuries were the proximate result of his own negligence in this: That defendant stood by or near said skidway, knowing that it was in an uneven and rough condition, and that notwithstanding such knowledge plaintiff so exposed himself and was injured."

(7) "Defendant says that plaintiff, with full knowledge and aware of the defects alleged, did continue and remain in the employ of the defendant for an unreasonable length of time thereafter."

The following demurrer was filed to additional plea 2: "Because remaining in the service and employment of defendant with full knowledge of the defects complained of

is not negligence per se, and no facts are stated that make it so."

To additional plea 4: "Because it seeks to set up a rule of the defendant, but fails to aver that plaintiff had knowledge of the same, and because it does not appear that what the plaintiff disobeyed was a rule or an instruction."

To the additional fifth plea: The grounds assigned to 2 and 4, and the additional ground that, for aught that appeared in said plea, plaintiff's duty required him to be where he was, because it is not averred or shown that plaintiff negligently exposed himself to danger, and because it does not appear that plaintiff appreciated the danger of standing where he was injured.

To additional plea 7 the same demurrer as filed to additional plea 2.

The additional pleas to the fifth count were as follows:

(1) "That plaintiff constructed and had control and superintendence of the construction and placing of said signal wire, and by reason of his contributory negligence said wire became crooked and knotted, which said contributory negligence proximately caused the injury alleged."

(2) "That it was the duty of plaintiff under his employment to see that said signal wire was in good condition, and as a proximate consequence of the failure of the plaintiff to perform his duty such alleged defect arose."

(3) "That at the place where plaintiff was injured there was no place fixed on said wire for signaling, and the custom was to do all the signaling from the top and bottom of the shaft, and that the plaintiff should have used the accustomed places to do his signaling, and that by reason of the failure to signal from the accustomed place, and the place fixed for such purpose, the plaintiff thereby caused his own injuries as alleged, well knowing the danger he incurred by so doing."

The demurrers interposed to these pleas were as follows:

(2) "Because it does not allege that the plaintiff was intrusted by the master with the duty of seeing that the ways, works, machinery, or plant was in proper condition. Because it does not allege in what way plaintiff failed to perform any duty with which he was intrusted by the master. It does not allege that any failure of duty by the plaintiff was the proximate cause of his injury."

(1) "Said plea fails to aver that said signal wire was ever in good condition. It fails to allege any fact from which contributory negligence on the part of the plaintiff might be inferred. It fails to aver that plaintiff was charged with the duty of seeing that signal wire was in proper condition."

(3) "Because said plea is not an answer to the count."

Plea A was as follows:

"For further answer to the third, fourth, fifth, and sixth counts, defendant says that said skidway, bucket, and signal wire alleged to be defective were only temporary in their nature, and were not a part of the permanent ways, works, machinery, or plant of the defendant."

The following charges were refused to the defendant:

(18) "I charge you, gentlemen of the jury, that there is no evidence that the plaintiff was acting in the scope of his duties in giving signals at the time and place he was injured, and you cannot find for the plaintiff under the third, fourth, fifth, and sixth counts of the complaint."

(23) "I charge you, gentlemen of the jury, that there is no evidence that the defendant knew of the defects alleged and set out in counts 3, 4, 5, and 6 of the complaint, and you cannot find for the plaintiff under said counts."

(26) "If the jury believe from the evidence that the alleged uneven joint in the skidway was not a defect in the ways, works, machinery, or plant of the defendant, then you cannot find for the plaintiff under count 3 of the complaint."

(31) Affirmative charge as to the fourth count.

(G) Affirmative charge as to the sixth count.

(H) Same as to the fifth count.

(E) Affirmative charge as to the third count.

J. L. Davidson and Ben G. Perry, for appellant. Thomas T. Huey, for appellee.

SIMPSON, J. This is an action by the appellee against the appellant for injuries received by the plaintiff while working in the coal mine of the defendant.

There was a certain "skidway" extending from the mouth to the bottom of the air way in said mine, said skidway having three-cornered pieces of timber bolted to cross-ties, thus forming a groove or trough, in which a large bucket about 30 inches in diameter and 4 feet deep, which slid on its side in said trough, and was raised and lowered by a rope attached to a windlass or drum in the engine room at the mouth of the mine. By the side of this skidway was a wire rope, connected with a bell in the engine room, for the purpose of signaling to the engineer to raise and lower the bucket. There was also a pipe through which communication might be had with the engineer. The plaintiff was working at a "crosscut" about 45 or 50 feet from the bottom of the air shaft, and sent a man to the bottom for a piece of timber. The man got a piece of green pine timber eight or nine feet long and six inches thick, placed it in the bucket, without fastening, and called to plaintiff to "signal the engineer to take the slack out

of the rope." Plaintiff gave the signal to hoist the bucket, which was obeyed, and, as he was giving or attempting to give the signal to stop the bucket, it was thrown from the skidway, striking the plaintiff, and causing the injury complained of. The case was tried on counts three, four, five, and six of the complaint. The counts of the complaint were properly held to be not subject to the demurrer, on the ground that they do not show that the plaintiff was engaged in and about the duties of his employment at the time of the injury. *Sloss-Sheffield S. & I. Co. v. Chamblee*, 48 South. 664.

There was no error in overruling the demurrer to the fifth count of the complaint on the ground that the signal rope was not a part of the ways, works, machinery, or plant. This rope had a permanent place in the plant, and was not like the rope in the case of *Southern Railway Co. v. Moore*, 128 Ala. 434, 29 South. 659; *Sloss-Sheffield S. & I. Co. v. Mobley*, 139 Ala. 425, 38 South. 181; *Goins v. Alabama Steel & Wire Co.*, 141 Ala. 537, 548, 37 South. 784.

The court erred in sustaining the demurrer to plea 5. While it is true that this court has held that a plea of contributory negligence (unlike a complaint alleging negligence) is not sufficient if it merely states a conclusion of law, but must allege the facts constituting the negligence (*Tenn. C. & R. Co. v. Herndon*, Adm'r, 100 Ala. 451, 14 South. 287; *L. & N. R. Co. v. Markee*, Adm'r, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21; *Western Railway of Alabama v. Russell*, Adm'r, 144 Ala. 144, 153, 39 South. 311, 113 Am. St. Rep. 24; *Southern Railway Co. v. Shelton*, Adm'r, 136 Ala. 191, 208, 34 South. 194), yet said fifth plea does allege the facts of the particular act of negligence, and the knowledge of the danger. It was consequently sufficient. *A. G. S. R. Co. v. Roach*, 110 Ala. 266, 270, 20 South. 132.

It was error to sustain the demurrers to pleas 7, 9, and 10. They are not subject to the causes assigned.

Plea C alleges assumption of risk, but the facts alleged relate to contributory negligence, and the plea is not sufficient. Hence there was no error in sustaining the demurrer to the same. *Southern Railway Co. v. McGowan*, 149 Ala. 440, 43 South. 378.

Plea D does not allege that the supposed negligence contributed proximately to the injury. Hence there was no error in sustaining demurrers to same.

Additional plea 2 (to the third count) and plea 7 (to the third count) are pleas of assumption of risk, and not of contributory negligence. The demurrers to said pleas were properly sustained. 1 *Labatt's Master & Servant*, § 305, and note "s"; *Goins v. Alabama Steel & Wire Co.*, 141 Ala. 538, 542, 550, 37 South. 784.

Additional plea 5 (to the third count) is not subject to the causes of demurrer as-

signed, and the court erred in sustaining the demurrer to it.

The court erred in sustaining the demurrer to plea 4 (to the third count). If the injury occurred as the proximate result of the plaintiff's own negligence in disobeying instructions as alleged in the plea, he cannot recover.

While additional pleas 1 and 2 (to the fifth count) are not sufficient, yet they are not subject to the causes of demurrer assigned, and there was error in sustaining said demurrer. Additional plea 3 (to the fifth count) is no answer to the count, and the demurrer was properly sustained to the same.

There was no error in sustaining the demurrer to plea A. The description of the skidway, bucket, and wire shows that they are a part of the plant. *Going v. Alabama Steel & Wire Co.*, supra.

Charges 18 and 23, requested by the defendant, were properly refused. The court cannot be required to give a charge that there is no evidence of a particular fact.

There was no error in the refusal to give charge D.

Charge 26 was properly refused.

Charge 31 was also properly refused. There was no proof as to how long before the accident the plaintiff had discovered the defect in the bucket, and the question of reasonable time was for the jury.

For the same reason there was no error in refusing to give charge G, nor was there any error in refusing to give charge H. It was for the jury to consider whether the rope was defective, and whether the accident was due to the defect. The plaintiff testified that he had had no trouble with it till that night.

It was also for the jury to consider whether there was a defect in the skidway, and whether said defect caused the accident. Consequently there was no error in the refusal to give charge E.

As to the question to the witness Costello about the expression of pain at the time of the accident, besides the fact that it was a part of the *res gestæ* of the accident, the witness had already testified in the same words as were used in answer to this question, to wit, "he said he was hurt." There was no error in overruling the objection to the question to the witness Costello as to whether it had been the custom to give signals to the engineer from the point where Kilgore was hurt. The witness had testified before without objection that "It had been the custom to give signals to the engineer anywhere along the line." The questions propounded to the witness Costello as to whether the bucket was more liable to jump out when going fast, whether it was dangerous to stand by the skidway when the bucket was traveling up, and whether the bucket running at such a speed would be liable to

jump out related to matters of common observation, and there was no error in sustaining the objections to the questions. The court calls attention to the fact that this record is in great confusion, owing to the unnecessary number of pleas, etc., and to the fact that there are several sets of pleas and replications bearing the same numbers.

The judgment of the court is reversed and the cause is remanded.

Reversed and remanded.

ANDERSON, DENSON, and MAYFIELD, JJ., concur.

### MONTGOMERY MOORE MFG. CO. v. LEETH.

(Supreme Court of Alabama. June 10, 1909.)

#### 1. APPEAL AND ERROR (§ 338\*)—TIME OF TAKING PROCEEDINGS—LIMITATIONS—STATUTES—RETROACTIVE EFFECT.

The right to appeal within a year from the rendition of the judgment as given by Code 1896, § 436, continues as to a judgment rendered prior to the taking effect of Code 1907, section 10 of which declares that the Code shall not affect any existing remedy, etc., though section 2868 lowers the time within which to appeal to six months.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1882; Dec. Dig. § 338.\*]

#### 2. DEPOSITIONS (§ 94\*) — IRRESPONSIVE ANSWERS.

An answer not responsive to an interrogatory, to which no objection was made, should be excluded.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 273; Dec. Dig. § 94.\*]

#### 3. WITNESSES (§ 37\*)—KNOWLEDGE OF FACTS—RECOLLECTION.

On the issue whether a sale of merchandise was in fraud of the seller's creditors, the statement of the seller that he supposed he owed something like a specified amount at the time of the sale was a statement of his best recollection of the amount of the indebtedness, and not a mere guess, and was admissible.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 37.\*]

#### 4. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

It is not reversible error to exclude immaterial evidence, which could not affect the case one way or the other.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4188; Dec. Dig. § 1056.\*]

#### 5. EVIDENCE (§ 242\*)—ADMISSIONS—DECLARATIONS OF AGENTS.

Declarations of an agent, charged with the duty of going to a third person and buying his merchandise and bringing the same to the store of the principal, made as to the ownership of the goods while in the act of bringing the goods to the store, are competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 901; Dec. Dig. § 242.\*]

#### 6. FRAUDULENT CONVEYANCES (§ 291\*)—EVIDENCE—ADMISSIBILITY.

Where, on the issue whether a sale of merchandise was in fraud of creditors of the seller, the buyer testified that the invoice had been taken at the wholesale cost, and that he had

agreed to take the goods at that amount, it was not error to permit him to answer the question what per cent. of the invoice price would the stock be worth in the condition they were in at the time of the purchase.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 856; Dec. Dig. § 291.\*]

**7. FRAUDULENT CONVEYANCES (§ 286\*)—EVIDENCE—ADMISSIBILITY.**

On the issue whether a sale of merchandise was in fraud of creditors of the seller, the question as to how much goods the buyer was carrying at the time of the sale was relevant on the good faith of the transaction.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 286.\*]

**8. FRAUDULENT CONVEYANCES (§ 291\*)—EVIDENCE—ADMISSIBILITY.**

On the issue whether a sale of merchandise was in fraud of creditors of the seller, evidence of the value of a remnant stock of goods was inadmissible in the absence of proof that the merchandise was a remnant stock.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 856; Dec. Dig. § 291.\*]

**9. EVIDENCE (§ 489\*)—OPINION EVIDENCE—ADMISSIBILITY.**

A witness having no expert knowledge may testify as to the value of cattle.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2274; Dec. Dig. § 489.\*]

**10. FRAUDULENT CONVEYANCES (§ 291\*)—EVIDENCE—ADMISSIBILITY.**

Where, in a suit to set aside a sale of merchandise as fraudulent against creditors, there was evidence that the goods were worth about \$1,400 at the place of sale, and a witness testified that the goods in the store of the buyer were worth only about \$600, it was proper to show how much the goods were reduced in value by the manner in which they were moved to the store.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 856; Dec. Dig. § 291.\*]

**11. WITNESSES (§ 240\*)—EXAMINATION—LEADING QUESTIONS—DISCRETION OF COURT.**

Permitting leading questions is largely in the discretion of the court.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 795; Dec. Dig. § 240.\*]

**12. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

On the issue whether a sale of merchandise was in fraud of creditors of the seller, the overruling of an objection to a question whether the seller had stated that he was selling the goods too cheap, and that it was wrong to beat his creditors, was not erroneous, where the answer was in the negative.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4143; Dec. Dig. § 1048.\*]

**13. EVIDENCE (§ 121\*)—RES GESTÆ.**

On a trial of the right of property attached by plaintiff and claimed by a third person, the former may prove all that was said and done at the time of the levy as a part of the *res gestæ*.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 307-338; Dec. Dig. § 121.\*]

**14. TRIAL (§ 248\*)—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.**

An abstract instruction is properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 582, 583; Dec. Dig. § 248.\*]

**15. TRIAL (§ 194\*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.**

An instruction, on the issue whether a sale of merchandise was in fraud of creditors, that if the jury believed the evidence they must find that the seller made the sale with the intent to convert the property into money and place it beyond the reach of his creditors, was properly refused because invading the province of the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 439-441, 446-466; Dec. Dig. § 194.\*]

**16. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

Where on the issue whether a sale of merchandise was in fraud of creditors, there was no evidence that the buyer had access to the books of the seller before or at the time of the purchase, an instruction that if the buyer had access to the books, and could have ascertained from them that the seller was in debt, and he failed to inspect them, he was chargeable with notice of the indebtedness, was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

**17. TRIAL (§ 244\*)—INSTRUCTIONS—SINGLING OUT PORTIONS OF EVIDENCE.**

An instruction, which singles out a portion of the evidence and requires a separate finding thereon, is properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 577-581; Dec. Dig. § 244.\*]

**18. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF FACT.**

An instruction, which assumes a fact which is for the jury to find, is properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

**19. FRAUDULENT CONVEYANCES (§ 158\*)—INTENT OF GRANTEE—CONSTRUCTIVE NOTICE.**

That a buyer of a stock of merchandise paid a price greatly disproportionate to its value is sufficient to excite his suspicion as to the bona fide intent of the seller, and if he could, by proper inquiry, ascertain that the seller intended to convert his property into money and put it beyond the reach of his creditors, the sale is fraudulent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 500-502; Dec. Dig. § 158.\*]

**20. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

An instruction that fraud sufficient to set aside a sale because fraudulent against creditors is never presumed, but must be proved by the party asserting it, and it will not be imputed, when the facts from which it is supposed to have arisen may reasonably consist with honest contention, though misleading, is not ground for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

**21. FRAUDULENT CONVEYANCES (§ 282\*)—BURDEN OF PROOF.**

A creditor of a seller, attacking a sale made on a valuable consideration because fraudulent, must show notice to the buyer of the existence of debts or circumstances to elicit inquiry which, if followed up, would lead to knowledge of their existence, and when this is shown the buyer must show an adequate consideration, and proof of it does not render the purchase valid, where the buyer had notice of the insolvency or fraudulent intent of the seller.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 817, 818; Dec. Dig. § 282.\*]

**22. TRIAL (§ 202\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

The court cannot be put in error for giving an instruction in accordance with the evidence, though it was not required to give it.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 202.\*]

**23. FRAUDULENT CONVEYANCES (§ 295\*)—SUFFICIENCY OF EVIDENCE.**

An instruction that fraud sufficient to set aside a sale because fraudulent as against creditors must be proved by clear and satisfactory evidence, and, when a transaction is susceptible fairly of two constructions, the one which will support it will be adopted, is erroneous because requiring too high a degree of proof.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. § 295.\*]

**24. FRAUDULENT CONVEYANCES (§ 57\*)—INSTRUCTIONS.**

An instruction, which predicates the invalidity of a sale as against creditors on the insolvency of the seller and knowledge thereof, is erroneous, for one solvent may be guilty of a fraudulent intent in converting his property into money to put it beyond the reach of his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 141; Dec. Dig. § 57.\*]

**25. FRAUDULENT CONVEYANCES (§ 159\*)—INSTRUCTIONS.**

An instruction, which makes the validity of a sale as against creditors to depend on the fact that the buyer had no notice of the insolvency of the seller, though he had notice of his fraudulent intent, is erroneous.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 506-517; Dec. Dig. § 159.\*]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Trial of right of property between the Montgomery Moore Manufacturing Company and G. S. Leeth, claimant. From a judgment for claimant, plaintiff appeals. Reversed and remanded.

The following charges were refused to the plaintiff:

"(1) The court charges the jury that if they believe from the evidence in this case that McCutchen told Adams, before Adams turned over the money to McCutchen, that he (McCutchen) was selling his property too cheap, and could not pay his creditors, and that it was wrong to treat them that way, then this would be notice to Leeth, and the sale would be void, and their verdict should be for the plaintiff.

"(2) The court charges the jury that if they believe the evidence in this case they must find that at the time of the sale to Leeth that the defendants made such sale with the purpose and intent to convert their property into money and place it beyond the reach of their creditors.

"(3) The court charges the jury that if the claimant, Leeth, had access to the books of McCutchen & Son, and could have, by examining said books, ascertained that McCutchen & Son were in debt, and he failed to inspect the books, and acquire such in-

formation, then Leeth would be chargeable with the notice of such indebtedness.

"(4) The court charges the jury that if they believe the evidence in this case they must find that the defendants McCutchen & Son were insolvent on January 8, 1907."

"(6) The court charges the jury that if Leeth knew of or participated in the fraudulent intent of McCutchen & Son, or was in possession of such facts and circumstances as should have excited his suspicion and put him on inquiry, which, if followed up, would have brought knowledge to him of such fraudulent intent, then he is chargeable with notice, and you should find the issues in favor of the plaintiff.

"(7) The court charges the jury that if they believe the evidence in this case, and you are reasonably satisfied from the evidence that McCutchen told Leeth, before he paid for the property, that McCutchen & Son owed debts which they could not pay, you should find the issues in favor of the plaintiff.

"(8) The court charges the jury that if you are reasonably satisfied on the evidence in this case that the price paid by Leeth to McCutchen, or McCutchen & Son, was greatly disproportionate to the value of the property that he obtained from said McCutchen, or from McCutchen & Son, then I charge you that this fact was sufficient to have excited Leeth's suspicion as to the bona fide intent of said McCutchen & Son; and if Leeth could have, on proper investigation and inquiry, diligently pursued, ascertained that it was the purpose and intent of said McCutchen & Son to convert their property into money so as to put it beyond the reach of their creditors, then under the law said sale is fraudulent and void as to such creditors, and it would be your duty to so declare, and to return a verdict for the plaintiff."

The following charges were given at the request of the plaintiff:

"(1) The court charges the jury that fraud is never presumed, but must be proven by the party asserting it, and it will not be imputed when the facts and circumstances from which it is supposed to arise may reasonably consist with honest contention.

"(2) The court charges the jury that the payment by the claimant to the defendants McCutchen & Son was a valuable consideration, and that the burden was cast upon the plaintiff to prove the existence of a fraudulent intent, and that such fraudulent intent was known to the said claimant at the time of his purchase.

"(3) The court charges the jury that there is no evidence in this case that the books of McCutchen & Son contained a single account of any of their indebtedness.

"(4) The court charges the jury that fraud must be proved by clear and satisfactory

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



evidence, and, when a transaction is susceptible fairly of two constructions, the one which will support and free it from the imputation of impurity of intention will be adopted.

"(5) The court charges that if you believe from all the evidence in this cause that the defendants McCutchen & Son were insolvent at the time of the sale of the goods in controversy to Leeth, the claimant, still, if they further believe from all the evidence in this cause that if the said Leeth paid a reasonably fair price for the same in cash at the time of his said purchase (if they believe he did purchase them) without any such knowledge of their insolvency, and without such information as reasonably to put him on inquiry; then the said purchase is valid, and your verdict must be for said Leeth, no matter how fraudulent was the intent of said McCutchen & Son, the defendants.

"(6) The court charges the jury that if you find from the evidence the claimant gave a fair, adequate consideration for the property in controversy, then I charge you that the burden of proof is on the plaintiff to show a fraudulent intent on the part of the defendants McCutchen & Son in making said sale, and knowledge on part of claimant of that intent, or of facts sufficient to charge him with the notice of the financial insolvency on the part of said McCutchen & Son; and if, on consideration of all the evidence, both of these facts have not been established to your reasonable satisfaction, your verdict must be for the claimant."

Brown & Kyle, for appellant. F. E. St. John and George H. Parker, for appellee.

SIMPSON, J. The judgment in this case was rendered on September 23, 1907, and the appeal was taken August 28, 1908.

A motion is made to dismiss the appeal because section 2868 of the Code of 1907, which went into effect on May 1, 1908, provides that appeals shall be taken within six months from the rendition of the judgment or decree. We hold that section 10 of the Code of 1907 preserves the right of appeal for the one year provided by section 436 of the Code of 1896. Said section 10 provides that: "This Code shall not affect any existing right, remedy or defense, \* \* \* as to all such cases the laws in force at the adoption of this Code shall continue in force." *Poull Co. v. Foy-Hays Const. Co. (Ala.)* 48 South. 785. The motion to dismiss the appeal is overruled.

This action is a trial of the right of property. The appellant, as plaintiff, sued out a writ of attachment against P. S. McCutchen & Son, levying the same on a stock of merchandise and other personal property which had belonged to the defendant, but which, at the time of the levy, were in the possession of appellee's agent, being removed from Baileyton, Ala., where defendant had been

doing business, to Cullman, Ala. where said appellee was doing business. Appellee thereupon interposed his claim to the property, executed bond, and took possession of the property. The insistence of plaintiff is that said McCutchen & Son were in failing circumstances, which was known to the claimant, that the stock of goods was bought for an amount greatly less than its real value, and that said sale was fraudulent and void as to the creditors of said McCutchen & Son; the plaintiff being one of said creditors. The plaintiff took the deposition of P. S. McCutchen, and the seventh interrogatory to said witness was: "Do you think it is wrong for a man to buy goods from a wholesale merchant, and then sell them with the purpose and intention of not paying for them, and then put the money in their pockets, without paying for them?" The witness, for answer to this interrogatory, said: "I never bought the goods with such intention. I never bought them with that intention." Before offering any part of the deposition, the plaintiff objected to this answer as not being responsive to his interrogatory, and moved to expunge it from the deposition, which motion was overruled, and the answer was read to the jury. As no objection was offered to the interrogatory, and the answer was not responsive to the interrogatory, it should have been excluded.

The eighth interrogatory to said witness asked, "What was the indebtedness of the defendants P. S. McCutchen & Son, on the 8th day of January, 1907?" and the answer was, "I suppose we owed something like from \$1,200 to \$1,400." The claimant moved to exclude said answer, and the court sustained the motion and expunged said answer from the deposition. This was error. This was not a "mere supposition or guess," but was a statement of the witness' best recollection of the amount of indebtedness, not having the books before him, and this is particularly true, as the witness went on to state the several amounts which they owed to various creditors.

The tenth interrogatory is not set out in full; but the court, on motion of the claimant, excluded from the jury the answer to a part of it, to wit, "I asked them when they drove up if Leeth was coming, and they said he was not." This was immaterial and could not affect the case one way or the other. Hence there was no reversible error in excluding it. There was no error in sustaining the objection to the question to the witness Whaley (referring to Mr. Leeth, as he was taking the goods into his store), "Did he appear to be mad?" as it was leading, and it was not material to the issue.

The court erred in sustaining the objection to the question to the witness Whaley, as to whether he heard Adams say anything about the ownership of the goods. It was proved and not denied that Adams was the

agent of Leeth, charged with the duty of going to the defendants, buying the goods, and bringing them to Leeth's store, and he was then in the act of bringing them. His declarations as to the ownership of the goods were competent.

There was no error in overruling the objection to the question to the witness Leeth (claimant), "What per cent. of the invoice price would the stock of goods be worth, in the condition it was when you purchased it?" The witness had just stated that the invoice had been made at wholesale cost, and he had agreed to take the goods at that, and the invoice was, immediately thereafter, introduced.

The question to the witness Leeth (the claimant) as to how much goods he was carrying at the time may have been relevant as to the bona fides of the transaction, and should be allowed on another trial.

The objections to the questions to the witnesses Kinney and Vandiver, as to what a remnant stock of goods would be worth, should have been sustained, as there was no proof that the stock purchased was a remnant stock.

There was no error in overruling the objections to the questions to the witnesses Adams and Drake as to the value of the cattle, as it required no expert knowledge to answer said questions.

There was no error in overruling the objection to the question to the witness Vandiver as to how much the goods were reduced in value by the manner in which they were moved from Baileyton to Cullman. The plaintiff had introduced evidence tending to show that the goods were worth \$1,400 or \$1,500 at Baileyton, and the witness Copeland had testified that he had invoiced the goods after they were in Leeth's store in Cullman, that they were in bad condition, etc., and worth only \$630, also that if they were in good condition at Baileyton they would be worth \$1,200. Hence it was proper to show how much they were reduced in value by the move, so as to throw light on the real value of the goods before they left Baileyton.

The matter of permitting leading questions is largely in the discretion of the trial court. Referring to the question by claimant to the witness Adams: "Did Mr. McCutchen tell you that he was selling his goods too cheap, and that he was thinking of backing out, and that it was wrong to beat his creditors that way?"—there was no motion to exclude the answer, and it was a mere negative. There was no error in overruling the objection to the question.

As to the question, to the witness Allgood, as to what occurred at the time the levy was made, while the court was not informed as to what additional facts were expected to be brought out, yet we remark, for the guidance of the court in another trial, that the plaintiff is entitled to the benefit of proof,

of all that was said and done at the time of the levy, as a part of the res gestæ.

Charge 1 requested by the plaintiff was properly refused, as being abstract. There was no evidence that the expression therein recited was used. One witness was asked if that expression was used, and replied that he could not say that that was said, but that something like that was said. Another witness denied it.

Charge 2 requested by the plaintiff was an invasion of the province of the jury, and properly refused.

Charge 3 was properly refused. There was no evidence tending to show that Leeth had access to the books of McCutchen & Son before or at the time of making the purchase.

There was no error in refusing charge 4 requested by the plaintiff, as it was singling out a portion of the evidence and requiring a separate finding on that fact.

Charge 6 requested by the plaintiff was properly refused. It assumed the fraudulent intent of McCutchen & Son, which was a matter for the jury to find.

Charge 8, also, should have been given. *Teague, Barnett & Co. v. Bass*, 131 Ala. 423, 427, 31 South. 4; *Carter v. O'Bryan Bros.*, 105 Ala. 305, 316, 16 South. 894; *Smith v. Collins & Griffith*, 94 Ala. 394, 399, 404, 10 South. 334; *Carter Bros. & Co. v. Coleman*, 82 Ala. 178, 182, 2 South. 354; *Jordan v. Rice*, 151 Ala. 523, 44 South. 93, 94.

There was no error in the refusal of the court to give charge 7 requested by the plaintiff. While it is true that there is evidence tending to show the fraudulent character of the sale on the part of McCutchen & Son, and it is also true that if McCutchen told Leeth, before he paid for the property, that McCutchen & Son owed debts which they could not pay, this would be sufficient to put Leeth on inquiry, yet it is not proper to single out this item of evidence from all the others, and instruct the jury to find for the plaintiff, on that alone.

While charge 1, given at the request of the claimant, may have been misleading, yet it does not contain such error as to be reversible.

The court erred in giving charge 2 at the request of the claimant.

The rule is that: "If made upon a valuable consideration, the attacking creditor must go further and show notice to the grantee of the existence of other debts, or circumstances sufficient to elicit inquiry (italics ours), and which, if followed up, would lead to knowledge of their existence. When this is shown, then the burden is upon the grantee to show an adequate consideration—one reasonably equivalent to the value of the goods." And even the payment of an adequate consideration would not render the purchase valid, if the purchaser had notice of the insolvent condition or fraudulent intent of the vendor. *Chipman v. Glennon*, 98 Ala. 263, 265, 13 South. 822, 823; *Smith v.*

Collins & Griffith, 94 Ala. 394, 403, 10 South. 334.

While the court could not be required to give such a charge as charge 3, yet it is in accordance with the evidence, and the court cannot be put in error for giving it.

Charge 4 given at the request of the claimant is erroneous in requiring too high a degree of proof in order to satisfy the jury.

Charge 5 given at the request of the claimant is erroneous, in that it predicates the invalidity of the deed entirely on the insolvency of the defendants, and knowledge thereof; whereas, one who is entirely solvent may be guilty of a fraudulent intent in converting his property into money for the purpose of putting it beyond the reach of his creditors. *Teague, Barnett & Co. v. Bass*, 131 Ala. 427, 31 South. 4.

Charge 6 is subject to the same criticism, in that it makes the deed valid if the claimant had no notice of the insolvency of defendants, although he might have had notice of their fraudulent intent.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

### HOLLAND v. STATE.

(Supreme Court of Alabama. June 15, 1909.)

#### 1. GRAND JURY (§ 10\*)—DRAWING—STATUTORY PROVISIONS.

Code 1907, § 7261, providing for the drawing of juries for adjourned or special terms by the jury commission, when ordered prior to the convening thereof, and section 3249, providing for the drawing of juries by a judge or the court during a special or adjourned term, when the order therefor is made during such special or adjourned term and not prior thereto, are not in conflict, as there is a field of operation for both, and, where the judge in ordering an adjourned term made no order at the time for a grand jury and did not order the same until after such term had convened, it was properly drawn under section 3249.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 10.\*]

#### 2. GRAND JURY (§ 12\*)—IMPANELING—STATUTORY PROVISIONS.

Under Code 1907, § 3249, providing that a jury not ordered and drawn until after a special or adjourned term shall have convened shall be organized, sworn, and impaneled as at a regular term, a grand jury was properly completed under section 7263, providing that if 15 persons qualified as grand jurors do not appear, or if the number of those who appear is reduced below 15, by reason of discharges or other cause, the court shall command the sheriff to summon twice the number of persons required to complete the grand jury, and that in any event the court may, in its discretion, order a sufficient number of qualified jurors to increase the number of 15, and that, if a greater number appear than is necessary to complete the grand jury, the names shall be written on

separate slips and from them a sufficient number drawn to complete the jury.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 12.\*]

#### 3. GRAND JURY (§ 20\*)—VALIDITY—GRAND JURY.

Under the express terms of Code 1907, § 7572, no objection can be taken to an indictment by a plea in abatement, or otherwise, directed to the organization, formation, etc., of a special grand jury.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 20.\*]

#### 4. HOMICIDE (§ 157\*)—EVIDENCE—ADMISSIBILITY.

On a trial for murder, the state may show the fact of a former difficulty between decedent and defendant to prove malice; but the fact that decedent's face was swollen and bruised about three weeks before the killing tended to enter into the details of the difficulty and should not have been admitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 288-292; Dec. Dig. § 157.\*]

#### 5. HOMICIDE (§ 169\*)—EVIDENCE—ADMISSIBILITY.

On a trial for murder, a conversation between decedent and another before the killing, and while defendant was absent, should not have been admitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 347-350; Dec. Dig. § 169.\*]

#### 6. CRIMINAL LAW (§ 366\*)—EVIDENCE—ADMISSIBILITY.

On a trial for murder, evidence that decedent told witness about five minutes before the difficulty, and before defendant had returned, that defendant had told decedent that he was going after a gun and coming back to kill decedent, and that he could not defend himself, was hearsay and not a part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806-820; Dec. Dig. § 366.\*]

#### 7. HOMICIDE (§ 169\*)—EVIDENCE—ADMISSIBILITY.

On a trial for murder, it was error to permit a witness to testify that decedent had said that defendant did not want him on account of a warrant, but for some other reason.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 347-350; Dec. Dig. § 169.\*]

#### 8. HOMICIDE (§§ 158, 169\*)—EVIDENCE—ADMISSIBILITY.

On a trial for murder, the state was entitled to show what defendant did and said just before the killing, and the threats he may have made.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296, 341-350; Dec. Dig. §§ 158, 169.\*]

#### 9. CRIMINAL LAW (§ 414\*)—STATEMENTS OF ACCUSED—RIGHT TO ENTIRE CONVERSATION.

Where the state introduces evidence of defendant's statements just before the killing, defendant is entitled to the whole conversation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 862; Dec. Dig. § 414.\*]

#### 10. HOMICIDE (§ 174\*)—EVIDENCE—ADMISSIBILITY.

On a trial for murder, it was not error to permit proof of what defendant said after the killing as to the difficulty, where, while not a part of the *res gestæ*, it was an inculpatory confession, and where a predicate was laid therefor.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 367, 368; Dec. Dig. § 174.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**11. CRIMINAL LAW (§ 364\*)—EVIDENCE—ADMISSIBILITY.**

On a trial for murder, evidence as to what witnesses overheard defendant say about the killing, when leaving the place just after the shooting, was a part of the res gestæ and admissible without a predicate as to its being voluntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 810-818; Dec. Dig. § 364.\*]

**12. HOMICIDE (§ 171\*)—EVIDENCE—ADMISSIBILITY.**

On a trial for murder, the state should not have been permitted to show that defendant struck a third person, where it did not appear that he struck him in an effort to escape.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 171.\*]

**13. HOMICIDE (§ 184\*)—EVIDENCE—ADMISSIBILITY.**

Where defendant's theory was that the killing was justifiable, in that he had a warrant for the arrest of decedent and was forced to kill him to repel a threatened attack by decedent, and the state's theory was that, notwithstanding defendant was armed with a warrant, he willfully and maliciously killed decedent, defendant should have been permitted to show that he asked decedent to go with him.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 184.\*]

**14. HOMICIDE (§ 171\*)—EVIDENCE—ADMISSIBILITY.**

On a trial for murder, defendant was entitled to show by one who was an eyewitness everything that was said and done from the time defendant came to where decedent was until the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 351-358; Dec. Dig. § 171.\*]

**15. HOMICIDE (§ 105\*)—MAKING ARREST—RIGHT TO KILL.**

Though an officer having a warrant of arrest is justified in killing a person charged with a felony if he resists or flees, this rule does not prevail as to the arrest of a person charged with misdemeanor, and in the latter case life can only be taken where the person resists and so endangers the life or person of the officer as to make such killing necessary in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 135; Dec. Dig. § 105.\*]

**16. HOMICIDE (§ 105\*)—DEFENSES.**

Where the circumstances show a willful murder, rather than an attempt to arrest decedent, the warrant of arrest is of no benefit to defendant.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 105.\*]

**17. HOMICIDE (§ 105\*)—MAKING ARREST—FORCE.**

An officer armed with a legal warrant may enter the premises of the person to be arrested, is under no duty to retreat in case of resistance, and can repel by force any force used, but not in excess of what may be necessary to make the arrest or to protect his life or person.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 135; Dec. Dig. § 105.\*]

**18. HOMICIDE (§ 286\*)—TRIAL—INSTRUCTIONS.**

An instruction that if defendant went to the home of decedent with the premeditated intent to kill him, and in pursuance thereof did kill him with malice, the fact that defendant had a warrant was no excuse, and he would be guilty of murder, though it may be correct in the abstract, may have a misleading tendency and should not be given.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. § 286.\*]

**19. HOMICIDE (§ 298\*)—TRIAL—INSTRUCTIONS.**

On a trial for murder, a charge, requested by defendant, that he was under no legal duty to yield to solicitations not to enter the home of decedent, if he had a warrant for decedent's arrest, and was entering for the purpose of executing it, but that his duty required him to disregard such solicitations and execute the warrant, should have been given.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 612; Dec. Dig. § 298.\*]

**20. HOMICIDE (§ 293\*)—TRIAL—INSTRUCTIONS.**

On a trial for murder, a charge, requested by defendant, that resistance to a legal warrant might consist in acts or demonstrations by the person to be arrested, importing defiance and indicating an immediate purpose to use violence, and that after such acts or demonstrations the officer might at once employ such force as was necessary to accomplish the arrest, even to the taking of life, should have been given.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 612; Dec. Dig. § 298.\*]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

John Holland was convicted of murder in the first degree, and he appeals. Reversed and remanded.

It appears that at the time of the killing an adjourned term of the court was being held, in the calling of which no order had been entered for a grand jury, but only the petit jurors had been ordered and summoned. During the progress of the term the court drew and impaneled a grand jury, who investigated the killing and returned the indictment. The motion and pleas addressed to the indictment raise these questions. The facts sufficiently appear in the opinion of the court.

The following charges were given at the instance of the state:

(1) "If you believe beyond a reasonable doubt that defendant, in this county and before the finding of this indictment, purposely killed Putnam by shooting him with a pistol, with wickedness and depravity of heart towards the deceased, and not because of any resistance to arrest by deceased, and that said killing was determined on beforehand and after reflection, for however short a time is immaterial, then defendant is guilty of murder in the second degree."

(2) "If, after considering all the evidence, you have a fixed conviction of the truth of the charge, you are satisfied beyond a reasonable doubt, and it is your duty to convict the defendant."

(3) "If you believe from all the evidence beyond a reasonable doubt that the defendant is guilty, though you also believe that it is possible that he is not guilty, you should convict him."

(4) "The court has just charged you at the instance of the defendant that each juror must be convinced of defendant's guilt beyond a reasonable doubt before you can convict him. This means that your verdict must

mean a unanimous verdict, whether it be for or against the defendant; and although one of your number may have a reasonable doubt of defendant's guilt, this would not authorize you to acquit him."

(5) "If the defendant, in this county and before the finding of this indictment, killed Putnam by shooting him with a pistol with malice aforethought, and not in resistance of arrest, he is guilty of murder; and if the killing was willful, deliberate, malicious, and premeditated, and the deliberation and premeditation existed for only a moment before the fatal shot was fired, the defendant is guilty of murder in the second degree."

(6) "The court charges the jury that before the defendant would be entitled to any protection or justification for taking the life of the deceased, by reason of the official position which the defendant is alleged to have held at the time of the killing, he must have been acting in pursuance of some lawful authority, arming him with the legal right to arrest the deceased, and there must have been such resistance of the arrest by the deceased at the time the shot was fired as to create real or apparent present, impending, imperious necessity for the defendant to kill the deceased, either to protect himself from grievous bodily harm, or to overcome such resistance; and if you should find from the evidence beyond a reasonable doubt that no such necessity existed at the time the shot was fired, that the defendant did not act in good faith, but merely used his official position as a cloak or excuse to take the life of deceased, and that the defendant, in pursuance of a fixed purpose, willfully and with malice aforethought killed the deceased, then this would constitute murder in the first degree."

(7) "If the jury believe from the evidence beyond a reasonable doubt that the defendant went to the home of Putnam with the premeditation to kill Putnam, and, in pursuance of this previous determination, he did kill him, and killed with malice, the fact that the defendant had a warrant is no excuse to him, and defendant would be guilty of murder."

(8) "The court charges the jury that, before the defendant would be justified in shooting to kill the deceased, there must have been a sudden, impending, imperious necessity, real or apparent, to shoot, either to save the defendant from grievous bodily harm or to overcome a resistance of a legal arrest."

The following charges were refused to the defendant:

(1) "I charge you that the defendant was under no legal duty to yield to the solicitations or requests of the ladies in or about the home of Putnam not to enter such home, if you believe from the evidence that at the time he had in his possession the warrant of arrest in evidence in this case, and was entering the home for the purpose of executing the warrant; but his duty required him to

disregard such solicitations and requests, if any were made, and go forward and duly execute the warrant."

(26) "I charge you that resistance to a legal arrest may consist in acts or demonstrations on the part of the party sought to be arrested, which import defiance and indicate an immediate purpose to use violence in resisting, and after such acts or demonstrations the officer may instantly employ such degree or force as is necessary to reduce the party to submission and accomplish the arrest, even to the taking of the party's life, if so necessary."

It is unnecessary to set out the other charges requested by the defendant.

George H. Parker and Callahan & Harris, for appellant. Alexander M. Garber, Atty. Gen., and Brown & Kyle, for the State.

ANDERSON, J. The indictment was returned by a grand jury specially drawn and organized by the court or judge as provided by section 3249 of the Code of 1907.

Sections 7261 and 3249 of the Code of 1907 are not in conflict, as there is a field of operation for both. Section 7261 provides for the drawing of juries for adjourned or special terms, by the jury commission, upon the order of the clerk, when the judge orders same prior to the convening of said special or adjourned terms. Section 3249 provides for the drawing of juries by the judge or court during the special or adjourned term when the order for same is not made until said special or adjourned term and not prior thereto. The judge in ordering the adjourned term, in the present instance, made no order at the time for a grand jury and did not order same until after said adjourned term had convened and properly drew the grand jury in question under section 3249 of the Code. Section 3249 provides that all juries shall be organized, sworn, and impaneled as at regular terms, and the trial court properly completed the grand jury, under the terms of section 7283 of the Code of 1907. Moreover, section 7572 provides that no objection can be taken to the organization, formation, etc., of a special grand jury.

The trial court committed no reversible error in the ruling upon the motion and pleas questioning the validity of the indictment.

The state had the right to show a former difficulty between the defendant and the deceased, for the purpose of showing malice; but the fact that the decedent's face was swollen and bruised about three weeks before the killing had a tendency to enter into the details of the difficulty and should not have been admitted. *McAnally v. State*, 74 Ala. 9.

The conversation between the deceased and Annie Liggan before the killing, and while the defendant was absent from the house, was not admissible. Neither should the trial court have permitted Mrs. Taylor

to testify that deceased told her, about five minutes before the difficulty, and before the defendant had returned to the house, that "Holland told him he was going after a gun and was coming back to kill him, and that he could not defend himself." This was all hearsay evidence and was not a part of the *res gestæ*. *State v. Stallings*, 142 Ala. 115, 38 South. 261; *Fonville v. State*, 91 Ala. 39, 8 South. 688. The trial court likewise erred in permitting Mrs. Taylor to testify that deceased said, "Holland did not want him on account of the warrant, but for some other reason." The state had the right to show what the defendant did and said uptown, just before the killing, and the threats that he may have made; but the defendant was entitled to the full conversation. The trial court did not err in permitting proof of what defendant said, after the killing, in Towles' shop and in McEntires' store, as to the difficulty and killing. It is true it was not a part of the *res gestæ*, but was an inculpatory confession, and a predicate was laid for same by the witness Abercrombie. The evidence of Fuller and Alex Clark as to what they overheard defendant say about the killing, when leaving the place, and just after the shooting, was a part of the *res gestæ*, and was admissible without a predicate, as to its being voluntary.

The trial court should not have permitted the state to show that defendant struck Abercrombie after he had gotten into the store. It did not appear that he struck him in an effort to escape. Of course, if he struck in an effort to escape, it would have been relevant; but we do not think it was shown, by the evidence, that this was done in an effort to escape.

The defendant should have been permitted to ask the witness Alonzo Webb if defendant asked deceased to go anywhere with him. The defendant's theory was that he went there to arrest deceased, and the state's was that he went to kill him whether or no, and the defendant should have been permitted to show that he was trying to arrest deceased and had requested him to go with him. Indeed, this was an eyewitness, and the defendant was entitled to elicit from him everything that was said and done from the time they got there until the killing. Of course, he could not state conclusions, and the trial court did not err in sustaining objections to questions of this character; but there were some direct questions asked which the court should have permitted.

The rulings upon the evidence have been considered, and we do not think the court committed reversible error except as heretofore pointed out.

The state's theory is that, notwithstanding this defendant was armed with a warrant for the arrest of the deceased, he willfully and maliciously killed him, in that, he was

using the warrant as a mere cloak to commit the crime, and that said killing was not necessary to repel the resistance by the deceased of an attempted arrest by the defendant. The defendant's theory is that the killing was justifiable, in that he had the legal right to arrest the deceased, and had to kill him in order to repel a threatened attack upon himself by the deceased in his effort to resist the arrest. The killing was therefore either unlawful or justifiable under legal process.

While an officer having a warrant of arrest is justifiable in killing one charged with a felony, if he resist or flees, this rule does not prevail as to arrest of persons charged with misdemeanors. "When an attempted arrest is for an ordinary misdemeanor or in a civil action, life can only be taken by the officer where the person arrested resists by force, and so endangers the life or person of the officer as to make such killing necessary in self-defense." *Kerr on Homicide*, 187; *Birt v. State* (Ala.) 46 South. 858; *Clements v. State*, 50 Ala. 117. If the circumstances show a willful murder, rather than an attempt to arrest the deceased, the warrant can be of no benefit to the defendant. 21 Cyc. 953, and authorities cited in note 39. On the other hand, if the defendant is armed with a legal warrant, he has the lawful right to enter the premises of the deceased, is under no duty to retreat in case of resistance, and can repel any force used by the deceased not in excess of what may be necessary to make the arrest or to protect his life or himself from serious bodily harm.

All the charges given at the request of the state, with, perhaps, the exception of No. 7, were warranted by the law and the facts hypothesized. Charge 7 may be correct in the abstract; but it may have misleading tendencies, and should not be given on the next trial.

Charges 1 and 26, refused the defendant, should have been given.

We have examined the other charges refused the defendant and find that they were either bad or fully covered by the given charges.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

Ex parte DICKENS.

(Supreme Court of Alabama. May 11, 1909.  
Rehearing Denied June 30, 1909.)

1. COURTS (§ 210\*)—STATE SUPREME COURT—JURISDICTION.

The common law vested in the Supreme Court power to review orders, proceedings, and judgments of all inferior courts and tribunals,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and to pass on the question of their jurisdiction and decisions on questions of law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 499-504; Dec. Dig. § 210.\*]

**2. CERTIORARI (§ 15\*)—SCOPE OF WRIT.**

In the absence of statute, the Supreme Court cannot review determinations of inferior tribunals on questions of fact on certiorari.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 15.\*]

**3. CERTIORARI (§ 15\*)—SCOPE OF WRIT—QUESTIONS OF LAW.**

While, originally, certiorari was only available to review questions of jurisdiction, it may now be used to determine legal questions affecting the merits of the cause.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 15.\*]

**4. CERTIORARI (§ 5\*)—RIGHT TO WRIT—APPEAL.**

In general, certiorari will not be granted in cases where the party seeking it has an adequate remedy by appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.\*]

**5. CONTEMPT (§ 4\*)—"CIVIL CONTEMPT."**

A "civil contempt" consists in failing to do something ordered by the court for the benefit of the opposing party.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1194, 1195.]

**6. CONTEMPT (§ 66\*)—APPEAL—NATURE OF PROCEEDING.**

A proceeding for contempt is not a part of the main case, but is a complete collateral proceeding, which may not be reviewed on appeal in the main case.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 66.\*]

**7. CONTEMPT (§§ 66, 67\*)—HABEAS CORPUS (§ 22\*)—REVIEW—REMEDIES.**

An order committing a party for contempt is reversible on certiorari for errors on the face of the record, or, if relator has been illegally imprisoned, by habeas corpus, but not by appeal.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-237; Dec. Dig. §§ 66, 67;\* Habeas Corpus, Dec. Dig. § 22.\*]

**8. MANDAMUS (§ 26\*)—NATURE OF WRIT.**

The office of a writ of mandamus is to require a lower court or judge to act, and not to correct error or reverse judicial action, though it may be issued to enforce a clear right.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 62; Dec. Dig. § 26.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4322-4330; vol. 8, pp. 7714, 7715.]

**9. CERTIORARI (§ 65\*)—SCOPE OF REVIEW.**

On a writ of certiorari the trial is not de novo.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 65.\*]

**10. CONTEMPT (§ 33\*)—POWER TO PUNISH.**

All courts have inherent power to punish for contempt, which power rests on their right to protect their dignity and to demand obedience to their decrees, whether the contempt be criminal or civil.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 95-98; Dec. Dig. § 33.\*]

**11. CONTEMPT (§ 20\*)—ORDERS IN CHANCERY—DISOBEDIENCE.**

Where an order directing a party to deliver certain bonds to a receiver had not only become functus officio, by having been complied with,

but had been reversed on appeal, an order adjudging the party in contempt for failing to comply therewith was unsustainable.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 20.\*]

**12. CONSTITUTIONAL LAW (§ 83\*)—IMPRISONMENT FOR DEBT—CONTEMPT ORDERS—FAILURE TO PERFORM.**

An order committing a party for contempt until he should pay an amount equal to the value of certain coupons detached from bonds and disposed of was erroneous as violating the constitutional prohibition against imprisonment for debt.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151½; Dec. Dig. § 83.\*]

**13. CONTEMPT (§ 33\*)—AUTHORITY OF COURT—ENFORCEMENT OF ORDER.**

Where a receiver had been appointed to take charge of the assets of a firm whose estate was being administered in the court, the court had jurisdiction to make such orders and adopt such measures as were necessary to have the firm's property placed in the hands of the receiver.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 95-98; Dec. Dig. § 33.\*]

**14. CONTEMPT (§ 79\*)—PUNISHMENT—IMPRISONMENT TO COMPEL PERFORMANCE.**

A party having violated an order of the chancery court requiring the surviving partner of a firm to account and deliver the assets in his hands to a receiver, the court had jurisdiction to commit him to prison until the order was complied with, either by him or until the purpose of the order had been accomplished by other means.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 270; Dec. Dig. § 79.\*]

**15. CONTEMPT (§ 72\*)—PUNISHMENT—STATUTES—APPLICATION.**

Code 1907, § 3057, providing that courts may punish for contempts by fine, not exceeding \$50, and by imprisonment not exceeding 5 days, one or both, does not apply to civil contempts consisting of a refusal or failure to obey a chancery court's orders.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 249-256; Dec. Dig. § 72.\*]

Petition for certiorari by Charles C. Dickens to review an order incarcerating him for contempt of court. Granted in part, and petitioner discharged.

Stevens & Lyons, Francis J. Inge, Webb & McAlpin, and B. B. Bone, for petitioner. Gregory L. & H. T. Smith, opposed.

**SIMPSON, J.** This is a proceeding by certiorari, from this court, seeking to have set aside certain orders of the chancery court under which the petitioner is imprisoned for contempt of court.

The first question which arises is whether or not the petitioner can have relief by this proceeding. "By the common law the power is vested in the Supreme Court to review the orders, proceedings, and judgments of all inferior courts and tribunals, and pass upon the question of their jurisdiction and decisions on questions of law; but, in the absence of some statute conferring the power of reviewing the determinations of these inferior tribunals upon questions of fact, the action of the court or tribunal is final and conclusive

and cannot be reviewed, revised, or corrected on the common-law writ of certiorari." Harris on Certiorari, p. 40, § 45. Originally, on certiorari, only the question of jurisdiction was inquired into; but this limit has been removed, and now the court "examines the law questions involved in the case which may affect its merits." *Id.*, p. 3, § 1. As a general proposition certiorari will not be granted in cases where the party seeking it has an adequate remedy by appeal. Harris on Certiorari, p. 37, § 44; *A. G. S. R. R. Co. v. Christian*, 82 Ala. 307, 309, 1 South. 121.

So it becomes necessary to decide whether the petitioner in this case has an adequate remedy by appeal. "A 'civil contempt' consists in failing to do something, ordered to be done by a court in a civil action, for the benefit of the opposing party therein." 9 Cyc. 6. While there have been some opinions to the contrary, the weight of authority, as well as the reason of the case, is that a proceeding for contempt is not a part of the main case, before the court, but is collateral to it, a proceeding in itself, and consequently would not come up for consideration on an appeal in the main case. 9 Cyc. 33; *Hogan v. Alston*, 9 Ala. 627.

If it were a new proposition, the writer might be disposed to think that, as it is a collateral independent proceeding, a final order of commitment would be a final decree, in that case, from which an appeal might be taken; but, as the matter has been before our own court several times, we may refer to our own cases to determine this question.

In the case of *Hogan v. Alston*, supra, this court said that a rule for an attachment against a party or witness "must, in general, be corrected by a mandamus, or other appropriate remedy."

Where a party appealed from a judgment fining him for contempt, the court declared the appellant was without remedy, and stated that: "If the judgment entry showed error on its face, possibly it would furnish ground for a certiorari; or, if the party has been illegally imprisoned, for a habeas corpus, it furnishes no ground for appeal." *Easton v. State*, 39 Ala. 551, 554, 87 Am. Dec. 49. In that case the record did not show what the facts were, upon which the contempt was adjudged, and the quotation made from Judge Ruffin seems to indicate that if the facts were stated, and were insufficient to justify the adjudication of contempt, the party should be discharged.

In a case where a physician refused to testify as an expert, without being paid for his services, and was fined for contempt, the case was brought to this court by certiorari, and the judgment of the circuit court was affirmed. *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611.

Again, where a witness refused to answer a question which might tend to criminate him, and was adjudged guilty of contempt, the case was brought up to this court by

certiorari, and the order of the lower court quashed, and the petitioner discharged. *Ex parte Boscowitz*, 84 Ala. 463, 4 South. 279, 5 Am. St. Rep. 384.

In the Hardy Case, where Hardy was imprisoned by order of the chancery court for refusing to obey the order of the court requiring him to deliver up bonds for the payment of a debt (under a section of the Code of 1876), the matter was brought to this court by a petition for a writ of habeas corpus, and the order of this court was that "the writ of habeas corpus and certiorari will be awarded," etc. *Ex parte John Hardy*, 68 Ala. 303, 323.

An order granting a rule nisi to show cause why the respondent should not be adjudged guilty of contempt was held not to be such a final decree as will authorize an appeal. *McKissack v. Voorhels, Miller & Co.*, 119 Ala. 101, 104, 24 South. 523.

The case of *Brady v. Brady*, 144 Ala. 414, 39 South. 237, seems to be based mainly on the fact that the decree confirming the report of the register, and ordering the defendant to pay the alimony awarded or go to jail, was not such a final decree as would support an appeal, and in that case, on account of the fact that the final decree could not place the parties in statu quo, a rule nisi was granted to show cause why a peremptory mandamus should not be granted to vacate the decree.

On the other hand, this court has entertained an appeal from an order of court refusing to commit for contempt. *Adair Bros. & Co. v. Gilmore*, 106 Ala. 436, 17 South. 544. The proceedings of lower courts have also been reviewed and corrected by certiorari in the following cases, to wit: Where a claim against an insolvent estate was rejected. *Cawthorne v. Welsinger*, 6 Ala. 714, 717. Also where one not a party to the proceeding was injured by it. *Earle v. Juzan*, 7 Ala. 474. Also on dismissal of petition, by administrator of a distributee, to represent his intestate in the settlement. *Graham et al. v. Abercrombie et al.*, 8 Ala. 552. Also where a void order of removal of an administrator had been entered. *Ex parte Boynton*, 44 Ala. 261. Also where a justice of the peace rendered judgment against a corporation, by default, without showing that proof was made of the official character of the person on whom service was had, because an appeal would not be an adequate remedy. *M. & C. R. R. Co. v. Brannum*, 96 Ala. 461, 11 South. 468; *Independent Pub. Co. v. Am. Press Ass'n*, 102 Ala. 475, 15 South. 947. Also to quash a summary execution issued on a bond illegally returned as forfeited. *Cobb v. Thompson*, 87 Ala. 381, 384, 6 South. 373. Also on contest of election, without authority of law, in probate court. *Clarke & Daviney v. Jack et al.*, 60 Ala. 271. Also in a stock law case; no appeal being provided by statute. *Standfill v. Court of Co. Rev.*, 80 Ala. 287; *Com'rs' Court*



v. Johnson, 145 Ala. 553, 39 South. 910. Also for defects on face of proceedings in probate court for erecting a dam. *McCulley v. Cunningham*, 96 Ala. 583, 11 South. 694; *In re Chetwood*, 165 U. S. 462, 17 Sup. Ct. 385, 41 L. Ed. 782; *Bessette v. Conkey*, 194 U. S. 335, 24 Sup. Ct. 685, 48 L. Ed. 997.

From these, and other cases which might be cited, the judgment of this court is that the proper way to review the action of the court in cases of this kind is by certiorari, and not by appeal.

We think that certiorari is a better remedy than mandamus, because the office of a "mandamus" is to require the lower court or judge to act, and not "to correct error or to reverse judicial action," though it may be issued to enforce a "clear right" (5 Mayfield's Dig. 628; 9 Cyc. 65); whereas, in a proceeding by certiorari, errors of law in the judicial action of the lower court may be inquired into and corrected.

As stated by this court, under this writ "the jurisdiction of the court and the regularity of its proceedings—that is, errors of law apparent on the record—are available; but the trial is not de novo, and conclusions of fact cannot be reviewed." *McCulley v. Cunningham*, 96 Ala. 583, 585, 11 South. 694, 695; *Clarke & Daviney v. Jack et al.*, 60 Ala. 271, 280; *A. G. S. R. R. Co. v. Christian*, 82 Ala. 307, 309, 1 South. 121; *Harris on Certiorari*, p. 65, § 83.

All courts have the inherent power to punish for contempt of court, and, although contempts are divided into criminal and civil contempts, yet the power of the court, in each, rests upon its right to protect its dignity and to demand obedience to its decrees.

The decree which is referred to as the decree of May 2, 1908, after stating the motion on which it is made, goes on in these words: "Upon consideration, I am of opinion that it is the duty of said surviving partner, so far as it is possible, to file such account as is required by this motion, and to do so at the earliest possible moment. The court does not, in this order, fix a time within which this must be done, further than to request that it be done within a reasonable time, as there is not sufficient data before the court to determine what would be a reasonable time within which this account could and should be prepared." On the same day (May 2d) a motion was filed by the complainant asking that an order or reference be made to a special master to state the accounts, in about the same manner as indicated for the respondent to state it. On May 9th this motion was granted, in so far as the first 10 grounds are concerned; but as to the last paragraph of said motion, asking that said special master state an account between Charles Dickens as surviving partner, and complainant, and ascertain what moneys have come into his hands as surviving partner, how he has invested

the same, and what credits he is entitled to for expenses in winding up the partnership, the chancellor says it should not be granted, until the issues presented by the plea and cross-bill have been determined, also that it would require an accountant of more than ordinary ability. So the motion, on this point, is reserved for further hearing.

On November 4, 1908, on motion, an order was entered directing the defendant to forthwith file his accounts and vouchers, showing his receipts and disbursements since the last account filed by him, both as surviving partner and as administrator. After motion made for commitment for contempt, a great volume of testimony was taken, showing that experts had had access to all of the books and papers of the business, and an exhaustive analysis of the accounts and dealings was made. On January 28, 1909, a decree was rendered, stating: That, in the opinion of the chancellor, said Charles C. Dickens had not, in good faith, carried out the orders of the court of May 2 and November 4, 1908; that the accounts which had been filed by him, both as administrator and as surviving partner, were fraudulent; that he had not made an honest effort to comply with the decree of February 15, 1908, requiring him to file, before February 24th, a true and correct account, etc. It was therefore adjudged that he had been guilty of contempt, in failing to comply with said several orders, and in filing fraudulent accounts, also, that he be allowed 30 days to comply with the order of May 2d, and 8 days to comply with the order of November 4th and the decree of November 15th, and on failure to comply he was to be committed for contempt, until he has fully complied with said orders.

Dickens was enjoined from disposing of his real estate January 28, 1909, and, on the same day, a motion was made that the defendant be adjudged guilty of contempt of court, first, "by violating the injunction heretofore issued against him, by taking the bonds which he purchased with the assets of the English Manufacturing Company, and removing them from the depository from which he was forbidden by the injunction of this honorable court from removing, and secreting them and appropriating them to his own use," and asking that he be committed until he restore the bonds and surrender them to the receiver. Another motion was made to commit said Dickens to jail for removing the bonds, and on February 1, 1909, a decree was rendered committing said Dickens for contempt, in violating the injunction issued November 8, 1907, by removing and converting to his own use the bonds, and ordering that he be committed to the custody of the sheriff until he deliver the bonds to the receiver, Wm. Vizard, "and the amount of money equal to the coupons which have been detached and disposed of before the issuance of this injunction, or until released

by the further order of this court." On motion a further order was made committing him on account of certain other bonds, which had been omitted from the first order.

With regard to that part of the decree adjudging Dickens guilty of contempt, in reference to the bonds, it will be noticed that the injunction therein referred to was the one issued on November 8, 1908, which was, in fact, an order directing said Dickens to turn over to A. Inge Selden, the receiver theretofore appointed, the property in question, and ordering him not to dispose of the same. Subsequently, and before the date of said decree of contempt, the court had reversed the decree appointing the receiver, holding that, as Dickens was shown to be entirely solvent, he, as surviving partner, had a right to the possession of the assets of the late firm, and that it was not proper to appoint a receiver. *Dickens v. Dickens* (Ala.) 45 South. 630. The record shows that said bonds were, in fact, delivered to said Selden, receiver, in accordance with said decree; but, after the action of this court, the same were returned to said Dickens. There was no proof that said bonds had ever been re-deposited in the same safety depository as before.

It is difficult to see how Dickens could be adjudged guilty of contempt for disobeying an order, which the record shows that he obeyed. That order had not only become functus officio, by having been complied with, but also by the judgment of this court, under which the papers were properly returned to him. It is true that, subsequent to the decision of this court, another receiver, Vizard, was appointed; but no order had been made for him to deliver the bonds to Vizard, and the order states distinctly that he is committed for violating the injunction of November 8, 1907. It results that said order of February 1, 1909, was without authority of law; and it was, further, violative of the law, in that it committed him until he should pay the "amount of money equal to the coupons which have been detached and disposed of." The amount due for the coupons was simply a debt, and to imprison a man until he paid it would be simply imprisonment for debt, which is forbidden by our Constitution. *Ex parte John Hardy*, 68 Ala. 303, 323.

While the decree of May 2d was not peremptory, as to the time within which the accounts should be separated, as therein required, yet that did not mean that the defendant was not to comply at all with the directions of the chancellor, and whenever an account was filed it was the duty of the defendant to make it out as therein directed. The subsequent decree of November 4th was peremptory, and after more than eight months, allowed as a reasonable time to comply with the decree of May 2d, the decree of January 28, 1909, fixed the time with-

in which the decree of May 2d should be complied with, thus making it peremptory. Following the rules above stated, the chancellor has found the facts that said Dickens has not, in good faith, obeyed the orders of the court, but, on the contrary, has filed a false and fraudulent account; and we must take his finding as being correct. Those being the facts, said Dickens was properly adjudged to be in contempt, and it was within the power and jurisdiction of the court to order that he be imprisoned until he should comply with the orders of the court.

A receiver having been appointed to take charge of the assets of the firm and estate being administered in the court, it was the duty of the court to make such orders and adopt such measures as were necessary to have the property placed in the hands of the receiver. The disobedience of this order is what is denominated a "civil contempt," and the consensus of authority is that the court, having made an order within its power and jurisdiction, has a right to commit the violator of it to prison until he complies with the order. *Rapalje on Contempts*, p. 26, § 21; 7 Am. & Eng. Ency. Law (2d Ed.) 68; 9 Cyc. 60; *In re Allen*, 13 Blatchf. 272, 275, Fed. Cas. No. 208; *Ex parte Tinsley*, 37 Tex. Cr. R. 517, 40 S. W. 306, 66 Am. St. Rep. 818, 828; *Bessette v. Conkey & Co.*, 194 U. S. 324, 328, 24 Sup. Ct. 663, 48 L. Ed. 997; *Ex parte Crittenden*, 62 Cal. 534; *Ex parte Smith*, 53 Cal. 204.

Section 3057 of the Code of 1907 provides that: "The court of chancery may punish for contempts by fine, not exceeding fifty dollars, and by imprisonment, not exceeding five days, one or both." In the chapter (103) on "Judicial Power," etc., in section 4630, it is said: "The powers of the several courts, in this state, to issue attachments and inflict summary punishment for contempts, do not extend to any other cases than \* \* \* (3) the disobedience or resistance of any officer of the court, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command thereof." And section 4631 provides that: "Every court has power \* \* \* (3) to compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding therein." And section 4632 is: "For the effectual exercise of the powers conferred by the preceding section, the court may punish for contempts in the cases provided for in this chapter."

The question arises: Does the limitation in section 3057 apply to civil contempts in refusing or failing to obey the orders of the court? In holding that a similar statute did not apply to a civil contempt, the Supreme Court of Florida said: "It never could have been the design or intention of the Legislature to deprive the court of chancery of the only means which it possess-

es to enforce affirmatively its orders and decrees, or to enforce any decree, whether affirmative or otherwise, which may be passed upon the final hearing of the cause." *Ex parte A. K. Edwards*, 11 Fla. 174, 187. To the same effects, see *Rebham v. Fuhrman* (Ky.) 50 S. W. 976; *Rapalje on Contempts*, p. 13, § 11. We hold that said section does not limit the power of the chancery court in enforcing obedience to its decrees.

The writer confesses that, to him, the distinction between imprisoning a man for refusal to produce his property for the payment of a debt, and for refusing to deliver it to a receiver to be appropriated to the debts of his firm, if it proves ultimately to be so liable, is very narrow; yet this court held, in the *Hardy Case*, that the former was imprisonment for debt. And it seems also to be contrary to the spirit of our Constitution that a man should be imprisoned indefinitely, for a mere civil wrong; yet this inherent right of the chancery court seems to be sustained by the authorities.

It has been suggested that the refusal or failure to obey the orders of the court is continuing, and that, so long as the party continued to disobey, he might be reimprisoned without limit, so that this is not imprisoning him for only the original offense. The fact that some of the states have specifically put a limit on this particular power suggests that it is a matter for legislative consideration. At any rate, we hold that, after the end sought has been accomplished by other means, the authority to continue imprisonment should cease; and if, in this case, by full access to the books, the state of the accounts has been satisfactorily ascertained, the defendant should be discharged.

With regard to the use of affidavits in the evidence as to the contempts, they seem to have been used by both parties without objection, and no advantage can be claimed on that account.

As to the refusal of the court to allow the defendant to be represented in the proceedings for stating the account against him, that pertains to the conduct of the main case, and will come up for review on final appeal in that case, if such is taken. It does not relate to the issue raised by the petition in this case.

The order of commitment of February 1, 1909, is quashed; but the order of January 28, 1909, being proper, the court denies the prayer of the petition to quash the same.

The costs of this proceeding will be divided in the proportion of two-thirds to the petitioner and one-third to the respondent.

Petition granted in part, and in part denied.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

# REESE et al. v. IVEY et al.

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

## 1. TRUSTS (§ 243\*)—POWERS OF TRUSTEE—POWERS OF SUCCESSOR.

Where a deed conveyed land to a trustee and to his "successors in trust," and the habendum clause was to him and "his successors in trust," and it was recited that the trustee and "his successors in trust" were to hold the premises, and it was provided that the "said trustee," with the consent of the grantor, should have power to sell and convey the premises or any part thereof free from the trust, the power to sell was annexed to the office of trustee and passed to the original trustee's successor.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 350; Dec. Dig. § 243.\*]

## 2. TRUSTS (§ 203\*)—SALE OF PROPERTY—RIGHTS OF PURCHASER.

One who buys in good faith from a trustee having power to sell, and pays the purchase money, is not responsible for its application, unless the purchaser colluded with the trustee or knew of his intention to waste or mismanage the funds.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 203.\*]

## 3. TRUSTS (§ 169\*)—RESIGNATION OF TRUSTEE—APPOINTMENT OF SUCCESSOR—VALIDITY OF PROCEEDINGS.

Code 1907, § 6093, provides that the trustee in an express trust may resign on application to the register. Section 6094 provides that notice of the application must be given in such paper as the register may direct for a specified number of weeks. Section 6097 provides that the register, on granting such application, may appoint a trustee, and, if necessary, require the necessary bond of such trustee. Section 6098 relates to proceedings on the death of a trustee and the appointment of his successor. Section 6099 relates to the same, and provides that parties in interest must be notified either by personal notice or publication. *Held*, that where the trustee in an express trust resigned, and the notice required by section 6094 was given, the appointment of the successor was not invalid on the ground that certain persons having a contingent interest in the property were not brought in by notice.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 169.\*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Suit by W. R. Reese, Jr., and others, against J. R. G. Ivey and others. From a decree sustaining demurrers to the bill, complainants appeal. Affirmed.

The instrument mentioned in the opinion is as follows: "State of Alabama, Montgomery County. This indenture, made on the 7th day of May, 1898, between Caroline Bostwick Reese, party of the first part, and Warren S. Reese, party of the second part, witnesseth: That said party of the first part, in consideration of the sum of \$5 to her in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements entered into herein by the party of the second part, have granted, bargained, sold, and conveyed unto the said party of

the second part, and to his successors in trust, the following real estate: [Here follows the description.] To have and to hold, all and singular, the above-granted premises, together with the appurtenances, and every part thereof, unto the party of the second part, his successors in this trust, upon the trust and conditions herein set out, to and for the uses, interests, and purposes hereinafter limited, described, and declared; that is to say: That said party of the second part and his successors in trust are to have and to hold the aforegranted premises to and unto the said Warren S. Reese, trustee, for the sole and separate use of the party of the first part, Caroline B. Reese, for and during her natural life; and should said Caroline Reese marry and die leaving children or grandchildren, for the use and benefit of said children and grandchildren of said party of the first part, Caroline B. Reese, for their lives, with the remainder in fee to their descendants. Should any of her children die without issue, then the said property is to be held in trust for the use of the survivor for and during his or her natural life; but in the event of the death of any of her said children, leaving issue, then the said property shall be held in trust during the life of the surviving child for the benefit of the surviving child, and the children by such deceased child or children, the children of said deceased child to take the part their ancestor would have taken. If the party of the first part should die, leaving no children or descendants of children, then said property upon the death of the party of the first part shall descend to the brother of the party of the first part, viz., Warren S. Reese, Jr., and to the sister of the party of the first part, viz., Minnie Reese Richardson, during the term of their natural lives; and upon the death of the said Warren S. Reese his share shall descend to his legal heirs, and upon the death of said Minnie Reese Richardson her share shall descend to her legal heirs. [Here follows the power, not necessary to be set out, with this additional power]: And it is hereby provided that the said trustee, by and with the written consent of the said Caroline Bostwick Reese, shall have the power to sell and convey the aforegranted premises, or any part thereof, discharged of the trust aforesaid; but the proceeds of sale or sales shall be invested in other property by the said trustee, which shall be subject to the like trust as the original property was under and by virtue of the terms of this deed."

Gunter & Gunter, for appellants. Marks & Sayre and Wilson & Martin, for appellees.

**SIMPSON, J.** The bill, in this case, was filed by the appellants, who are the children of Minnie Reese Richardson, and Warren S. Reese, both of whom are living.

The averments of the bill are: That on May 7, 1898, Carrie B. Reese, who was the then unmarried sister of said Minnie Reese Richardson and Warren S. Reese, executed the conveyance, which will be copied in the statement of this case, so far as may be necessary. That Carrie B. Reese afterwards was married to William Pullum, and on August 31, 1908, died intestate and without descendants. That, during the life of said Carrie B. Reese, in 1902, said Warren S. Reese and Minnie Reese Richardson conveyed their interest in the property described in said deed to said Carrie B. Reese. That afterward, in 1902, said Warren S. Reese resigned his trusteeship under said deed to the register in chancery of Montgomery county. That, on the petition of said Carrie B. Reese, said William Pullum was, by the register, appointed trustee in place of said W. S. Reese, resigned. The register's order recited that C. Pullum, Minnie Reese Richardson, and Corayle S. Richardson, minors, were interested in said property. A guardian ad litem was appointed to represent them and did represent them. No bond was required of said trustee. No notices were served on the complainants in this bill. On May 26, 1902, said William Pullum, as trustee, and his said wife, Carrie B. Pullum, conveyed the property to Geo. W. Crist, on a recited consideration of \$5,000. That no consideration was really paid by said Crist. That he placed a mortgage on said property for \$3,000 June 2, 1902, and on July 24, 1902, said Crist conveyed said property to said Carrie B. Pullum on a recited consideration of \$2,200 and the assumption by said Carrie B. Pullum of the payment of said mortgage. That the entire transaction was fraudulent for the purpose of getting said trust property clear of said trust. That afterward, to wit, on August 12, 1902, said William and Carrie B. Pullum conveyed the property to J. S. Willcox for the sum of \$5,500; the consideration being that he assume the payment of said mortgage debt, amounting to \$3,059, and the satisfaction of a personal debt due to said Willcox, by said Wm. Pullum, of \$1,250, the payment of taxes due on the property of \$71.88, insurance \$58, attorney's fee \$75, recording fees \$325, papering the house on said property \$30, and cash \$1,068.37. Afterwards said Willcox sold the property to Blakey for \$6,000. He sold to Hawkins, and on September 9, 1908, said Hawkins sold the same to J. R. G. Ivey, the defendant, for \$7,500. That said Willcox had notice that said property was trust property, and that said sale to Crist was not bona fide for reinvestment, and was in fraud of the trust.

The bill claims: That the trust was discretionary; that the power conferred on the original trustee did not pass to said Pullum; that the deed from said Pullum and wife operated to convey only the life estate of said

Carrie B. Pullum, and the life estate thereafter of said Minnie Reese Richardson, and said Warren S. Reese; that said remaindermen are in constructive possession, and said Ivey, being only a life tenant, is a bailliff of said property for said remaindermen and holds possession for them, but said Ivey denies their title and claims to own said property in fee; that no suit is pending, and complainants have no right to immediate possession. The prayer is that the title and right of complainants and defendant be settled and determined and all doubts and disputes concerning the same be cleared by decree, and complainants be declared entitled to vested remainders in said property. The bill originally sought, also, in the alternative, to make Willcox account for the loss of said remainders; but, after demurrer sustained, that feature was eliminated by amendment. Demurrers were interposed to the bill, which were sustained, and from that decree this appeal is taken.

"One who buys, in good faith, from a trustee having power to sell, and pays the purchase money, is not responsible for its application, unless the purchaser colluded with the trustee, or knew of his intention to waste or mismanage the funds." *Dawson et al. v. Ramser*, 58 Ala. 573; 28 Am. & Eng. Ency. Law (2d Ed.) pp. 1131, 1132. As it is not alleged that the appellee J. R. G. Ivey knew of any mismanagement, or bought otherwise than in good faith, it is important to inquire whether the trustee had power to sell. The deed of Caroline B. Reese conveyed to the original trustee, Warren S. Reese, "and to his successors in trust," and the habendum clause is to him, "his successors in trust, upon the trust and conditions herein set out, to and for the uses, interests and purposes hereinafter limited, described and declared, that is to say, the said party of the second part and his successors in trust, are to have and to hold the aforegranted premises," etc. After describing the trusts, it is provided: "That the said trustee, by and with the consent of said Caroline Bostwick Reese, shall have power to sell and convey the aforegranted premises, or any part thereof discharged of the trust aforesaid." "The said trustee," must necessarily refer to the trustee previously described in the deed, to wit, said Warren S. Reese, "and his successors in trust." This is made clear by the fact that the intent of the grantor was to keep the power of sale, within her own discretion, as the sale was to be made only with her consent. We think the power is annexed to the office of trustee. 2 *Perry on Trusts*, § 503.

It is insisted, however, by appellant, that the law was not complied with, in the appointment of the new trustee, because the complainants were not brought in by notice. It will be noticed that, at that time, said Carrie B. Pullum had two children, who were

represented by guardian ad litem, and, if these complainants had any interest, it was only contingent on said children dying before their mother, and she then dying without children. The statute provides that a trustee may resign to the register (section 6093, Code 1907), that notice must be given by publication (section 6094, which was done), and that "the register, on the granting of such application, may appoint a trustee, and if necessary to protect the parties interested in the trust property, may require the necessary bond of such trustee" (section 6097). It will thus be seen that the resignation and the appointment of the new trustee constitute one continuous proceeding, and, in this case, the only notice required by statute was given. The next succeeding section of the chapter relates to the case of the death of a trustee, and section 6099 relates to the same, and provides only that parties in interest must be notified either by personal notice or by publication, while section 6100 seems to refer to the same, as it refers only to a proceeding "to appoint a trustee," and not to a proceeding on resignation. However, it confers authority on the register to appoint a guardian ad litem, but does not make it jurisdictional. It results then that the appointment of Pullum as trustee was legal and regular. The conveyance by him (his wife consenting) carried the legal title, and the appellee Ivey, being a bona fide purchaser, cannot be affected by the matters set up in the bill.

In the view we take, it is unnecessary to discuss the other interesting questions suggested in the brief of appellant.

The decree of the court is affirmed  
Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

#### WILMER LUMBER CO. v. EISELY.

(Supreme Court of Alabama. June 17, 1909.)

##### 1. TRESPASS (§ 45\*)—CUTTING TIMBER—EVIDENCE.

Where, in trespass for cutting timber, defendant alleged ownership of the trees cut and removed, the court erred in excluding a deed offered by defendant granting to it all the timber on the lands described in the complaint, among others.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 117; Dec. Dig. § 45.\*]

##### 2. APPEAL AND ERROR (§ 1057\*)—EXCLUSION OF EVIDENCE—ERROR CURED BY OTHER EVIDENCE.

Where, in trespass for cutting timber and digging holes on plaintiff's land, defendant claimed ownership of the timber and the right to dig the holes as necessary to the removal of the timber, the court's error in excluding a deed to defendant conveying all the timber on the land, and granting to defendant a reasonable right of way over the land to cut and remove the timber, was not cured by an admission that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant was the owner of the timber on the land.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4197; Dec. Dig. § 1057.\*]

### 3. LOGS AND LOGGING (§ 3\*)—OWNERSHIP OF TIMBER—REMOVAL.

Where defendant owned the timber on certain land, he was entitled to enter and remove the timber, doing no more damage and committing no trespass beyond what was necessary to accomplish such removal.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.\*]

### 4. TRESPASS (§ 67\*)—QUESTIONS FOR JURY—TIMBER.

Where, in trespass for the removal of timber, defendant justified under a deed conveying to it all the timber on the land, and the evidence was conflicting as to what trees standing on the land were of sufficient size to constitute timber, such question was for the jury.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 150; Dec. Dig. § 67.\*]

### 5. TRESPASS (§ 68\*)—DEFENSES—CONSENT.

In trespass, certain requests to charge, that plaintiff could not recover if he consented expressly or impliedly to defendant's acts, were improperly refused.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 151; Dec. Dig. § 68.\*]

### 6. TRESPASS (§ 68\*)—REMOVAL OF WOOD—INSTRUCTIONS.

In trespass for the removal of wood from plaintiff's land, the court erred in refusing to charge that, before plaintiff could recover therefor, the jury must be reasonably satisfied that defendant cut and removed the wood from plaintiff's land without his consent, and must also be satisfied of the value of the wood so cut and removed.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 151; Dec. Dig. § 68.\*]

### 7. TRIAL (§ 234\*)—INSTRUCTIONS—BURDEN OF PROOF.

In trespass and for the conversion of certain wood cut from plaintiff's land, the court erroneously refused to charge that the burden was on plaintiff to show by a preponderance of the evidence that defendant wrongfully went on plaintiff's land, described in the complaint, and committed the acts of trespass therein alleged, or converted the wood described, otherwise to find for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 537; Dec. Dig. § 234.\*]

### 8. TRIAL (§ 261\*)—INSTRUCTIONS—ERRONEOUS REQUESTS.

A request to charge, eliminating several elements of possible basis for recovery, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 660; Dec. Dig. § 261.\*]

### 9. TRESPASS (§ 68\*)—INSTRUCTIONS—FORM—SPECIFIC DAMAGES.

A request to charge that the jury could not assess any damages for the value of timber cut or the digging of holes in plaintiff's land, as specific damages, was properly refused, as the term "specific damages" was calculated to mislead the jury.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 151; Dec. Dig. § 68.\*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Thomas J. Elisely against the Wilmer Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The following charges were refused to the defendant:

"(1) The court charges the jury that, before you can find for the plaintiff under the trespass count of the complaint, you must be reasonably satisfied from the evidence that the defendant went on the lands of the plaintiff, and without his consent committed the acts of trespass mentioned in the first and second counts of the complaint.

"(2) The court charges the jury that, before you can find for the plaintiff under the last count of the complaint, you must be reasonably satisfied from all the evidence that the defendant cut and removed the wood from lands belonging to the plaintiff described in said count of the complaint, and that without plaintiff's consent; and you must also be satisfied from the evidence of the value of the wood thus cut and removed.

"(3) The court charges the jury that the burden of proof is on the plaintiff to show to the jury by a preponderance of the evidence that the defendant wrongfully went upon the lands belonging to the plaintiff, as described in the complaint, and committed the acts of trespass therein mentioned, or converted the wood therein described; and, if the evidence fails to so satisfy your minds, your verdict must be for the defendant.

"(4) If the jury believe from the evidence that the defendant purchased all the trees it cut from the land described in the complaint, and was the owner of the same with the right to cut and remove them, and that plaintiff had notice of that fact before he purchased the land, then your verdict must be for the defendant.

"(5) If the jury believe from the evidence that the defendant had the consent of the plaintiff to do upon the lands described in the complaint all that it is charged with doing, then your verdict must be for the defendant.

"(6) The court instructs the jury that every trespass and every conversion involves the wrongful doing of the acts complained of; and if you believe from the evidence that the plaintiff was at the camp of the defendant all the time during the period when the acts which he now complains of were being done, and had a full knowledge of what was going on, and either expressly or impliedly consented thereto, then your verdict must be for the defendant.

"(7) The court instructs the jury that they cannot assess any damages for the value of timber wood or the digging of holes in the land as specific damages."

McIntosh & Ritch, for appellant. Gregory L. & H. T. Smith, for appellee.

McCLELLAN, J. The complaint consists of three counts, two in trespass, and one for the conversion of wood situated on this land. The pleas were the general issue and a spe-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

cial plea alleging that defendant (appellant) was the owner of the trees cut and removed by it, of which plaintiff had notice, and that in so doing it exercised its right, and that to remove such trees it was necessary to dig the holes mentioned in the complaint in order to enjoy the defendant's rights in the premises. Issue was joined on these pleas.

The defendant offered to introduce its deed to "all the timber, standing, growing or being on" the lands, among others, described in the complaint; but the court sustained the plaintiff's objection. The obvious error committed in this ruling is said to have been rendered harmless to defendant by the fact that it was otherwise shown, without dispute, that defendant was the owner of the timber on the land described in the complaint. This would be true but for the further fact that the conveyance also contained this clause: "It is further agreed that the said Wilmer Lumber Company shall have all reasonable right of way over and through said lands for the purpose of cutting and removing said timber by railroad or otherwise." No testimony appears to have been received, on the trial, covering this feature of the rights conveyed to the defendant and subject to which plaintiff, some of the testimony tends to show, acquired title to the soil in question. We do not think the error committed in the exclusion of the deed was cured.

If the ownership of the timber was with the defendant, it had the "right to enter and remove the timber, doing no damage, and committing no trespass, beyond what was necessary to accomplish" the removal of its property. *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776; *Goodson v. Stewart* (Ala.) 46 South. 239. The proof showed that defendant owned the "timber." What was within that term, and what without, was necessarily an inquiry of fact, and on the evidence in this record it cannot be said that the proof, on that inquiry, was conclusive. One witness testified to timber being long and short leaf pine, and included in the size of timber trees six inches in diameter and up, though generally mills use, or regard as being susceptible of conversion into lumber, only trees eight or ten inches in diameter, and above. We do not think on this testimony the court was authorized, if so it did, to take the inquiry from the jury as to what was within the ownership, denominated "timber," of the defendant. Furthermore, on the evidence admitted, it could not have been conclusively assumed, thus taking the inquiry from the jury, that the material taken was not within the scope of the right of the timber owner as defined in *Heflin v. Bingham*, *supra*.

It was not shown conclusively that the digging was unnecessary damage to the realty from which, without unnecessary dam-

age or trespass, the defendant had the right to remove its timber. The proof was not conclusive as to the wrongful taking or destruction of the wood.

The record presents a case where the general affirmative charge was given, but with an explanation; whether the explanation nullified the effect of the charge we will not undertake to now say, as it is not demanded.

There were some tendencies in the evidence from which the jury might have inferred that the plaintiff consented to the commission of the acts complained of. If so he did, no wrong against his possession or rights could be predicated upon such acts. On this account, special charges 1, 5, and 6 should have been given.

Charge 2 should have been given.

Charge 3 predicated a recovery upon a wrongful entry by defendant; whereas, the plaintiff might have recovered for the unwarranted invasion of the possession by unnecessary damage or trespass in taking its timber or digging the soil or converting wood not belonging to defendant. This charge was properly refused.

Charge 4 omitted several elements of possible basis for recovery. It was well refused.

Charge 7 uses the term "specific damages." It was calculated to mislead the jury and was properly refused.

For the errors indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

#### CROOKER et al. v. WHITE et al.

(Supreme Court of Alabama. May 20, 1900.  
Rehearing Denied June 30, 1909.)

#### 1. CONTRACTS (§ 94\*) — VALIDITY — FRAUDULENT MISREPRESENTATIONS.

Misrepresentation, to amount to fraud authorizing equity to rescind a contract, must relate to a fact material to the interests of the other party, and must be a representation concerning the subject-matter which taken as true would add substantially to the value or promise of that subject-matter.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 421; Dec. Dig. § 94.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

#### 2. SALES (§ 40\*) — VALIDITY — FRAUDULENT REPRESENTATIONS—MATERIALITY.

A representation by a seller of an agency right to vend the family right to use a clothes washer and wringer as to the number of family rights others had sold and the profits made thereon, made to induce the buyer to purchase, are material representations, and, if false, constitute fraud justifying a rescission of the contract of sale.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 79-83; Dec. Dig. § 40.\*]

### 3. SALES (§ 38\*)—VALIDITY—FRAUDULENT REPRESENTATIONS.

The presumption that men intend the natural consequences of their voluntary acts arises in cases of misrepresentation amounting to fraud authorizing equity to rescind contracts of sale only after proof of the other essential elements of fraudulent misrepresentations; and the representation must be shown to be untrue, the seller must have known or had good reason to believe that it was untrue, and the buyer must have relied on it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 65; Dec. Dig. § 38.\*]

### 4. SALES (§ 52\*)—MISREPRESENTATIONS—EVIDENCE.

In a suit to rescind a contract for the sale and purchase of a patent right on the ground of the fraudulent representations of the seller, evidence held not to show that fraud was practiced on the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 140; Dec. Dig. § 52.\*]

### 5. CONTRACTS (§ 99\*)—FRAUDULENT REPRESENTATIONS—EVIDENCE.

Fraudulent representations justifying the cancellation of a contract must be established by clear and convincing proof, and equity cannot grant relief on a mere preponderance of the evidence; but the representations and the fact that they were falsely and fraudulently made must be clearly established.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 451; Dec. Dig. § 99.\*]

### 6. CONTRACTS (§ 94\*)—EQUITABLE RELIEF.

While equity will not permit fraud and undue misrepresentation, yet where the parties rely on their own judgment, or are not unduly imposed on by others, it will leave them where they place themselves.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430; Dec. Dig. § 94.\*]

### 7. QUIETING TITLE (§ 35\*)—POSSESSION OR PLAINTIFF—PLEADING.

A bill to remove a cloud on title must allege that complainant was in possession at the commencement of the suit.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 74; Dec. Dig. § 35.\*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Suit by Bryant L. White and another against E. R. Crooker and another. From a decree for complainants, defendants appeal. Reversed, and judgment rendered dismissing the bill.

Hamilton & Crumpton, for appellants.  
John E. Mitchell, for appellees.

**SAYRE, J.** The bill in this cause in its aspect of primary importance sought a decree for the rescission of a contract of sale by the appellants to the appellees of an agency right to vend the family right to use the "Mystic clothes washer," and the cancellation of notes and a mortgage given to secure the purchase price. The gravamen of the bill is to be found in its fifth paragraph as amended, which is as follows: "Orators further aver that the said I. I. Ward represented to them that the said Mystic clothes washer and wringer were articles easy to sell and admirably adapted for the purpose for which they were

made; that one Joe Page, who was alleged by said I. I. Ward to be an agent to sell family rights, had told him, the said Ward, that he, the said Page, had sold about 50 family rights of the said Mystic clothes washer, and would clear about (\$300) from said sales; that the said I. I. Ward also stated to orators that his brother, George Ward, had on one day, in about two hours and a half, sold six family rights. Orators aver that the statements made by said I. I. Ward in reference to the sales of family rights by Joe Page and George Ward were false, and that, in fact, the said Page had not sold more than half a dozen family rights, and the said George Ward had not sold any family rights, and the said Page had not told said Ward that he had sold about 50 family rights. Orators further aver that the representations of said I. I. Ward in reference to the sales of the said Joe Page and George Ward were calculated to deceive orators as to the value of the agency rights of the said Mystic clothes washer and wringer, and did deceive orators, and that the said representations were one of the inducements which led orators to sign said notes and mortgage, and that orators would not have signed said notes and mortgage had they known at that time that said representations of I. I. Ward were untrue. Orators further aver that they did not learn of the falsity of such statements until a short while prior to filing the bill of complaint in this cause." Passing over the allegation that the clothes washer was represented to be an article easy to sell and admirably adapted for the purpose for which it was made as being mere words of praise and commendation, ordinarily permissible to honest men in their dealings with one another, and deemed insufficient in law to impose liability (*Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804), and as so treated by the complainants, it is to be observed that the representations complained of consisted in the statement by the defendant Ward that Page had told him that he, Page, had sold about 50 family rights of the clothes washer, and would clear about \$300 from the sales, and that his brother George had on one day, in about two hours and a half, sold six family rights. The allegation further is that these statements were false, and resulted in complainants' deception.

Misrepresentation constituting fraud which will authorize the rescission in equity of a contract must relate to a fact material to the interests of the other party (*Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448), that is to say, it must be a misrepresentation concerning the subject-matter, "which, taken as true, would add substantially to the value or promise" of that subject-matter. (*Jennings v. Broughton*, 5 De Gex. M. & G. 130. In the application of this definition of materiality to concrete cases everything depends upon the nature of the fact represented and its capac-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



ity to affect human conduct as determined by ordinary human experience. Important in this case was the value of the market purchased by the appellees. That depended upon the urgency of the need or desire the article was designed to meet, and the appeal it would likely make to the judgment or fancy of prospective purchasers. Probably the value of an agency to sell a new article or an old article with new shapes or adaptations, the manufacture of which is protected by patent and the sale of which is restricted by contract, can be shown in no more satisfactory way than by reference to the experience of others vending it. In *Allen v. Hart*, 72 Ill. 104, the vendors of a patent right territory represented that other persons had made purchases, and all had done well, realizing large profits. It was held that the vendees had a right to rely upon the representation as materially affecting the value of the thing sold. So in this case the nature of the subject-matter considered, we hold that the representations as to the statements made by Page and the sales by Ward were material to the contract.

The parties have made no contention in respect to the absence from the amended bill of an averment touching the good faith of the appellants in making the representations charged to have been false. There is no allegation that they were fraudulently false. It is a necessary rule of law, as it is of all human conduct, that men are presumed to intend the natural and inevitable consequences of their voluntary acts. This presumption, however, as to purpose or design, in its application to a case of this character, must arise after proof of other essential elements of fraudulent misrepresentation which are capable of proof, and must be proven. The representation must be shown to be untrue. The vendors must have known, or had good reason to believe, it was untrue; and the vendees must have relied upon it. *Hooper v. Whitaker*, 130 Ala. 324, 30 South. 355; *Pom. Eq. Jur.* § 876. The misrepresentations complained of are charged to have been made by the defendant Ward to the complainants, and to have induced them to enter into the contract and to execute the mortgage and notes. The natural meaning of this charge is that both representations were addressed to and acted upon by both complainants, and the rule that chancery gives relief *secundum allegata et probata* would require complainants to prove the facts as alleged. But, without insisting upon this infirmity in complainants' case, we will examine the evidence. The complainant White, testifying as a witness in his own behalf, denied that Ward had told him or Bankester in his presence at any time before the mortgage was signed how many family rights Page had said he had sold, but he testified that Ward had told him that his brother had sold six. He would not say that Ward had made any statement as to the amount Page had cleared on his sales. The other com-

plainant, Bankester, testified that the defendant Ward had told him the evening before the mortgage and notes were executed that Page had made a statement substantially as alleged. He further testified "to the best of his knowledge" that the defendant Ward had made to him the statement charged in respect to his sale of six family rights substantially as alleged. Page testifying denied having made the statement attributed to him, but said that one Sanders had made it, and the form of the question here put to the witness justifies the inference that he intended to convey the idea that Sanders made the statement in his presence. The defendant Ward testified without qualification that Page had made the statement to him in reference to the sale of 50 rights, and to his best recollection that he had repeated the statement to complainants after the mortgage and notes had been signed. Complainants testified that subsequent to the transaction they "found out" that Page had not sold 50 rights and George Ward had not sold 6. George Ward, a witness for complainants, stated that he had bargained to sell some rights and had gone to see several parties who said they would take them later, and as soon as they could raise the money. It was also shown that both complainants had been thinking about the washing machine business, and had broached the subject to Ward. This is a close reproduction of the entire evidence on the point at issue. Without relieving complainants of their proper burden of proof, we are unable to say that fraud was practiced upon complainants. On the contrary, the reasonable net tendencies of the evidence are consistent with good faith on the part of the defendants. In *Howle v. North Birmingham Land Co.*, 95 Ala. 389, 11 South. 15, it was said: "The right to the rescission or cancellation of a contract because of fraudulent misrepresentations must be established by clear and convincing proof. A court of equity cannot grant such relief upon a probability, nor even upon a mere preponderance of the evidence. The representations themselves, and that they were falsely and fraudulently made, must be clearly established." The complainants may have made a bad bargain; but "it is not the province of a court of equity to even up the consideration of contracts, and see that equality is meted out in the various transactions of life, or to supply judgment and skill where it is wanting. It will not permit fraud and undue misrepresentation, but where parties rely upon their own judgment, or are not unduly imposed upon by others, it will leave them where they place themselves." *Johnson v. Rogers*, 112 Ala. 581, 20 South. 929, 931.

The bill contains allegations touching the execution of the mortgage which indicate that the pleader had in mind an alternative and secondary aspect in which the relief of the cancellation of the mortgage was sought on the ground that some at least of the parties

were induced to sign it by fraudulent representations that it would not affect their homestead rights in the land conveyed. This part of the bill is not stated as in the way of an alternative claim to relief, but rather as a reinforcement of the aspect of the bill first considered. But the facts alleged have no relation to the execution of the contract of sale of the agency right, and constitute in effect an alternative reason, if anything, why the complainants should have the relief of a cancellation of the mortgage, though the contract of sale of the agency be left unimpaired. The bill having been found on consideration of the pleading and proof to be devoid of equity in its primary aspect, this last-named aspect must stand upon its own merits. So considered, it is a bill to remove cloud upon title and it was necessary to allege and prove—passing over the objection that the bill shows that one only of the complainants could in any event have relief on this ground—that complainants were in possession at the commencement of the suit. 4 Mayf. p. 197, § 418. There was no independent equity to obviate this necessity. However, this part of the bill was eliminated on the appellants' demurrer, nor was there an amendment restating the issue, so that it need not be further considered. We have referred to it for the reason that evidence was taken as to it, and counsel have argued it.

The decree will be reversed and a decree here rendered dismissing the bill.

Reversed and rendered.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

# ROE et al. v. DOE ex dem. TENNESSEE COAL, IRON & RY. CO.

(Supreme Court of Alabama. May 12, 1909.  
Rehearing Denied June 30, 1909.)

## 1. ADVERSE POSSESSION (§ 27\*)—DEFENDANT'S POSSESSION—EVIDENCE.

A plaintiff by suing in ejectment, where the defense is adverse possession, admits that defendant is then in possession of the premises.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 27.\*]

## 2. ADVERSE POSSESSION (§ 101\*)—EXTENT OF POSSESSION — CONVEYANCE — LAND CONVEYED.

Each 40 acres in a conveyance does not constitute a separate tract, and the fact that a stranger claimed to own a part of the land conveyed, but not the whole, would not operate to make two tracts of it, so as to affect the question of adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 575-589; Dec. Dig. § 101.\*]

## 3. ADVERSE POSSESSION (§ 101\*)—COLOR OF TITLE.

Fact that legal title to parts of a tract described in a deed was in others than the grantor would not prevent the grantee's possession of a part of the tract from extending to the whole tract so as to give him color of title there-

to under the deed, since it is not necessary that the grantor should have title to the whole or a part of the entire tract described to give color of title thereto.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 575-589; Dec. Dig. § 101.\*]

## 4. ADVERSE POSSESSION (§ 101\*)—"COLOR OF TITLE"—POSSESSION OF PART OF LAND LEGAL TITLE OF WHICH WAS CONVEYED.

"Color of title" is that which in appearance is title, but which in reality is no title, and, if an instrument itself passes or constitutes title, it is not color of title, and hence if a grantor had legal title to one 40 only of a tract described in the deed, or had color of title thereto only, possession of the grantee of that 40 under the deed could not be extended to the other 40's described in the deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 575-581; Dec. Dig. § 101.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1264-1273; vol. 8, p. 7606.]

## 5. ADVERSE POSSESSION (§ 71\*)—COLOR OF TITLE.

An absolutely void instrument may be good color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. § 71.\*]

## 6. ADVERSE POSSESSION (§§ 70, 100\*)—"COLOR OF TITLE"—"CLAIM OF TITLE."

While "color of title" is the appearance of title, which in reality is not title, "claim of title" is the entering and occupying of land by one with the intent to hold it as his own against the world, irrespective of any color of right or title as a foundation for his claim; the two terms being distinct but supplementary to each other, in that, while "color of title," without claim, is of little effect, "claim of title," without color, may ripen into title to the land actually occupied, while with color it may ripen into title not only to the land actually occupied, but by a legal fiction may extend to all land described in the color of title, if that actually occupied be a part thereof.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 394-414, 547, 574; Dec. Dig. §§ 70, 100.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1214, 1215.]

## 7. ADVERSE POSSESSION (§ 100\*)—EVIDENCE—COLOR OF TITLE.

Color of title is not of itself evidence of adverse possession, and it does not follow that less evidence is required to prove adverse possession with than without it, unless so provided by statute, and it can only draw and impart to the whole tract to which there is such color the same claim and character of possession which is impressed upon the part thereof which is actually possessed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.\*]

## 8. ADVERSE POSSESSION (§ 11\*)—CLAIM OF TITLE—NECESSITY FOR GOOD FAITH.

The only requisite of good faith or motive in adverse possession is to show that the claimant actually intended to claim the land as his own to the absolute exclusion of others, and it is not necessary that the claim of title should be honestly believed to be good.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 67-76; Dec. Dig. § 11.\*]

Appeal from City Court of Birmingham;  
C. W. Ferguson, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Ejectment by the Tennessee Coal, Iron & Railway Company against R. L. Crowder. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Frank S. Andress, for appellant. Percy, Benners & Burr, for appellee.

MAYFIELD, J. The trial court was clearly in error in giving the general affirmative charge for the plaintiff. The real question at issue was whether or not the defendant, and those under whom he claimed title, had been in the adverse possession of the land sued for for 10 years prior to the suit, so as to perfect title thereto in the defendant. Under any and all of the evidence this was a disputed question of fact and not one of law. The jury only, and not the court, should have decided this issue.

The plaintiff, by the bringing of his suit, admitted that defendant was then in possession. His possession he attempted to show was adverse, and was the same then that it had been for 10 years prior thereto. There was some evidence tending to show this. The fact of possession, as well as the character thereof, depended upon color of title. The color of title described the lands in question, the defendant claimed under this color of title, and there was some evidence tending to show actual possession of a part of the lands described in the color of title.

The appellee concedes the well-established proposition of law that actual possession of a part of a tract of land described in a color of title is, by legal fiction, extended to the entire tract so described, but claims that there is a qualification, limitation, or exception to this rule, to the effect (to quote from brief of counsel) that: "If A. conveys to B. a tract of land of which he is in adverse possession, and of which he puts B. in the adverse possession, he cannot constructively extend B.'s adverse possession to C.'s land by describing C.'s land in the conveyance to B., along with the land which A. owned"—that B.'s possession under his deed will not thereby be extended to C.'s land. If this qualification, exception, or limitation of the general rule be true or correct, as to which we do not decide, the case made by the record does not wholly fall within it, nor is it wholly taken without the influence of the general rule. The case falls within the limitation to the extent that appellee has title to a part, and to a part only, of the land described in the color of title, but for the adverse possession, and does not claim title to the other lands described in the color; but, so far as the record shows, the defendant and each of those under and through whom he claims title by adverse possession had the same title, claim, and right to the whole. They did not claim the two parts under different rights or titles. They may have had no title or right to any part except that acquired by adverse pos-

session. If they had no title to that claimed by the appellee, then probably they had none to the other; the chain and claim of title to both are the same.

There is no evidence that Mrs. Wheeler or her intestate did not claim to own, or have title or right to convey, the three 40's in question. It is, however, shown that she did not then have the legal title thereto, and it is not shown that she did have the legal title to the other 40, further than possession carries with it a presumption of title. There is nothing to show that the vendor in this case conveyed two separate and distinct tracts of land. Only one was conveyed. Each 40 acres in a conveyance does not constitute a separate tract. The fact that plaintiff, a stranger, did not claim to own the whole, but only a part, could not have the effect to make two tracts. The case at bar does not fall within the qualification declared in the case of *Woods v. Montevallo, etc., Co.*, 84 Ala. 560, 3 South. 475, 5 Am. St. Rep. 393, which is again announced in the case of *Henry v. Brown*, 143 Ala. 456, 39 South. 325.

The color of title has its inception in Mrs. Wheeler's deed as administratrix. The claim under color of title does not antedate this deed; but it is claimed to exist only thereafter, and to continue down to the time of trial. The source of defendant's title and claim was the deed of the administratrix and possession held thereunder. If Echols took possession of a part of the lands described in the administratrix's deed, and held possession under it, there is nothing in this record to show why it was not, by the rule or legal fiction, extended to the whole. The fact that the legal title to parts of the tract described in the color of title was in different persons, and not in one and the same, can make no difference. To constitute color of title it is not necessary that the grantor should have title to the whole or a part of the entire tract described. *Henry v. Brown*, 143 Ala. 456, 39 South. 325. If the legal title to the whole had been in the grantor or her intestate, there would be no opportunity or chance for the rule under discussion to apply. The conveyance would then have been a conveyance of the legal title to the whole, and not a mere color of title.

The mere fact that a deed passes the legal title to a part of the tract, but not to the whole, does not prevent the application of the rule as to the part to which it does not pass title and limit it to only that part to which it passes title. As to that part there is no need of the fiction, to perfect the title. The deed itself passes title thereto. If it had been shown that the administratrix's intestate had title to the one 40, or had color of title thereto only, then his possession of that 40 under that deed could not be extended to the other three 40's which were first described or mentioned in the administratrix's deed. Such is the doctrine

announced in the cases of *Woods v. Montevallo, etc., Co.*, 84 Ala. 560, 3 South. 475, 5 Am. St. Rep. 393, and *Henry v. Brown*, 143 Ala. 446, 456, 39 South. 325. See, also, 1 Am. & Eng. Ency. Law, 873.

An instrument, to constitute "color of title," need not be valid as a muniment of title. If the instrument itself passes, or constitutes title, it is not color of title. It is in a sense the title itself. The very term implies that it is not valid to pass title. An absolutely void instrument may be good color of title. "Color of title" is said to be that which in appearance is title, but which in reality is no title. *Wright v. Mattison*, 18 How. 50, 15 L. Ed. 280; *Torrey v. Forbes*, 94 Ala. 135, 10 South. 320; *Abercrombie v. Baldwin*, 15 Ala. 363; *Saltmarsh v. Crommelin*, 24 Ala. 347. "Color of title" and "claim of title" are often confounded; the terms being used as if synonymous, whereas in fact they are very different things. "Claim of title" is where one enters and occupies land, with the intent to hold it as his own, against the world, irrespective of any shadow or color of right or title as a foundation for his claim. "Color of title" is the semblance or appearance of title, but which in reality is not. They are distinct from, but supplementary to, each other. Color of title, without claim, is of little effect. Claim of title, without color, may ripen into title to the land actually occupied, while, with it, it may ripen into title not only to the land actually occupied, but to all described in the color of title, if that actually occupied be a part thereof. "Claim of title," or at least of right, is necessary to acquire title by adverse possession; but "color of title" is not, unless so required by statute. A claimant must enter and hold the land as his own, to the exclusion of all others; but the title thus acquired does not extend beyond the land actually occupied, that which the claimant stands on, "pedis possessio." The right and title thus acquired is commensurate with the use. "Color of title," by a pure and legal fiction, extends this claim of title and actual possession to the entire tract which it describes. It is sometimes said that the color of title furnishes the presumption and the evidence of the intention to claim to the extent of the boundaries therein fixed. It must, however, be remembered that the color of title is not of itself evidence of adverse possession, and that it does not follow that less evidence is required to prove adverse possession with than without it, unless so provided by statute. It can only draw and impart to the whole the same claim and character of possession which is impressed upon the part by the actual possession. *Normant v. Eureka*, 98 Ala. 181, 12 South. 454, 39 Am. St. Rep. 45; *Doe v. Clayton*, 81 Ala. 391, 2 South. 24; *Tennessee, etc., Co. v. Linn*, 123 Ala.

112, 26 South. 245, 82 Am. St. Rep. 108; *Black v. Tennessee, etc., Co.*, 93 Ala. 109, 9 South. 537; *Childress v. Calloway*, 76 Ala. 128.

Good faith is often spoken of, in connection with adverse possession—sometimes appropriately, and sometimes not. It is not necessary that the claim of title should be honestly believed to be good. It is enough if the claimant really intends to assert title and to rely upon it is hostile or adverse to the true owner or to the world. *Baucum v. George*, 65 Ala. 259; *Saltmarsh v. Crommelin*, 24 Ala. 347. The only requisite of good faith or motive, in adverse possession, is to show that the claimant actually intended to claim the land as his own, to the absolute exclusion of others.

It is unnecessary to pass upon the other questions, as they may not arise on another trial.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### BEARD v. HICKS.

(Supreme Court of Alabama. June 17, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. EASEMENTS (§ 61\*)—ACTIONS FOR INTERFERENCE—COMPLAINT—SUFFICIENCY.

The complaint, in an action for interfering with an easement, must allege plaintiff's ownership of the easement; but it need not set out the particular manner in which the title was acquired, though, where plaintiff sets out his source of title, the complaint must allege all the facts necessary to establish the same.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 141; Dec. Dig. § 61.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 671\*)—ALLEYS—OBSTRUCTION—ACTIONS—PLEADING.

The complaint, in an action for obstructing an alley, which avers plaintiff's ownership and possession of land fronting on the alley, and that he is entitled to its use as a means of ingress and egress to and from the land, and that defendant willfully obstructed the alley by building a fence across it in such a way as to prevent its use, is sufficient as against a demurrer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1447; Dec. Dig. § 671.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 698\*)—ALLEYS—OBSTRUCTION—EVIDENCE.

Whether an obstruction of an alley interrupted the adverse user of the alley by the public, so as to break the continuity of the 20 years' prescription, held under the evidence for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1506; Dec. Dig. § 698.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 671\*)—OBSTRUCTION OF ALLEY—PUBLIC NUISANCE—ACTION BY PRIVATE CITIZEN.

Where a fence constructed in an alley deprived no one of the use of the alley except an

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

owner of a lot abutting thereon, who was cut off from using the alley as a means of ingress and egress to and from his land, the owner could sue for the injury to him, though the fence was a public nuisance and could be abated by the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1447; Dec. Dig. § 671.\*]

**5. MUNICIPAL CORPORATIONS (§ 671\*)—OBSTRUCTION OF ALLEY—ACTIONS—EVIDENCE.**

One suing for the obstruction of an alley, which cuts off the communication with his land abutting on the alley, may show the use to which the alley had been put, the fact that the city had repaired it, and that the alley was his only means of communication with his land.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1447; Dec. Dig. § 671.\*]

**6. MUNICIPAL CORPORATIONS (§ 648\*)—ALLEYS—PRESCRIPTION.**

The fact that one had previously bought a strip claimed by another for an alley was not inconsistent with the latter's theory of a dedication of the strip for an alley or prescriptive use of the same.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1421; Dec. Dig. § 648.\*]

**7. APPEAL AND ERROR (§ 928\*)—PRESUMPTIONS—INSTRUCTIONS.**

The court on appeal cannot put the trial court in error as to an instruction directing the jury to find such damages as they deem to be reasonable, for the court on appeal must presume that the trial court previously instructed as to the proper elements of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3750; Dec. Dig. § 928.\*]

**8. LIFE ESTATES (§ 28\*)—ALLEYS—OBSTRUCTION—RIGHT TO SUE.**

A life tenant in possession of land abutting on an alley may sue for an interference with his easement right to the alley.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 54; Dec. Dig. § 28.\*]

**9. MUNICIPAL CORPORATIONS (§ 698\*)—ALLEYS—OBSTRUCTION—INSTRUCTIONS.**

In an action for obstructing an alley, in which plaintiff claimed an easement, an instruction, predicated a finding for plaintiff only in case the alley was a public one for a certain distance, was properly refused, for it might have been a public alley at the point of the obstruction, though it was not a public alley throughout such distance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1506; Dec. Dig. § 698.\*]

**10. MUNICIPAL CORPORATIONS (§ 698\*)—ALLEYS—OBSTRUCTION—INSTRUCTIONS.**

In an action for obstructing an alley, an instruction, predicated a recovery on the fact that the obstruction was willfully and maliciously built, and ignoring a count of the complaint which did not charge malicious conduct, was properly refused.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1506; Dec. Dig. § 698.\*]

**11. MUNICIPAL CORPORATIONS (§ 698\*)—ALLEYS—OBSTRUCTION—INSTRUCTIONS.**

In an action for obstructing a public alley, an instruction confining plaintiff to actual dam-

ages was properly refused, where the evidence authorized punitive damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1506; Dec. Dig. § 698.\*]

Appeal from City Court of Gadsden; John D. Disque, Judge.

Action by John Hicks against J. K. P. Beard. From a judgment for plaintiff, defendant appeals. Affirmed.

The first count is as follows: "The plaintiff claims of defendant \$1,000 damages for wrongfully obstructing a certain alley in the city of Gadsden. And plaintiff avers: That he is the owner of a certain lot in the city of Gadsden, it being the lot on which plaintiff resides with his family. That said lot fronts on said alley, and plaintiff's only way of ingress and egress to and from said lot is on and over said alley. That plaintiff owned said lot on and prior to the 1st day of December, 1906, and has continuously owned said lot since said date up to the present time. Said alley furnishes and has furnished to plaintiff his only rightful and lawful method of ingress and egress to and from said lot that plaintiff has or has had, except a footpath which he has been allowed use by the owners of adjoining lots, which said footpath has been used not as of right, but by permission of said owners. And plaintiff avers that on and prior to the said 1st day of December, 1906, and up to the present time, he has been and of right is entitled to use said alley as a means of ingress and egress to and from said lot. Plaintiff avers that on, to wit, the 1st day of December, 1906, the defendant knowingly and willfully and intentionally obstructed the said alley by building a fence across the same in such a way as to prevent the use of said alley for the purpose of ingress and egress to and from said lot by plaintiff. And plaintiff avers that since said date, and up to the present time, defendant has maintained said obstructions, and has thereby prevented the use of said alley by plaintiff for ingress and egress to and from said lots." Count 2 is same as 1, except that it is alleged to be a public highway; that is, the alleyway obstructed is alleged to be a public highway.

The oral charge excepted to is as follows: "In the event the jury find the issues in favor of the plaintiff, they will assess such damages as to them seem reasonable and right."

The following charges were refused: (1) "The court charges the jury that, if the jury believe all the evidence in this case, there is no public alley at the point where said fence is located and from said point north to the creek." (2) "The court charges the jury that, before the plaintiff can recover in this case, the jury must be satisfied from the evidence reasonably that the alleged alley at the point where said fence is located, and from thence

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

north to the creek, is a public alley; that such alley became a public alley, either by grant, dedication, or prescription for more than 20 years." (4) "The court charges the jury, before the plaintiff can recover in this case, he must show by the evidence to your reasonable satisfaction that he is the owner of the lot on which he lives with his family, that said lot fronts on a public highway, that plaintiff owned said lot from the 1st day of December, 1906, and now owns it, and that the defendant willfully and maliciously built a fence across said public highway, thereby damaging plaintiff." (5) "The court charges the jury that under the evidence in this case there is no public alley from the south line of defendant's property north to the creek, either by grant, dedication, or prescription." (6) Affirmative as to the second count. (7) "The court charges the jury that unless the plaintiff is shown by the evidence reasonably that plaintiff has been damaged, and to what extent, then the law says that plaintiff must fail as to such damages." (8) "The court charges the jury that there is no evidence in this case that plaintiff is the owner of the Hicks lot, as averred in the complaint, and your verdict must be for the defendant." (9) "The court charges the jury that there is no evidence in this case that plaintiff has any right, title; or interest in any part of that land cut off by said fence and lying north of said fence."

Culli & Martin, for appellant. Goodhue & Blackwood, for appellee.

ANDERSON, J. "In an action for injuring or interfering with an easement, the complaint must allege plaintiff's ownership of the easement in question; but it need not set out the particular manner, whether by prescription, grant, or otherwise, in which the title was acquired—it being sufficient to allege generally plaintiff's right to the easement and a violation of this right by defendant. If, however, plaintiff undertakes to set out his source of title, the complaint must allege all the facts necessary to be proved to establish the same." 14 Cyc. 1220; *Gerber v. Grabel*, 16 Ill. 217; *Story v. Odin*, 12 Mass. 157, 7 Am. Dec. 46; *Hall v. Hendrick*, 125 Ind. 326, 25 N. E. 350. The first count avers that the plaintiff is the owner of and in the possession of a lot fronting on the alley and is entitled to the use of said alley as a means of ingress and egress to and from said lot, and was not subject to the demurrers interposed thereto.

The cases of *Whaley v. Wilson*, 120 Ala. 504, 24 South. 855, and *Trump v. McDonnell*, 120 Ala. 200, 24 South. 353, are easily differentiated from the present case and have no bearing on the sufficiency of the complaint in the case at bar.

The complaint was amended by the addition of a second count, and demurrers were filed to said count 2; but we find no ruling

upon said demurrers. The judgment entry does recite the overruling of demurrers to the complaint as amended; but we find no demurrer to the amended complaint. The complaint as amended consisted of counts 1 and 2 and not amended count 2.

It appears that, for more than 20 years prior to the erection of the fence complained of, an alleyway was open and maintained from Lister's alley running north to or near the creek bluff, and it was a question for the jury as to whether or not the plaintiff and the public generally had acquired a prescriptive right to same. It is true there was some proof that the defendant, before the user of said alley for a continuous period of 20 years, erected and maintained, for a time, a fence across the north end of the alley at or near where it intersected the creek, and at a point where there is a very high bluff, and at such a point where it could not interfere with the alley as a highway, as no one could travel through the northern opening of same, owing to the high creek bluff at the north of said alley. It was therefore a question for the jury as to whether or not this obstruction was sufficient to intercept the adverse user, by the public, so as to break the continuity of the 20-year prescription. Especially was it a question for the jury, in view of the evidence tending to show that said first fence was put there merely as a means of protection against going over the bluff, and not to obstruct said alley so as to prevent the use of same as a highway. It also appears that the erection of the second fence, the one in question, deprived no one of the use of the alley except the plaintiff, who was cut off entirely from all ingress and egress to and from his home, thus injuring him, not only greater in degree from all others, but different in kind from the public generally, and which would give the plaintiff a right of action, notwithstanding the fence may have been a public nuisance and could be abated by the city. *Whaley v. Wilson*, 112 Ala. 630, 20 South. 922; *Southern Ry. v. Ables*, 153 Ala. 523, 45 South. 234.

The plaintiff had the right to show the use to which the alley had been put, the fact that the city repaired and looked after it, and to show that it was his only means of ingress and egress to and from his home. Moreover, there was evidence tending to show a dedication by the owners over 20 years before the last fence was erected, and the repairing of the alley by the city tended to show an acceptance.

It was immaterial whether Bruce et al. bought a right of way to Lister's alley, or what they paid for same, as the witness testified that they set their fences back prior to '86 so as to give an opening to Lister's alley. It was therefore immaterial what they paid for the strip, or whether or not they bought it. The fact that they previously bought the strip and paid for it was not inconsistent with or contradictory of the plain-

tiff's theory of a dedication or the prescriptive use of same, from the opening of the alley up to the time of the obstruction complained of, by the plaintiff.

We cannot put the trial court in error as to so much of the oral charge as was excepted to by appellant. It merely instructs them to find such damages as may seem to be reasonable and right. We must presume that the court had previously instructed as to the proper elements of damage, and that this part excepted to referred to the damages as explained by the court, and to which the plaintiff would be entitled under the law and evidence, in the event they found for the plaintiff.

The trial court did not err in refusing the general charge (No. 3) requested by the defendant, as there was evidence in support of the complaint. Nor was there a variance as to proof of ownership, as the plaintiff owned a life estate in the property and was in possession and was such an owner as could maintain the suit for interfering with his easement right to the alley. *Walker v. Clifford*, 128 Ala. 67, 29 South. 588, 86 Am. St. Rep. 74.

There was no error in refusing charge 2 requested by the defendant. If not otherwise bad, it predicates a finding for the plaintiff only in case the alleyway was a public one clear to the creek. It may not have become a public alley clear to the creek, and yet may have been one at the point where the present fence was located. Charge 1 was likewise bad.

Charge 4 requested by the defendant was properly refused. If not otherwise bad, it predicates a recovery as to the whole complaint upon the fact that the fence was willfully and maliciously built, and ignores the second count, which does not charge "malicious" misconduct.

Charge 5 refused to the defendant was misleading, if not otherwise faulty. There may not have been a public alley from the south line of plaintiff's property clear back to the creek, yet it may have been such where the fence was built, and plaintiff would be entitled to recover whether it was a public alley all the way to the creek or not.

Charge 6 was but the general charge, as to the second count, and was properly refused, as there was evidence from which the jury could infer a public alley.

Charge 7 requested by the defendant was properly refused. If not otherwise bad, it confined the plaintiff to actual or compensatory damages, when there was evidence in the case which authorized an assessment of vindictive or punitive damages.

Charges 8 and 9 are manifestly bad.

The judgment of the city court is affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

## CENTRAL OF GEORGIA RY. CO. v. CARROLL.

(Supreme Court of Alabama. June 10, 1909.)

### 1. RAILROADS (§ 103\*)—CATTLE GUARDS—COMMON-LAW DUTY.

A railroad company is not bound by the common law to erect or maintain cattle guards upon its right of way, and is not liable for injuries resulting from the absence thereof.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 315; Dec. Dig. § 103.\*]

### 2. RAILROADS (§ 103\*)—CATTLE GUARDS—STATUTORY PROVISIONS.

Code 1896, § 3480, requiring a railroad company to erect cattle guards and keep the same in repair when the owner of the land shall make demand therefor and show that guards are necessary to prevent depredation of stock upon his land, being in derogation of the common law, must be strictly construed.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 103.\*]

### 3. RAILROADS (§ 114\*)—CATTLE GUARDS—FAILURE TO REPAIR—MEASURE OF DAMAGES.

The measure of damages for failure by a railroad company to maintain cattle guards in good repair, permitting live stock to enter and damage crops, is the difference between the market value of the crops that would have been raised, had not the stock damaged the same, and the market value of the crop actually raised, less what would have been the reasonable cost of gathering and marketing that part of the crop destroyed.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 114.\*]

### 4. RAILROADS (§ 114\*)—CATTLE GUARDS—FAILURE TO REPAIR—DAMAGES.

Where, in an action against a railroad company for failure to maintain cattle guards in good repair, permitting live stock to enter, the only damage sought to be recovered was that to the crop, and not to the land or freehold, and plaintiff was the sole and exclusive owner of the crop, the fact that he only owned, as a tenant in common, an undivided one-fifteenth interest in the land, did not require that his recovery be limited to one-fifteenth of the amount of damage to the crop; but he was entitled to recover the entire amount.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 114.\*]

### 5. RAILROADS (§ 103\*)—CATTLE GUARDS—ERECTION AND REPAIR—DEMAND.

Code 1896, § 3480, requiring a railroad company to erect cattle guards and keep the same in repair when the owner of the land shall make demand therefor and show that guards are necessary to prevent depredation of stock upon his land, makes a demand necessary only to compel the erection of the cattle guards, and after once erected no further demand to keep them in repair is required.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 103.\*]

Mayfield, J., dissenting in part.

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by I. S. Carroll against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

It is deemed unnecessary to set out the pleadings. The following part of the oral charge of the court is excepted to: "If you believe from the evidence that the plaintiff is

entitled to recover, then the measure of his damages in this case is the difference between the fair and market value of the crop actually raised and gathered on said lands in the year 1905 and the fair and reasonable market value of the crops that would have been raised on said lands in said year, considering the way the crops were worked, had not stock come in over the stock gap on defendant's roadbed and destroyed said crop, less the reasonable costs of gathering, housing, and marketing that part of the crop that was destroyed." The following charges were refused to the defendant: (1) Affirmative charge. (2) "The court charges the jury that, if they believe from the evidence in this case that I. S. Carroll owned only a one-fifteenth interest in the land on which the crop, for injury to which this suit is brought, is grown, then he can only recover a one-fifteenth amount of the damages done said crop."

Espy & Farmer, for appellant. R. D. Crawford, for appellee.

**MAYFIELD, J.** This was an action of case, brought by the appellee against the appellant railroad company, to recover damages for the destruction of plaintiff's crops, caused by the trespassing of live stock upon the same, which injury is alleged to have been the result of the negligence of the defendant company or of its agent in failing to keep and maintain stock gaps or cattle guards in good condition and repair at the points where the defendant company's railroad track crosses the boundaries of plaintiff's land. The complaint contains two counts; the second being added by amendment on April 6, 1907. The original complaint was filed on the 15th day of January, 1906. The defendant filed demurrers to the original complaint and to the amended complaint, demurring to each count separately, and assigning several special grounds of demurrer. The demurrers being overruled to the complaint, the trial was had upon the general issue, resulting in a verdict and judgment for the plaintiff in the sum of \$250. From the judgment the defendant appealed, and here assigns as error the overruling of defendant's demurrer to each count of the complaint, and that part of the oral charge of the court which is set out in the bill of exceptions and in the assignment of error, and also the refusal to give two written charges requested by the defendant, which are set out in the bill of exceptions and in the assignment of error.

The plaintiff evidently bases his right of action in this cause on section 3480 of the Code of 1896. This section of the Code reads as follows: "3480. Cattle Guards.—Every person or corporation operating a railroad must put cattle guards upon such railroad and keep the same in good repair whenever the owner of the land through which the road passes shall make demand upon them

or their agents and show that such guards are necessary to prevent the depredation of stock upon his land." This section is now amended in the Code of 1907 (section 5513); but, of course, such amendment has no application to this case. The cause of action attempted to be alleged is based solely upon this section of the Code, and without this statute there could be no valid contention that it states a cause of action, for the reason that it has been repeatedly decided by this court that railroad companies are not bound by the common law to erect or maintain cattle guards or stock gaps upon their right of way or roads, and that they are not liable for injuries resulting from the want of such erections. *M. & C. R. R. Co. v. Lyon*, 62 Ala. 71; *Birmingham Min. R. R. Co. v. Parsons*, 100 Ala. 665, 13 South. 602, 27 L. R. A. 263, 46 Am. St. Rep. 92; *L. & N. R. R. Co. v. Murphree*, 129 Ala. 432, 29 South. 592. It therefore follows that, if the defendant railroad company be liable at all, it is liable by reason and by virtue of failing to observe the requirements of the statute. The statute being in derogation of the common law, and of the law of this state, but for the statute, it has been held by this court to require strict construction.

The statute in question is a codification of, and is based upon, section 1 of an act of the Legislature of December 11, 1886 (Acts 1886-87, p. 163). This act was construed by this court, in the case of *Birmingham Min. R. R. Co. v. Parsons*, 100 Ala. 662, 13 South. 602, 27 L. R. A. 263, 46 Am. St. Rep. 92, before codification, and before it ever appeared in any Code of this state. In this case section 1 of the act upon which this section of the Code in question was based was held to be constitutional and within the police power of the state; but section 2 of said act was held to be unconstitutional for the assigned reason that it attempted to impose absolute liability on railroad companies, irrespective of compliance on their part with the duties prescribed in the first section of the act and of freedom from fault on their part, thus following the case of *Zeigler v. S. & N. R. R. Co.*, 58 Ala. 594, in which case the court say: "We can perceive of no reason, in law or morals, for holding them [railroad companies] to a stricter measure of accountability for inevitable misfortunes than would be exacted from natural persons for injuries which resulted from unavoidable accident, or accidents which no human prudence can foresee or avert"—citing a number of cases in support of the same doctrine. On account of section 2 of said act being held unconstitutional and void in *Parsons' Case*, it was omitted from the Code of 1896 by the commissioner, while section 1 of the same act was retained and codified, and the act adopting the Code of 1896, of course, repealed section 2 of that act, which was thus omitted from the Code.



It will be observed from a reading of the statute that all persons or corporations operating railroads in this state must erect cattle guards upon their railroads and keep the same in good repair, whenever the owner of the land through which the road passes shall make a demand upon them or their agents and show that such guards are necessary to prevent the depredation of stock upon his land. It will also be noted that this statute does not impose absolute liability to erect or maintain such cattle guards in all cases, but only in those cases in which the owner of the land through which the road passes shall make demand for them and show that such guards are necessary to prevent the depredation of stock. Consequently there can be no duty without such demand and showing by the owner to the railroad company or its agents, and, of course, if no duty exists, there can be no breach thereof. That no duty rests upon the railroad company to erect or maintain such cattle guards until demand and a showing be made, was decided by this court in the case of *L. & N. R. R. Co. v. Murphree*, 129 Ala. 432, 29 South. 592, where it was held that demand made by the tenant, instead of by the owner of the land, was not sufficient. This case, therefore, expressly decides that a demand by the owner of the land is necessary to fix the duty or liability upon the railroad company, and we can see no reason why it is not as necessary that the owner should show that such guards are necessary to prevent depredation of stock as it is to demand that they be erected or maintained. The statute requires both the demand for the guards and the showing that they are necessary; and, as the statute must be strictly construed, it must be held that the demand alone, without the showing of the necessity therefor, is insufficient.

The first count of the complaint makes no attempt to allege a demand or a showing for the erection or maintenance of such cattle guards; while the second count alleges a demand, and that it was made prior to the commencement of the injury complained of, and is sufficient as to the allegation of demand for the repair or maintenance in good condition of the stock gaps. There is no attempt therein to allege that it was shown to the defendant railroad company, or to its agents, that such repair and maintenance was necessary to prevent the depredation of stock on plaintiff's land. The demand, and the showing as to the necessity, we hold are necessary allegations in the complaint, under this section, to the recovery of damages for failure to erect, or to maintain in good repair, cattle guards or stock gaps, as required by this section of the Code. Several grounds of demurrer were leveled against each count of the complaint, because of failure to allege a demand to

keep said stock gaps in good repair, or a showing made that the stock gaps or cattle guards were necessary to prevent depredations by stock on the lands. While the second count sufficiently alleged a demand, it did not allege that there was any showing, or attempt to show, that the repair of the stock gaps was necessary to prevent depredations by stock on the lands. It was, therefore, reversible error for the court to overrule the demurrer as to each of the counts of the complaint, and such ruling would have been equally error, had the demurrer been addressed to the amended complaint as a whole, and not to each count thereof.

We have examined that portion of the oral charge excepted to by the defendant, and find it to be a correct exposition of the law as to the measure of damages, in so far as it attempts to measure the same.

There was, likewise, no error in the court's refusal to give the charge, requested by the defendant, which sought to limit the recovery of the plaintiff to one-fifteenth of the amount of damages done to the crop, because he was only the owner, as a tenant in common, of an undivided one-fifteenth interest in the lands upon which the crop was grown. While it is conceded that the plaintiff owned only an undivided one-fifteenth interest in the land, yet the evidence was undisputed that he owned the entire crop grown upon the land, which was destroyed and for which damages were sought to be recovered; such being the only damages sought to be recovered in the action. There was no attempt to recover any damages in this case, other than those for the destruction of the crop growing upon the land, which was the absolute and exclusive property of the plaintiff alone; and the fact that he owned only an undivided one-fifteenth interest in the land upon which the crop was grown was no reason for limiting his damages to one-fifteenth of the total damages suffered.

Counsel for defendant are in error when they suppose that the plaintiff could not own the crops unless he owned the lands, or had leased the lands on which they were grown. The possession of one tenant in common is the possession of all. One tenant may cultivate the whole of the common property, without being liable to his co-tenants for rent or damages, and without his co-tenants being entitled to any part of the crops, in the absence of a contract, or unless his entry be hostile and exclusive. The rule is different, however, where one tenant in common receives rent from a third party for the use of the property; for then he may be compelled to account without an agreement, and without the hostile or exclusive entry. *McCaw v. Barker*, 115 Ala. 543, 22 South. 131; *West v. West*, 90 Ala. 458, 7 South. 830; 4 *Mayfield's Digest*, p. 931, §§ 51, 52.

Murphree's Case, *supra*, which is cited and relied upon by defendant's counsel, only decided that the demand for the erection or maintenance of cattle guards must be made by the owner. It did not decide that the action could not, under the statute, be maintained by a tenant if the demand be made by the owner. Nor is it necessary for us to decide in this case that the tenant can or cannot maintain an action under the statute, because the plaintiff was the owner of both the land and the crop for all purposes necessary to the maintenance of this action. *Murphree's Case, supra*, simply decided that the demand must be made by the owner, and not by the tenant—that, and nothing more.

By reference to the original statute, of which this section of the Code is a part, it will be seen that it was the intention of the Legislature to protect the crops and to make defendant railroad companies liable for the destruction thereof on account of their failure to comply with the statute; and as the only damages sought to be recovered in this action were damages to the crop, and not to the land or freehold otherwise, and the plaintiff being the sole and exclusive owner of the crop, it should and could not affect the amount of his recovery that he was only a tenant in common, owning an undivided one-fifteenth interest in the land. If there were an attempt in this action to recover damages to the freehold or the fee in these lands, then there might be some question as to what part of the entire damages plaintiff was entitled to recover; but he being the sole and exclusive owner of the crop destroyed, and damages to that being the only damages sought to be recovered in this action, there can be no doubt that the plaintiff, if entitled to recover at all, is entitled to recover all the damages suffered, in the destruction of the crop, on account of defendant's failure to maintain stock gaps or cattle guards as required by law. It therefore follows that there was no error in the court's refusal to give the other charge requested by the defendant; it being merely the affirmative charge in favor of the defendant.

The other Justices do not concur in what is said in the above opinion as to the necessity of a demand by the owner to maintain and repair stock gaps after they are once erected, but adhere to the opinion in the case of *A., B. & A. Ry. Co. v. Brown* (Ala.) 48 South. 73, in which it is held that the demand is only necessary to compel erection, and that, when the demand is once made to place them, it then becomes the duty of the railroad company to place them and to keep them in repair without further demand.

It follows, therefore, that there was no reversible error in the record, and the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, ANDERSON, DENSON, McCLELLAN, and SAYRE, JJ., concur. MAYFIELD, J., dissents.

#### ALLMAN v. CITY OF MOBILE.

(Supreme Court of Alabama. June 10, 1909.)

##### 1. MUNICIPAL CORPORATIONS (§ 712\*)—SEWER REGULATIONS—ORDINANCES.

Mobile City Ordinance No. 830, requiring the plumbing inspector to order in writing all persons owning property any part of which abuts on a street in which a sewer is laid to connect all closets, etc., from which water is wasted, with the sewer, and declaring that any person failing or refusing to make such connections within 30 days after notice shall be punished, in so far as it relates to residence property located on sewer streets equipped with open pit vaults, was not in conflict with Ordinance No. 829, forbidding the connection of such vaults with the sewers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 712.\*]

##### 2. MUNICIPAL CORPORATIONS (§ 712\*)—SANITARY ORDINANCES—APPLICATION.

Mobile City Ordinance No. 824, regulating sewer connections, is applicable only in cases where parties voluntarily request permission to connect their premises with the sewage system of the city; no permit being necessary or contemplated under Ordinance No. 830, as amended, requiring such connections from property on streets containing sewers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 712.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 591\*)—ORDINANCES—DELEGATION OF POWER.

Mobile City Ordinance No. 830, requiring the plumbing inspector to order all persons to make sewer connections under certain circumstances, was not objectionable as leaving the persons against whom the ordinance should be enforced to the discretion of the inspector; it being his imperative duty to order all persons of the class to comply therewith.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 591.\*]

##### 4. MUNICIPAL CORPORATIONS (§ 591\*)—SEWER ORDINANCES—LEGISLATIVE POWER—DELEGATION.

Mobile City Ordinance No. 830, as amended, requiring sewer connections under certain circumstances, was not invalid as a delegation of legislative power to the plumbing inspector.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 591.\*]

##### 5. STATUTES (§ 108\*)—TITLE—PLURALITY OF SUBJECTS.

If the title of an act indicates, and the act itself embraces, two different subjects, diverse in their nature and having no necessary connection, the whole act will be void; but, however numerous the heads stated in the title and the provisions of the act, if they can by fair intendment be considered as falling within the general subject, the act is not in violation of the constitutional provision that no law shall embrace more than one subject, expressed in its title.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 108.\*]

##### 6. STATUTES (§ 123\*)—TITLE—PLURALITY OF SUBJECTS.

Act March 12, 1907 (Laws 1907, p. 398), entitled "An act to authorize cities and towns in Alabama to provide for the drainage thereof by sanitary and storm sewers, ditches, sur-

face drains, aqueducts, and canals, to prescribe rules and regulations for the installment of plumbing, to enforce connections with and the use of such sewers and drains, and to regulate the same," was not in violation of the constitutional provision requiring each law to contain but one subject, clearly expressed in its title.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 123.\*]

**7. MUNICIPAL CORPORATIONS (§ 266\*)—POLICE POWER—IMPROVEMENT OF PROPERTY.**

Act March 12, 1907 (Laws 1907, p. 398), authorizing cities and towns to provide for drainage, and to prescribe rules and regulations for the installment of plumbing, and to enforce connections therewith, etc., was a valid exercise of police power, and was not invalid as compelling the improvement of property against the will of the owner.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 266.\*]

**8. MUNICIPAL CORPORATIONS (§ 712\*)—SEWERS—ORDINANCES.**

A city, authorized by Act March 12, 1907 (Laws 1907, p. 398), to construct sewers and compel connections therewith, was authorized to prescribe necessary and reasonable ordinances to carry out such requirement.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 712.\*]

**9. MUNICIPAL CORPORATIONS (§ 712\*)—SEWERS—ORDINANCES.**

Mobile City Ordinance No. 830, requiring all persons owning property on sewered streets to connect closets, etc., with the sewers, and prescribing punishment for failure to comply with a notice to do so by the plumbing inspector, was reasonable.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 712.\*]

Appeal from City Court of Mobile; O. J. Semmes, Judge.

Action by the City of Mobile against Eliza J. Allman. From a judgment for plaintiff, defendant appeals. Affirmed.

Brooks & Stoutz, for appellant. B. B. Boone, for appellee.

DENSON, J. This appeal is from a final judgment, rendered by the city court of Mobile against the appellant, Mrs. Allman, for the violation of an ordinance of the city of Mobile, in that she failed to connect her property with the sanitary sewers of that city after notice so to do. The case was tried in the city court on an agreed statement of facts, and it is not contended that appellant was wrongfully convicted if the ordinance under which she was tried is a valid one.

The ordinance involved is No. 830 as amended, and is in this language: "It shall be the duty of the plumbing inspector, or of an authorized inspector acting under the plumbing inspector, to order, in writing, all persons, associations, and corporations owning property any part of which abuts a street in which a sewer is laid, to connect all closets, urinals, sinks, lavatories, laundry tubs, bath tubs, and fixtures of whatsoever kind and character from which water is wasted with said sewer in said street, and any person, association, or corporation failing or re-

fusing to make said sewer connection for a period of thirty days after such notice shall be guilty of a breach of this section, and on conviction shall be punished as hereinafter provided. Said notice may be served upon a person or left at their residence or place of business." This ordinance was approved June 17, 1907. The facts show that the defendant's property is used by her as a residence, and that at the time notice was served upon her to connect with the sewer there was in use on the premises an open pit privy vault.

In view of this condition of the property, it is insisted that Ordinance No. 830 is void, because another ordinance (No. 829) forbids the connection of such a privy vault with the city sewers. We do not think there is merit in this contention, or that there is conflict between the two ordinances, even should it be conceded that Ordinance No. 830 is not a later expression of the legislative intention than Ordinance No. 829. It may be that Ordinance No. 829 forbids an owner of property to voluntarily, or without first obtaining permission from the proper city authority, connect with the sewer such a vault as that mentioned in the ordinance. But common knowledge concedes it to be the part of wisdom to have good sanitary regulation in cities; and, as an incident of this, experience has evolved the system of placing under the supervision of an expert inspector all such matters as that in controversy, and providing that no sanitary connection shall be made, except when it is necessary to conserve the hygienic conditions of the city. In this view, each of the two ordinances has a field for operation without conflicting with the other.

In this connection we may as well dispose of the second and third insistences, by saying that Ordinance No. 824 is applicable only in cases where parties voluntarily request permission to connect their premises with the sewerage system of the city. Manifestly, no permit to make such connection is necessary, or was even contemplated under Ordinance 830 as amended.

The fourth insistence is that Ordinance No. 830 as amended is an improper delegation of legislative power to an administrative officer. It is argued that "the ordinance is not a general indiscriminating ordinance, but is directed only against those whom the sanitary inspector chooses to prosecute. The ordinance does not fix a duty on the property holder for failure in which anybody can prosecute. To be uniform, the ordinance should declare the duty and make noncompliance punishable, whether the sanitary inspector wills it or not. Only those whom he notifies are under duty to help make the city sanitary." This insistence cannot prevail, for the reason that the ordinance leaves nothing to the discretion of the inspector, but imposes upon him the imperative duty of ordering all persons of the class mentioned in the ordi-

nance (1 Dillon [4th Ed.] § 394), namely, those owning property any part of which abuts a street in which a sewer is laid, to connect all closets, etc., with the sewer; and then the ordinance makes the refusal or failure, after such order is given in writing, to comply with it within 30 days, a violation of the regulation. Nor does the ordinance leave it to the discretion of the inspector whether or not parties violating same shall be prosecuted, or even make it his duty to prosecute them. The ordinance provides a uniform rule of action. It contains permanent legal provisions. It operates generally and impartially, and its enforcement is not left to the will or unregulated discretion of the inspector, or even of other municipal authorities. It properly requires the order or notice to be given, and then, voicing the will of the legislative department of the city, provides that a failure or refusal to comply therewith within 30 days shall constitute a breach of its provisions. We do not think that it confers any legislative power upon the inspector, or even gives him discretion. *Town of Tipton v. Norman*, 72 Mo. 380; *Village v. Lake Erie, etc., Co.*, 60 Ohio St. 136, 53 N. E. 795.

It is next contended that the city has no power to compel connection with sewers; the first point of the contention being that the act of the Legislature approved March 12, 1907 (Laws 1907, p. 398), by which it is supposed that the power to compel such connections exists, was enacted in violation of that section of the Constitution (Const. 1901, § 45) which provides that "each law shall contain but one subject, which shall be clearly expressed in its title." The title to the act is in this language: "An act to authorize cities and towns in the state of Alabama to provide for the drainage thereof by sanitary and storm water sewers, ditches, surface drains, aqueducts, and canals; to prescribe rules and regulations for the installment of plumbing; to enforce connection with and the use of such sewers and drains, and to regulate the same." The appellant insists that three distinct subjects are embraced in this title: First, to authorize municipalities "to provide for the drainage thereof"; second, "to prescribe rules and regulations for the installment of plumbing"; and, third, to enforce connection with and the use of sewers or drains and to regulate the same.

It is too well settled by the adjudicated cases to really require, or even warrant, further discussion, that, if the title to an act indicates, and the act itself actually embraces, two different subjects diverse in their nature and having no necessary connection, the whole act must be treated as void, from the manifest inability of the court to choose between the two and hold the act valid as to one subject and void as to the other. But it is equally well settled that, however numerous the heads stated in the title and however numerous the provisions of an act may

be, if they can be by fair intendment considered as falling within the subject-matter legislated upon in the act, or necessary as ends and means to the attainment of such subject, the act is not in conflict with a constitutional provision that no law shall embrace more than one subject, which must be expressed in its title. In other words, the title may be so written as to form an index to the provisions of the body of the act; but if only one subject-matter is the essence of the act, and its provisions are referable and cognate to the general subject, the constitutional mandate is not violated. In short, the Constitution is not offended if the act has but one general subject, and that is fairly indicated by the title. *Ex parte Pollard*, 40 Ala. 98; *Ballentyne v. Wickersham*, 75 Ala. 533; *State v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520; *Bell's Case*, 115 Ala. 87, 22 South. 453; *Ex parte Birmingham*, 116 Ala. 186, 22 South. 454; *Lindsay v. United States, etc.*, 120 Ala. 156, 172, 24 South. 171, 42 L. R. A. 783; *Pioneer Irrigation District v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201. Here it seems clear to us the matters stated in the title and all the provisions of the act are germane to the same subject. Consequently we hold that the title contains but one general subject, that the act treats only of that general subject and matters properly connected therewith, and that the enactment evinces a sufficient compliance with section 45 of the Constitution. Authorities supra.

Finally, it is insisted that even the Legislature cannot compel the connection of property with the sewers; that this would be the compulsory improvement of private property. It is suggested, in this connection, that the Legislature might pass laws declaring nuisances and forbidding the use of property in an unsanitary way, but that it is without its power to compel improvements on property. The case of *Philadelphia v. Provident, etc., Co.*, 132 Pa. 224, 18 Atl. 1114, is cited as supporting this contention of the appellant. That case was decided upon the distinct idea that the board of health of the city was without authority to order water-closets to be constructed on private premises. The court said: " \* \* \* When the board proceeded further, and ordered water-closets to be constructed by the owners, we think they exceeded their powers. At least, no such authority has been exhibited to us, and we cannot assume it to exist without evidence. The act of April 5, 1849 (P. L. 346), was called to our attention; but it does not meet the difficulty. It is true that it authorizes the board of health 'to remove the cause of all nuisances that now exist, or may be hereafter created.'" The holding is that the act of the Legislature did not confer the authority, but the clear intimation is that such authority might have been conferred. In the

instant case we have authority expressly conferred by the Legislature on the city to require the connections to be made.

No police power is more important than that to adopt such sanitary regulations as may be necessary to insure the safety and preserve the health of the inhabitants of a city. Nor do we doubt that the maintenance of an efficient sanitary sewerage system is of prime importance in encompassing the ends sought by the delegation of such power; and surely no sewerage system could be regarded as efficient without the incident of power in the municipal corporation to compel connections of property by its owners with the system. So, on principle and authority, we hold it to be within legislative competency to confer on municipal corporations the power to compel such connections. *Bliss v. Kraus*, 16 Ohio St. 54; *Village of St. Mary's v. Railroad Co.*, 60 Ohio St. 136, 53 N. E. 795; *Railroad Co. v. Sullivan*, 32 Ohio St. 152; *Health Department v. Rector*, etc., 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579; *Bancroft v. Cambridge*, 126 Mass. 438; *Commonwealth v. Roberts*, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400. The power being legitimately conferred upon the city to impose upon the property owner the duty to make connections, the performance of that duty may be secured by necessary and reasonable sanctions; and we do not see that the sanction provided in this instance is unreasonable. *Railroad v. Sullivan*, supra; *Commonwealth v. Roberts*, supra; 1 *Dillon on Munic. Corp.* (4th Ed.) § 328.

There is no error in the record, and the judgment of the city court will be affirmed. Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

## LOUISVILLE & N. R. CO. v. SMITH.

(Supreme Court of Alabama. June 1, 1909.  
Rehearing Denied June 30, 1909.)

### 1. RAILROADS (§ 478\*)—INJURIES FROM FIRE—PLEADING.

Where counts of a declaration plainly impute the communication of fire to plaintiff's cotton in consequence of defendant railroad's negligence, the further averment that the damages were caused "by reason of said fire" was merely an averment of the consequence of the negligence, and the counts were not subject to demurrer.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 478.\*]

### 2. RAILROADS (§ 478\*)—INJURIES FROM FIRE—PLEADING—"CAUSED OR ALLOWED."

A declaration, averring that plaintiff owned bales of cotton near the railroad, and that defendant negligently "caused or allowed" said cotton to be damaged by fire communicated by means of said locomotives, was not equivocal be-

cause of the alternative averment, as the words as so used were synonymous.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 478.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 344-346; vol. 2, p. 1012; vol. 8, pp. 7597, 7598.]

### 3. PLEADING (§ 34\*)—CONSTRUCTION—ALTERNATIVE AVERMENTS—EQUIVOCAL MEANING.

In deciding whether a count of a declaration was equivocal because of an alternative averment, the construction is to be made with reference to the rule of disfavor to the pleader.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 66; Dec. Dig. § 34.\*]

### 4. PLEADING (§ 34\*)—CONSTRUCTION—CONTEXT.

In the construction of a pleading to determine as to whether an alternative averment renders it equivocal, the whole count must be considered, and a segregated portion cannot control the construction.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 66-75; Dec. Dig. § 34.\*]

### 5. WORDS AND PHRASES—"ALLOW"—"PERMIT."

The meaning of the word "allow" is often controlled by the context. As employed in an averment in a declaration that defendant negligently "caused or allowed" cotton to be destroyed by fire, it is synonymous with "permit," one of its accepted meanings, and familiarly so in common parlance. When so read, the averment is that the defendant negligently caused or permitted the damage.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, pp. 5315-5318; vol. 8, p. 7752.]

### 6. NEGLIGENCE (§ 80\*)—CONTRIBUTORY NEGLIGENCE AS DEFENSE.

The defense of contributory negligence may be set up by a plea in all cases where simple negligence is counted on in the complaint for a recovery.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 84; Dec. Dig. § 80.\*]

### 7. PLEADING (§ 352\*)—MOTION TO STRIKE—DEMURRER.

A complaint claimed damages to cotton by fire from defendant's locomotive. Defendant pleaded that plaintiff was himself guilty of negligence which proximately contributed to the burning of his cotton, that the plaintiff placed the cotton on an open platform not the property of defendant and within a few feet of the railroad track along which locomotives frequently passed emitting sparks in dangerous quantities to the knowledge of plaintiff, that defendant permitted the cotton to remain there for a period of 10 hours or more, that the weather was dry, and that the cotton was not completely covered by bagging, all of which facts were known to plaintiff, and in this regard plaintiff proximately contributed to his damage. *Held*, that it was error to strike these pleas on a motion that they were immaterial, irrelevant, and sought to set up contributory negligence, where that defense could not be pleaded, and plaintiff should have been put to his demurrer in order that defendant might have opportunity to amend.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1078-1101; Dec. Dig. § 352.\*]

### 8. RAILROADS (§ 481\*)—INJURIES FROM FIRE—EVIDENCE.

In an action for damages to cotton from fire, communicated from defendant's locomotive, plaintiff's witness having testified that the damage was about five cents a pound, evidence, sought to be elicited on cross-examination, as to the price at which the damaged cotton was sold,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the extent of damage in consequence of the cotton lying on the ground exposed for a number of days after the fire, was irrelevant as throwing no light on the measure of damages.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 481.\*]

**9. WITNESSES (§ 330\*)—CROSS-EXAMINATION—EVIDENCE TO TEST CREDIBILITY.**

Where, in an action against a railroad for damages to cotton from fire, plaintiff's witness had testified to the value of the cotton in a market, cross-examination as to what plaintiff sold the damaged cotton for, and as to the extent of damages in consequence of the cotton lying on the ground after the fire, was not allowable as tests of the witness' credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1106; Dec. Dig. § 330.\*]

**10. WITNESSES (§ 252\*) — EXAMINATION — METHOD.**

Where, in an action against a railroad for damages from fire, defendant's engineer had testified as to the proper equipment, construction, and operation of the engine, it was not improper cross-examination for plaintiff's counsel to exhibit a substance in the nature of cinder or charcoal and question the witness with a view of eliciting testimony tending to show that the spark arrester was faulty; the witness having already testified to the size of sparks emitted through a proper spark arrester.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 266; Dec. Dig. § 252.\*]

**11. TRIAL (§ 251\*)—INSTRUCTIONS—CONFORMITY TO PLEADINGS.**

Where a declaration counted in case for consequential injury, instructions on the theory that the action was trespass were properly rejected.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 251.\*]

**12. RAILROADS (§ 459\*)—INJURIES FROM FIRE —INSTRUCTIONS.**

In an action against a railroad for damage to cotton by fire from defendant's negligence, an instruction, predicating a finding for defendant on failure of plaintiff to take due care to protect his cotton, was properly rejected, as it was not the duty of plaintiff to anticipate negligence on the part of the defendant.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 459.\*]

**13. RAILROADS (§ 480\*)—INJURIES FROM FIRE —PRESUMPTIONS.**

Testimony for plaintiff, that witness saw sparks emitted from defendant's locomotive which set fire to cotton of which plaintiff's bales were a part, raised a presumption that the fire igniting the cotton was the result of negligence in the equipment, construction, and operation of the locomotive.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1709-1716; Dec. Dig. § 480.\*]

**14. RAILROADS (§ 484\*)—INJURIES FROM FIRE —QUESTION FOR JURY.**

In an action against a railroad for damages to cotton by fire, evidence held to render the question of negligence one for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.\*]

Anderson, Denson, and McClellan, JJ., dissenting.

Appeal from Circuit Court, Conecuh County; J. C. Richardson, Judge.

Action by Irby T. Smith against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The complaint is in the following language:

Count 3: "Plaintiff claims of the defendant the further sum of \$1,000 as damages, for that heretofore, to wit, April 27, 1906, the defendant was running and operating a railroad through Evergreen, Ala., and was running and operating a locomotive thereon; that plaintiff owned 14 bales of cotton near to said railroad; that defendant negligently caused or allowed said cotton to be greatly damaged or destroyed by means of a fire communicated from or by means of said locomotive, all to the damage of plaintiff as aforesaid."

(4) "Plaintiff claims of the defendant the further sum of, to wit, \$1,000 damages, which damages were caused by fire from an engine operated by the defendant whereby said sum of, to wit, \$1,000 damages was caused by said defendant to the plaintiff by reason of said fire, whereby 14 bales of cotton were greatly damaged or destroyed, all caused by the negligence of the defendant, and by reason of said fire the plaintiff was damaged in said sum. Wherefore he brings this suit."

(5) "Plaintiff claims of the defendant the further sum of \$1,000 as damages, for that on, to wit, the 27th day of April, 1906, the defendant was engaged in running or operating a steam engine or locomotive on defendant's track in Evergreen, Conecuh county, Ala., and that plaintiff owned 14 bales of cotton, which were situated on a platform adjoining the cotton warehouse in the town of Evergreen, known as the 'Evergreen Cotton Exchange,' which cotton was damaged or destroyed by the fire; and plaintiff alleges that said fire was communicated to said cotton upon said platform through the negligence of the defendant; and plaintiff avers that said cotton was of the value of \$1,000, and that by reason of the said fire the plaintiff was injured as aforesaid."

(6) Same as 5, except that it is alleged that the fire was communicated to seven bales of cotton, situated on the platform, which cotton belonged to the defendant.

Demurrers were interposed, raising the question of misjoinder, and the other questions discussed in the opinion.

The following pleas were filed by the defendant:

"(2) For further answer to plaintiff's complaint as a whole, and each count thereof severally and separately, defendant says that the plaintiff was himself guilty of negligence which proximately contributed to the burning of his said cotton, in this: That the plaintiff placed or caused to be placed the cotton which was damaged or burned on an open platform, not the property of the defendant, which platform was within, to wit, 5 to 10 feet of the defendant's railroad track; that the defendant's trains, both freight and passenger, passed along said railroad track

frequently each day and night, and said locomotives emitted sparks therefrom in dangerous quantities, all of which was known to the plaintiff; and, well knowing the above state of facts, the plaintiff permitted or allowed said cotton to remain upon the said platform unprotected and unguarded, and in this regard proximately contributed to the injury and damages set out in his complaint.

"(3) The defendant, for further answer to plaintiff's complaint as a whole, and each count thereof severally and separately, says that the plaintiff was himself guilty of negligence in this: That he permitted or allowed said cotton which is alleged to have been burned or damaged to be placed upon and remain upon, for a period of, to wit, 10 hours or more, a platform, which platform was not covered in any manner, which platform was within, to wit, 5 to 10 feet of defendant's railroad track, well knowing that said cotton was easily ignited, and well knowing that the said cotton was unprotected, and well knowing that the said platform was within, to wit, 5 to 10 feet of defendant's railroad track, and well knowing that the defendant ran and operated trains to which were attached locomotives, which locomotives were run by steam, and well knowing that steam is generated by fire from boiling water, and that in order to boil water it is necessary to use fire, and well knowing that the said locomotives emitted sparks in dangerous quantities, and that said cotton in its unprotected condition was liable to be set afire and burned by the said sparks, which negligence of the plaintiff proximately contributed to the injuries and damages set out in his complaint.

"(4) The defendant, for further answer to the plaintiff's complaint as a whole, and each count thereof severally and separately, says that the plaintiff was himself guilty of negligence in this: That he permitted or allowed the cotton which is alleged to have been burned or destroyed to be placed upon a platform, which platform is in close proximity to the defendant's railroad track, engines, or locomotives, and that said engines or locomotives emitted sparks in quantities sufficient to set said cotton on fire, and thereby proximately contributed to his own injury.

"(5) The defendant, for further answer to plaintiff's complaint as a whole, and each count thereof severally and separately, says that the plaintiff was himself guilty of negligence in this: That the plaintiff placed, or caused to be placed, the cotton which is alleged to have been burned or damaged on an open platform, which platform is not the property of the defendant; that the weather was very dry; that the defendant's locomotive engines passed along its railroad track in close proximity to the said platform every day, upon which said cotton was stored; that said cotton was not completely covered by bagging, but portions of it was absolutely uncovered and easily ignited; and that

the said locomotive engines threw out sparks in dangerous quantities, the emission of said sparks being apparent—all of which facts were known to the plaintiff, and plaintiff negligently permitted and allowed the said cotton to remain on the said platform, and in this regard the plaintiff proximately contributed to his alleged damages as set out in his said complaint.

"(6) The defendant, for further answer to the plaintiff's complaint as a whole, and each count thereof severally and separately, says that the plaintiff was himself guilty of negligence in this: That he permitted or allowed the cotton which is alleged to have been burned to be placed upon an open and unprotected platform, which platform is within, to wit, 5 to 10 feet of the defendant's railroad track, and permitted or allowed said cotton to remain on said platform, unguarded and unprotected, for a period, to wit, 10 to 48 hours. At the point where the said platform is situated the defendant has a side track, along which side track the defendant's engines frequently pass in switching cars, which said engines throw out sparks in dangerous quantities—all of which facts above set out were well known to the plaintiff, and in this regard the plaintiff proximately contributed to the damages as set out in the said complaint."

George W. Jones and Rabb & Page, for appellant. Hamilton & Crumpton and D. M. Powell, for appellee.

MCCLELLAN, J. The cause of action relied on for a recovery is the negligent destruction of plaintiff's cotton by fire communicated thereto. The cotton was located on a platform very near the defendant's tracks in Evergreen.

The argument, based on the demurrers to the fourth, fifth, and sixth counts, cannot be sustained. The counts plainly impute the communication of the fire to the plaintiff's cotton in consequence of the negligence of the defendant. The further averment that the damage suffered by the plaintiff "by reason of said fire" took nothing from the antecedent allegation of negligent communication thereof to the plaintiff's cotton. In fact, under these counts of the complaint, there could have been no more apt description of the consequence of the alleged negligent communication of the fire than that employed. The negligence imputed is one thing, and the effect thereof, to plaintiff's damage, quite another. If "cause" and "effect" were the same thing, the argument indicated would be well taken. The ascription of the "cause" to the negligence of the defendant and the "effect" to the "said fire," communicated as averred, are not susceptible of the construction urged for appellant.

Counsel for appellant insist that count 3 stated no cause of action, and that hence it was prejudicial error to refuse the affirma-

tive charge requested by the defendant. The basis for the insistence is that count 3, omitting not presently important features, alleges: "That plaintiff owned 14 bales of cotton near to said railroad; that the defendant negligently caused or allowed said cotton to be greatly damaged or destroyed by means of fire communicated from or by means of said locomotives." It is urged that the alternative averment "caused or allowed" rendered the count equivocal within the principle applied in *L. & N. R. Co. v. Orr*, 121 Ala. 489, 26 South. 35, and in *Southern Ry. Co. v. Bunt*, 131 Ala. 591, 32 South. 507, and others to like effect. A construction of the count, and that with reference to the rule of disfavor to the pleader, is of course necessary, and to do so satisfactorily the whole count must be considered. A segregated portion thereof cannot be taken and the construction controlled thereby. It is also essential to take into account, in the construction of pleading, the law applicable to the status made by the allegations of the count, plea, etc. The count in question seems to have been taken, at least as respects the alternative averment, from *A. G. S. R. R. v. Johnston*, 128 Ala. 283, 286, 29 South. 771. The demurrers assailing the count, and which were overruled, were, perhaps, sufficiently definite to raise the inquiry now presented; but, aside from the affirmation entered there, the court does not seem to have passed on the matter. It may be the ruling on the demurrer was not urged as error. As now appears we do not think the last-cited decision authority on the question in hand. In the vital respects the third count clearly expresses three ideas: First, that the plaintiff was the owner of 14 bales of cotton located near defendant's railroad; second, that it was damaged or destroyed; and, third, the means of such damage or destruction was fire from a locomotive of the defendant.

The word "allow" has many meanings. Its meaning here, as often, is controlled by the context. As here employed it is synonymous with "permit," one of its accepted meanings, and familiarly so in common parlance. When so read the averment is that the defendant negligently caused or permitted the damage or destruction of property by means of fire communicated from a locomotive. There can be no sort of doubt that a duty rests on a railroad to use due care to "prevent," not to "permit," the communication of fire necessarily employed in the propulsion of its locomotives. This is true from the very nature of the case. Such institutions must use fire. It is, of course, a dangerous agency. The degree of reasonable care is commensurate with the danger attendant on the use. Accordingly, the obligation—the duty—prevails for railroads to observe care, within the rule defined in *L. & N. R. R. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66, among other of our

decisions, to prevent the communication of fire; and the performance of this duty is so jealously enforced that a prima facie, evidential, presumption of its breach is indulged upon proof of the fact of fire being communicated to property by or from a locomotive operated by a railroad company. Indeed, since the use of fire in the operation of locomotives is a right, and damning consequences therefrom will not, alone, afford a cause of action to the injured property owner, nearly if not all of the whole field of liability for fires communicated from locomotives arises from negligent failure to observe due care to restrain dangerous tendencies of the element. The duty is, in a large sense, negative—preventive—and to breach it omission is among the most usual means. Under this construction of the alternative, is it equivocal? We think not, and for these reasons:

The principle illustrated in the *Orr* and *Bunt* Cases is, of course, sound. Equivocal averments have no place in pleadings. In the *Orr* Case the count condemned attempted to impute, disjunctively, wantonness and simple negligence. As has been often ruled here, they cannot coexist in the same act or omission, for the reason that wanton or willful misconduct implies mental action; whereas, that factor is absent in mere negligence. They are hence necessarily distinct colorings of a wrong to another's injury. The *Bunt* Case dealt with the alternative, "knowledge or notice," and this as related to the imputation of wanton or willful misconduct which, to exist, must have, as a predicate, knowledge of the situation on the part of the party charged therewith. The ruling therein turned on the fact that "notice" is not the equivalent of "knowledge." In *Tinney v. Railroad*, 129 Ala. 523, 30 South. 623, the ruling was invited by a charge on the effect of the evidence, not on the pleading. It was, however, held that there was no data given the jury in the evidence from which the jury could apply the prima facie, evidential, presumption arising to the negligent operation of the locomotive the only source of negligence ascribed in the complaint, to the exclusion of the other elements of presumed, prima facie, breach of duty in such cases. The soundness of the conclusion would seem to be beyond doubt. It is hardly necessary to say that the *Tinney* Case is without bearing in this instance. That the principle underlying the *Orr* and *Bunt* Cases is not infringed by the alternative present in count 3 is evident when it is considered that distinct, nonequivalent alternatives were, in both instances, employed. As we construe the terms "caused" and "allowed," noting, as must be done, the context and the stated duty involved, there can be no serious question but that they are synonymous. Such was the view of the Rhode Island court, in *Carroll v. Allen*, 20 R. I. 144, 37 Atl. 704 where the words "caused" and



"suffered" were under consideration, and that with reference to the analogous, in nature, duty of a city to keep its streets in repair. And such was the view of District Judge Billings, in *Comitez v. Parkerson* (C. C.) 50 Fed. 170, where he was dealing with a statute employing the word "cause" in defining "duty and liability." Of course, in many instances, "cause" implies affirmative action, whereas "permit, suffer or allow" imply omission merely; but where these terms are employed to impute a breach of duty largely negative in nature, and hence preventive, they import the same idea, at least to the extent of accuracy and definiteness for all practical purposes of stating a cause of action. If we take them to be clothed with a different meaning in this instance, it must be in consequence of a disposition to be hypercritical—a disposition not to be encouraged in such practical affairs as the administration of the law. Count 3 stated a cause of action.

The defendant interposed six pleas; the first being the general issue. Pleas 2 to 6, inclusive, were stricken on written and filed motion, embracing grounds that they were immaterial, irrelevant, and sought to set up contributory negligence where that defense could not be pleaded. The complaint claimed damages for the ignition and destruction of cotton by fire communicated from a locomotive. The reporter will set out these pleas in his statement of the case. As appears from the plain averment of these pleas, they seek to set up contributory negligence. Each plea is denominated therein to be a plea in contributory negligence. The insistence of counsel for appellant that these pleas set up subsequent negligence within the principle announced and applied in *L. & N. R. R. Co. v. Sullivan Co.*, 138 Ala. 379, 35 South. 327, is obviously unsound. In the first place, as stated, the pleas themselves bear their own label that they invoke contributory negligence. In the second place, it is apparent from their averments that the negligence assumed to be imputed by them was anterior to that averred and relied on for a recovery in the complaint. Subsequent negligence on the part of a plaintiff, within the doctrine of the *Sullivan Co. Case*, *supra*, can never be predicated upon after negligence of the defendant. The principle in subsequent negligence is that it arose from a breach of duty coming into existence by reason of the prior negligence of the other party, and the intervention of that duty and its breach operates to break the order of causation, and then requires the ascription of the injury, for its proximate cause, to the breach of the duty last occurring. The doctrine of subsequent negligence had been many times treated in recent cases here. It is not presently necessary to reiterate. So the pleas are, and must be dealt with as pleas of contributory negligence. The court below, as before stated, struck the pleas in response to plaintiff's

motion. A majority of the court hold this action to be reversible error. They have prepared their opinion on this point and it is as follows:

"DOWDELL, C. J., and SIMPSON, MAY-FIELD, and SAYRE, JJ., constituting a majority of the court, hold that the defense of contributory negligence may be set up by plea in all cases where simple negligence is counted on in the complaint for a recovery. *Johnson v. Birmingham Ry., L. & P. Co.*, 149 Ala. 529, 43 South. 33, and cases there cited. This seems to be the universal rule, except in those cases where the plaintiff is an infant under the years of discretion, and such facts appearing on the face of the complaint, and as to whom contributory negligence is not imputable. The case of the *L. & N. R. R. Co. v. Marbury*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620, is not opposed to these views. It was error to strike pleas 2 to 6, inclusive, on motion of the plaintiff. The plaintiff should have been put to his demurrer in order that the defendant might have the opportunity of meeting the defects pointed out by an amendment of its pleas. *Brooks v. Continental Ins. Co.*, 125 Ala. 615, 29 South. 13; *Troy Fertilizer Co. v. State*, 134 Ala. 333, 32 South. 618; *Ala. G. S. R. R. Co. v. Clark*, 136 Ala. 450, 34 South. 917; *Dalton v. Bunn & Allison*, 137 Ala. 175, 34 South. 841; *Troy Grocery Co. v. Potter & Wrightington*, 139 Ala. 359, 36 South. 12; *Owensboro Wagon Co. v. Hall*, 149 Ala. 210, 34 South. 71; *Wefel v. Stillman*, 151 Ala. 249, 44 South. 203."

The writer is unable to agree to a reversal of the judgment on this point, and these reasons are thought to be conclusive against the soundness of the view of the majority:

First. Counsel for appellant, in their brief, say, "We concede the proposition that pleas of contributory negligence are not available as a general rule in actions of this nature," and then insist that the pleas set up subsequent negligence. Since the pleas are of the class to which the quoted concession relates, the question is: May a party appellant avail himself of an alleged error in the elimination from the case of his pleading by motion when demurrer (if so) was the proper mode, notwithstanding he confesses the impropriety of his stricken pleading in the character of action in which he filed it? The question suggests its own answer, it seems to me. The gist of the insistence is that, while my plea was bad, inapt, you erred in the mere mode of disposing of it. Such a proceeding has all the elements of a speculation with respect to whether the adversary will adopt, and the court approve, one of two methods of assailing inapt pleading, one proper and one improper. Besides, it is not at all certain that a pleader should not be held to have invited the alleged error in mode of procedure to eliminate his confessedly inapt pleading. I am unwilling to annul a judgment below on such a state of fact.

Second. Mr. Elliott, in his App. Pro. (section 633), says: "One class is represented by the cases which hold that, where an objection is taken by a motion when a demurrer would be appropriate, the substitution of the one mode of procedure for the other is a harmless error if the result reached is clearly right." *Black v. State*, 123 Ala. 78, 26 South. 340. No more wholesome, rational doctrine can be found in the books. It is supported by the authorities noted to the cited section. The pleas were patently demurrable. *A. G. S. R. R. v. Planters' Co.*, 153 Ala. 241, 45 South. 82; *Marbury's Case*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620.

Third. Motion was the proper mode of procedure to eliminate these pleas. *L. & N. R. R. v. Malone* was twice considered by this court, viz., in 109 Ala. 509, 20 South. 33, and 116 Ala. 600, 22 South. 897. On the first appeal, as appears from the opinion, the court did not review the action of the court in striking, on motion, the plea of contributory negligence. On the second appeal the question was considered and decided; the court, through Coleman, J., saying: "Without formulating a general principle, we are of the opinion that the court did not err in holding that the plea did not present a proper issue, *and in striking it from the file.*" (Italics supplied.) The *Clark Case*, cited by the majority, took no account of the express and exactly apt ruling made in the *Malone Case* on its last appeal. Both the *Clark* and *Malone Cases* cannot be sound on the point under consideration. It will be noted that the *Malone Case* rests its conclusion on the factor that the "plea did not present a proper issue." If such was the case here, under our statute (Code, 1907, § 5322; Code 1896, § 3286) the pleas were due to be stricken on motion. They were "irrelevant." 4 Words & Phrases, pp. 3771, 3772.

Did the pleas present a "proper issue"? In the *Malone Case* the fact that combustible debris was allowed, by the plaintiff, to accumulate on the roof of the burned house, near the track on plaintiff's land, was alleged to have constituted contributory negligence. The court, as before stated, affirmed the trial court in striking this plea. In the *Marbury Case* cotton stored on plaintiff's premises was destroyed by fire, from a locomotive, alleged to have been negligently communicated thereto. The court held flatly that in so locating his cotton the plaintiff was within his rights, because he was not bound, in the use of his property, to anticipate negligence on the part of the defendant. Concluding the ruling on the question, the court said: "If destroyed [the cotton] by the negligent act of the defendant, this was the direct and proximate cause. We are aware that in some jurisdictions the doctrine of contributory negligence has been recognized and enforced in this class of cases; but the great weight of authority in this

country and in England is decidedly the other way. Upon principle we do not think it has any application to this sort of a case. 8 Am. & Eng. Ency. Law, 16, and authorities cited in note 1; *Sherman & Redfield on Neg.* § 679, and note; note on page 74 of 38 Am. Dec." The citations made by the court support the conclusion. The only difference, as presently important, between the *Marbury Case* and the case at bar, is that in the former the plaintiff placed his cotton on his own premises, and in the latter the plaintiff placed his cotton on a warehouse platform, not owned by him (we assume). There is no pretense that this plaintiff had no right to so employ the platform. There is no averment that such action infringed any property right of the defendant. Presumably this plaintiff was entitled to use the platform for storing his cotton thereon. If his use of the platform, as indicated, was rightful, and that is not gainsaid, except, by the pleas, it is asserted that he was negligent, with knowledge of the danger from fire emitted from locomotives, in so placing his cotton, it is obviously an untenable position to take, viz., that he is without the pale of the influence of the doctrine announced in the *Marbury Case*. Even counsel for appellant, in their brief before quoted, concede it. Certainly the ownership in fee of the premises cannot alter the principle, viz., that one who exercises a lawful right to the enjoyment of property, whether that right flow from full ownership or from lease or hire, cannot be held an insurer of his own possessions against negligent acts of a railroad company in the use of fire on its locomotives—that such an one is not required to anticipate negligence on the part of the company. If this principle is sound, it applies to the status presented by this record; and, if it applies, there can be no escape from the conclusion that pleas 2 to 6 "did not present a proper issue." They were "irrelevant" within the statute, and hence motion was the proper mode to eliminate them. *Malone's Case*, supra.

Fourth. A reversal of the judgment below solely because the wrong mode (let us assume for the argument) was employed to effect a right result, viz., the elimination of the alleged defense asserted by the pleas, is, in my opinion, a purely technical reversal; and this is demonstrated when it is considered that upon the return of the cause to the trial court the only act required is to file a demurrer to the pleas, and the same result is attained. *Black v. State*, 123 Ala. 78, 28 South. 340. Such a reversal to such a purpose cannot, in my opinion, be justified. No amendment conceivable can render the rightful use by the plaintiff of this platform for the storage of his cotton negligent in respect of omission to guard against, or in assumption of risk from, uncommitted negligence of the defendant occurring subsequent

to the placing of this cotton on the warehouse platform.

Aside from the Marbury and Clark Cases, those cited by the majority did not involve the question under consideration. The general rule with respect to when motion, and not demurrer, is appropriate, is not doubted. Its application, in this instance, is the point at issue.

A number of the errors assigned relate to the refusal of the court to permit defendant, on cross-examination of witness Cunningham, to elicit testimony as to the price for which the damaged cotton was sold, and also the extent of damage in consequence of the fact that the cotton, after the fire, lay on the ground exposed for 30 days. The witness had testified that the damage to the cotton, from the fire, was about five cents per pound. The only character of damage recoverable under the complaint was that consequent upon the burning. No damage was claimed on any other account. In view of these issues, it is manifest that the proffered testimony was irrelevant. The measure of damages in this action is the difference between the market value before and after the burning. None of the testimony tended to shed light on that issue. Nor were the questions to the witness allowable on the cross as tests of the witness' credibility. The witness had testified to the value of the cotton in that market. What this plaintiff sold the damaged cotton for was not allied to the testimony of the witness or to the issue in the premises. There was no error in the rulings indicated.

Plaintiff's counsel were cross-examining the engineer, who had testified to the proper equipment, construction, and operation of the engine alleged to have set the fire, and in that connection exhibited what is indifferently called, in the bill of exceptions, spark, cinder, or piece of charcoal, and asked the witness several questions with the evident view of eliciting testimony tending to show that the spark arrester was faulty. Thereupon counsel for defendant objected to the character or method of the examination. It was overruled and exception taken. We can perceive of no error in this, even if the objection was assumed to be serviceable. It was an immediate testing of the witness upon a vital fact, about which he had already testified on the examination in chief, viz., the size of sparks, etc., possible of emission through a properly constructed and installed spark arrester.

Special charges 12, 14, 15, 16, and 18, refused to defendant, are the basis for as many assignments. Those numbered 14, 15, and 16 proceed on the idea that the action is trespass. The counts all of them after amendment, are in case, for the consequential injury, within the distinction, between trespass and case, announced in *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389. Charge 12 was outside the issues in the case. The

striking of pleas 2 to 6 eliminated the matter suggested by this charge. Charge 18 predicates a finding for the defendant upon the failure of the plaintiff to take due care to protect his cotton. It was not the duty of the plaintiff to anticipate negligence on the part of the defendant. The complaint counts on negligent ignition of the cotton. The charge would have turned the verdict without reference to the negligence of the defendant. It was hence bad.

The remaining error assigned arises out of the refusal of the affirmative charge requested by the defendant. The proof for the plaintiff embraced testimony of a witness who testified that he saw sparks emitted from the defendant's locomotive set fire to the cotton of which plaintiff's 14 bales were about a tenth. Under the rule declared in *L. & N. R. R. v. Reese*, supra, and others of our decisions following it, this testimony raised the evidential presumption that the fire igniting the cotton was the result of negligence in the equipment, construction, or operation of the locomotive. The defendant sought to rebut the prima facie presumption through two witnesses. Assuming, without affirming it, that the defendant's testimony rebutted the presumption, we are of the opinion that the plaintiff's evidence, he then being put to proof of negligence in one or more of the respects whereby it may have intervened, to cause the firing of the cotton, rendered the question of negligence *vel non* one for the jury. The witness Waller testified: "My attention was attracted by a blaze of fire coming out of the engine. I saw sparks coming out of there too. I suppose they were as large as a buckshot, or the end of your little finger. They were in unusual numbers." Henderson, a machinist, testified that: "Sparks the size of my little finger would not go through a properly equipped engine. Sparks the size of buckshot would not go through a properly equipped engine." The witness Cargill testified: That he saw the locomotive, alleged to have started the fire, pass by the cotton. That he "saw red hot sparks coming out of the locomotive as it came by the cotton. These sparks were as large as No. 4 buckshot." That he saw "red hot sparks, but not flames." That "the sparks were pretty thick and in large quantities." The witness Cunningham testified: That he saw "sparks coming out of said engine. The sparks looked very large. They were about as large as the end of your little finger. This engine was running along in two or three feet of this cotton when it was throwing sparks. \* \* \* Fire came out of the engine too. Sparks fell over on the cotton, and the cotton blazed up. \* \* \*" The defendant's witness Young testified, on the cross: That a "spark the size you are showing me would come out if there was a hole in it" (spark arrester); that, if the engine was properly equipped, a spark of the size exhibited would not come out. There is nothing

we discover in the bill to indicate the size of the spark or cinder testified about by Young. This was presumably in the presence of the jury. It follows that we cannot review satisfactorily this feature of the evidence.

We have set forth enough of the testimony, though not all, to show that the inquiry of negligence vel non was a jury question. *Southern Ry. Co. v. Darwin* (Ala.) 47 South. 314.

Justices ANDERSON and DENSON concur in the opinion of the writer that the judgment should be affirmed; but the majority, indicated below, rule that a reversal shall be entered because pleas 2 to 6, inclusive, were stricken on motion.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON, MAY-FIELD, and SAYRE, JJ., concur. ANDERSON, DENSON, and MCOLELLAN, JJ., dissent.

#### WESTERN UNION TELEGRAPH CO. v. HILL.

(Supreme Court of Alabama. May 13, 1909.  
Rehearing Denied June 30, 1909.)

##### 1. WORDS AND PHRASES—"TELEGRAPH."

A "telegraph" is an apparatus or machine used to transmit intelligence to a distant point by means of electricity.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6893-6897.]

##### 2. WORDS AND PHRASES—"TELEGRAM."

A "telegram" is a message transmitted by the telegraph.

##### 3. EMINENT DOMAIN (§ 36\*)—PUBLIC USE—TELEGRAPHS.

A telegraph is such a public use as to justify the exercise of eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 81; Dec. Dig. § 36.\*]

##### 4. TELEGRAPHS AND TELEPHONES (§ 28\*)—TRANSMISSION OF MESSAGES.

A telegraph company is bound to serve the public without discrimination.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 16; Dec. Dig. § 28.\*]

##### 5. TELEGRAPHS AND TELEPHONES (§ 54\*).

A telegraph company cannot evade liability for any negligence by contract.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39-47; Dec. Dig. § 54.\*]

##### 6. TELEGRAPHS AND TELEPHONES (§ 36\*)—CARE REQUIRED.

A telegraph company is not an insurer.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 26; Dec. Dig. § 36.\*]

##### 7. TELEGRAPHS AND TELEPHONES (§ 37\*)—NEGLIGENCE—LIABILITY.

The mere fact that a message offered did not comply with the rules of the company by being on its regular blanks, but is telephoned to the operator, does not affect its liability, where the negligence complained of is failure to deliver.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 37.\*]

##### 8. TELEGRAPHS AND TELEPHONES (§ 38\*)—TRANSMISSION OF MESSAGES.

Upon the receipt of a message, it is the duty of the telegraph company to transmit it without delay, and if from any cause it is impossible to transmit the message, or if delay be necessary, the company should inform the sender; certainly so if the message shows on its face the importance of hasty transmission and delivery.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. § 38.\*]

##### 9. TELEGRAPHS AND TELEPHONES (§ 38\*)—DELIVERY OF MESSAGE.

Delivery of a message should be made as soon after transmission as is reasonably practicable.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. § 38.\*]

##### 10. TELEGRAPHS AND TELEPHONES (§ 73\*)—DELAY IN DELIVERY—QUESTIONS FOR JURY.

What constitutes due diligence as to prompt delivery is usually a question for the jury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.\*]

##### 11. TELEGRAPHS AND TELEPHONES (§ 31\*)—RULES OF COMPANY.

Telegraph companies have a right to provide reasonable regulations as to hours during which it will do business, and the reasonableness of the regulation will depend largely upon the character of business done, the locality of the office, and is often a mixed question of law and fact.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 20; Dec. Dig. § 31.\*]

##### 12. TELEGRAPHS AND TELEPHONES (§ 37\*)—RULES OF COMPANY—WAIVER.

A telegraph company may waive its rules as to office hours, and it cannot receive or transmit messages out of its office hours, especially when that fact is not brought home to the patron, and then set up that regulation as a defense to an action for a breach of its contract or for its negligence in failing to deliver.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 37.\*]

##### 13. ACTION (§ 27\*)—DELAY IN DELIVERY—FORM OF REMEDY.

An action against a telegraph company for delay in delivering a telegraph message was not necessarily *ex contractu*, but may be *ex delicto* for the breach of a duty; injury in such case being more often the result of a breach of duty imposed by law, or a breach of duty growing out of the contract, than a mere breach of the contract.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-164; Dec. Dig. § 27.\*]

##### 14. TELEGRAPHS AND TELEPHONES (§ 68\*)—DAMAGES—MENTAL ANGUISH.

Where plaintiff's wife sent him a telegram reading, "Baby dying," and, owing to delay in delivery, plaintiff was not able to be present with his wife and in time to prepare the body for removal and interment, and plaintiff sued *ex contractu* for the recovery of the amount paid for the transmission of the message and for mental anguish, he was entitled to recover such damages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**15. TELEGRAPHS AND TELEPHONES (§ 27\*)—  
DELAY IN DELIVERY—ACTIONS—WHAT LAW  
GOVERNS.**

Where plaintiff's wife sent him, from a point in Georgia to a point in Alabama, a telegram announcing that their baby was dying, and, owing to negligent delay in delivering, he was unable to be present with his wife and in time to prepare the body for removal and interment, and no breach of the contract occurred in Georgia, and any negligence causing delay in delivery occurred in Alabama, in an action ex contractu in such state plaintiff was entitled to recover for mental anguish under the law of Alabama, though no such recovery could be had in Georgia.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 27.\*]

**16. TORTS (§ 2\*)—WHAT LAW GOVERNS.**

Where a tort is committed in one state and sued on in another, the *lex loci delicti* controls.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 2; Dec. Dig. § 2.\*]

**17. CONTRACTS (§ 101\*)—WHAT LAW GOVERNS.**

Provisions in a contract made in another state will be enforced here only to the extent that the contract is lawful in this state.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 455-461; Dec. Dig. § 101.\*]

**18. TELEGRAPHS AND TELEPHONES (§ 66\*)—  
DELAY IN DELIVERY OF MESSAGE—ACTION—  
EVIDENCE.**

In an action against a telegraph company for negligent delay in delivering a message to plaintiff, where it appeared that the operator at the receiving office did not know plaintiff's residence, it was proper to admit evidence that plaintiff had a telephone in his house, that there was one in the receiving telegraph office, and that plaintiff had frequently received messages from defendant over the telephone.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 62; Dec. Dig. § 66.\*]

**19. TELEGRAPHS AND TELEPHONES (§ 38\*)—  
RULES OF COMPANY—WAIVER OF RULES.**

A telegraph company waives its rules as to office hours when it accepts a message for transmission and delivery outside of the office hours, without informing the sender of such rules, or without explaining to him that it would not be transmitted or delivered until the time.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 38.\*]

**20. TELEGRAPHS AND TELEPHONES (§ 73\*)—  
QUESTIONS FOR JURY.**

In an action for negligent delay in the delivery of a telegram, *held* a question for the jury whether defendant had waived its rules as to office hours.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 73.\*]

**21. NEW TRIAL (§ 52\*)—QUOTIENT VERDICT.**

The fact that jurors agreed among themselves to render a quotient verdict, and afterwards declined to do so and did not arrive at their verdict in that manner, does not render their verdict a quotient one so as to authorize a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 104; Dec. Dig. § 52.\*]

**22. TELEGRAPHS AND TELEPHONES (§ 71\*)—  
NEGLIGENCE—DAMAGES.**

Where, through wrongful negligent delay on the part of defendant telegraph company to deliver a message, plaintiff was unable to be present with his wife and in time to prepare the body of their deceased child for removal and

interment, a verdict of \$1,100 for mental anguish was not excessive.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 74; Dec. Dig. § 71.\*]

**23. PLEADING (§ 136\*)—PLEA IN BAR—SUFFICIENCY.**

In an action against a telegraph company for negligent delay in the delivery of a message, a plea that the contract was made in another state, and should be governed according to its laws, under which plaintiff could not recover damages for mental anguish, was demurrable, as the plea was intended for one in bar, and only went to the measure of damages, and the question should have been raised by objections to the evidence, motions to strike, or instructions.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 284; Dec. Dig. § 136.\*]

**24. TELEGRAPHS AND TELEPHONES (§ 74\*)—  
TRANSMISSION OF MESSAGE—ACTION—IN-  
STRUCTIONS.**

In an action against a telegraph company for negligent delay in the delivery of a message, it was proper to charge that, though defendant had adopted office hours, if it undertook to transmit the message, the jury had a right to look to that circumstance, the nature of the message, and everything else in the case, in saying whether defendant was negligent.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 74.\*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by W. W. Hill against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

George H. Fearons, Campbell & Walker, and Rushton & Coleman, for appellant. S. H. Dent, Jr., for appellee.

MAYFIELD, J. This was an action by appellee against appellant to recover damages for failure to deliver within a reasonable time a telegram, and that, by reason of such failure on the part of the telegraph company, the plaintiff did not receive the message in time to reach Gainesville, in the state of Georgia, so as to be present with his wife and in time to prepare the body of their child for removal and interment, and claims as actual damages 40 cents paid to the defendant company for sending the message and for mental pain and anguish suffered by the plaintiff in consequence thereof. To this complaint the defendant filed pleas, one setting up the general issue, and special plea No. 2, which was in words and figures as follows: "(2) For further answer to said complaint, this defendant says: That the contract for transmission and delivery of the telegram, for the breach of which this action was brought, was not made in the state of Alabama, but was entered into between the plaintiff's agent and the defendant in the state of Georgia, and was to be partly performed in the state of Georgia; that said contract is to be construed and governed according to the laws of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the state of Georgia; that under the laws of the state of Georgia, as construed by its highest court, plaintiff cannot recover the special damages for mental pain and anguish claimed in each count of the complaint." To which special plea the plaintiff demurred, and the court sustained the demurrer. The trial was had upon the general issue, and resulted in a verdict for the plaintiff for \$1,100.40. The defendant subsequently made a motion to set aside the verdict, because it was contrary to the evidence, because the verdict was excessive, and because it was a quotient verdict. On hearing this motion, upon the affidavit made in connection therewith, the court overruled the motion, and the defendant then and there duly excepted.

The facts as shown by the record are substantially as follows: The wife of plaintiff and his oldest child, 3½ years old, and the one who died, who was about 21 or 22 months old, were at Gainesville, Ga., during the summer of 1906. That the plaintiff was there a while and left about a week before the death of the child, and instructed his wife that, if any change took place in the condition of the child, to wire or phone him at once in order that he might come back. At about 6:30 o'clock Sunday morning, on July 15, 1906, the landlady, Mrs. Bell, with whom Mrs. Hill was stopping, telephoned to the defendant company's office at Gainesville asking the agent to take over the telephone for transmission a telegram reading as follows: "Gainesville, Ga., 7-15-1906. W. W. Hill, 643 South Lawrence Street, Montgomery. Come on first train. Baby dying. [Signed] Mrs. W. W. Hill." That the operator got up, dressed, and went to the office of the telegraph company and sent the message at 6:43 a. m., Eastern time, to Atlanta, Ga. That the amount paid for the message was 40 cents. That between 6 and 7 a. m. Central time the same morning another agent of the defendant company was on duty at the defendant's office at Montgomery for the purpose of testing wires and to send out linemen, etc. That at 6:15 a. m. Central he got a call from the chief clerk at Atlanta. That the chief clerk at Atlanta said to him, "Take this rush message." That he then took the message over the wire, wrote it out; and hung it on the file where the telegrams always hung and where the delivery clerk got them. That there was no one in the office at the time but him and no messenger boys. That the office hours of defendant in Montgomery in week days were 7 o'clock in the morning and on Sundays 8 o'clock. That the business was conducted at Montgomery as follows: The operators took the message over the wires, and that check boys came around and checked up the messages and carried them to the messenger clerk, and that he fixed them up and sent them out by the messenger boys. That the office was not open for business on Sunday

mornings until 8 o'clock. That the agent in the office who received this message had only been in Montgomery about 10 days and did not know plaintiff's residence. That it also appeared that there was a telephone in the office of the Western Union Telegraph office, and that Mr. Hill also had a telephone at his residence. Plaintiff, Mr. Hill, got a message over the long distance telephone from Selma about 8 o'clock informing him of the dangerous condition of his child, and that he left his house at about 8:20 and drove to the depot. That a messenger boy was started with this message at about 8:20. The boy, not finding him at home, followed him to the depot and delivered the message at 8:50. That a through train left Montgomery at 6:55 a. m., which went through Atlanta and by Gainesville, reaching Gainesville at 2 o'clock. That a local train left Montgomery for Atlanta at 9:15. Mr. Hill went on this train to Atlanta, wiring his wife to come to Atlanta. He met his wife in Atlanta with the corpse of the child. The train he went on made no connection at Atlanta. He reached Atlanta about 2 or 3 o'clock in the afternoon. That plaintiff telephoned from Atlanta to Gainesville about making arrangements for bringing the child home. That there was no relative of his wife at Gainesville at the time. That his wife reached Atlanta about 6 o'clock in the afternoon. That he was in Atlanta by himself from 2 o'clock until 6 o'clock. The child died about 8 o'clock in the morning of the 15th of July.

Various errors are assigned: First, to the sustaining of the demurrers to defendant's special plea No. 2 and the exclusion of the decision of the Supreme Court of Georgia in the case of *Chapman v. Western Un. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, and to the exclusion of certain sections of the Georgia Code, and to other rulings as to the evidence and to the giving and refusing of certain charges, and to the refusal of the court to set aside the verdict for the reason assigned in the motion.

Probably the most serious question involved by this appeal, and the assignment insisted upon most strenuously by counsel for appellant, is that under the laws of Georgia damages are not recoverable for mental anguish in cases for failure to deliver or delay in delivering telegrams, like the one in question, and that, the contract the basis of this action being made in Georgia, the laws of Georgia govern as to the damages recoverable for the delay or failure to deliver the telegram in question. It is insisted by counsel for appellant that the *lex loci contractus*, and not the *lex fori*, governs the measure of damages in this case. The complainant contained two counts, and both are treated as counts *ex contractu*. It must be conceded that there is much conflict of authorities on the question as to what law governs the recovery in telegraph cases where a telegram

is sent from one state to another; some holding that the law of the state in which the telegram originated governs, and others holding that the law of the state where it is delivered, or where the negligent act complained of or where the breach of the contract occurred, governs as to the measure of damages. It is conceded that the law of the forum will govern in matters pertaining to remedy; but it is insisted by appellant that by "remedy" here is meant such matters as pertain to the character and form of action, evidence, procedure, mode of redress, limitations, executions, etc., and that the damages to be allowed, if fixed or limited by law, pertain to the right, and not to the remedy. So far as we know, this question has not been before passed upon by this court with regard to telegraph cases, though there are a number of cases which may be analogous. As this court has said: "A contract is usually governed as to its nature, obligation, validity, and interpretation by the law of the place where it is made, unless it is to be wholly performed in another state, in which case the place of performance, or in which the parties agree, must govern." 2 Mayfield's Digest, p. 668, subject "Conflict of Laws."

It should be remembered that in this case, as in most cases for failure to deliver or delay in delivering telegraph messages, while a contract is spoken of and the actions are often brought as for a breach of a contract, in fact, there is no express contract, or any express agreement. Whatever contract or agreement that exists is an implied one, and is usually, though not always, a breach of duty imposed by law, rather than a breach of an express contract; but it may be said that it is often, as in this case, a breach of an implied contract.

A "telegraph" is defined as an apparatus or machine used to transmit intelligence to a distant point by means of electricity. A "telegram" is a message or dispatch transmitted by the telegraph. A telegraph is such a public use as to justify the exercise of the right of eminent domain and to authorize the sovereign to regulate the business by a proper law. Telegraph companies are in many respects analogous to common carriers. Like common carriers, they are bound to serve the public without discrimination and cannot evade liability for the consequences of their negligence by any contract. Unlike common carriers, they are not insurers. A telegraph company is therefore an important public agency and an instrument of commerce. Consequently the duties and obligations of a telegraph company do not arise entirely out of contract, being a quasi public institution. This duty and liability is not measured by the standard of private individuals. The contracts for sending and delivering messages, such as the one in question, give force and effect to these public duties which the law imposes. Some of these

duties are to accept for transmission all proper messages tendered by persons who comply, or offer to comply, with the reasonable rules and regulations of the company; but the mere fact that the message offered did not comply with the rules of the company by being on its regular blanks, but is simply telephoned to the operator, does not affect its liability, where the negligence complained of is failure to deliver after transmission.

Upon the receipt of the message it is the duty of the telegraph company to transmit it without delay, and if from any cause it is impossible to transmit the message, or if delay will be necessary, the company should inform the sender; certainly so if the message shows on its face the importance of hasty transmission and delivery. The message, when transmitted, must be delivered to the addressee or his authorized agent. Delivery should be made as soon after transmission as is reasonably practicable. The duty of early delivery is as necessary as the prompt transmission. What constitutes due diligence as to prompt delivery is usually a question for the jury, and usually depends upon the facts of each particular case. Telegraph companies have a right to provide reasonable regulations as to hours during which it will do business, and the reasonableness of the regulation will depend largely upon the character of business done, the locality of the office, and is often a mixed question of law and fact; but a telegraph company may waive its rules as to office hours, and it cannot receive or transmit a message out of its office hours, especially when that fact is not brought home to the patron, and then set up that regulation as a defense to an action for a breach of its contract or for its negligence in failing to deliver. These rules, like any other rules of other companies, are designed for the benefit and protection of the company itself, and may be waived expressly or by implication. *Wilson's Case*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23.

The rule as to the measure of damages against telegraph companies for failure to deliver or to deliver promptly, or for negligence in the transmission and delivery, unfortunately is not well settled, and the decisions of the various courts of the United States are far from being uniform, and many decisions of the same court of many states are conflicting. Actions against telegraph companies, like the one in question, are not necessarily *ex contractu*. They may be *ex delicto* for the breach of a duty; the right of action somewhat depending upon the implied contract of sending as to make the general rule relating to damages for breach of a contract applicable. Injury, in such cases, is more often the result of a breach of duty imposed by law, or a breach of duty growing out of the contract, than a mere

breach of the contract. The contract usually serves merely to show the relation of the parties and the existence of a duty breached, which duty is more often imposed by law than by contract. There is rarely any express contract between the parties. Whatever exists is usually implied. Of course, parties can make contracts with regard to sending and delivery; but we are speaking now of the usual contracts.

Likewise, the authorities are far from uniform as to whether or not damages for mental anguish are recoverable in actions for failure or delay in delivering or transmitting telegrams; some courts holding that they are recoverable in certain actions and not in others, some courts holding that they are recoverable under certain conditions and not under others, and some holding that they are not recoverable in any action or under any condition. These various rulings and conflicting decisions involve various perplexing questions, as to all of which very few agree. One is: Whether the sendee as well as the sender can recover; whether the action is in contract or in tort; whether the mere violation of a contract as to injured feelings, and mental anguish, disconnected and disassociated from physical injury or injury to estate, is an element of damages; to what extent the message must show on its face the relationship of the parties; and whether damages for mental anguish are in their nature punitive or compensatory. However, the rule has been settled in this state, and probably cannot be better or more succinctly expressed, than was done by Chief Justice McClellan in the case of *Blount v. Western Union Tel. Co.*, 126 Ala. 107, 27 South. 779, as follows: "The complaint in this case claims damages only for mental suffering. Such damages are not recoverable in actions for the nondelivery or negligent delivery of telegrams, except in case where there is a right of recovery aside from such injuries. There can be no recovery of actual substantive damages for physical injuries or injuries in estate here, for no such damages are claimed. There can be no recovery here of nominal damages as for a breach of contract—to which we have held that damages for mental suffering may be superadded—because the complaint is not upon contract, but purely in tort. No recovery, apart from damages for mental suffering, in other words, can be had on this complaint, and therefore no recovery for mental suffering can be had." Or by Chief Justice Tyson, in *Westmoreland's Case*, 151 Ala. 819, 44 South. 383, to this effect: "Such damages, notwithstanding their elusive character, are actual; but they are ordinarily not the natural result of a breach, and thus not within the contemplation of the parties. In cases where they are not clearly contemplated, it would be dangerous and unfair in the extreme to allow them. When the message is between persons of a close degree of relationship and relates to

exceptional events, such as sickness or death of such relations, in which a failure to deliver obviously comprehends mental distress and anguish, we have allowed such anguish as an item of damages; but to extend as a natural result the allowance on other occasions would in our judgment tend to promote and encourage a species of litigation more or less speculative in its nature, and unjust and oppressive in its result." *Crocker's Case*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398; *Ayers' Case*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; *Water's Case*, 139 Ala. 653, 36 South. 773; *Crumpton's Case*, 138 Ala. 632, 36 South. 517; *Henderson's Case*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Krichbaum's Case*, 132 Ala. 535, 31 South. 607; *Cunningham's Case*, 99 Ala. 314, 14 South. 579; *Wilson's Case*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *McNair's Case*, 120 Ala. 99, 23 South. 801. As was said by Chief Justice Tyson in *Westmoreland's Case*, above: "It is often a question difficult to determine, whether an action from its mere nature or in its form is in case or assumption. \* \* \* Manifestly the measure of damages in such cases cannot be altered in any material respect by a mere adoption of one form of action rather than another for the redress of the same grievance."

As to the main questions involved in this appeal, as to whether the laws of Georgia or of Alabama should control in determining whether or not damages for mental anguish were recoverable in this action, we are met again with the condition that there is more conflict in the decisions, if possible, than of the law of the two states as to which of the two laws, if different, should control. The question has been treated fully in a note to the case of *Gray v. Telegraph Co.*, as reported in 91 Am. St. Rep. 706, in which the annotator concedes the conflict, but probably is constrained to the view that the *lex loci contractus* controls in such cases. The question has also been reviewed by annotators in the *Lawyers' Reports Annotated*. See note to case of *Hughes v. Pa. Co.*, 63 L. R. A. 532. This annotator also concedes the conflict and reviews many of the conflicting decisions. There are various other conflicting decisions than those reviewed by the annotators. The writer of the text in the *American and English Encyclopedia of Law* (12d Ed.) vol. 27, p. 1079 states the law applicable to this case as follows: "The fact that damages for mental anguish alone are not recoverable under the laws of the state from which the message was sent will not preclude a recovery of such damages in the state to which the message was directed, where the laws of the latter state permit such recovery. Likewise, a recovery for such damages may be had in the state whence the message was sent, although they may not be recoverable under the laws of the state where the message was to be delivered. But when



the law of the place whence the message was sent and that of the place of delivery both refuse to recognize such damages, they cannot be recovered, although the action may have been brought in a jurisdiction which recognizes the right to recover them."

After a careful examination of all these authorities, we deem the sounder rule to be, in cases like the one at bar, though we do not decide that the same rule would apply in all cases, that the laws of Alabama should govern in this case, for the reason that the complaint, as well as the undisputed evidence, shows that whether the injury was the result of a breach of a contract, or whether it was the result of a breach of a duty growing out of a contract or imposed by law, it occurred solely within the state of Alabama, and that the parties to the contract and the contract itself, if any existed, provided for or allowed the contract to be performed partly at least in Alabama. No breach of the contract occurred in the state of Georgia either as alleged in the complaint or as shown by the evidence. No negligent act was alleged to have occurred in that state or was shown by the evidence to have occurred there. The wrong complained of, and if shown to exist by the evidence, occurred in Alabama. The plaintiff resided in Alabama. He had a right to bring his action in the courts of Alabama either for a breach of the contract or for a breach of duty imposed by law and the contract together. If the action had been in tort, rather than in contract, then we think it certain that the laws of Alabama would control, and we can see no reason, though there is authority to the contrary, that the laws of Georgia should control. The general rule seems to be that, where the right of action is independent of a contract, the locus of the contract is immaterial and cannot affect the question of measure of damages recoverable. We also think that the great weight of authority supports the proposition that, where a tort is committed in one state and sued on in another, the *lex loci delicti* controls. So if the action at bar could be construed as one of tort, disconnected from the contract, then, if the action were brought in Georgia, the laws of Alabama would control.

Chief Justice Stone, in Falls' Case, 97 Ala. 433, 13 South. 31, 24 L. R. A. 174, 38 Am. St. Rep. 194, quoting from Chancellor Kent, says that: "If the contract be made under one government and is to be performed under another, and the parties had in view the laws of such other country in reference to the execution of the contract, the general rule is that the contract in respect to its construction and force is to be governed by the laws of the country or state in which it is to be executed." And in quoting from Mr. Story, he says: "Where the contract is either expressly or tacitly to be performed in another place, then the general rule is in conformity to the presumed intention of the par-

ties that the contract as to its nature, validity, obligation, and interpretation is to be governed by the law of the place of performance." He also quotes from the Am. & Eng. Encyc. of Law, as follows: "As a general rule, the validity of the contract is to be determined by the law of the place where it is made, unless it appears on its face that it was to be performed or made in reference to the laws of some other place, in which case it will be governed by the laws of the place of performance." This language was quoted by the learned Chief Justice, which evidently met his sanction, though it was made in a dissenting opinion, in which he held that the contract in question was governed by the laws of Minnesota, rather than of Alabama; the majority of the court holding that it was governed by the laws of Alabama.

It is true, as said by the same learned Chief Justice in the same case, that, in entering into contracts, if nothing appear to the contrary, the law of the place silently becomes a part of the contract and determines the measure of the rights it secures, but adds: "This right of comity, however, has limitations. No state will enforce contracts or redress grievances entered into or suffered in another state, if the enforcement involve a breach of legal or moral right as maintained in the law of the forum." It is likewise a fundamental principle that the laws of the state can have no binding force *proprio vigore* outside of the territorial limits and jurisdiction of the state enacting them. Consequently any provision found in the law of another state authorizing the making of a contract which is obnoxious to the laws of Alabama, as to such obnoxious provisions the contract will not be enforced in Alabama; but it will be enforced in Alabama only to the extent that it is lawful in Alabama. While there are respectable authorities holding that, where a contract is entered into in one state to be performed partly in that state and partly in another, the laws of the state in which the contract was made will control as to the measure of damages, but in a case like this, where the contract of necessity, so far as the breach complained of was concerned, must be performed wholly within the state of Alabama, then this rule would not apply; that is to say, the breach complained of was delay in delivering a telegram. The parties intended that the telegram should be delivered in Alabama, and it was not contemplated that it could or would be delivered in Georgia. While a part of the transmitting would probably be performed in Georgia, that part for the breach of which this action is brought was to be performed wholly within the state of Alabama, and as the breach occurred here, and a part of the injury at least was suffered here, we think the laws of Alabama, and not the laws of Georgia, should control as to the measure of damages. If the breach had occurred in Georgia, rather than in Alabama,

then, for the same reason, the laws of Georgia should control, rather than that of Alabama.

There is another strong reason, if not a conclusive one, why the laws of Alabama should govern in this case. It will be observed that the laws of Georgia did not deny that the plaintiff in a case like this suffers damage for mental anguish; but the court merely declares that they are of such nature that they are not recoverable in courts and under the laws of Georgia. We do not think that the courts of Alabama are bound in this respect by the courts of Georgia; but as to whether or not such damages, if suffered, are recoverable in an action like this when brought in the courts of Alabama, is properly decided by the court of Alabama untrammelled by the decisions of any other court. This is the rule that seems to be adopted by the federal court with regard to the recovery of damages for mental anguish, no matter what may be the laws of the state in which the contract was made, or in which the breach occurred, or in which the action is brought. The federal court holds to the rule that such damages are not recoverable in the federal court, and that the question is one with respect to which such court will exercise an independent judgment and will not be bound by the holding of the courts of the states in which the cases arise. *Sklar's Case*, 126 Fed. 295, 61 C. C. A. 281; *Wood's Case*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706.

It therefore follows that there was no error in the court sustaining demurrer to plea No. 2, nor in excluding the evidence offered by the defendant as to the laws of Georgia. The demurrer to the plea could have been properly sustained for the reason that it was intended as a plea in bar and only went to the measure of damages, not denying the right of recovery as to nominal damages. Such questions should be raised by objections to the evidence, motions to strike, or instructions by the court.

We likewise see no error in the court allowing plaintiff to prove that he had a telephone in his house, and that there was one in the defendant company's office at Montgomery, and that he had frequently received messages from the defendant company over the telephone.

We find no error in the refusal to give any of the charges requested by the defendant. There was certainly evidence tending to support all the material averments of the complaint, and consequently the general affirmative charge for the defendant could not have been given as to any one of the counts. What we have said as to the right to recover damages for mental suffering disposes of the charge which sought to limit the recovery to other damages than for mental suffering.

Nor do we think there was any error in

that part of the oral charge excepted to by the defendant to the effect that, notwithstanding the defendant company may have adopted office hours, if it undertook to transmit and deliver a telegram, the jury had a right to look to that circumstance, the nature of the telegram, and everything else in the case, in saying whether or not the defendant was negligent in failing to deliver the telegram sooner than it did deliver it. As stated in the opinion above, a telegraph company has a right to adopt rules as to office hours and have reasonable rules for its own protection; but it also has a right to waive them, and does waive them as to office hours when it accepts a message for transmission and delivery without the office hours without informing the sender of such rules or without explaining to him that it would not be transmitted or delivered until the time. Of course, if the telegraph agent so receiving had no knowledge of the office hours at other offices, and was not chargeable with notice or knowledge thereof, so receiving the message would not be a waiver. However, we hold that in this case there was sufficient evidence to authorize the submission to the jury of the question of waiver of the rules, and to prevent the giving of the general affirmative charge to the jury on this question.

There was likewise no error in the court's overruling defendant's motion for a new trial. The evidence affirmatively showed that it was not void because it was a quotient verdict. The fact that the jurors agreed among themselves to render a quotient verdict, and afterwards declined to do so, and in fact did not arrive at their verdict in that manner, does not make the verdict a quotient one, and is no reason for setting the verdict aside. Whether or not the verdict was excessive no one can tell. There is no standard or rule of computation by which the amount can be determined in this or similar cases. There may be cases where it would be so great that the court might say that it was arbitrary or intended as punishment, when no such punitive damages could be allowed, and in such case it might be set aside; but this is not such a case.

Finding no error in the record, the case must be affirmed.

DOWDEEL, C. J., and SIMPSON and DENSON, JJ., concur in the conclusion reached in this case without committing themselves to all that is said in the opinion.

#### PRESTWOOD v. CARLTON.

(Supreme Court of Alabama. June 10, 1909.)

1. DEEDS (§ 70\*)—LANDLORD AND TENANT (§ 28\*)—VALIDITY—FRAUD AND MISREPRESENTATION.

If the grantee or lessee by misrepresentations of what the grant or lease contains ob-

tains the grantor's signature to the grant or lease, which he did not intend to sign, and did not know he was signing, this is a fraud that is available in a court of law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70;\* Landlord and Tenant, Cent. Dig. §§ 82-84; Dec. Dig. § 28.\*]

## 2. CONTRACTS (§ 94\*)—IGNORANCE OF CONTENTS—FRAUD.

One who has executed a written contract in ignorance of its contents cannot set up his ignorance to avoid the obligation in the absence of fraud or misrepresentations, as he should read or have the instrument read to him, but, if the execution was procured by misrepresentations of the other party as to its contents, such misrepresentations may furnish a defense to an action at law based on the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430; Dec. Dig. § 94.\*]

## 3. CONTRACTS (§ 94\*)—VALIDITY—MISREPRESENTATION.

One who is negotiating a trade must not recklessly or innocently assert as a fact that which is untrue, if such asserted fact be an inducement to the other party to enter into the contract, as it is a fraud to affirm as true that which is untrue, though not known to be so.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430; Dec. Dig. § 94.\*]

## 4. LANDLORD AND TENANT (§ 48\*)—COVENANT OF TITLE—ACTION FOR BREACH—DEFENSE—FRAUD.

In an action for breach of covenant of warranty in a lease, in that lessor had no title to a part of the premises, a plea alleging that, if there was want of title in defendant, the error was due to the negligence or fraud of the lessee in failing to get the correct numbers or giving an improper description of the lands, that defendants signed the conveyance relying on the representations of the lessee that the lease described his lands and only his lands, and that any error was the fault of the lessee, and not of the defendant, showed a good defense.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 48.\*]

## 5. LANDLORD AND TENANT (§ 63\*)—ESTOPPEL OF TENANT—MISREPRESENTATIONS TO PROCURE LEASE.

Where one intending to lease property undertakes to procure a correct description of the same and misrepresents the same to the lessor, and thereby procures a lease including property not owned by the lessor, such lessee is estopped to dispute his lessor's title by bringing an action for breach of the covenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 63.\*]

## 6. LANDLORD AND TENANT (§ 48\*)—COVENANT OF TITLE—ACTION FOR BREACH—PLEA.

In an action for breach of covenant of warranty in a lease, in that lessor had no title to part of the premises, a plea showing that the lessee undertook to get a description of the premises, that the lessor did not even know the description by numbers, that he relied on the representations of the lessee, was sufficient, though it did not aver that defendant was prevented from reading the lease, and did not negative the fact that he did read it.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 48.\*]

## 7. LANDLORD AND TENANT (§ 48\*)—COVENANT OF TITLE—ACTION FOR BREACH—PLEA.

In an action for breach of covenant in a lease, in that lessor had no title to part of the premises, a plea alleging fraud and misrep-

resentation of the lessee, and asking no affirmative relief, was sufficient without offering to return the consideration or to place the plaintiff in statu quo, and though it did not allege the nature and extent of defendant's damages.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 48.\*]

## 8. PLEADING (§ 291\*)—VERIFICATION—PLEA—FRAUD.

In an action for a breach of covenant in a lease, a plea alleging only matters of fraud or estoppel on the part of the lessee, no attempt being made to deny the execution of the lease, need not be verified.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 291.\*]

## 9. LANDLORD AND TENANT (§ 44\*)—COVENANT OF TITLE—ACTIONS FOR BREACH—DEFENSES—MISTAKE.

Where land not owned by the lessor was included in a lease through mutual mistake of both parties thereto, there was no breach of covenant for want of title as to such lands, and this is especially true where the error was the result of the lessee's fault.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 44.\*]

## 10. APPEAL AND ERROR (§ 754\*)—ASSIGNMENTS OF ERROR—NECESSITY.

Where there are no assignments of error to the striking out of a part of defendant's answer to the interrogatories propounded by plaintiff, though exceptions were reserved, the same will not be reviewed except for the purpose of aiding in another trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 754.\*]

## 11. DISCOVERY (§ 67\*)—UNDER STATUTORY PROVISIONS—ANSWERS.

Answers to interrogatories taken under the statute are governed by the same rules applicable to answers of bills of discovery, and in such answers nothing can be considered impertinent which tends to disprove the existence of the cause of action, and consequently a party in answering may accompany his admission of particular facts called for by a statement of additional facts in avoidance of them, and his answers cannot be stricken solely because they were not strictly responsive.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 79; Dec. Dig. § 67.\*]

## 12. FRAUDS, STATUTE OF (§ 158\*)—EFFECT OF VOID AGREEMENT.

Parol authority to lease land being absolutely void under the statute of frauds, evidence thereof is inadmissible to support the lease.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 158.\*]

## 13. LANDLORD AND TENANT (§ 48\*)—COVENANT OF TITLE—ACTIONS FOR BREACH—VARIANCE.

In an action for breach of covenant in a lease, in that the lessor had no title to part of the property under a plea alleging that such land was included through the lessee's fraud and misrepresentation, defendant could not show that he leased the lands under a parol agreement with the owner thereof.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 48.\*]

## 14. DAMAGES (§ 1\*)—THEORY OF REPARATION.

The primary object of damages is compensation to the injured party, which should be for the natural and proximate result of the wrong done; and the general rule aims to give compensation for the loss sustained and to put the party in as nearly the same condition as

he would have been had the contract been performed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol 2, pp. 1812-1820; vol. 8, pp. 7625, 7626.]

**15. COVENANTS (§ 130\*)—DAMAGE FOR BREACH—VENDOR AND PURCHASER.**

On breach of covenant by the vendor of land, the vendee can recover only the amount of payments made with interest and costs.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 245-253, 257; Dec. Dig. § 130.\*]

**16. LANDLORD AND TENANT (§ 48\*)—COVENANT OF TITLE—DAMAGE FOR BREACH.**

On breach of covenant by the lessor, the lessee is entitled to recover the difference between rent reserved and the value of the use of the premises for the term, together with other damages which are the direct and proximate result and natural consequence of the breach, if such damage can be certainly and correctly estimated by reliable data.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 48.\*]

Appeal from Circuit Court, Covington County; H. A. Pearce, Judge.

Action by J. B. Carlton, as administrator, against J. A. Prestwood. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Stallings & Reid and Foster, Samford & Prestwood, for appellant. Powell, Albritton & Albritton and Henry Opp, for appellee.

**MAYFIELD, J.** This action was brought for the breach of covenants of warranty contained in a lease of certain lands for turpentine purposes. The lease is set out in the complaint, and the various breaches assigned in each count are, in substance, that the covenant was broken in that the lessor had no title to certain lands leased, but that such lands at the time of the lease were owned and possessed by other named parties than the lessor. No question is raised on this appeal as to the sufficiency of the complaint. The complaint contained 10 counts, each assigning a breach because of want of title and the possession on the part of the lessor, each count alleging title to certain parts of the lands leased to be in separate and distinct parties. To this complaint defendant filed five pleas, only one of which need be considered on this appeal because the sufficiency of the others is not raised, or, if raised, was decided in favor of appellant. This one plea to be considered on this appeal is plea No. 3, the sufficiency of which was tested by demurrer thereto, and was decided against the appellant, in that there was a judgment sustaining the demurrer as to this plea which raised one of the material questions to be decided. The second, third, and seventh assignments of error each raises substantially the same point of law, which is this: Whether or not a verbal agreement between the defendant and one McIntosh, the alleged owner and possessor of the lands

at the time of the lease, by which McIntosh agreed for the defendant to lease his lands for turpentine purposes, is a defense to this action. The fourth, sixth, eighth, tenth, eleventh, and twenty-first assignments of error all relate to the proper measure of damages in this action, and the thirteenth, fourteenth, seventeenth, eighteenth, and nineteenth assignments of error relate to the general affirmative charge requested by the defendant on the several counts of the complaint. The charge that the defendant cannot recover on the first, eighth, ninth, or tenth counts is not insisted upon. The twenty-third assignment of error relates solely to the refusal of the court to set aside the judgment, and grant a new trial for the defendant. It is not necessary to discuss in this opinion or to decide as to whether or not there was error as to each one of the separate assignments.

There are a few general propositions of law involved on this appeal, and a correct decision of these will sufficiently point out or pass upon the correctness or incorrectness of the rulings of the trial court as to the several assignments of error. The first of these questions of law is this: "Whether or not the misrepresentations of the vendee or lessee at the time of executing a lease, which is in writing and under seal, as to the description of the premises to be leased, and which representations are relied upon by the lessor or grantor, are available in an action at law for the breach of covenant in the lease because of want of title or want of possession on the part of the vendor at the time of the execution of the lease. If the grantee or the lessee by misrepresentations of what the grant or lease contains obtains the grantor's signature to the grant or lease which he did not intend to sign, and did not know he was signing, this is a fraud which is available in a court of law. *Foster v. Johnson*, 70 Ala. 249; *Davis v. Snider*, 70 Ala. 315; *Shelby Iron Co. v. Ridley*, 135 Ala. 513, 33 South. 331; *Pinckard v. American Mortgage Co.*, 143 Ala. 571, 39 South. 350. Yet, if a party signs an instrument without reading it or having it read to him if he cannot read, he cannot avoid it because not informed of its contents, unless there be fraud, deceit, or misrepresentations practiced upon him in the execution thereof. Ignorance of its contents in such case the law attributes to his own negligence. *Pacific Guano Co. v. Anglin*, 82 Ala. 492, 1 South. 852; *Burroughs v. Pac. Guano Co.*, 81 Ala. 255, 1 South. 212; *Beck & Pauli Co. v. Houppert & Worcester*, 104 Ala. 503, 16 South. 522, 53 Am. St. Rep. 77; *Bank of Guntersville v. Webb & Butler*, 108 Ala. 132, 19 South. 14. But if the execution of any written instrument, such as a lease, deed, or mortgage, is obtained from the grantor by a misrepresentation of its contents made by the grantee or lessee, the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

grantor not knowing what he is signing and not intending to sign such a document, then the ignorance of the contents is not attributable to the party signing by a failure to read, or to have it read to him, because the natural effect of the misrepresentations in such case may have been to prevent him from so reading it or having it read. He may have trusted to the truth of the representations made by the other party with whom he was dealing. Authorities *supra*. To state the proposition in different language: One who has executed a written contract in ignorance of its contents cannot set up his ignorance to avoid the obligation in the absence of fraud or misrepresentations. If he cannot read, it is his duty to have the instrument read to him; but, if the execution of such contract by him was procured by misrepresentations on the part of the other party of its contents, such misrepresentations may be such a fraud as will furnish a defense in an action at law, based upon such contract, when brought by the party making the misrepresentations. *Cannon v. Lindsey*, 85 Ala. 198, 3 South. 676, 7 Am. St. Rep. 38; *Bates v. Harte*, 124 Ala. 427, 26 South. 898, 82 Am. St. Rep. 186. Judge Brickell has stated the proposition as follows in the case of *Tillis & O'Neal v. Austin*, 117 Ala. 263, 22 South. 975: "When the execution of an instrument which the party signing did not intend to sign and did not know he was signing is procured by a misrepresentation of its contents, and the party signing it does so without reading or having it read, relying upon such misrepresentation and fraud and believing he is signing a different instrument, he can avoid the effect of his signature notwithstanding he was able to read, and had the opportunity to read the instrument." The law imposes the duty of ascertaining the truth of statements made in transactions as to material matters, and requires that, if the statements are false, they shall be made good, and that the party shall not take advantage of his own wrong. *Jordan v. Pickett*, 78 Ala. 331. One who is negotiating a trade must not recklessly or even innocently assert that as a fact which is untrue if such asserted fact be to any extent an inducement to the other party to enter into the contract. Honest belief in the truth of the statement of such fact, while it exculpates from moral fault, does not relieve from the legal liability to make it good. *Jordan v. Pickett*, 78 Ala. 331; *Bail v. Farley*, 81 Ala. 288, 1 South. 253. It is as much a fraud to affirm as true that which is untrue, though not known to be so, as it is to assert what is untrue and known to be so. *Jordan v. Pickett*, 78 Ala. 331.

Plea No. 3, if the facts therein stated be true (and on demurrer the facts alleged must be taken as true), presented a complete defense to the plaintiff's entire action. The plea was as follows: "(3) For further special plea to the complaint defendant says: That his signature was obtained to the con-

tract sued upon by a statement of such facts and under such circumstances as constitute fraud in law. That such circumstances are as follows, to wit: The plaintiff's intestate applied to defendant prior to the execution of the contract sued upon for the execution by the defendant to the plaintiff's intestate of such a contract as the one which he executed, and which is sued upon, and plaintiff's intestate and defendant had a verbal agreement as to the terms of the lease, whereby defendant agreed to execute to the plaintiff's intestate lease upon his (defendant's) lands. Defendant thereupon told plaintiff's intestate that he (defendant) did not know the description of his lands by their numbers, and plaintiff's intestate agreed with defendant that plaintiff's intestate go to the courthouse, and to the tax books where defendant's lands were assessed to him, and ascertain the numbers of the defendant's lands and the correct description thereof, and defendant relied upon plaintiff's intestate to ascertain the correct description of the lands of defendant which had been agreed to be leased by defendant to the plaintiff's intestate. Plaintiff's intestate thereupon went to the courthouse, and afterwards returned to defendant with a description of a large amount of land, and told defendant that the same described defendant's lands, and defendant did not know whether said description was a correct description of defendant's lands or not, but defendant relied upon the statement to that effect by the plaintiff's intestate and acted thereon, and plaintiff's intestate wrote out the contract sued upon, and inserted the numbers of the land therein, and presented the same to defendant, stating that the same described only the lands of defendant, and defendant, not knowing any better, but relying upon said statement of plaintiff, executed the contract sued upon, and defendant says that if said contract embraces lands not owned by defendant, as alleged in the bill or complaint, to that extent said statement of said plaintiff's intestate that said description only described the lands of the defendant was false, and therefore to that extent said contract is not binding upon this defendant for the false statement of said plaintiff's intestate, wherefore defendant prays the judgment of the court upon this plea."

The breach alleged in the complaint is a want of title and possession on the part of the grantor at the time of the lease to a part of the premises described in the lease. The plea in substance and in effect alleges that, if there was such want of title or possession in the defendant at the time of the lease to any part of the premises as is alleged in the complaint, it was the result of a fraud on the part of plaintiff's intestate; in short, the plea shows that, if there was a want of title in the defendant to the lands conveyed, it was due to the negligence or fraud of plaintiff's intestate in failing to get the correct

numbers, or in getting improper description of the lands; that the defendant signed the conveyance relying upon the representations of plaintiff's intestate that it did describe his lands, and only his lands, and, if it described or conveyed timber or rights or lands not owned by him, it was the fault of plaintiff's intestate, and not of this defendant. To state a similar case concisely and abstractly, it is this: If A. applies to B. to purchase the latter's lands, and B. agrees to sell, but replies that he does not know the description of his land, and A. replies that he does, or can ascertain it, and he writes out a conveyance representing to B. that it describes B.'s land, and B. signs it relying upon this statement as to the description, and it afterwards develops that it describes C.'s land, and A. sues B. for a breach of covenants because he had no title to the lands described, certainly B. should be allowed to show on that trial that if there was a breach, as alleged, it was due to the negligence or fraud of A. in describing the lands conveyed. The fraud alleged in said plea and as appears from the whole evidence shown by the record was a constructive fraud as distinguished from an active fraud; that is to say, it does not appear that it was an intentional fraud on the part of plaintiff's intestate, but that the description was an error or mistake the result of his negligence or lack of information in describing defendant's lands and the ones intended to be conveyed; but defendant relied upon this representation and acted upon it, and it would certainly be a fraud upon the rights of defendant to allow plaintiff's intestate to profit by his own wrong, however innocently it may have been made. In other words, the plea shows facts which would have estopped plaintiff's intestate from disputing that the defendant owned the land as alleged, as much so as defendant's covenants of warranty, in the absence of such representations, would estop him from denying that he owned the land. One is an estoppel in pais and the other is an estoppel by deed. It is insisted by counsel for appellee that the plea was defective because it did not aver that the defendant was prevented from reading the lease, and because it did not negative the fact that he did read it. This was not necessary, for the reason the plea shows that the grantee undertook to get the description, and that the grantor did not even know the description by numbers, and consequently would have been no better informed after reading the description, which is by government numbers, than if he had not read it. The grantee undertook to get the correct description of the defendant's lands from the books in the courthouse, and stated that he had gotten it, and that it correctly described only the land of defendant. It is possible that a person might know the correct description of his own land by seeing the government numbers thereof only, but certainly very few people

would be able to do so where as large a quantity of land as was described in this lease. The point is that the lessee undertook to describe the defendant's lands, went to the books from which to get the data, and returned, saying he had the description, prepared the description himself, and told the grantor that it was correct. If the description was erroneous and described other lands, certainly he should not be enabled to profit thereby, though it be an honest mistake, and though the grantor could have ascertained the correct numbers if he had undertaken so to do; but the plea alleges that he did not undertake to describe them, that it was the grantee who undertook to describe them and did describe them. Counsel for appellee also insist that the plea was bad for that it was effect an attempt to rescind the contract because of fraud without offering to pay back the purchase price or to place the other party in statu quo; and they further urge that the plea is bad for that, if it is a plea attempting to claim damages because of fraud, it should allege the nature and extent of the damages. The answer to this is that the plea does not invoke any affirmative relief—that is, in asking a rescission of the contract—nor does it claim damages by reason of the fraud, but it simply sets up the facts and matters alleged therein as a defense to the action brought and in avoidance of the breach of covenants alleged. The plea does not undertake either to affirm or deny the contract or lease upon which the action is based, but only asserts that, if there was a breach as alleged, it was the result of the fault and fraud of the plaintiff's intestate, and not of the defendant. If the facts alleged in the plea are true, it was not necessary for the plea to allege whether the defendant owned or did not own the lands described, nor was it necessary for him to separate the lands owned by him from those not owned by him. If the lease described other lands than those intended to be embraced therein, either party could have had the lease reformed so as to describe the lands intended, or it might authorize either party to rescind this lease and to specifically enforce the contract to lease the lands agreed upon. Though as to this we do not decide, yet we do decide that neither one of these remedies in equity would prevent a defense at law in an action, based on the contract, by the party responsible for the erroneous description. There is no case presented to authorize an election to rescind the contract in toto, or to affirm and claim damages for fraud. All that is necessary for this plea to do, and which we hold that it does, is to set up a state of facts which, if true, would be a bar to the cause of action alleged in the complaint. There is no attempt in this plea to deny the execution of the lease, but only to show matters of fraud or of estoppel on the part of plaintiff's intestate to maintain this action, in which case there is, of course,

no necessity of having the plea verified by affidavit. In short, the plea alleges that, if there has been a breach of the covenants in the lease as alleged in the complaint, it was the result and consequence of the act of plaintiff's intestate, and not that of defendant. No person should be allowed to profit by his own wrong; consequently it was error in the trial court to sustain demurrer to this plea. It clearly appears from this plea, and from the evidence shown by this record, that whatever breach there was of the covenants of lease it was the result of the mistake of description, and the plea alleged that the error was due to the negligence of plaintiff's intestate, and not of himself. If the mistake in the description of the lands intended to be conveyed was due to the mutual mistake of both parties thereto, there would be no breach of covenant for want of title as to the lands described in the lease by mutual mistake; that is to say, covenants would not be broken by reason of such mistake. Tyson, C. J., speaking of this question in the case of *Pinckard v. American Mortgage Co.*, 143 Ala. 571, 39 South. 350, said: "If the parcel of land was put into the deed by mutual mistake of the parties, the covenants were never broken." If this be true, certainly the covenants were not broken so as to be actionable by the lessor when the error of description was the result of his own fault. This being true, it would also be error to sustain objections to or to exclude evidence to prove the facts stated in said plea, if the evidence be otherwise competent. While there are no assignments of error as to striking certain parts of defendant's answer to the interrogatories propounded to him by the plaintiff under the statute, the exceptions were reserved, and consequently we do not consider the same here except for the purpose of aiding in another trial, if such should be had. A demurrer having been sustained to the third plea, which set up facts substantially the same as those contained in that part of the answer stricken, of course, such evidence could not be material under the issues in the case; but the court being in error, as we have pointed out, in sustaining demurrer to this plea, this evidence would be material and proper with the facts stated in that plea being in issue. The bill of exceptions recites that the motions to strike this portion of defendant's answers were made upon the ground that the same was not responsive to the interrogatory, and was not pertinent to the issue. While it may not be strictly responsive to the question or interrogatory, and may not have been pertinent to any issue, after demurrer was sustained to the third plea, but for the purpose of another trial, it is proper for us to say that at least a part of the matter stricken upon the motion of the plaintiff was pertinent, that part which was the same in substance as the facts stated in the plea, and, if the mat-

ter was pertinent, it cannot be stricken because not responsive to interrogatories propounded under the statute. If this had been an interrogatory propounded to a witness or even to the defendant as a witness, it may be said that part of the answer stricken was not responsive to the interrogatory. For that reason alone it might be stricken, but the rule is different when the deposition is taken under the statute, which is a mere examination of the parties by interrogatories. Answers to interrogatories taken under this statute are governed by the same rules that are applicable to answers to bills of discovery in chancery so far as respects the nature of the discovery sought and the effect of the answer as evidence, and in answers to such bills nothing can be considered impertinent which tends to disprove the existence of the cause of action, and consequently an answer to an interrogatory under the statute, whether it is purely responsive or contains affirmative irresponsible allegations in avoidance of the demand, can be made the subject-matter of exceptions. Consequently a party answering interrogatories may accompany his admission of particular facts called for by the interrogatory with a statement of additional facts in avoidance of them. A party is not in his answer to interrogatories propounded to him under the statute bound to confine himself to a simple admission or denial of the facts thus sought to be elicited. He has the right to confess and avoid, and consequently answers or parts thereof cannot be stricken solely because they are not strictly responsive to the interrogatory. If pertinent and tending to prove or disprove the issues of the case, they cannot be stricken. A party cannot by an examination of his adversary under this statute elicit that, and that only, which he desires, and exclude that he does not desire, by making an answer of that which he does not desire not responsive to the interrogatory. The party answering his adversary's interrogatories is required to answer them fully, and as a part of his answer to any interrogatory he may state the whole of a transaction, even though a part only is asked by the interrogatory. Being required to admit and confess by this form of a bill in the nature of one for discovery, he may also avoid as well as confess, and his answers avoiding plaintiff's cause of action should not be excluded because not strictly responsive.

There was no error in excluding the evidence of the defendant and of the witness McIntosh to the effect that the defendant and McIntosh had a parol agreement by which the defendant was authorized to lease the lands of McIntosh for turpentine purposes. We fail to discover how this evidence could be pertinent to any issue. Such agreement, if made, would be absolutely void under the statute of frauds; that is to say, it was not binding upon either one of the par-

ties, and, had it been executed by the defendant leasing the lands in writing, the lease would still be void because of want of authority in writing on the part of the defendant to execute the lease, and consequently, if it had appeared that this lease was an attempt on the part of the defendant to execute a lease to plaintiff's intestate on McIntosh's land under this agreement, the lease would have been void as to such lands. Such evidence was clearly not admissible, and was properly excluded by the court for another reason which appears beyond doubt from the record in this case, to wit, that there was no attempt on the part of the defendant to lease the lands of McIntosh. He only agreed to lease his own lands and by mistake or error he executed a lease upon the lands of McIntosh, and certainly he should not be allowed to say at one time and in one breath that he leased or intended to lease only his own lands, and then in the next breath say that he leased the lands of McIntosh under a parol agreement which is absolutely void under the express terms of the statute. Such evidence was not admissible whether contracts in violation of the statute of frauds are absolutely void, or whether merely voidable. It is to be regretted that the decisions of this court at this time are in conflict upon this question; some of the decisions holding that contracts in violation of the statute of frauds are absolutely void and mere nullities, while others hold that they are merely voidable, and not void. The decisions of this court prior to Code 1852, § 1551, uniformly, and unquestionably correctly, held that such contracts were only voidable and not void under the statute as it existed prior to the Code of 1852, but the language of the statute was entirely changed by the Code of 1852, and in consequence of which there was a change in the decisions of this court. The former decisions were pronounced when the statute pursued the words of the English statute of frauds, which statute did not declare verbal agreements for the sale of lands void, but merely declared that no action could be supported on them. See Clay's Digest, p. 254, § 1. The construction placed upon such statute by this court and by the English courts and by the courts of other states, so far as we have examined, were to the effect that the statute did not render such agreements absolutely void, but merely voidable; that the statute applied to and affected only the evidence necessary to prove the contract; that the statute in such cases merely required the evidence to be in writing, whereas at common law it was satisfied by parol evidence. *Gillespie v. Battle*, 15 Ala. 276. But the statute now, and as it has always appeared since the Code of 1852, in express terms declares such contracts and agreements to be void unless in writing, expressing the consideration and signed by the party to be charged, etc. This change of the statute and the necessary change of decisions construing

it were expressly pointed out by Chief Justice Brickell in the case of *Flinn v. Barber*, 64 Ala. 193, in which case he held that verbal contracts as to lands could not be enforced unless the statute was violated, that such contracts were absolutely void, and that contracts which were void by express statutory declaration must be mere nullities, must be without any legal effect, incapable of conferring any right or of imposing any duty, following and quoting the case of *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311. This case of *Flinn v. Barber*, 64 Ala. 193, was subsequently quoted from and cited by *Coleman, J.*, in the case of *Nelson v. Shelby Mfg. Co.*, 96 Ala. 515, 526, 11 South. 693, 699, 38 Am. St. Rep. 116. While the learned judge in some respects explains this case, he announces the same rule declared by Chief Justice Brickell, and then again in the same case announces the contrary rule held by the other line of Alabama cases. (This apparent conflict may be explained, to which we will refer later.) In this case the judge, in referring to a case in which a vendee had done nothing more towards complying with the statute than to pay a part of the purchase money, says: "In such case neither party is bound, and the contract is void by the very terms of the statute itself. A contract void under the statute of frauds, is void for all purposes." And on page 528 of 96 Ala., page 700 of 11 South. (38 Am. St. Rep. 116), the judge says: "Parol evidence is not admissible to render valid undertakings which are void by reason of the statute of frauds. To permit parol evidence to be introduced to supply the omission would break down the safeguard intended to be secured by statute in all contracts for the sale of lands"—while at the bottom of page 529 of 96 Ala., page 700 of 11 South. (38 Am. St. Rep. 116), he says: "The authorities are almost uniform to the effect that contracts for the sale of land, although they contravene the statute of frauds, are not strictly void, and, to avoid a contract on the ground that it is offensive to the statute of frauds, it must be specially pleaded. If waived and the contract is proved, it will be enforced." There are other Alabama cases citing and criticising the case of *Flinn v. Barber*, 64 Ala. 193, but none expressly overrule it.

On the other line of cases *Somerville, J.*, in the case of *Shakespeare v. Alba*, 76 Ala. 355, referring to the rule of pleading and practice that the benefit of the statute of frauds is not available without being specially pleaded, and, if waived and the contract is admitted or satisfactorily proven, it will be enforced, used the following language: "Our most recent rulings hold that such agreements therefore are not strictly void, but 'voidable merely'"—citing *Cooper v. Hornsby*, 71 Ala. 62, and *Comer v. Sheehan*, 74 Ala. 452. In this the learned judge evidently referred to the rule of pleading and practice as to the statute of frauds, and not



strictly to the validity or invalidity of contracts in violation of the statute, for the cases cited by him only go to the question as to whether or not it must be specially pleaded. It will be observed and found from an examination of all of these cases that the decision of Brickell, Chief Justice, in 64 Ala. 193, has never been expressly overruled, and that it is the only case which specifically points out the change of the language of the statute which justifies the change of the decisions; that is, that the statute of frauds as it appeared prior to the Code of 1852 only prevented an action for enforcing it and prevented parol evidence to prove such contract, while the statute as it appeared since the Code of 1852 expressly declares all such contracts in violation of the statute to be void. This distinction is also pointed out by the text-book writers on the subject of the statute of frauds. The doctrine is announced in 20 Cyc. p. 279, as follows: "Under the original statute of frauds and statutes like in form, an oral contract falling within its scope is not void but is simply incapable of sustaining an action to enforce it. The statute does not as a rule apply to the contract, unless it is the foundation of the cause of action or an affirmative defense. If it comes in question only collaterally, the contract may be relied on and proven. In those states, however, in which the statute declares contracts within its terms to be void, it would seem that such contracts are of no effect whatever"—citing *Madigan v. Walsh*, 22 Wis. 501; *Culligan v. Wingerter*, 57 Mo. 241. The same distinction is made in the same book (page 284), holding if the statute expressly declares that the contract shall be void it has no validity whatever—citing *Pierce v. Clarke*, 71 Minn. 114, 73 N. W. 522, and authorities supra. Notwithstanding these cases, there is an unbroken line of decisions in this state to the effect that the benefit of the statute is not available without its being specially pleaded, and, if waived and the contract is admitted or satisfactorily proved, it will be enforced, extending from the case of *Carter v. Fischer*, 127 Ala. 52, 28 South. 376, to that of *Patterson v. Ware*, 10 Ala. 445. There is also a line of cases that a stranger to the contract or transaction cannot plead or raise the question of the statute of frauds in avoidance of the contract. *Bain v. Wells*, 107 Ala. 562, 19 South. 774; *Cooper v. Hornsby*, 71 Ala. 62; *Shakespeare v. Alba*, 76 Ala. 351; *Mewburne's Heirs v. Bass*, 82 Ala. 622, 2 South. 520. There is another line of cases holding that, if a defect by reason of the statute of frauds affirmatively appears upon the pleading, advantage may be taken by demurrer. *Strouse v. Elting*, 110 Ala. 132, 20 South. 123, and cases cited.

We will not attempt in this opinion to reconcile the apparent conflict in the authorities on this question, because it is not necessary to the correct decision of this cause, for the

reason that the evidence offered by the plaintiff to prove the oral agreement between him and the third party to lease the lands of the third party would not be admissible under any line of the decisions nor for any purposes, especially not so in this particular case where it conclusively appears that there was no intention to lease the lands of such third party, and when this comes from the mouth of the defendant himself. This apparent conflict, however, may be explained upon the theory that the line of cases holding the contract in violation of the statute to be absolutely void and a mere nullity were decisions which were construing the contract itself, whereas the other line of cases holding such contracts to be voidable merely, and not void, were cases in which the question before the court in each case was a question of pleading and practice, and was not necessarily a construction of the contract; but as to this we do not decide, for the reason that it would be a dictum, if we so decided, in the same manner that it was a dictum in those cases which held that the contract was voidable merely, and not void.

The next question of importance to be decided in this case relates to the proper measure of damages for the breach of covenant in leases of this character. The measure of damages for the breach of covenants to lease, or of contracts and covenants with relation thereto, seems to be the rental value of the lease, and not profits, but profits may be recovered also when they are an element of the contract, though such profits must never be speculative, or conjectural, or incapable of estimation, for the reason that such damages cannot be estimated with reasonable certainty; but, if profits constitute the basis of the legitimate value of the use of lands leased, such profits must be an element of the contract of lease, and must be established by data from which the amount can be ascertained with reasonable certainty. A breach of covenant for peaceable possession or to give possession is the value of the lease or of the unexpired term in case there was occupation for a part of the term, less the unpaid rent, and not profits which the tenant would have made had he not been disturbed in his occupancy. Profits are recoverable as damages if they are the proximate and not the remote result of the breach of the contract. They are, however, frequently speculative, conjectural, and uncertain not only as to the amount, but also as to whether or not any at all could be realized, or when they depend upon the intervention of other agencies than the contract in question. In such cases they are never recoverable. Whether profits are proximate or remote, and whether within the contemplation of the parties at the time of the contract, and whether speculative and uncertain, or depend upon the intervention of other agencies than the contract, often depends upon the ques-

tion whether or not such profits arise directly out of the contract or its subject-matter, or whether they constitute the immediate fruits of the contract, or whether they result from collateral engagements or enterprises besides the contract itself, or whether they depend upon the chances of business or upon contingencies. If profits are the immediate fruits of the contract, arise directly from it without the aid of other agencies and be not dependent upon chances of business, uncertain contingencies, etc., they are recoverable; otherwise, not. The primary object in awarding damages is compensation to the injured party, which should be for the natural and proximate result of the wrong done, and the general rule aims to give compensation for the loss sustained and to put the party in as nearly the same condition as he would have been had the contract been performed, but, as between vendor and vendee of land for breaches of covenants, an exception to this general rule prevails to the extent that the vendee can recover of the vendor for breach of covenant only the amount of payments made, with interest and costs; but this rule between vendor and vendee does not apply to cases between lessor and lessee for breach of covenants of leases or rental contracts. The measure of damages in such cases is the loss the plaintiff has proximately sustained by reason of the breach of the contract.

It has been held in some states, to wit, New York and Missouri, that the lessee could only recover the difference between the rent as provided for in the contract of lease and the rental value of the premises; but the rule adopted in most of the states, including that of Alabama, is that the lessee is entitled to recover the difference between the rent reserved and the value of the use of the premises for the term, together with other damages which are the direct and proximate result and natural consequence of the breach of the contract by the lessor, if such damages can be certainly and correctly estimated by reliable data. There are some cases in which profits constitute not only an element, but are the measure, of damages. There are some cases in which certain profits might not be recoverable as damages, yet proof thereof should be allowed as averring facts from which the jury could properly estimate the value of the lease to the tenant. *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601; *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; *Hodges v. Fries*, 34 Fla. 63, 15 South. 682; *Brent v. Parker*, 23 Fla. 200, 1 South. 780; *Sullivan v. McMillan*, 26 Fla. 543, 8 South. 450; note in 53 L. R. A. 33-112. It has recently been decided by this court that the measure of damages for the breach of a covenant for possession and enjoyment in a lease where the rent has not been paid is the difference between the value of the leasehold at the time of the breach and the amount of rents reserved covering the

period of the nonenjoyment of the premises under the lease. *Tyson v. Chestnut*, 118 Ala. 406, 407, 24 South. 73, citing *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601; *Chestnut v. Tyson*, 105 Ala. 149, 18 South. 723, 53 Am. St. Rep. 101, and note to same case, 53 Am. St. Rep. 116 et seq.

We have examined each of the assignments of error and each of the objections to the rulings of the court relating to the elements and measure of damages, whether upon charges or as to the admissibility of evidence, but the exceptions and objections are too numerous to be treated separately. Suffice it to say that what we said will be a sufficient guide in another trial. We find no reversible error in any of the rulings of the court as to the admissibility of evidence pertaining to the elements or measure of damages, and the charges given and refused at the request of the plaintiff and defendant as shown by the record are without error. This is certainly true as to the issues upon which this case was tried.

The measure of damages for breach of covenants as to leases of land is distinguishable, as stated above, from the measure of damages for breaches of covenants in deeds of conveyance of lands; and is also equally distinguishable from the cases under breaches of contracts for the sale and delivery of chattels. This latter class is illustrated in the cases of *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52, and *McFadden Bros. v. Henderson*, 128 Ala. 221, 29 South. 610; that is to say, the elements and measure of damages for breaches of covenants as to chattels real are distinguishable from breaches of covenants and warranties as to the sale of lands, and also as to breaches of contract for the sale of ordinary chattels. These cases cited above are cited and relied upon by counsel for appellant.

If the facts set forth in plea 3 are true, there was no breach of the covenants as alleged in any count of the complaint, and, of course, evidence tending to prove these facts, if otherwise competent and admissible, should not be excluded. We do not mean to hold by this that all of the evidence offered by the defendant or testified to by him tending to prove the facts alleged in said plea was competent. It might be incompetent for other reasons than those assigned on this trial in the lower court, or those for which it was manifestly excluded in the lower court. The demurrer to the plea having been sustained, the evidence clearly appears to have been excluded (and properly so on that trial) for the reason that it did not tend to prove any issue raised by the plea.

For the errors pointed out, this cause must be reversed and remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

## STATE v. BLEY.

(Supreme Court of Alabama. April 23, 1909.  
Rehearing Denied June 30, 1909.)

## 1. CONSTITUTIONAL LAW (§ 50\*)—LEGISLATIVE POWER OF STATE.

There are no limits to the legislative power of the state government, except such as are written in the state or federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 48; Dec. Dig. § 50.\*]

## 2. JURY (§ 10\*)—RIGHT TO JURY TRIAL.

The constitutional right to trial by jury does not enlarge the right, nor extend it to cases where it did not exist prior to the Constitution.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 16; Dec. Dig. § 10.\*]

## 3. JURY (§ 19\*)—RIGHT TO TRIAL BY JURY.

The right to trial by jury does not extend to taxation proceedings.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 125; Dec. Dig. § 19.\*]

## 4. CONSTITUTIONAL LAW (§ 284\*) — ASSESSMENT OF TAXES—PROCEDURE—DUE PROCESS OF LAW.

It is not necessary to due process of law that an owner of property sought to be assessed in taxation proceedings should be given an opportunity to have the assessment reviewed by the courts, or should have the right of appeal; it being sufficient that he is afforded a right to be heard before some tribunal or board in resistance of the tax.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 892, 893; Dec. Dig. § 284.\*]

## 5. CONSTITUTIONAL LAW (§ 284\*)—DUE PROCESS—TAXATION—VALUATION—APPEAL.

Valuation of property for taxation is not such an exercise of judicial authority as necessarily involves the right of appeal to a judicial tribunal; taxes being recoverable without judge or jury.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 892, 893; Dec. Dig. § 284.\*]

## 6. CONSTITUTIONAL LAW (§ 284\*)—DUE PROCESS—ASSESSMENT—APPEAL.

Act Sept. 30, 1903 (Gen. Acts 1903, p. 295) § 1, authorizing the tax commissioner to appeal from an order of the court of county commissioners dismissing assessment proceeding, is not unconstitutional for failure to afford the taxpayer an equal opportunity to appeal.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 892, 893; Dec. Dig. § 284.\*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Proceedings by the State against Isidore Bley for the taxation of bank stock. The proceeding being dismissed, the state appealed to the circuit court, and from an order dismissing the appeal, it again appeals. Reversed and remanded.

Alexander M. Garber, Atty. Gen., Thomas W. Martin, Asst. Atty. Gen., and William Cunningham, for the State. De Graffenried & Evins, for appellee.

SAYRE, J. In the year 1906 the tax commissioner of Marengo county commenced a proceeding before the court of county com-

missioners against the appellee to require him to assess for taxation certain shares of the capital stock of a national bank at Demopolis. At the hearing the proceeding was dismissed on the ground that the stock had been already assessed. Within 10 days of the judgment the state sued out an appeal to the circuit court. On motion in the circuit court the appeal was dismissed.

Section 1 of the act approved September 30, 1903 (Gen. Acts 1903, p. 295), provided that from the order of the court of county commissioners disposing of an additional assessment reported to that court by the tax commissioner the tax commissioner might appeal within ten days to the circuit court. It appears that the circuit court, in dismissing the appeal on the motion of the appellee, went upon the theory that the provision of the act referred to was unconstitutional and void, for the reason that it did not afford to the parties an equal opportunity to appeal. The argument in the beginning is that the state may not discriminate between parties. The full force and effect of this argument must be conceded in its application to judicial causes pending between private parties. But the tax commissioner proceeds under the statute as an officer of the state, and in the interest of the state, in the exercise of one among the highest attributes of sovereignty, the imposition of taxes. In *Ex parte Macdonald*, 76 Ala. 603, it was argued that the statute which authorizes suits to be brought in the name of the state without giving bond or security, or causing affidavit to be made, though the same may be required in actions between private citizens, was unconstitutional as dispensing with due process of law. This court responded to the argument in this language: "The objection, then, reduces itself to the proposition that the state must enter its own courts upon terms of perfect equality with its own citizens, and that the phrase 'due process of law' carries with it the essential idea that the Legislature can enact no law under which benefits can be claimed for the sovereign that are denied to the citizen. To state such a proposition is to deny it." A familiar example of the asserted prerogative of the state is to be found in the fact that, constitutional provision apart, it is not liable to suit in ordinary cases unless by its own consent. Likewise, in pursuance of the principle that the sovereign can do no wrong, applicable to republican forms of government, it has always been held that the state may deny its remedies to slothful persons having grievances, and so secure the repose of society, by the enactment of statutes of limitation by which it is not itself bound unless by its own express consent. "Nullum tempus occurrit regi." Other examples of the same prerogative are to be found mentioned in *Ex parte Macdonald*, *supra*.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexer

It has been mooted whether, when the state goes into its own courts to contest with the private citizen matters not affecting its sovereign powers, as where, for example, it contests with a citizen the ownership of property or rights growing out of contract, its prerogative ought not to be abated, so as to put it upon a footing of equality with the private citizen in the assertion of such rights; but that question is not raised here, and, of course, is not to be decided. The general principle hereinbefore referred to, which is a partial expression of the doctrine that there are no limits to the legislative power of the state government save such as are written upon the pages of the state or federal Constitution, must be conclusive against the appellee's right to have the state's appeal dismissed out of the circuit court for the reason upon which it proceeded, unless his further contention that the Constitution secures to him, in common with all private parties litigant, the right of appeal absolutely, or, in any event, an appeal in order that the constitutional guaranty of trial by jury may not be impaired.

By the Constitution the right of trial by jury is made inviolate. The settled construction of this provision is that it does not enlarge the right of trial by jury, nor extend it to cases where no such right existed prior to the Constitution. *Tims v. State*, 28 Ala. 165; *Thomas v. Bibb*, 44 Ala. 721; *Montgomery & Fla. Ry. Co. v. McKenzie*, 85 Ala. 546, 5 South. 322. The appellee will find that the issue made by him—or, rather, which might have been made by him on the hearing of the proceeding before the court of county commissioners—belongs to that class of cases in which the right of trial by jury has never existed. The dependence of government upon taxation is such as to exclude the idea. A tax is a charge levied by the sovereign power upon persons and property for the support of government and for public purposes. Judge Cooley, in his work on *Taxation*, after pointing out the desirability, and frequently the necessity, of the prompt payment of taxes in order that the government may be maintained, and that this consideration leaves no room for the supposition that the dilatory proceedings incident to forms of process and trial by jury were within the contemplation of the people when consenting to any general provision of the Constitution, says that: "It is safer, and, we believe, more correct, to say that our Constitutions have been framed and agreed upon in view of an immemorial practice and rule of government, under which the whole subject has been intrusted to the legislative department; and they are to be understood and construed in the light of that practice, wherever the people have not expressly undertaken to change it." Many cases, cited to the text of Judge Cooley's work, show that to hold the right of trial by jury to be applicable to

tax cases would work a radical change in the principles upon which taxation is supposed to rest. "It would cripple the legislative power, and subject the action of the department whose function it is to make laws on its own views of the questions of public interest and public policy which the laws involve, to a review and possible reversal at the hands of a jury. It would not so much strengthen the judicial department as it would weaken the legislative; for the courts themselves, though juries sit with and as a part of them, are compelled to recognize a large degree of independence in the action of these assistants. Such independence is often useful, and never can be seriously detrimental, when a verdict determines a single controversy only; but to make juries the assessors of the claims of the state upon individuals could only introduce anarchy."

The court of county commissioners sits, as a board of assessment and equalization, to hear complaints against valuation by property owners and by the state. It is an assessing board, with powers quasi judicial only. If the assessed valuation is too great, or too small, the assessment is erroneous only, not void. *Collins v. Keokuk*, 118 Iowa, 30, 91 N. W. 791; *Holland v. Mayor*, 69 Am. Dec. 198, note. We do not question the right of the taxpayer to attack an assessment void because some principle of law is violated in making it; but it does not seem ever to have been held that because a right of appeal from an assessment is not given by law, the taxpayer having had an opportunity to be there heard, a tax levied upon such assessment is void. Nor is it necessary to due process of law that the owner of property be given the opportunity to have an assessment reviewed by the courts. The valuation of property is not such exercise of judicial authority as necessarily involves the right of appeal to judicial tribunals. 27 A. & E. Encyc. 718; 1 Cooley, Tax. p. 64. In *Harris v. Wood*, 6 T. B. Mon. (Ky.) 641, it is remarked that taxes are recoverable, not only without a jury, but without a judge. In *Springer v. United States*, 102 U. S. 586, 26 L. Ed. 253, it is said: "The idea that every taxpayer is entitled to the delays of litigation is unreason." The right of appeal is purely statutory. Unless the Constitution so prescribes, an act is not invalid because not providing for an appeal. 2 Cooley, Tax. 1393, 1394. Concessions made to the taxpayer along this line are concessions of favor, not of right, and their extent rests in legislative discretion.

For the reasons and on the authorities hereinbefore set out and cited, we do not see our way clear to a declaration that the act authorizing proceedings by the tax commissioner to correct undervaluations of property, as that act was at the time the proceeding in this cause was commenced, was unconstitutional for any ground urged against

it. Under section 2252 of the Code of 1907, the discrimination complained of no longer exists.

We have been unable to consult the case of *People v. Sholem* (Ill.) 87 N. E. 390, much urged upon our attention by appellee; that volume of the *Northeastern Reporter* not having yet reached our library, and the advance sheet containing the opinion in that case having been mislaid. We have, however, consulted the other cases from the Illinois courts, cited by appellee, and find nothing to the contrary of what we have written.

Our conclusion is that the certiorari was improperly dismissed by the trial court, and the judgment of the circuit court to that effect is reversed and remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

# STATE ex rel. SHOLL et al. v. DUNCAN.

(Supreme Court of Alabama. June 3, 1909.  
Rehearing Denied June 30, 1909.)

## 1. STATUTES (§ 161\*)—IMPLIED REPEAL.

Gen. Acts 1903, p. 499, amended by Act Aug. 15, 1907 (Gen. Acts 1907, p. 893), provided for enforcement of laws relating to the public health, gave general control to the State Board of Health, conferred on county boards certain powers under general supervision of the state board, gave the county board power to elect health officers for incorporated cities in the county whose charter did not otherwise provide, and enumerated the duties of the health officers elected by the county board. *Held*, that this did not repeal Act Aug. 13, 1907 (Gen. Acts 1907, p. 864) § 142, conferring on municipalities power to adopt ordinances to guard against contagious diseases, establish quarantine, and promote sanitary condition, and to fix the salaries in compensation for such health officers as they may deem necessary, and therefore an ordinance providing for a city bacteriologist was not invalid as appointing an officer to exercise the functions pertaining to a state officer.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 230; Dec. Dig. § 161.\*]

## 2. WORDS AND PHRASES—"BACTERIOLOGY."

"Bacteriology" is the science which investigates bacteria and other microbes, especially their life history and agency in the production of disease.

## 3. STATUTES (§ 159\*)—IMPLIED REPEAL.

That two statutes relating to the public health and creating offices in connection therewith were passed by the same Legislature within a few days creates a strong presumption that no conflict was supposed to exist.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 231; Dec. Dig. § 159.\*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Quo warranto by the State on the relation of Edward H. Sholl and others, against Ellis M. Duncan. From a decree for respondent, relators appeal. Affirmed.

Robert E. Smith and Tyson, Wilson & Martin, for appellants. R. H. Thatch, for appellee.

SAYRE, J. This is a proceeding in the nature of a quo warranto, challenging the right of respondent to exercise the functions of city bacteriologist, created by an ordinance of the city of Birmingham approved January 5, 1908. It is not denied that respondent was elected to the office in question, nor is there averment that he is in any respect disqualified to hold the same. The controversy between the parties relates to the right of the municipality to create an office with the powers and functions conferred by the ordinance upon the respondent; the argument for the relators being that the ordinance is in contravention of the laws of the state, which is to say that respondent, acting under the color of the ordinance, is wrongfully exercising the functions which, under the general law of the state, pertain to the health officer of the city of Birmingham. In the act approved October 9, 1903 (Gen. Acts 1903, p. 499), an elaborate system was amended, reconstructed, and provided for the enforcement of the laws relating to the public health. A general control was committed to the State Board of Health, and many powers and duties in their respective counties conferred upon county boards, which are placed under the general supervision and control of the State Board. By subdivision "f" of section 4 it was made the duty of the county board in each county to elect a health officer for any incorporated city or town in the county whose charter did not otherwise provide. In the re-enactment of this subdivision in the amendatory act of August 15, 1907 (Gen. Acts 1907, p. 893), the exception of municipalities having charters providing otherwise was omitted. The duties of municipal health officers, elected by the county boards, enumerated in section 710 of the Code of 1907, may, so far as needful in this connection, be epitomized as follows: They are to keep registers of births, deaths, and infectious diseases; to exercise, under the direction and control of the committee of public health, acting for the county board of health, and in accordance with the health laws of the state and the municipality, general supervision over the sanitary interests of the municipality; to investigate cases of disease suspected to be contagious, infectious, or pestilential in character, and report the facts in writing to the mayor and council of the municipality, to the committee of public health of the county board of health, and to the state health officer; to investigate municipal prisons and charitable institutions as respects condition and conduct; and to perform other duties of like general character. The various legislative enactments of recent years, codified in chapter 22 of the Code, evince a purpose

to bring all matters concerning the health and quarantine of the state under the jurisdiction of the State Board of Health and its subordinate county boards.

With undoubted propriety, relators concede that section 142 of the act of August 13, 1907 (Gen. Acts 1907, p. 864), confers upon municipalities the power to adopt ordinances to prevent the introduction of contagious, infectious, or pestilential diseases, to establish and regulate a sufficient quarantine not inconsistent with the laws of the state, to adopt ordinances and regulations to insure good sanitary conditions in public and private places, and to prescribe the duties and fix the salaries and compensation for such health officials as they may deem necessary. This section is an amplification in one direction of the general power conferred by section 80, by which municipal corporations are given power to adopt ordinances, not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred, and to provide for the safety, health, prosperity, morals, order, comfort, and convenience of the inhabitants of the municipality. Bacteriology is the science which investigates bacteria and other microbes, especially their life history and agency in the production of disease. Ordinances providing for bacteriological investigation and research have a just and reasonable, not to say necessary, relation to the health and safety of communities. It will not be denied therefore, that the general and special powers conferred by the two sections of the act last referred to are amply broad to justify the ordinance of the city of Birmingham creating the office of city bacteriologist. But the act amendatory of the health and quarantine laws of the state postdates the act of August 13, 1907, known as the "Municipal Code Law," by two days. They have both been printed in the Code, but were not enacted as a part of the Code of 1907. The question, then, is whether the later statute, dealing with the subject of health and quarantine, must be held to repeal the power to appoint a bacteriologist, with such duties as are enumerated in the ordinance, which power is fairly implied in the municipal charter act.

The health and quarantine law and the municipal code law cover in part the same field so far as cities and towns are concerned. The fact that they were passed by the same Legislature, and so nearly together, creates a strong presumption that no conflict was supposed to exist. We find no conflict in the letter of the two statutes. Nor do we think the duties imposed by the ordinance upon the bacteriologist are of such nature as to give rise to conflict between that official and the health officer provided for in the health and quarantine law. The former is nothing more than an agent for gathering information, as the ordinance shows. Such

information will be valuable to the officers and people of the municipality in the conduct of its government within the limits of its unquestioned powers. It can in no wise curtail the powers of the health officer, nor interfere with their complete beneficial exercise, that one or a dozen bacteriologists appointed or elected by the city may cover the same ground for the purpose of getting information. We discover in the health and quarantine laws of the state no expressed or implied purpose to deny to a municipal corporation the authority to procure for the use of its officers and people, in the administration of their affairs, expert knowledge of things which may affect the safety, health, and comfort of the community.

In view of some expressions in the opinion of the learned judge of the trial court, made a part of the record here, we remark that this proceeding can have no effect upon the official status or powers of the municipal health officer of the city of Birmingham, who has been elected by the county board. This, indeed, is necessarily implied in what we have said above.

There was no error in the ruling of the court below, and its judgment will be affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

#### HOUSTON v. HOWZE.

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

##### 1. RELIGIOUS SOCIETIES (§ 14\*)—ACTIONS—JURISDICTION.

The courts will not take jurisdiction of matters concerning religious associations, except to protect some property right.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 100-102; Dec. Dig. § 14.\*]

##### 2. CHARITIES (§ 43\*)—ACTIONS—JURISDICTION.

The courts will not take jurisdiction of matters concerning charitable associations, except to protect some property right.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 43.\*]

##### 3. EQUITY (§ 363\*)—DISMISSAL BEFORE HEARING—DETERMINATION OF MOTION.

In considering the question of the dismissal of a bill for want of equity, only the bill can be looked to.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 766; Dec. Dig. § 363.\*]

##### 4. EQUITY (§ 17\*)—JURISDICTION—PROPERTY RIGHTS.

A bill which shows that the right of complainant to an office, to which is attached a pecuniary interest in the shape of exemption from dues, in a fraternal society, and a right to life and health insurance, is involved, should not be dismissed for want of equity as the bill shows that a property right is involved.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 17.\*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by Jennie Houston against C. A. Howze. From a judgment dismissing the bill, plaintiff appeals. Reversed in part, and remanded.

Powell & Blackburn, for appellant. Z. Rudolph, for appellee.

SIMPSON, J. The bill in this case was filed by the appellant against the appellee, alleging that appellant and appellee are members of a beneficial and charitable organization known as "United Brothers of Friendship and Sisters of the Mysterious Ten," organized in Alabama as a corporation; that the Grand Lodge in Alabama is governed by an Executive Board, of which the defendant is the chief executive officer; that complainant is the chief executive officer of Elizabeth Temple, No. 2, of Birmingham, a subordinate lodge of said organization, the title of her office being "Worthy Princess"; that each member who carries a certificate of endowment is entitled to sick benefits and to life insurance to the amount of \$300; that complainant receives no salary, but in lieu thereof is relieved of the payment of the monthly dues of 35 cents, which keep up said insurance; that complainant was elected to said office in December, 1907, for one year; that on February 1, 1908, the defendant, as Grand Master, issued an order suspending her from said office, and has attempted to install another member; that he is about to order her benefit and insurance certificate canceled, and is misappropriating funds, etc.; and that she had no right to appeal to any board of officers for redress. The bill prays that said Howze be enjoined from interfering with complainant in the exercise of said office, and from taking steps to remove complainant, and from interfering with the installation of other proper officers of any subordinate temples, and from collecting fees for said installations, except when requested by such temple, etc., and that he be required to account for and pay over to the Grand Lodge all moneys collected, etc.

The answer denies that the Grand Lodge is governed by the Executive Board, but alleges that the Executive Board is the agent of the Grand Lodge, with the duty to supervise subordinate lodges and see that the constitution and by-laws are obeyed; that said Grand Lodge is governed by the wishes and voice of the subordinate lodges expressed by a majority vote of delegates; that the Grand Master merely presides, and does not vote; and that respondent is Grand Master. It denies that complainant was, at the time of the filing of the bill, or is now, holding said office, but alleges that one Stella Gaston is. It denies that said organization maintains a sick benefit fund or insurance, but alleges that a department entirely separate and independent provides for the endowment

fund securing \$300 insurance, that no sick benefits are paid out of the endowment fund or by the endowment department, that the 35 cents paid by each member goes to the endowment department, and that, if any provision is made for sick benefit, it is by the subordinate lodge. It denies that the office of Worthy Princess has any pecuniary value, alleging the same to be entirely honorary. It denies that orator was ever legally installed in said office, in accordance with the law of the association, but alleges that her installation was set aside for violation of the law of the order January 6, 1908. It denies any intention to cancel her benefit policy, alleging that this can be done only on the initiative of the subordinate lodge.

Without stating all of the allegations of the answer, it is sufficient to say that it denies all the facts which could give equity to the bill, if there were any. The courts will not take jurisdiction of matters concerning religious or charitable associations, except to protect some property or financial right. *State ex rel. McNeill v. Bibb Street Church*, 84 Ala. 23, 4 South. 40; *B. & O. R. R. Co. v. Stankard*, 49 L. R. A. 385, 386, note. But, in considering the question of the dismissal of the bill for want of equity, only the bill can be looked to, and not the answer. The allegations of the bill show that a property right is involved, to wit, the right of complainant to an office which has attached thereto a pecuniary interest, in the shape of exemption from dues and a right to life and health insurance. That being the case, it is within the jurisdiction of the court to protect that right and interest. *Christian Church of Huntsville v. Sommer*, 149 Ala. 145, 43 South. 8, 8 L. R. A. (N. S.) 1031.

We will not discuss the question whether injunction is the proper remedy to try the right to office in a corporation, as this is not a case where a person has been removed from office by the constituted authorities of a corporation. The corporation is not made a party, and the claim is only that an individual, who has no such authority in the corporation, is interfering with the enjoyment by complainant of her rights.

As to the other feature of the bill, to wit, the prayer that said respondent be required to pay over funds collected to the corporation, the bill is defective, as it is in other respects; but there was no demurrer.

The decree of the court is affirmed in so far as it dissolved the temporary injunction; but in so far as it dismissed the bill the decree is reversed, and a decree will be here rendered overruling the motion to dismiss the bill for want of equity, and the cause is remanded.

In part affirmed, and in part reversed and rendered, and remanded.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

**WRIGHT v. SAMPLE.**

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

**1. ACTION (§ 27\*)—INJURY TO FRUIT TREES—ACTION FOR PENALTY—NATURE—CONTRACT OR TORT.**

An action under Code 1907, § 6037, for the statutory penalty for destruction of or injury to fruit trees, though technically an action of debt, is not one for a debt contracted, but for a tort.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 27.\*]

**2. DISMISSAL AND NONSUIT (§ 26\*)—DISCONTINUANCE AS TO JOINT DEFENDANTS.**

In actions *ex delicto*, plaintiff may discontinue as to one or more defendants and maintain the action against the remaining defendants without discontinuing the entire action.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 46, 48-59; Dec. Dig. § 26.\*]

**3. PENALTIES (§ 40\*)—VACATION OF JUDGMENT—WHO MAY COMPLAIN.**

In an action for the statutory penalty for destruction of fruit trees, one of defendants could not complain that after the action was discontinued as to his codefendant the latter was subsequently reinstated as a party defendant and a judgment rendered against her, which was subsequently vacated.

[Ed. Note.—For other cases, see Penalties, Dec. Dig. § 40.\*]

**4. TRESPASS (§ 67\*)—INJURY TO FRUIT TREES—STATUTORY PENALTY—"ORCHARD"—"YARD"—"INCLOSURE."**

In an action under Code 1907, § 6037, for statutory penalty for destruction of fruit trees inclosed on premises, a general charge for defendant on the ground that there was no proof that the trees were removed from an inclosure was properly refused; it appearing that the trees were taken from a yard and orchard, which showed *prima facie* an inclosure; "orchard" being defined by Webster as meaning, among other things, "an inclosure containing fruit trees," etc., and the word "yard" meaning by common acceptance an "inclosure."

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 67.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3498, 3499; vol. 6, p. 5016; vol. 8, p. 7551.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by R. H. Sample against John L. Wright and another. Judgment for plaintiff, and defendant John L. Wright appeals. Affirmed.

The suit was originally begun against John L. Wright and Laura F. Wright. It seems that after the filing of the complaint an amendment was allowed striking Laura F. Wright as a party defendant. Upon this amendment being allowed, appellant John Wright moved for a discontinuance, which was overruled. Subsequent to this amendment, and before the trial, another amendment was filed reinstating Laura F. Wright as a party defendant, and on this complaint as last amended the trial was had, resulting in a judgment against both defendants, which was subsequently amended by the

court setting aside the judgment as to Laura F. Wright. John Wright takes this appeal alone.

E. M. Russell and Wert & Lynn, for appellant. John R. Sample, for appellee.

**ANDERSON, J.** This action was brought, under section 6037 of the Code of 1907, for the statutory penalty for destruction of or injury to fruit trees. Actions of this character, though technically actions of debt, are not for debts contracted, but are actions for a tort. *Crawford v. Slaton*, 133 Ala. 393, 31 South. 940.

The rule is well settled in this state that in actions *ex delicto* the plaintiff may discontinue as to one or more defendants, and maintain his action against the remaining defendants, without discontinuing the entire action. *Strickland v. Wedgworth* (Ala.) 45 South. 653, wherein the case of *Torrey v. Forbes*, 94 Ala. 135, 10 South. 320, was explained and qualified.

The trial court did not err in declining to discontinue the cause, at the instance of the appellant, John L. Wright, because the suit was dismissed as to his codefendant. Nor can this appellant complain that his codefendant was subsequently reinstated as party defendant and a judgment rendered against her, which was subsequently vacated.

The appellant further insists that the trial court erred in refusing the general charge requested, because there was no proof that the trees were removed from an inclosure. The proof showed that the trees were taken from the yard and orchard, which showed *prima facie* an inclosure. "Orchard" is defined by Webster as meaning, among other things, "an inclosure containing fruit trees," etc. Yard: "The word 'yard' by common and current acceptance is an inclosure," etc. *Cook v. Lowe*, 60 N. Y. Supp. 614, 44 App. Div. 239; *State v. Bugg*, 66 Kan. 668, 72 Pac. 236.

The judgment of the law and equity court is affirmed.

**DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.**

**LOUISVILLE & N. R. CO. v. WEATHERS.**  
(Supreme Court of Alabama. June 10, 1909.  
Rehearing Denied June 30, 1909.)

**1. CARRIERS (§ 275\*)—CARRIAGE OF PASSENGERS—ACCOMMODATION DURING TRANSIT—ACTIONS—PLEADING—SUFFICIENCY OF COMPLAINT.**

A count in a complaint in an action by a passenger against a carrier for injuries received from accommodation furnished, which alleged that plaintiff boarded defendant's train, which contained at least one first-class car, and paid first-class fare; that he was blind, and so constituted physically that the inhaling of tobacco smoke in large quantities would make him sick, and defendant's servant, acting within the scope



of his authority, wrongfully and negligently caused plaintiff to remain in a smoker or second-class car, where the air was so laden with tobacco smoke that as a proximate consequence thereof plaintiff was made sick and caused to inhale the smoke, and was caused to vomit and suffer great mental and physical pain, and was greatly humiliated and put to great trouble, inconvenience, and expense in curing his sickness—was not insufficient because failing to allege that plaintiff was placed in the car against his protest or objection; those allegations not being necessary in an action for simple negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 275.\*]

**2. CARRIERS (§ 275\*)—CARRIAGE OF PASSENGERS—ACCOMMODATIONS DURING TRANSIT—ACTIONS—PLEADING—SUFFICIENCY OF COMPLAINT.**

Likewise a count embracing the above count, with additional averments that defendant's servant, acting within the line of his authority as such, being informed that to inhale tobacco smoke would make plaintiff sick, nevertheless wrongfully and wantonly, or wrongfully and intentionally, caused plaintiff, against his protest, to be or remain in a car where there was a large quantity of tobacco smoke, known as a "second-class car" or "smoker," and thereby the servant so acting wrongfully, wantonly, and vexatiously caused plaintiff to suffer the said injuries and damages, was sufficient.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 275.\*]

**3. TRIAL (§ 139\*)—DIRECTION OF VERDICT.**

Where there was evidence tending to support both simple and wanton negligence of defendant, and thus to authorize actual and punitive damages, the general affirmative charge for defendant as to any count of the complaint was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. § 139.\*]

**4. APPEAL AND ERROR (§ 1004\*)—REVIEW—EXCESSIVE DAMAGES—APPROVAL OF VERDICT BY TRIAL COURT.**

Where plaintiff, who was blind, was placed in the smoking car of his train by defendant's servants, over his protest that he held a first-class ticket and was entitled to ride in the first-class coach, and that tobacco smoke always made him sick, and was actually made sick by the smoke, a verdict for \$700, while large, is not so excessive as to require the interference by the Supreme Court, especially where the trial court has refused a new trial on such ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3945; Dec. Dig. § 1004.\*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by T. S. Weathers against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The counts of the complaint noticed in the opinion are as follows:

(3) "Plaintiff claims of the defendant \$1,500 as damages, for that heretofore, to wit, on the 10th day of September, 1904, the defendant was a common carrier of passengers from Warrior to Birmingham, in Jefferson county, Ala., by means of a train drawn by a locomotive engine and containing two or more cars, at least one of which cars was known as a 'first-class coach,' and was rea-

sonably free from tobacco smoke, and one other of said cars contained large quantities of tobacco and was known as a 'smoker' or 'second-class car'; that on said day plaintiff boarded said train at said Warrior, to be carried by defendant thereon as a passenger from said Warrior to said Birmingham, and plaintiff paid to the defendant the fare charged by defendant for first-class passage from said Warrior to said Birmingham; that plaintiff was blind at said time, and was so constituted physically that the inhaling of tobacco smoke in large quantities would make him sick, and defendant's servant or agent on said train, acting within the line and scope of his authority as such, wrongfully caused plaintiff to be or remain in said car, known as a 'second-class car' or 'smoker,' and where there was a large quantity of tobacco, and where the air was so laden with tobacco smoke that as a proximate consequence thereof plaintiff was made sick, was caused to inhale large quantities of said smoke, was caused to vomit and suffer great mental and physical pain, and was greatly humiliated, and was put to great trouble, inconvenience, and expense in or about curing his said sickness. Plaintiff avers that said servant or agent negligently caused plaintiff to be or remain in said car in which said large quantity of smoke was as aforesaid, and as a proximate consequence of said negligence as aforesaid plaintiff suffered said injuries and damage."

(4) Same as 3, down to and including "curing his said sickness," and adds the following: "Said servant or agent, acting within the line and scope of his authority as such, being informed that to inhale tobacco smoke would make plaintiff sick, nevertheless wrongfully and wantonly, or wrongfully and intentionally, caused the plaintiff, against the protest of plaintiff, to be or remain in that one of said cars where there was a large quantity of tobacco smoke and where the atmosphere was laden with tobacco smoke, to wit, said car known as a 'second-class car' or 'smoker' as aforesaid, and thereby said agent or servant, so acting within the line and scope of his authority, wrongfully and wantonly and vexatiously caused plaintiff to suffer the said injuries and damages."

The following charges were refused to the defendant:

(1) "Even if the plaintiff was placed in the smoker against his express will, the plaintiff cannot recover damages for having been made sick from it, if he was made sick, unless the jury are reasonably satisfied that the employes who placed him in the smoker against his expressed will had notice that he would likely, or might, be made sick by tobacco smoke."

(2) "If, when the plaintiff went or was carried into the smoker, the conductor did not

know that tobacco was offensive to the plaintiff, and had him carried into the ladies' car at the first stop made by the train after he was notified that tobacco smoke was offensive, then I charge you that the conductor was not guilty of any wrong, and that you cannot find a verdict for the plaintiff predicated on any wrong of the conductor."

(3) "The employes of the defendant had the right to assume that no injury or damage would result to the plaintiff from his going into the smoker, unless the jury are reasonably satisfied from the evidence that actual notice was given to the conductor or flagman that he was subject to being made sick by tobacco or tobacco smoke."

(4) Affirmative charge as to the third count.

There was judgment for plaintiff, and his damages were assessed in the sum of \$700.

Tillman, Grubb, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

**MAYFIELD, J.** This is an action by a blind passenger against a common carrier to recover damages for inconvenience and sickness, the result of the carrier's placing him in a coach filled with tobacco smoke and fumes. The grossest wrong alleged was the placing of plaintiff in the smoker coach, against his wishes and over his protests, after the agents were notified of the fact that the tobacco smoke would make him sick. The sole injury alleged or proven was that plaintiff was thereby caused to inhale tobacco smoke, which made him sick and caused him to vomit, by reason of which he suffered mental pain and anguish. The plaintiff's evidence tended to prove the averments. The defendant's evidence denied that its agents put plaintiff in the smoker, or that they had any knowledge or notice of the fact that tobacco smoke would make him sick, and further tended to show that it removed him to another coach upon request from his sister so to do, and that the plaintiff did not complain of being sick, nor object to riding in the smoker.

The third count stated a cause of action, and was not subject to demurrer on the ground that it failed to allege that defendant's agents knew of the fact that tobacco smoke made plaintiff sick, and that it failed to allege that he was placed in the car against his protest or objection. While these allegations might be necessary in order to state a cause of action for wanton negligence or willful injury, they are not necessary in an action for simple negligence. The count alleged the relation of passenger and carrier, the right of the passenger as for a first-class coach, and a breach of duty by the carrier in wrongfully placing him, a blind passenger, in a second-class or smoking car. The court

properly overruled the demurrer to this count.

The fourth count was good, for the same reasons assigned above to the third, and for the additional reason that it alleged, in effect, that the plaintiff was wantonly placed in the smoker over his protest.

There was no error in refusing any of the four charges to the defendant, as to which error is assigned. The first requested a verdict for defendant unless the employé, placing plaintiff in the car against his expressed will, had notice that plaintiff would, or would likely, be made sick on tobacco. This was not necessary to the right of recovery, though it might be necessary as for punitive damages (but as to this we do not decide).

The second charge requested a verdict solely upon the failure of the conductor to have notice of the fact that tobacco smoke would make plaintiff sick. The defendant might well be liable, under the evidence, in the absence of any such notice or knowledge on the part of the conductor:

The third charge required the court to peremptorily instruct the jury that defendant's agents had the right to assume that no damage or injury would result to plaintiff unless the conductor or flagman had actual notice that plaintiff was subject to be made sick on tobacco smoke. The plaintiff might have been entitled to recover under evidence that he was not made sick on tobacco smoke. This did not go to the entire right of recovery, but only to the degree of the negligence or the amount of the damages:

There was evidence tending to support simple and wanton negligence on the part of defendant's agents, and thus to support or authorize actual and punitive damages. Therefore the general affirmative charge could not properly have been given for the defendant as to any count of the complaint.

While the verdict is probably large, yet, under the plaintiff's evidence and that of his sister, we are not willing to reverse the trial court in denying the motion for a new trial on the ground that the verdict was excessive.

The judgment of the city court must be affirmed.

Affirmed.

**DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.**

#### CITY OF BESSEMER v. EIDGE

(Supreme Court of Alabama. April 9, 1909.  
Rehearing Denied June 30, 1909.)

1. HABEAS CORPUS (§ 113\*)—"PARTY AGGRIEVED"—RIGHT TO APPEAL.

An appeal by a city from an order of the judge of a city court, discharging on a writ of habeas corpus a person convicted for violating a city ordinance, lies under Code 1907, § 6245, providing that any "party aggrieved" by the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment in habeas corpus may appeal; the city being the "party aggrieved."

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 105; Dec. Dig. § 113.\*

For other definitions, see *Words and Phrases*, vol. 1, pp. 273-278; vol. 8, pp. 7569, 7570.]

**2. SEARCHES AND SEIZURES (§ 7\*)—SEARCH AND SEIZURE—ORDINANCES—CONSTITUTIONALITY.**

An ordinance prohibiting the keeping of intoxicating liquor in any house, building, or place where people resort, public or private, for lawful or unlawful purposes, and providing for the seizure and confiscation of such liquor and the arrest of any person suspected of violating the ordinance, with or without warrant, is in violation of Const. 1901, Bill of Rights, § 5, declaring that the people shall be secure in their persons, houses, and possessions from unreasonable search and seizure, and that no warrant shall issue to search any place or seize any person or thing without probable cause, supported by oath.

[Ed. Note.—For other cases, see *Searches and Seizures*, Cent. Dig. § 5; Dec. Dig. § 7.\*]

**3. CRIMINAL LAW (§ 211\*)—AFFIDAVIT FOR WARRANT—SUFFICIENCY—"GOOD REASON TO BELIEVE"—"PROBABLE CAUSE FOR BELIEVING."**

An affidavit for a warrant of arrest, stating that affiant has "good reason to believe" that an offense has been committed, rather than, as required by Code 1907, § 6703, that he has "probable cause for believing," is void.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 211.\*

For other definitions, see *Words and Phrases*, vol. 4, p. 3125.]

Dowdell, C. J., and Denson and McClellan, JJ., dissenting in part.

Appeal from City Court of Bessemer; William Jackson, Judge.

W. S. Eidge, having been convicted for violation of an ordinance of the City of Bessemer, was thereafter discharged on a writ of habeas corpus, and the City appeals. Affirmed.

Estes, Jones & Welch, for appellant. Thomas T. Huey and G. F. Goodwyn, for appellee.

MAYFIELD, J. Appellee was arrested, prosecuted, and convicted, and sentenced to hard labor, for violating an ordinance of the city of Bessemer, after which he was released and discharged by the judge of the city court of Bessemer on a writ of habeas corpus; such judge declaring the ordinance under which the prosecution was had, to be void. From that order or judgment the city of Bessemer prosecutes this appeal.

It is claimed by counsel that this appeal is taken under section 1220 of the Code of 1907; it being section 66 of the Municipal Code bill passed by the last session of the Legislature, of date August 13, 1907. If this were true, the appeal could not be entertained. That provision only applies to cases taken to the circuit or other courts of like jurisdiction by appeal from the municipal court, and not to proceedings like this, originating in the circuit court or before a judge

of such court. But the appeal does lie under section 6245, Code 1907 (Town of Elba v. Rhodes, 142 Ala. 689, 38 South. 807); the city being "the party aggrieved" in this particular case.

The ordinance in question is clearly void. It not only exceeds the powers of the municipality, which is enough to render it invalid, but it probably exceeds the power of the Legislature itself. It attempts to prohibit the keeping of any spirituous, vinous, malt, or intoxicating liquors, drinks, or beverages in any house, building, or place where people resort, public or private, for lawful or unlawful purposes, and then provides for the seizure and confiscation of such liquors, drinks, or beverages without due process of law, as well as for the arrest of any and all persons suspected of violating such ordinance with or without warrant. There is a futile attempt to comply with the Constitution and statutes, as to seizures, searches, and arrests, by section 5 of the ordinance; but it is wholly insufficient.

Section 5 of our own Bill of Rights provides "that the people shall be secure in their persons, houses, papers and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation." The fourth amendment to the Constitution of the United States reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." These provisions have been construed as follows:

Search warrants are not allowed for the purpose of obtaining evidence, but they should be allowed only after the evidence has been obtained. There are exceptions to this rule, a few specific cases, where that which is the subject of the crime is supposed to be concealed, and the public has an interest in finding it and destroying it. Such are searches for stolen goods, or for smuggled goods in violation of revenue law, and implements for gaming, counterfeiting, lottery lickets, liquors made in violation of revenue law or sold in violation of prohibition law, obscene books and papers, explosives, injurious materials, etc. "It is oftentimes better that crimes should go unpunished than that citizens should be liable to have their premises invaded, their private books and papers exposed or destroyed at the hands of ignorant and suspicious men, under the direction of ministerial officers who may bring such persons as he pleases and who selects them on account of their physical

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

courage rather than their sensitive regard for the rights or feelings of other people." Cooley, Const. Lim. 372.

The common-law maxim, "Every man's house is his castle," is guaranteed by the constitutional provision of "the right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures," and that "no warrant shall issue except upon probable cause, supported by oath or affirmation, describing the place to be searched and the person or things to be seized." It was said by Lord Chatham that "the poorest man in his cottage may bid defiance to all the forces of the crown; it may be frall; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king may not enter, and all his forces dare not cross the threshold of the ruined tenement."

A search warrant must be issued only by a court of competent jurisdiction, it must be issued to the officer of the law and not to the aggrieved party, it can be granted only upon probable cause supported by oath or affirmation, and the warrant must describe the premises and the person or things to be taken. Bishop, Crim. Proc. 240-246; Tiedeman's Lim. Pol. Pow. 462. "To enter' a man's house by virtue of a warrant in order to procure evidence against him is worse than Spanish Inquisition, a law under which no Englishman would wish to live an hour," said Lord Camden. Search warrants may be issued for the release of females in houses of ill fame, for the recovery of children enticed away from their parents, and for the unlawful detention of any person. When it is to search for a person suffering from a dangerous or infectious disease, the warrant can be issued in aid of civil process.

Brickell, C. J., in the case of Cunningham v. Baker, 104 Ala. 169, 16 South. 70, 53 Am. St. Rep. 27, says: "As a general rule at common law an arrest could not be made without a warrant. If a felony was committed, or a breach of the peace threatened or committed, within the view of an officer authorized to arrest, it was his duty to arrest without warrant and carry the offender before a magistrate; or, if a felony had been committed, and there was probable cause to believe a particular person was the offender, he could be arrested without warrant. *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Burns v. Erben*, 40 N. Y. 463. The matter of arrests is now the subject of statutory regulation, largely affirmatory of the rules of the common law. Cr. Code, §§ 4260, 4274. The statutes, and the corresponding rules of the common law, have primary, if not exclusive, relation to the administration of the criminal laws of the state. If an arrest be legal, under what conditions and for what purposes there may be a search of the person arrested, and what things found upon his person may be taken into possession by the officer making the arrest, was the subject of

very full and deliberate examination and exposition in *Ex parte Hurn*, 92 Ala. 102, 9 South. 515, 13 L. R. A. 120, 25 Am. St. Rep. 23. A repetition of what is there said is not now necessary. A search of the person arrested is justifiable only as an incident to a lawful arrest. If the arrest be unlawful, the search is unlawful, and is aggravated by the illegality of the arrest."

And in the same book (page 171 of 104 Ala., page 71 of 16 South. [53 Am. St. Rep. 27]) he says: "An officer cannot justify an arrest upon the ground that he had reasonable cause to believe the person arrested had committed a felony, unless he has information of facts, derived from those reasonably presumed to know them, which, if submitted to a judge or magistrate having jurisdiction, would require the issue of a warrant of arrest, and the holding of the accused to await further examination. \* \* \* An illegal arrest cannot be justified by facts subsequently ascertained; nor can an arrest made for one purpose be justified for another."

It is needless for us to examine or search for the provisions of the statutes, or the charters of the city, to see if the city is authorized to pass this ordinance, for the reason that, if such provisions exist, they are void. We do not think that the Legislature has attempted to confer such authority upon the city of Bessemer; but, if it has done so, the attempt would be void. The purpose of the Constitution was to prohibit the Legislature from conferring authority upon municipalities inconsistent with the general laws of the state. *Holt v. Birmingham*, 111 Ala. 369, 19 South. 735; *Hewlett v. Camp*, 115 Ala. 499, 22 South. 137.

The power of municipal corporations to make by-laws is limited by the federal and state Constitutions, and the by-laws must be in harmony with the general laws of the state and with the charters of the respective corporations. If they conflict with either they are void. By-laws of municipal corporations must also be reasonable and they must be certain, not left to the discretion of the officers or court which imposes penalty for violating them after conviction, and they should be in harmony with the general principles of the common law and with the statutes of the state. *Mayor of Huntsville v. Phelps*, 27 Ala. 55, overruling *Mayor of Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441; *Ex parte Burnett*, 30 Ala. 461; *Craig v. Burnett*, 32 Ala. 728; *Cooley, Const. Lim.* 240-242; *Milliken v. City Council*, 54 Tex. 388, 38 Am. Rep. 629.

Municipal corporations existed at common law, and they had there but few powers beyond those of electing their officers and removing their persons. Such corporations might sue and be sued, might have a common seal, might hold property, personal and real, necessary for the corporate purposes, might convey the same, and might make by-laws

necessary and proper. But as a rule the powers of these corporations are now conferred expressly or impliedly (and with a very few exceptions, such as incidental powers) by and from their charters or the general law under which they exist, and such charters and laws are the measure of authority to be exercised by such corporations. The trend of the courts has been to confine these corporations to the exercise of those powers only which were so granted by the charter, or necessarily implied therefrom, or that were incidental to their existence. *Coolcy on Const. Lim.* 233, 234.

The general laws of this state as to spirituous, vinous, malt, and intoxicating liquors are now numerous, and may be said to be strict and stringent; but we have seen none, general or local, as strict, stringent, and drastic as this ordinance in question. The affidavit for the warrant of arrest in this case was void, and likewise was the provision of the ordinance authorizing it. They do not either comply with the state or the federal Constitution as to "probable cause, supported by oath or affirmation," nor with the general law of the state providing for affidavits to support arrests or prosecutions. *Code 1907, § 6703.*

"Good reason to believe" is not the equivalent of "probable cause for believing," as required by the statute. While this defect is probably amendable, it is insufficient to support a conviction, especially where objection was made on the trial as for this defect. *Butler v. State*, 130 Ala. 127, 30 South. 338; *Johnson v. State*, 82 Ala. 29, 2 South. 466; *Miles v. State*, 94 Ala. 106, 11 South. 403.

We do not mean to decide that this municipal corporation, if authorized by its charter or by statute so to do, cannot pass valid ordinances, like the one in question, to prevent violations or evasions of the prohibition laws of the state or of its own valid ordinances. The law is well settled that it may. But such ordinances must be kept within the bounds of the state and federal Constitutions and within the authority conferred upon the municipality by law. An ordinance, to be valid, must be authorized by some other law, and cannot be valid if in conflict with the Constitution and statutes of the state. It thus necessarily depends, for its validity, upon these other laws. Its own ipse dixit cannot alone make it law. Its validity is derivative, and not self-creative.

The judgment appealed from must be affirmed.

**Affirmed.**

**DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.**

**ANDERSON, J.** I concur in the conclusion in this case; but I do so solely upon the ground that the ordinance is too broad and

far-reaching, in that it makes it unlawful to have or store liquors, whether for unlawful purposes or not. I do not think that the Legislature could, under the Constitution, prohibit the full exercise of property rights, except when exercised for unlawful purposes. It is my opinion, however, that when liquors are kept or stored, either in a public or private place, for unlawful purposes, the Legislature has the right to prohibit same, and to authorize a search for and seizure of said liquors, upon proper affidavit that they are held or stored for illegal purposes. Every man's house is his castle, only so long as he uses it for lawful purposes; but, when he converts it into a den of lawlessness, then the right to search, upon proper affidavit, is not forbidden by the Constitution. *25 Am. & Eng. Ency. Law*, 151, and authorities cited in note 12.

**DOWDELL, C. J., and DENSON and McCLELLAN, JJ.,** concur in the affirmance of the judgment below upon the sole ground that the affidavit for the warrant was void, in that the basis for the affiant's belief was stated to be "good reason," rather than, and as was requisite, "probable cause," therefor. *Butler v. State*, 130 Ala. 127, 30 South. 338. They are of the opinion that, since the affidavit was void, it is entirely unnecessary to determine the validity vel non of the ordinance set forth in the record. However, the majority conclude that a decision of that inquiry is called for.

The CHIEF JUSTICE and Justices DENSON and McCLELLAN, after careful consideration, entertain the opinion that the ordinance is valid, and hence that the conclusion of the majority on that point is unsound. They therefore dissent, in that particular, from the opinion controlling the decision on this appeal.

# **ROMAN v. MORGAN.**

(Supreme Court of Alabama. June 8, 1909.

Rehearing Denied June 30, 1909.)

## **1. CORPORATIONS (§ 522\*)—DEFAULT JUDGMENT—RECORD.**

Under *Code 1907, § 5303*, providing that in suits against a corporation the summons may be executed by the delivery of the summons and complaint to the president, or other head thereof, etc., in order to sustain a default judgment against a corporation the record must show that the court ascertained by proof that the person served was the officer or agent of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2100; Dec. Dig. § 522.\*]

## **2. JUDGMENT (§ 495\*)—REGULARITY—PRESUMPTIONS—COLLATERAL ATTACK.**

The judgment of a domestic court having general and superior jurisdiction is always to be presumed regular and valid, and founded on jurisdiction duly acquired, until the contrary definitely appears; and such judgment is not open to collateral impeachment merely because the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

record fails to show the service of the process by which the court acquired jurisdiction of defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.\*]

**3. CORPORATIONS (§ 522\*)—DEFAULT JUDGMENTS—JURISDICTION—SERVICE OF PROCESS—PRESUMPTIONS.**

Under Code 1907, § 5303, providing that in suits against a corporation the summons may be executed by the delivery of the summons and complaint to the president or other head thereof, etc., where the sheriff's return on the subpoena was to the effect that he served a copy thereof on one P. as president of defendant corporation, and the decree recited that, "it being made to appear to the court that a summons requiring defendant corporation to appear, etc., was served upon it by the sheriff," the presumption was that the court had jurisdiction of the corporation by a proper service.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2100; Dec. Dig. § 522.\*]

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Action by S. Roman, trustee, against A. A. Morgan. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Brown & Kyle, for appellant. S. J. Griffin and E. W. Godbey, for appellee.

**SIMPSON, J.** This is a statutory action of ejectment, brought by the appellant against the appellee. The plaintiff traced title from the United States government to the "North Alabama Land & Immigration Company," a corporation, and offered, as a link in its title, a duly certified transcript of the record of the chancery court of Morgan County showing a decree against said corporation for the sale of the lands involved in this suit, with the report of sale, a conveyance by the register to the appellant, and the confirmation by the court, and in connection therewith offered the deed from the register conveying the lands in accordance with said decree. The record showed a decree pro confesso against said corporation, and a final decree. Objection was made to the introduction of the transcript, on the ground that the decree pro confesso was void. The objection was sustained, and the transcript excluded.

The ground of objection is that the transcript does not show that process was properly served on said corporation. The return of the sheriff on the subpoena is in these words, to wit: "Executed by handing to the defendants, J. C. Cheney, and also a copy to Ignatius Pollak, as president of the North Alabama Land & Immigration Company, a copy of the within summons." The decree pro confesso states: "In this cause, it being made to appear to the court that a summons, requiring the defendant the North Alabama Land & Immigration Company to appear and plead to or answer the bill of complaint in this cause within thirty days from the service of said summons upon it, was served up-

on it by the sheriff," etc. Our statute provides that, in suits against a corporation, "the summons may be executed by the delivery of the summons and complaint to the president, or other head thereof, secretary, cashier, station agent, or any other agent thereof." Code 1907, § 5303. Our court held, at an early day, on writ of error by the corporation, that the sheriff's return of service on W. G. H., cashier, etc., did not show that said party was cashier, as "the official duties of the sheriff did not require him to certify in his return who was the cashier," and that the identity of said cashier should "be ascertained, as other facts are, by proof." *Planters' & Merchants' Bank of Huntsville v. Walker, Minor*, 391.

This case has been followed by a long line of cases holding, on appeal, "that a judgment by default against a corporation cannot be sustained by the sheriff's official return, or even the clerk's statement," stating "that the person upon whom such process was served occupied such a relation to the defendant corporation as to bring the defendant into court," etc. *M. & C. R. R. Co. v. Whorley*, 74 Ala. 270, citing cases. These decisions require the record to show that the court ascertained by proof that the person served was the officer or agent of the corporation. *Oxanna Bldg. Ass'n v. Agee*, 99 Ala. 571, 13 South. 279, and cases cited; *Oxanna Bldg. Ass'n v. Agee*, 99 Ala. 591, 13 South. 280. This court later held that, where a judgment by default was rendered in a justice of the peace court without such proof, the circuit court on certiorari should vacate the judgment. *Hoffman, A. & Co. v. Ala. Distillery, etc., Co.*, 124 Ala. 543, 27 South. 485. The same point was decided on petition for a writ of certiorari to this court. *Ex parte Nat. Lumber Mfg. Co.*, 146 Ala. 600, 41 South. 10. In the case of *Independent Publishing Co. v. Am. Press Ass'n*, 102 Ala. 475, 493, 495, 497, 15 South. 947, 954, 955, which was an appeal from a judgment of the circuit court dismissing a writ of certiorari to a justice of peace court, this court discussed the matter at considerable length, referring to previous decisions, and by a divided court held that, so long as the record did not show that there was any proof as to the character of the officer upon whom the service was had, the court was without jurisdiction, and the judgment should be quashed. The majority opinion argues to the point that, so long as the record stood that way, the judgment was void, but gives as a reason why certiorari was the proper remedy in that case that the defendant should not be put to his appeal from the judgment of the justice, thereby waiving the matter of jurisdiction, and in concluding says: "There was no demurrer or objection for insufficiency, and no motion to dismiss or quash the writ as having been improvidently granted. No

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such question was before the court." Justice Head, who concurred with the Chief Justice in dissenting, says, among other things: "I understand the writ of certiorari is grantable as well when the court proceeded irregularly to judgment as when it is without jurisdiction. The case of Boyett et al. v. Frankfort Chair Co., 152 Ala. 317, 44 South. 546, was an appeal from a final decree, based on a decree pro confesso rendered without proof that the person on whom service was had was the president of the corporation, and the decree pro confesso recited: "And it being made known to the register that the party upon whom service was made for the defendant corporation was such agent as shown by the sheriff's return at the time of such service." The sheriff's return was: "Executed by handing the defendant W. A. W., as president of said corporation." This court held that the judgment, being based on a void decree pro confesso, was error; the court saying: "There is a wide difference between having a thing made known and having legal proof made of the thing. The character of the person served might be made known to the register by the unsworn statement of some person."

It will be noted that all of the cases cited were on direct appeal, or certiorari, by the parties to the suit; and it may be well, at this point to advert to some of the recognized principles of the law with regard to collateral attacks on judgments of courts of record. It is a maxim: "Omnia præsumuntur rite et solemniter esse acta." "The judgment of a domestic court, having general and superior jurisdiction, is always to be presumed regular and valid, and founded upon jurisdiction properly and duly acquired, until the contrary is definitely made to appear in some permissible manner." "A judgment is not open to collateral impeachment merely because the record fails to show the service of the process by which the court acquired jurisdiction of the defendant." "Unless the record itself shows that the court never acquired jurisdiction of him, it will be conclusively presumed that the jurisdiction did attach." "If the record \* \* \* recited that jurisdiction did in fact attach, its averments are final and conclusive in every collateral proceeding." Where the record recited that all of the parties had been duly summoned, although the name of one was omitted in the summons served by publication, "yet the judgment was sustained; the court indulging the presumption that there was adequate proof of service on that defendant, although it did not appear in the record." While "the recital of service may be contradicted by producing the original summons and return, \* \* \* the contradiction must be explicit and irreconcilable." 1 Black on Judgments (2d Ed.) § 273.

An exception has been made where the service is "constructive," as by publication

against a nonresident, though the same author states that the later decisions are that "such a rule is arbitrary and illogical." It is to these cases of constructive service, and cases where a special jurisdiction is conferred upon a court of general jurisdiction, thus rendering it pro hac vice a court of limited jurisdiction, that the cases cited in appellee's brief refer. The principal case of Galpin v. Page, 18 Wall. 350, 366, 21 L. Ed. 959, was a case involving constructive service on a nonresident infant. The remark quoted from that case merely shows that no presumption will be indulged to contradict the averments in the record as to service of process. The case of Settlementier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110, involved a service by delivering a copy to a member of the family when the defendant could not be found, and the gist of the decision is that it was the duty of the sheriff, who made the service, to certify that fact on his return. It was not a matter to be ascertained by the court, and consequently the general statement in the judgment did not cure it. The case of Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 23 L. Ed. 298, was also a case where constructive service on a nonresident was void for noncompliance with the requirements of the statute, and the court held that the mere recital of due service did not cure it. The case of Barber v. Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836, was also a case where the requirements of the statute in regard to constructive service on a nonresident were not complied with, and the record showed distinctly that the statute had not been complied with, and the mere recital of the summons having been duly served could not cure it. That was not a matter to be ascertained by the court, but a matter to be shown by the filing of the affidavit. The case of Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457, involved special statutory provisions requiring service in certain ways in order to sell lands of a decedent. The record showed noncompliance with the statute, and there was no recital in the record to show any service. In the case of Mickel v. Hicks, 19 Kan. 578, 27 Am. Rep. 161, the statute required, in proceedings to sell the real estate of a decedent, that the court should make an order for the persons interested to appear at the next term of the court, and that there should be publication for 6 weeks. The court made an order for them to appear "at this term," and set a day for the hearing within less than 60 days. Notwithstanding this glaring and positive violation of the statute, Justice Brewer (now of the United States Supreme Court) said: "The writer of this opinion is inclined to regard with favor the first of the above line of arguments and to consider the order of sale as beyond successful attack"—while the majority of the court held that the recital in the record,

"after due" notice, did not override the positive statement in the record of what the notice was.

In the case now under consideration it will be noticed that it does not involve a question of constructive service on a nonresident, nor of special statutory proceedings. On the contrary, it is a case pertaining to the general jurisdiction of the court. Nor does it involve any contradiction of any part of the record or of the sheriff's return. The sheriff made all the return which he was required to make. It was not his duty to state that the person served was an officer of the corporation, and if he had so stated it would not have had any probative force. That was a matter to be ascertained by the court, and the decree recites that "it being made to appear to the court that a summons requiring the defendant the North Alabama Land & Immigration Company \* \* \* was served upon it." As stated by counsel for the appellee, service upon it could not be made, except by service upon its officer. Consequently this expression means service upon a proper officer of the corporation. "Although the word 'appear' has reference, in one sense, to that which is seen by the eye, we have no doubt that it was intended to be used in its broader sense, and signifying that which is obvious, or known, or clear, or made clear, by evidence or reasoning, and that it comprehends all the cases in which it shall be satisfactorily known or shown to the court that," etc. "The word 'appear,' or 'appearing,' is one of frequent use in judicial proceedings (and is sometimes used in statutes referring to them) as meaning 'clear to the comprehension,' when applied to matters of opinion or reasoning, and 'satisfactorily or legally known, or made known,' when used in reference to facts or evidence." *Gorham v. Luckett*, 6 B. Mon. (Ky.) 165. We hold that the presumption of law is that the court had jurisdiction of said corporation by a proper service, and that the transcript and deed should have been admitted. *Hunt's Heirs v. Ellison's Heirs*, 32 Ala. 173, 209, 210, 215.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

LOUISVILLE & N. R. CO. v. DAVANER.  
(Supreme Court of Alabama. May 19, 1909.  
Rehearing Denied June 30, 1909.)

1. RAILROADS (§ 350\*)—ACCIDENTS AT CROSSINGS—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

Where a train which had just cleared a crossing by 20 or 30 feet was reversed, and could have been at a stand when plaintiff started

over the crossing, and then started back and struck the rear of his wagon, whether the train had started back when the crossing was attempted, and plaintiff knew it, *held* for the jury.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 350.\*]

2. RAILROADS (§ 350\*)—ACCIDENTS AT CROSSINGS—QUESTIONS FOR JURY—NEGLIGENCE.

Whether it was wanton misconduct to reverse a train after clearing a populous crossing and immediately recross it without giving any warning or signal and without first ascertaining that the crossing was clear, or that a flagman was there to warn persons, *held* for the jury.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 350.\*]

3. RAILROADS (§ 310\*)—ACCIDENTS AT CROSSING—DUTY OF ENGINEER.

The engineer of a switch engine must be presumed to know the surroundings and conditions at a public crossing.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 310.\*]

4. RAILROADS (§ 310\*)—ACCIDENTS AT CROSSING—DUTY OF ENGINEER.

It is the duty of an engineer to know that the way is clear at a populous crossing.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 310.\*]

5. RAILROADS (§ 312\*)—ACCIDENTS AT CROSSINGS—DUTY OF ENGINEER.

It is the duty of an engineer to ring the bell or sound the whistle at short intervals while passing through a town.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 988-995; Dec. Dig. § 312.\*]

6. EVIDENCE (§ 127\*)—ADMISSIBILITY—COMPLAINT OF SUFFERING.

In a personal injury action, there was no error in permitting evidence that plaintiff complained the next day of his injuries, and said that his limbs and back were hurting.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 377-382; Dec. Dig. § 127.\*]

7. TRIAL (§ 85\*)—RECEPTION OF EVIDENCE—EVIDENCE ADMISSIBLE IN PART.

Though a part of a witness' answer may be improper, it is not error to refuse to exclude the entire answer where the other part is proper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 223-225; Dec. Dig. § 85.\*]

8. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Though, in an action for injuries at a railroad crossing, it may not have been material or proper to show the custom as to driving over the crossing, yet the evidence was of no detriment to defendant where it showed that people drove rapidly, and the jury could have inferred that, had plaintiff complied with the custom, he would have cleared the track.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1050.\*]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by John Davaner against the Louisville & Nashville Railroad Company for injuries sustained in a crossing accident. Judgment for plaintiff, and defendant appeals. Affirmed.

The following charge is given for the plaintiff: "I charge you that at such a crossing as where the accident happened in this case, as shown by the evidence, it is the duty of an engineer in charge of an engine



on a railroad to know the way is clear before crossing; and it is the duty of engineers or other persons in charge of trains, to ring the bell or blow the whistle of engines at short intervals while passing through the limits of the town."

The following charges were refused to the defendant: (1) General affirmative charge. (2) Affirmative charge as to the first count. (3) Affirmative charge as to the second count.

John C. Eayter, for appellant. Callahan & Harris, for appellee.

ANDERSON, J. The appellant's counsel in argument concedes that there was proof in support of the simple negligence count of the complaint, but contends that the defendant was entitled to the general charge as to said count because the pleas of contributory negligence were proven. These pleas set up, as proximate contributory negligence, a failure to stop and to look and listen before attempting to cross the track, and an attempt to cross after the train had started back, and after he saw it moving back. There was proof that plaintiff had already stopped near the track, and that, when he started across, the train was either going forward or was at a standstill, and that it proceeded to back after he had started to cross. It was therefore a question for the jury as to whether or not he knew the train was backing when he went upon the crossing, and whether or not a failure to stop and look and listen was the proximate cause of his injury. *Central of G. Ry. Co. v. Hyatt*, 151 Ala. 355, 43 South. 867. The jury could have found from some of the evidence that the train had not started back until the plaintiff's mule had reached the crossing. The train had just cleared the crossing by 20 or 30 feet, was reversed and started back, and could have been at a stand when the plaintiff started over the crossing, and then started back and struck the rear of the wagon before it had cleared the track. Of course, the defendant's evidence showed that the train was moving backwards when the crossing was attempted, but there was some evidence to the contrary, and it was a question for the jury as to whether or not the plaintiff was guilty of proximate contributory negligence as set up in defendant's special pleas. There was proof that the crossing was a very populous one, and it was for the jury to determine from the evidence whether or not the act of the engineer in reversing the engine and immediately recrossing the said crossing, with the rear end of his train, which had just been cleared by the said train's going in the opposite direction, without giving any warning or signal and without first ascertaining that the crossing was clear or that a flagman was there to warn persons attempting to cross, amounted to wanton misconduct as charged in the second count. The

engineer was in charge of the switching train at this particular point, and it must be presumed that he was conscious of the surroundings and conditions at the crossing. *C. of G. Ry. Co. v. Partridge*, 136 Ala. 587, 34 South. 927. It is true the train may not have been going back at a great rate of speed and that to have gone over the crossing under different conditions and without warning and at other times might not have amounted to wantonness; but it was a question for the jury as to whether or not the backing of this train under the peculiar circumstances then existing amounted to wanton misconduct. The train was going forward, and just after clearing the crossing suddenly reversed its course and came back and recrossed an opening just made, which said opening created an implied invitation to people who may have been waiting to cross.

The trial court did not err in refusing charges 1, 2, and 3, requested by the defendant, nor was there error in giving charge 1 requested by the plaintiff.

There was no error in permitting the witness Ashford to testify that plaintiff was complaining the next day of his injuries and said that his limbs and back were hurting. *Postal, etc., Co. v. Jones*, 133 Ala. 228, 32 South. 500. If what the witness said as to what "seemed" to him as the plaintiff's "laying more stress on his back" was improper, it should have been separated from the other part of the answer; and the trial court will not be put in error for refusing to exclude the entire answer. It may not have been material or proper to show the custom as to how the people drive teams over this crossing, but the evidence was of no detriment to the defendant. The proof shows that they drive rapidly, and the jury could have inferred that, if the plaintiff had complied with the custom, he would have cleared the defendant's track before the train struck his wagon.

The judgment of the county court is affirmed.

Affirmed.

SIMPSON, DENSON, McCLELLAN, MAYFIELD, and SAYRE, JJ., concur.

#### MADDOX v. DUNKLIN.

(Supreme Court of Alabama. May 13, 1909.  
On Rehearing, June 30, 1909.)

#### 1. APPEAL AND ERROR (§ 907\*)—PRESUMPTIONS—EVIDENCE—SCOPE OF BILL OF EXCEPTIONS.

Unless the bill of exceptions shows that it contains all of the evidence, the court on appeal will presume that there was evidence justifying the court's charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. CHATTEL MORTGAGES (§ 177\*)—CONVERSION—DAMAGES.

In an action by the mortgagee of chattels for conversion, if the value of the property converted exceeds the mortgage debt, with interest and reasonable attorney's fees for collection, damages should be assessed in the amount of the mortgage debt, with interest from the maturity of the debt and reasonable attorney's fees for collection.

[Ed. Note.—For other case, see *Chattel Mortgages*, Cent. Dig. §§ 353-356; Dec. Dig. § 177.\*]

## 3. CHATTEL MORTGAGES (§ 177\*)—CONVERSION—EVIDENCE.

In an action by a chattel mortgagee for conversion of the property, there was no error in admitting the original mortgages in evidence, where it appeared that the mortgage under which plaintiff claimed was given in renewal.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 177.\*]

### On Rehearing.

## 4. APPEAL AND ERROR (§ 237\*)—OBJECTIONS IN LOWER COURT—EVIDENCE.

Where evidence was admitted on counsel's statement that its materiality would thereafter be shown, and this was not done, and no motion was made in the lower court to exclude such evidence, the error cannot be reviewed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 237; \* *Trial*, Cent. Dig. § 239.]

## 5. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for conversion of mortgaged property, the admission in evidence of mortgages other than the one under which plaintiff claimed did not prejudice defendant, where no judgment was sought or obtained on account of any property not included in plaintiff's mortgage.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1050.\*]

## 6. APPEAL AND ERROR (§ 843\*)—SCOPE OF REVIEW—MATTERS NECESSARY TO DECISION.

On appeal the court discusses only those questions that are necessary to a decision of the case, and does not attempt to further lay down rules for the bench and bar of the state.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.\*]

Appeal from Circuit Court, St. Clair County; A. H. Alston, Judge.

Action by S. J. Dunklin against W. N. Maddox, individually and as surviving partner of Wait & Maddox. From a judgment for plaintiff, defendant appeals. Affirmed.

The evidence tended to show that the mules, together with others, had been mortgaged by W. M. Cochran and by Cochran & Webb to J. C. Street. The mortgagors resided in St. Clair county, and the mortgaged property was kept there, and there the mortgages were duly recorded, and were later transferred by indorsement and also by separate paper writing by Street to the plaintiff. The mortgage becoming due and not being paid, Cochran executed a renewal mortgage note for the amount due Street, but executed it to plaintiff. This mortgage was executed February 12, 1901, and recorded the same day. Cochran conveyed the two mules to

Wait & Maddox to secure advances for the year 1901, and the mortgage was dated January 16, 1901, and was recorded February 1, 1901.

The following charge was given for the plaintiff: "(4) If the jury find the issues in favor of the plaintiff, and find the value of the property converted by the plaintiff to exceed the mortgage debt, with interest, and reasonable attorney's fees for the collection of the debt, then the jury should assess the damages at the amount of the mortgaged debt (not including the attorney's fee of \$12.50 paid to R. Y. Street), with interest from the maturity of the debt to the present, and reasonable attorney's fees for the collection of the debt."

M. M. Smith and Victor H. Smith, for appellant. Knox, Acker, Dixon & Blackmon, for appellee.

SIMPSON, J. This is an action by the appellee against the appellant for the conversion of two mules. The court, on the written request of the plaintiff, gave the general affirmative charge in favor of said plaintiff. The bill of exceptions does not state that it contains all of the evidence, and there is internal evidence that it does not contain all. This court has frequently held that, unless the bill of exceptions shows that it contains all of the evidence, the court will presume that there was evidence justifying the trial court in giving the general charge. *Wadsworth v. Williams*, 101 Ala. 264, 13 South. 755; *Evansville, etc., Co. v. Slater*, 101 Ala. 245, 15 South. 241; *Western Ry. v. Williamson*, 114 Ala. 145, 21 South. 827.

There was no error in the giving of charge No. 4, as to the measure of damages. *McLester v. Somerville & McEachin*, 54 Ala. 670.

There was no error in the admission of the mortgages to Street, as the evidence tended to show that the mortgage under which the plaintiff claimed was given in renewal of them; nor was there any other error in the admission or the exclusion of evidence.

The judgment of the court is affirmed.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

### On Rehearing.

SIMPSON, J. The defendant objected to the introduction of two of the mortgages, because the description of the mules in the same differs from the description in the complaint of the mules claimed to have been converted. Plaintiff's counsel stated to the court that evidence would be offered connecting each of the mortgage notes with the mortgage to the plaintiff, and the court admitted the mortgages. If, after the evidence was taken, the defendant thought that it had not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sufficiently connected the transactions to make the mortgages admissible, he should have moved then to exclude the mortgages, in order to put the court in error. In addition, it may be said that, as no judgment was sought or obtained on account of any mules other than those described in the complaint, it cannot be seen how the introduction of the mortgages could or did in any manner prejudice the case of the defendant.

As to not discussing all of the points suggested in the brief of appellant, this court discusses only those that are necessary to a decision of the case, and does not attempt further to lay down a "rule of guidance or precedent to the bench and bar of the state." "In the judicial records of the king's courts, the reasons or causes of the judgment," says Lord Coke, "are not expressed; for wise and learned men do, before they judge, labor to reach to the depths of all the reasons of the case in question, but, in their judgments, express not any; and in truth, if judges should set down the reasons and causes of their judgments, within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini Libri*, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence; and this is worthy for learned and grave men to imitate." Coke's Reports, part 3, pref. 5. "It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries." *Vaughn v. Harp*, 49 Ark. 160, 163, 4 S. W. 751, 753.

#### ALLEN v. STATE.

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

##### 1. CRIMINAL LAW (§ 265\*)—TIME FOR PLEA—PENDING MOTION TO QUASH INDICTMENT.

A motion to quash an indictment should be disposed of before requiring defendant to plead to the merits.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 265.\*]

##### 2. INDICTMENT AND INFORMATION (§ 140\*)—MOTION TO QUASH—HEARING—EVIDENCE.

Where a motion was made to quash an indictment for seduction on the ground that there was no corroborative evidence before the grand jury, and issue was joined thereon, defendant was entitled to prove by the grand jurors that there was no such evidence, though the court could not inquire into the weight or sufficiency of such evidence, if there was any.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 140.\*]

##### 3. INDICTMENT AND INFORMATION (§ 140\*)—MOTION TO QUASH—HEARING—EVIDENCE.

The mere fact that other witnesses than prosecutrix were examined did not prove that the testimony given by them was corroborative.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 140.\*]

##### 4. SEDUCTION (§ 46\*)—EVIDENCE—CORROBORATION—SUFFICIENCY.

Under Code 1907, § 7297, providing that no indictment or conviction shall be had on the uncorroborated testimony of prosecutrix, the corroboratory evidence is sufficient if it extends to a material fact and satisfies the jury that the woman is worthy of credit.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

##### 5. SEDUCTION (§ 46\*)—CORROBORATIVE EVIDENCE—QUESTION FOR JURY.

The weight or sufficiency of corroborative evidence is a question for the jury.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

Appeal from City Court of Talladega: G. K. Miller, Judge.

William H. Allen was convicted of seduction, and he appeals. Reversed and remanded.

Whitson & Harrison, for appellant. Alexander M. Garber, Atty. Gen., Thomas W. Martin, Asst. Atty. Gen., Marion H. Sims, and Knox, Acker, Dixon & Blackmon, for the State.

MAYFIELD, J. The defendant was indicted, tried, convicted, and sentenced to the penitentiary for three years for the offense of seduction. The defendant, before pleading not guilty, moved the court to quash the indictment upon various grounds contained in his motion. The state filed what is called an answer to this motion, though in fact it is not such; but, if the matter set up therein were availing at all, it would be as a demurrer to motion. The defendant moved to strike the answer, and each ground thereof, and after the motion was overruled demurred thereto, and the demurrer was also overruled. The defendant then introduced one or more of the grand jurors as witnesses, whom the court allowed to testify that other witnesses were examined by the grand jury; but the court declined to allow the defendant to prove by them any facts to which such witnesses before the grand jury had testified. To this the defendant excepted, and proposed to prove by these grand jurors that none of the other witnesses testified to any facts in corroboration of the evidence of the woman upon whom the seduction is charged to have been practiced. The court declined to allow the defendant to attempt to prove such facts. Whether the motion was sufficient, if proven, to require the indictment to be quashed, and whether it was interposed within time, are questions not before us for review. The court seems to have treated it as sufficient, and to have allowed it to be filed, but required defendant to announce ready for trial or to plead before passing upon the motion to quash. This was irregular. The court should have first disposed of the motion before requiring the defendant to plead to the merits. *Crawford's Case*, 112 Ala. 1, 21 South. 214.

The answer of the state to the motion to quash was wholly insufficient, and defendant's demurrer thereto should have been sustained. Treating the motion and the answer as sufficient—as the court evidently did—the defendant should have been allowed to make the proof offered. It tended to prove the averments of the motion and the issues raised thereby. Issue having been joined upon the motion and the answer, either party was entitled to introduce proof in support of or against. No matter if the issues were immaterial, the trial being had thereon, the defendant was entitled to prove or disprove them if he could, and could, under this particular statute and the issues in this case, make the proof by the grand jurors, who heard all the evidence. While it would not be proper to prove, or to attempt to prove, by the grand jurors or other witnesses, the weight, extent, or sufficiency of the corroborative evidence, it was certainly competent to prove that there was none, or that there was some. If there was no corroborative evidence the indictment should have been quashed; if there was any, it should not. The court could not and should not have inquired or attempted to inquire into the weight or sufficiency of such evidence. The mere fact that other witnesses than the prosecutrix were examined did not prove that the testimony given by them did or did not corroborate that of the prosecutrix. Their testimony may have contradicted hers, or have been as to entirely different or immaterial matters. It seems to be the practice (or, at least, it was approved and allowed in *Hart's Case*, 117 Ala. 183, 23 South. 43) to allow the grand jurors to testify as to what the witnesses before them testified touching the matter upon which the indictment was found.

It is evident that the trial court followed the rule and practice announced by this court in *Sparrenberger's Case*, 53 Ala. 481, 25 Am. Rep. 643, as to the extent to which inquiry can be had as to the evidence before the grand jury and upon which they passed or found an indictment. It is there said that when it appears that the witnesses were examined by the grand jury, or the jury had before them legal documentary evidence, no inquiry into the sufficiency of the evidence is indulged. This was said in reference to the common-law rule and the statute (Rev. Code 1867, § 4103, now section 7297, Code 1907). The section of the Code applicable to this case is 7776, which, in addition to what is required by section 7297, requires that "no indictment or conviction shall be had under this section on the uncorroborated testimony of the woman upon whom the seduction is charged." Therefore, in a case of seduction, in order to support an indictment, it must not only appear that "witnesses were before the grand jury," or that the grand jury had before them "legal documentary evidence," but it must also appear (if the issue is properly

raised) that the indictment was not had on the uncorroborated testimony of the prosecutrix. The provision of our statute as to the necessity and sufficiency of evidence, corroborative of that of the prosecutrix, to support the indictment or a conviction thereunder, has been construed to be sufficient if "the corroboration is of some matter material to the guilt of the accused, that such matter must not be in its nature formal, indefinite, or harmless, and that its effect shall be to convince the jury that the corroborated witness has sworn truly"; that it was unnecessary that the corroborating evidence should be as to all the material elements of the offense, or that it should tend to convict the defendant of the commission of the offense, as is required in the case of convictions of felonies on the testimony of accomplices.

The difference between these two statutes is pointed out, and the distinction made, in *Cunningham's Case*, 73 Ala. 56, Chief Justice Brickell, in *Wilson's Case*, 73 Ala. 534, declared a different rule, and the one that seems to have been adopted by most of the courts, in construing statutes of seduction similar to this one, and the one the textbooks seem to have preferred, if not adopted or adhered to; but in that case he yielded his opinion to that of the majority, and adopted the rule announced by Justice Stone in *Cunningham's Case*, 73 Ala. 51. The writer is much inclined to the rule announced by Chief Justice Brickell; but the other has become the settled rule of law in this state, and it is important that the law be certain, as well as that it be right. The two rules are thus stated by Brickell, C. J., in *Wilson's Case*, 73 Ala. 527: "Other courts, and the larger in number, require that the confirmatory or corroboratory evidence shall extend to every material fact which is a necessary element of the offense—the promise to marry, or the art of deception practiced to accomplish the illicit intercourse, and that the intercourse was the result of such promise, or of such art or deception. *State v. Timmens*, 4 Minn. 325 (Gil. 241); *Andre v. State*, 5 Iowa, 389, 68 Am. Dec. 708; *State v. Painter*, 50 Iowa, 317; *Zabriskie v. State*, 43 N. J. Law, 640, 39 Am. Rep. 610; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177. This, I am of opinion, is the proper construction of the statute before us. It means that there must be, independent of the evidence of the woman, proof of such facts and circumstances as tend to show the commission of the offense. Less will not meet the words or spirit of the statute. The confirmatory evidence may not be direct and positive. It may be circumstantial, consisting of such facts as usually attend upon or are the companions of the main facts to be proved, and which strengthen the evidence of the woman. And these circumstances must tend to connect the defendant with the commission of the of-

fense. They must point and single him out from other men. Mere acquaintance, and mere opportunity for sexual intercourse, do not furnish corroborating evidence of seduction; for sexual intercourse is one only of the elements of the offense. The evidence must go further, and must tend reasonably to prove, not only the sexual intercourse, but that it was accomplished by the use of some of the means specified in the statute. And if, as in the present case, a promise of marriage is relied upon as the moving cause for the criminal connection, and in corroboration of the evidence of the woman it is sought to deduce such promise from circumstances, the circumstances ought to be such as usually accompany an engagement of marriage, not attentions which are consistent only with the pursuit of lust. *State v. Painter*, 50 Iowa, 317; *State v. Araah*, 55 Iowa, 258, 7 N. W. 601; *Rice v. Commonwealth*, 100 Pa. 28. A majority of the court do not, however, concur in this view. They adhere to the rule laid down in *Cunningham v. State* (at present term) 73 Ala. 51, and it must be regarded as settled that the corroboratory evidence is sufficient if it extends to a material fact and satisfies the jury the woman is worthy of credit. As that case has passed beyond the control of the court, I am not adverse to this conclusion."

The other questions may not arise on another trial, and will not be here considered. The trial court should have allowed proof, on the hearing of the motion to quash, to show that there was or was not corroborative evidence of the testimony of the prosecutrix. The weight, sufficiency, and extent thereof are exclusively questions for the jury, and not for the court on the hearing of this motion.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### PANNELL v. STATE.

(Supreme Court of Alabama. June 10, 1909.  
Rehearing Denied June 30, 1909.)

#### SEDUCTION (§ 46\*)—CORROBORATIVE EVIDENCE—SUFFICIENCY.

The corroboration of the prosecutrix need not be as to every material fact, but is sufficient if it extends to a material fact and satisfies the jury that the woman is worthy of credit.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

Appeal from Circuit Court, Blount County; A. H. Alston, Judge.

James W. B. Pannell was convicted of seduction, and he appeals. Affirmed.

Ward & Weaver, for appellant. Alexander M. Garber, Atty. Gen., and James A. Embry, Sol., for the State.

MAYFIELD, J. The defendant was convicted of seduction. There was abundant evidence to support the verdict of guilty; hence the court did not err in declining to exclude the evidence on defendant's motion.

The evidence of the woman alleged to have been seduced, if true, made out a prima facie case of guilt under the indictment as charged. The father of the girl testified to a number of facts and circumstances which corroborated her. The child, the alleged offspring of the illicit intercourse, was present in court at the trial, and was so identified by its mother; and proof of it was made to the jury. There was also evidence showing, or tending to show, flight by defendant. The defendant introduced no proof, except as to his good character.

The evidence of the prosecutrix was sufficiently corroborated to support a conviction under the law as often decided by this court, which is to the effect that the corroboration of the prosecutrix need not be as to every material fact, but is sufficient if it extends to a material fact, and satisfies the jury that the woman is worthy of credit. *Cunningham's Case*, 73 Ala. 51; *Wilson's Case*, 73 Ala. 534; *Suther's Case*, 118 Ala. 88, 24 South. 48; *Allen's Case*, 50 South. 279.

Each of the charges requested by the defendant was properly refused. Some of them are confused and misleading, some are argumentative, some abstract, while others give undue prominence to a part only of the evidence. It is evident that in the copying or setting out of these charges several clerical errors were made, and some of the charges are thereby rendered unintelligible.

It appears from the record that charges Nos. 4 and 5 were asked and refused in bulk. Moreover, charge 4 was abstract, for that there was no evidence showing that the woman seduced was named Jane.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### LACEY et al. v. COWAN.

(Supreme Court of Alabama. June 10, 1909.)

#### 1. PARTNERSHIP (§ 186\*)—INDIVIDUAL CREDITORS—RIGHT TO PARTNER'S FUNDS.

The creditors of one partner are not entitled to exhaust the funds of the other partner for the payment of their claims.

[Ed. Note.—For other cases, see *Partnership*, Dec. Dig. § 186.\*]

**2. BANKRUPTCY (§ 51\*)—PARTNERSHIP.**

The bankrupt court, in proceedings to declare one partner a bankrupt, cannot declare the partnership or the other partner a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 51.\*]

**3. BANKRUPTCY (§ 42\*)—PARTNERSHIP.**

A partnership is a legal entity, which may be adjudged a bankrupt in either voluntary or involuntary proceedings, irrespective of any adjudication as to the individual members of the firm.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 42.\*]

**4. BANKRUPTCY (§ 149\*) — PROCEEDINGS AGAINST PARTNER — ADMINISTRATION OF PARTNERSHIP PROPERTY.**

Where one or more partners, not including all, are adjudged bankrupt, the partnership property cannot be administered in the proceeding, unless by consent of the other partners.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 149.\*]

**5. BANKRUPTCY (§ 149\*)—PARTNERSHIP PROPERTY.**

The proceeds of the property of a bankrupt partnership should be appropriated to the payment of the partnership debts, and if the partners are adjudged bankrupts the proceeds of the individual estate of each should be appropriated first to the payment of their own individual debts, and if any surplus remains in the partnership case it may be appropriated to the payment of the individual's debts, and in the other case the surplus may be appropriated to the payment of the partnership debts.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 149.\*]

**6. PARTNERSHIP (§ 178\*)—RIGHTS OF CREDITORS—ASSETS OF PARTNERSHIP.**

The assets of the partnership must be first applied to the payment of the partnership creditors, before anything can be applied to the claims of the individual partners or their creditors.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 312; Dec. Dig. § 178.\*]

**7. BANKRUPTCY (§ 149\*)—BANKRUPT PARTNER—ASSETS OF FIRM.**

The trustee in bankruptcy of the estate of one partner cannot maintain an action to subject the funds of the partnership, so long as the partnership remains unsettled.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 149.\*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Action by A. S. Cowan, as trustee in bankruptcy of Steve Lacey, against Ollie V. Lacey and others. From a judgment for plaintiff, certain defendants appeal. Reversed and rendered.

Pinkney Scott, for appellants. Trotter & Odell and Thompson & Thompson, for appellee.

**MAYFIELD, J.** This was a bill filed by the appellee, as trustee in bankruptcy of the estate of Steve Lacey, which was filed against the appellant, together with Robert Lacey, son of appellant bankrupt, and George Massey, son-in-law of appellant bankrupt, and the Bessemer Trust & Banking Company. Complainant averred that Steve Lacey was adjudicated a bankrupt on the 12th day of

February, 1907; that appellee was appointed a trustee of his estate; that on and before June 1, 1906, bankrupt Steve Lacey and George Massey were engaged in the mercantile business, as partners, under the firm name of Lacey & Massey; that the partnership incurred a great number of debts, and that on the 1st day of June, 1906, the partnership sold their business to one W. S. Harrison for \$1,200 cash; that this was all of the partnership property; that the proceeds of the sale were turned over by the partners to appellant Ollie V. Lacey, wife and mother-in-law, respectively, of the partners, leaving the debts of the firm unpaid; that both of the partners were insolvent, and that the creditors of the partnership, at the time the sale took place, were also creditors, which Lacey, in his petition of bankruptcy, listed as his individual creditors; that the money turned over by the partners to Mrs. Lacey was deposited by her in the Bessemer Trust & Banking Company; and that this was done by the partnership with the intent to defraud the creditors. The bill also alleged that certain lots were sold by Steve Lacey and his wife to their son, Robert Lacey, and that these sales were made with the intent to defraud the creditors of Lacey. The respondent moved to dismiss the bill for want of equity, and demurred to it, which motion and demurrer were overruled. Whereupon the respondent filed answers specifically denying the facts necessary to give equity to the bill.

The case was submitted for hearing upon the pleadings and proof, and upon hearing the chancellor dismissed the bill as to all the respondents save Mrs. Lacey and the bank, and as to all the property except that alleged to have been the proceeds of the sale of the partnership business and delivered to Mrs. Lacey by the owners, and by her deposited with the bank. As to this sale, and the payment of the money to Mrs. Lacey, and the deposit of it by her with the bank, it was decreed by the chancellor to have been fraudulent as to the creditors, and made with the purpose of defrauding the creditors, of Lacey & Massey, of which firm Lacey was a partner, who were listed in the petition in bankruptcy filed by the respondent Steve Lacey; that the trustee have and recover of the respondent Ollie V. Lacey the sum of \$1,000, for which execution might issue; and that for the payment of that sum the Bessemer Trust & Banking Company should be liable in the event that Ollie V. Lacey failed to pay same within 30 days after the enrollment of the decree. From this decree Mrs. Ollie V. Lacey and the bank appeal, here separately assigning errors.

We are of the opinion that in this decree the chancellor was in error. The bill was clearly without equity, in so far as it sought to reach the funds of the partnership, or the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

proceeds of the fraudulent sale by the partnership, by the trustee in bankruptcy of one of the partners only; and as the bill was dismissed as to the sale of the lots which were owned by the bankrupt alone, and relief was granted only as to the proceeds of the sale of the partnership property, it cannot be supported for any purpose. Partnerships, in courts of law or in courts of equity, are entities separate and distinct from that of the individuals who compose it, as much as the individuals themselves are separate and distinct persons. While it is true that the creditors of the partnership are, in a sense and for some purposes, likewise creditors of each of the partners, and while the proceeds of the partnership may, under certain conditions and for certain purposes, be subjected to the payment of debts due the creditors of the individual partners, yet, it is unheard of to allow one partner, or the creditors of one partner, to exhaust the funds of the partnership to the payment of the creditors of such individual partner. Neither the partner nor his creditors, individually or collectively, have such right, and certainly the trustee in bankruptcy can have no greater right than had the bankrupt or his creditors combined.

It is true—as argued by counsel for appellee, and as alleged in the bill and recited in the decree—that the creditors of the partnership were the creditors of the bankrupt, and that they were listed in the petition of the bankrupt filed by him in the bankruptcy court, and that, as a matter of law, the creditors of the partnership were also the creditors of Lacey; but it does not follow that the creditors he returned as his creditors are all the creditors of the partnership. Neither he nor the bankrupt court could bind the other partner or the partnership creditors by any of the recitals in his petition, or by any decree or judgment which the court could render. Had the complainant in this cause been the trustee of the partnership, he could have maintained this bill, and would have been entitled to the relief awarded, and would probably have been, had he been the trustee in bankruptcy of both partners, though as to this we do not decide. The bankrupt court, in proceedings to declare one partner a bankrupt, cannot declare the partnership or the other partner a bankrupt. Such court in such proceeding cannot judicially determine the solvency or insolvency of the other partner; neither can the chancery court, in a proceeding like this, determine that question, because it is one that cannot properly be made an issue. Consequently, granting that the sale in question by the partnership was fraudulent, and that the payment to Mrs. Lacey was voluntary and gratuitous, and in fraud of the creditors of the partnership, she cannot be made liable in a suit by the trustee of one of the partners. It should only be

reached first by the creditors of the partnership.

The chancery court would be without jurisdiction in this case to determine who are the creditors of the partnership, or what their rights are, or what the rights of the other partners are, in the premises. Suppose there should be other creditors of the partnership than the ones listed by the bankrupt. Could it be allowed to have the entire assets of the partnership applied to the debts of one partner and the costs of this suit, to the exclusion of the other creditors of the partnership not listed by him? We repeat, it is very probable, from the allegations and proof in this bill, that the creditors he listed were all the creditors of the partnership; but the bankrupt court, the chancery court, nor this court, could not act upon such belief or showing, because without jurisdiction to determine the fact. The partnership is a legal entity, which may be adjudged a bankrupt in either voluntary or involuntary proceedings, and this irrespective of any adjudication of any of the individual members of the firm as bankrupts, and in any event, where one or more of the partners, not including all, are adjudged bankrupt, the partnership property cannot be administered in bankruptcy, unless by the consent of the partner or partners not adjudged bankrupt; but such partners or partner not adjudged bankrupt must settle the partnership business as expeditiously as its nature will permit. The proceeds of the partnership adjudged a bankrupt should be appropriated to the payment of the partnership debts; and, if the partners are adjudged bankrupts, the proceeds of the individual estate of each should be appropriated first to the payment of his individual debts. If any surplus remains in the one case it may be appropriated to the payment of the individual's debts; and if in the other case a surplus remains, it may be appropriated to the payment of the partnership debts. 5 Cyc. p. 411 et seq.

The rule is well settled, especially by courts of equity, that the assets of a partnership must be first applied to the payment of the partnership creditors before anything can be applied to the claims of the individual partners thereof or their creditors. This does not result from any lien which the creditors have upon the assets, because they as such have no lien; but it results from the lien which each partner has to have the assets of the partnership applied first to the payment of the firm's debts, and then to the payment of whatever may be due to him from the other partners or partnership accounts. The partnership creditors are practically subrogated to the partners' lien upon the partnership property, and their rights to priority depend upon these. *Evans v. Winston*, 74 Ala. 349; *Mayer v. Clark*, 40 Ala. 259; *Bunn v. Timberlake*, 104 Ala. 263,

16 South. 97; Lucas v. Atwood, 2 Stew. 378.

This is not a bill for the settlement of the partnership and the subjection of the partners' interest after settlement. We think the law is well settled (if not, it should be) that the trustee in bankruptcy of the estate of one partner cannot maintain an action to subject the funds of the partnership to the rights, claims, or demand of such trustee, so long as the partnership remains unsettled. The assets in such case are partnership assets, and the trustee in such case is entitled to recover, or to subject the assets of the individual or partner whose asset the trustee represents. In re Sanderlin (D. C.) 109 Fed. 857. See, also, In re Mercur, 116 Fed. 656; Id., 122 Fed. 387, 58 C. C. A. 472; Amsinck v. Bean, 22 Wall. 395, 22 L. Ed. 801.

It therefore follows that the decree of the chancellor must be reversed; and this court will proceed to render the decree which the chancellor should have rendered, which was to dismiss the bill without prejudice.

Reversed and rendered.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### DIXIE v. HARRISON.

(Supreme Court of Alabama. June 10, 1909.)

#### 1. CHATTEL MORTGAGES (§ 153\*)—FAILURE TO RECORD MORTGAGE—SUBSEQUENT PURCHASERS.

Under Code 1896, § 1009, providing that unrecorded conveyances of personal property to secure debts are inoperative against purchasers without notice, a buyer of personal property in good faith for value and without notice of an unrecorded chattel mortgage, given by his seller buying the property from the original owner to secure the price, acquires title as against the original owner.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 255; Dec. Dig. § 153.\*]

#### 2. CHATTEL MORTGAGES (§ 169\*)—CONVERSION BY MORTGAGEE—ACTS CONSTITUTING.

A bona fide buyer for value and without notice of personal property, on which there was an unrecorded chattel mortgage may sue the mortgagee for conversion for taking possession of the property and converting it by disposing of it, though no objection was made to the taking.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 169.\*]

#### 3. TROVER AND CONVERSION (§ 9\*)—DEMAND—NECESSITY.

A demand in trover is only necessary where the original taking was rightful and where a demand and refusal are necessary to constitute a conversion; but, where there has been a wrongful assumption of property by defendant, which is of itself a conversion, plaintiff may sue without a demand.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 58-83; Dec. Dig. § 9.\*]

#### 4. TROVER AND CONVERSION (§ 22\*)—WAIVER—DEMAND OF PAYMENT.

Demanding payment for property converted is not a waiver of the right to sue in trover for conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 22.\*]

#### 5. PLEADING (§ 358\*)—FRIVOLOUS PLEADINGS—MOTION TO STRIKE.

In trespass and trover for the taking of a mule, pleas that plaintiff voluntarily surrendered to defendant the possession of the mule, that defendant had sold it to a third person and had taken a mortgage for the price, and that, on default in the payment of the mortgage, defendant obtained possession of the mule from plaintiff, etc., are not frivolous or irrelevant within Code 1907, § 5322, and are not subject to motion to strike.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 358.\*]

#### 6. PLEADING (§ 354\*)—OBJECTIONS—DEMURRER—MOTION TO STRIKE.

That pleas are bad to the complaint as a whole, though good as to some of the counts, must be pointed out by demurrer, and not by motion to strike.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1093; Dec. Dig. § 354.\*]

Mayfield, J., dissenting in part.

Appeal from Circuit Court, Marengo County; W. W. Quarles, Special Judge.

Action by Josh Dixie against W. C. Harrison. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The special pleas are as follows: "(3) That the plaintiff voluntarily surrendered the mule, for which damage is now sought, to the defendant. (4) The plaintiff voluntarily surrendered possession of the mule for which damage is now sought to the defendant, or the agent of the defendant. (5) That defendant sold mule in controversy to one J. M. Moore, and took a mortgage on the said mule for the purchase money, and that when said mortgage became due the said Moore defaulted in the payment of the same, and that the defendant sent his agent to the said Moore, after the maturity of said mortgage, for the mule, and that the said Moore told his said agent that the plaintiff then had said mule, and for the agent to return the following day and he could get the mule; that the said agent did return the day following; that Moore then informed him that the plaintiff had said mule, and to go and get him; that said agent went to the plaintiff, and told plaintiff that he had come for the mule, whereupon plaintiff gave the said agent of the defendant the said mule of his own accord and voluntarily. (6) That the defendant surrendered possession of the said mule to the plaintiff voluntarily, and that prior to any demand for the return of said mule and to the bringing of this suit, and before the defendant knew the plaintiff claimed said mule, the defendant sold said mule, and does not now know where said mule is; that plaintiff surrendered said mule in the first part of the year 1906, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



did not make a demand upon defendant for the same until more than six months thereafter."

Motion was made to strike these pleas, and after it was overruled the following demurrers were filed: "(1) The pleas are no defense to this suit. (2) They seek to raise an immaterial issue. (3) Because pleas 4, 5, and 6 set up an estoppel, and do not allege matters that amount to an estoppel. (4) Because plea 5 does not allege that plaintiff had knowledge of the mortgage taken by the defendant to secure the purchase price of said mule, and does not allege that same was recorded before plaintiff purchased said mule. (5) Because pleas 5 and 6 attempt to set up matters of defense that are obnoxious to the statute of frauds. These demurrers being overruled, replications were filed; but it is not deemed necessary to set them out.

George Pegram, for appellant. Elmore & Harrison, for appellee.

MAYFIELD, J. The complaint in this cause, as last amended, consisted of six counts, designated as 1, 2, 3, 4, A, and B. Counts 1, 2, and 3 were in trespass, for the wrongful taking of one bay mare mule. Count 4 was in trover, for the conversion of the same mule. Counts A and B were also in trespass, count A setting up the facts constituting the trespass. To this complaint defendant filed six pleas; the first two being the general issue, and pleas 3 and 4 attempting to set up the defense that the plaintiff voluntarily surrendered the mule to the defendant. Plea 5 set up that the defendant sold the mule to one J. M. Moore, taking a mortgage thereon for the purchase money, and that, when the mortgage became due, Moore defaulted in its payment, whereupon the defendant sent his agent to Moore for the mule; that Moore told the agent to return the following day, when he could get the mule; that he returned the following day, and Moore then informed him that the plaintiff had the mule and told him to go and get it; that defendant's agent then went to plaintiff and told him he had come for the mule, whereupon the plaintiff, of his own accord and voluntarily, gave the mule to the agent of the defendant. Plea No. 6 was that the plaintiff surrendered the possession of the mule to the defendant voluntarily, and that prior to the demand for the return and the bringing of the suit, and before the defendant knew of the plaintiff's claim, the defendant sold the mule, and did not know where it was; that the plaintiff surrendered the mule in the first part of the year 1906, and did not make demand for the same upon the defendant for more than six months thereafter. The plaintiff moved to strike the special pleas 3, 4, 5, and 6 upon the grounds set up in the motion. The court overruled the motion, and the plaintiff accepted. The

plaintiff then demurred to pleas 4, 5, and 6, which demurrers, being duly considered, were overruled by the court. The pleas and demurrers were refiled after the complaint was amended, with the same action, as to the amended complaint and the pleas and demurrers thereto. The trial was had upon the general issue and these special pleas, and resulted in a verdict and judgment for the defendant, from which plaintiff appeals.

There is in the record a brief of the appellee seeking to have the bill of exceptions stricken upon the ground that the case was tried by Wm. W. Quarles, as special judge holding the spring term of the circuit court of Marengo county, who as such special judge had no jurisdiction beyond the territorial limits of Marengo county, whereas said judge while in Selma, Ala. (in Dallas county), made and signed an order extending the time for signing the bill of exceptions. There is an affidavit made by Hon. Wm. W. Quarles, setting forth the facts substantially as the same are set forth in the brief of appellee. But there is in the record no motion nor copy of a motion which would serve as a basis for this brief; and the writer does not know as a matter of fact whether such a motion was made and afterwards withdrawn. There is no entry on the minutes of this court, nor any motion on its motion docket showing submission upon such a motion; the order of submission showing that the cause was submitted upon the merits merely. It is, however, unnecessary for us to consider whether or not this bill should be stricken, for the reason that the cause must be reversed upon the record proper, even if the bill of exceptions were stricken. The special pleas were each a wholly insufficient answer to the complaint. While they might probably be an answer to some counts of the complaint, they were clearly not an answer to each count of the complaint, and they were directed, and intended as answers, to the entire complaint, and it would not have been error for the court to strike a part of these pleas upon the motion of the plaintiff, though we do not decide that there was reversible error in the court's declining to strike them. But it was clearly reversible error to overrule the plaintiff's demurrers to these pleas; and, as the case must be reversed, we will consider some of the assignments of error which may be of interest and concern to the parties upon another trial.

Upon the undisputed evidence in this case the plaintiff was clearly entitled to the general affirmative charge upon the count in trover; the special pleas being eliminated, as they should have been, upon the motion or demurrer of the plaintiff thereto. The evidence is undisputed that the plaintiff purchased the mule in question from one Moore; that Moore had purchased the mule from the defendant prior to the time he sold it to the plaintiff; that Moore executed to the de-

fendant a mortgage upon the mule to secure the purchase price; and that this mortgage was not recorded until after the mortgagor, Moore, had sold the mule to the plaintiff, and there is no evidence that the plaintiff had any actual knowledge or notice of the existence of this mortgage at the time he purchased the mule. Section 1009 of the Code of 1896 provided, among other things, that conveyances of personal property to secure debts or to provide indemnity were inoperative against creditors or purchasers without notice until recorded, etc. He was clearly a bona fide purchaser for value without notice of the mortgage, and the facts are undisputed that the defendant sent an agent and took the mule from the possession of the plaintiff after his title was perfect thereto, and that defendant afterwards converted the mule by selling it or otherwise disposing of it. That the plaintiff did not forcibly resist the taking of this property, but acquiesced therein, cannot and should not defeat his right of action to recover damages for the conversion. While the evidence is not certain, but is in sharp conflict as to the exact dates of the sale by the defendant to Moore and of the sale by Moore to the plaintiff, it makes it to clearly appear that the mortgage executed by Moore to the defendant was not recorded until after the sale of the mule by Moore to the plaintiff; and there is no contention that the plaintiff had any actual notice of the existence of this mortgage at the time he purchased. The mortgage is therefore clearly void as against the plaintiff. Code 1896, § 1009.

There is no phase of the evidence which tends to show that the plaintiff in any way estopped himself from maintaining this action. The testimony of the defendant's son upon this subject is as follows: That he went to the plaintiff and asked for the bay mare mule which Mr. Moore told him to get from Josh, and that Josh, the plaintiff, delivered the mule into his possession of his own accord and voluntarily; that witness then took the mule and delivered same to defendant. The testimony of the plaintiff upon this subject is as follows: "Mr. Neal Harrison (son of defendant) rode up to where the mule was, and caught hold of the bridle, and commenced unhitching her, and took her out of the plow. I went up there where he was, and asked him what he was doing. He said his papa sent him after the mule. I told him that the mule was mine, and that I had paid Mr. Moore, and he said he was going to take the mule, and I helped him unhitch her then because I did not want to be bothering any white folks." This was all the evidence as to the taking. The defendant, among other things, testified that after his son delivered the mule to him he kept the same five or six weeks, and then sold her for \$100, and that he received a letter from Josh Dixie, the plaintiff, asking him to pay for the mule or to return it.

The mortgage which the defendant received from Moore to secure payment of the purchase price or a copy thereof was introduced in evidence by the defendant, and the instrument showed that it was executed on the 22d day of February, 1905, but was not filed for record until the 6th day of March, 1905. The evidence of the plaintiff tended to show that he purchased the mule from Moore in January, 1905, while the testimony of Moore tended to show that he sold the mule to the plaintiff in the month of February; but, under all the evidence, the plaintiff had purchased the mule from Moore before the mortgage was recorded or filed for record, and there is no evidence tending to show that he had any actual notice of the existence of the mortgage. The plaintiff, therefore, acquired a perfect title as against the mortgagee under any phase of the evidence.

The trial court, at the request of the defendant in writing, charged the jury, first, that unless a demand was made on defendant before the commencement of the suit the plaintiff could not recover for conversion; and, second, that, if the mule was freely and voluntarily delivered to Neal Harrison by plaintiff, then he could not recover in trespass. Both of these instructions were erroneous, because, under the undisputed facts in this case, no demand was necessary to support trover, but, even if it had been a case in which a demand was necessary, the undisputed evidence showed that there was a sufficient demand (see defendant's own testimony, where he says that he received a letter from Josh Dixie asking him to pay for the mule or to return it). But a demand in an action of trover is only necessary where the taking was rightful, and where a demand and refusal are necessary to constitute a conversion. This was clearly not a case in which any demand was necessary, nor does it constitute a waiver of the right of action to demand payment for property converted. *Baker v. Hutchinson*, 147 Ala. 637, 41 South. 809; *Williams v. McKissack*, 117 Ala. 441, 22 South. 489. In actions of trover, where there has been a wrongful assumption of property by the defendant which is of itself a conversion, no demand is necessary before suit brought. *Brown v. Beason*, 24 Ala. 466; *Rhodes v. Lowery*, 54 Ala. 4.

The court was also clearly in error in charging the jury that, if the plaintiff freely and voluntarily delivered the mule to the agent of the defendant, then he could not recover in trespass. The mere fact that the plaintiff did not resist or object to the taking could not make the taking rightful which was otherwise a trespass. If the plaintiff had induced the defendant to take the property, then it would be a defense to trespass, but there is no evidence tending to show that he induced the taking. The strongest phase of it is that he did not resist or object. *Smith v. Kaufman*, 94 Ala. 364, 10 South. 229. For this reason special pleas Nos. 3, 4,

and 6 were wholly insufficient. Plea No. 5 was also insufficient for the reason that it did not deny the plaintiff's title to the mule, the subject-matter of the suit, nor did it show that the mortgage under which the defendant claimed title was recorded prior to the acquisition of the plaintiff's title, nor did it show that plaintiff had any actual notice of the mortgage. As stated above, it would not have been error to strike pleas 3, 4, and 6 from the record upon the motion of the plaintiff; and, while it might not have been reversible error for the court to refuse the motion to strike and thus put the plaintiff to a demurrer, it was clearly reversible error to refuse the motion to strike and to overrule the demurrers thereto, and allow the cause to be tried upon wholly immaterial issues such as these pleas raise.

It is not necessary to consider the other assignments of error, which will probably not be raised upon another trial.

For the errors mentioned, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J. I concur in the conclusion to a reversal of the judgment, but do not concur in all that is said in the opinion of Justice MAYFIELD. I place my concurrence upon the ground that on the undisputed evidence in the case the plaintiff was entitled to the general charge as requested under the count of the complaint in trover.

I do not think it can be said of pleas numbered 3, 4, 5, and 6 that either or any one of them is frivolous, prolix, or irrelevant, and upon that reason subject to motion to strike. Code 1907, § 5322. That the pleas were bad to the complaint as a whole, though good as to some of the counts, was matter to be pointed out by demurrer, and not ground for motion to strike.

SIMPSON and McCLELLAN, JJ., concur in these views.

### FIES et al. v. ROSSER.

(Supreme Court of Alabama. May 20, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. QUIETING TITLE (§ 12\*)—RIGHT OF ACTION—POSSESSION OF COMPLAINANT.

Equity will not entertain a bill to remove a cloud on title to land in favor of a person asserting a legal right when he is not in possession, unless he shows some special equity—that is, some obstacle or impediment which would prevent or embarrass the assertion of his rights at law; and the existence of a life estate and the possession of the land by one holding under a life tenant is such an obstacle to the assertion of the legal rights of a reversioner as would give the reversioner the right to maintain such a bill, though not in possession.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 8; Dec. Dig. § 12.\*]

#### 2. PARTITION (§ 19\*)—RIGHT TO REMEDY—RIGHT TO POSSESSION OR USE OF PROCEEDS.

To compel a sale of land for partition under Code 1907, § 5231, giving the chancery court jurisdiction to sell for partition any property held by joint owners or tenants in common, whether or not defendant denies the title or sets up adverse possession, complainant must be entitled to possession or the immediate use of the proceeds after the sale.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 60; Dec. Dig. § 19.\*]

#### 3. PARTITION (§ 19\*)—RIGHT TO REMEDY—POSSESSION OF COMPLAINANT.

The right to sue for partition of land depends upon actual or constructive possession of the land, and a reversioner cannot maintain the suit against one holding an outstanding life estate in the entire property, and thus entitled to the present and entire use and enjoyment of the land.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 60; Dec. Dig. § 19.\*]

#### 4. TENANCY IN COMMON (§ 3\*)—CREATION—DESCENT.

A husband taking a life estate under Code 1907, § 3763, providing that, if a married woman having a separate estate die intestate leaving a husband living, he is entitled to the use of the realty during his life, takes it by curtesy, and is not a tenant in common with his children under section 3762, providing that when an inheritance descends to several persons they take as tenants in common, etc.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 6; Dec. Dig. § 3.\*]

#### 5. EQUITY (§ 148\*)—PLEADING—MULTIFARI- GIOUSNESS—PARTITION AND REMOVAL OF CLOUD FROM TITLE.

A bill for partition and to remove a cloud from the title is not multifarious.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 364; Dec. Dig. § 143.\*]

#### 6. APPEAL AND ERROR (§ 230\*)—REVIEW— FAILURE TO OBJECT IN TIME.

Where there was a joint appeal, and errors were assigned separately and severally, and presumably before the case was submitted, and appellee did not object to a severance in the assignment without permission before submission, he was precluded from subsequently objecting.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 230.\*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Kate O. Rosser against Eugene Fies and others. Decree for complainant, and respondents appeal. Affirmed in part, and in part reversed and rendered.

The case made by the bill is that Jennie Johns in her lifetime was the owner of certain lands in the county of Jefferson, and that before her death she undertook to execute and deliver deeds for the same to her husband, L. W. Johns; that L. W. Johns undertook to and did execute and deliver a deed to said property to Eugene Fies for the consideration expressed therein, and that said Fies executed to Johns a mortgage for part of the purchase money; that complainant and certain other respondents named therein, other than Fies, are the legal heirs and distributees of Jennie Johns' estate; and that she is dead intestate. The bill al-

leges the insanity of Jennie Johns at the time of the execution of the deed to L. W. Johns, and that the deed is void for that reason, and that Johns, having no title, conveyed none to Fies, except possibly his life estate in the said land. The prayer of the bill is that the deed from Jennie Johns to L. W. Johns and from L. W. Johns to Eugene Fies, and the mortgage from Fies to Johns, be declared null and void and of no effect, and delivered up for cancellation, and that the property described be sold for the purpose of division between complainant and certain of the respondents, who are joint owners. Fies interposed demurrers, setting up that it appeared that L. W. Johns had a life estate in the property described, and that it is not averred that the respondent L. W. Johns joins in the prayer of the bill of complaint for the sale of the property described for division, or consents thereto, and this court has no jurisdiction to order a sale for division without the consent of the life tenant, or until the life estate falls in. The other respondents filed numerous demurrers, setting up that Kate Rosser is not shown by the bill to be entitled to possession of the property mentioned in the bill, or that she has an estate in possession, and many other grounds not necessary to be set out.

Tillman, Bradley & Morrow and Frank S. White & Sons, for appellants. H. C. Mead, A. B. Perdue, and F. E. Blackburn, for appellee.

ANDERSON, J. The bill in this case claims nothing more than a reversionary interest in the property, as it concedes the title of Fies to the life estate of L. W. Johns, the husband of Jennie Johns, which L. W. Johns acquired upon the death of his said wife, and which was conveyed by his warranty to Fies, notwithstanding the deed from Jennie Johns to her husband, the said L. W. Johns, may be void. The bill seeks, however, to cancel said deed from the mother, Jennie Johns, to L. W. Johns, as a cloud upon the reversionary interest, the cancellation of which is essential to the establishment of any interest whatever in the complainant to the land; for, if said deed is valid, Fies acquired an absolute title under his purchase from L. W. Johns.

"The rule is well established that a court of equity will not entertain a bill to remove a cloud from the title to land in favor of a person asserting a legal right when he is not in possession, unless he shows some special equity; that is, some obstacle or impediment which would prevent or embarrass the assertion of his rights at law." 3 Mayfield's Dig. p. 197, § 418. In the case before us the existence of the life estate and the possession of the land by the respondent, holding under a life tenant, is an obstacle or impediment in the way of an assertion by the complainant, as reversioner, of her legal rights, and under the principles above stated the com-

plainant, although out of possession, has a right to maintain a bill in equity to remove a cloud from her title in reversion. *Mitchell v. Baldwin* (Ala.) 45 South. 715; *Lansden v. Bone* 90 Ala. 446, 8 South. 65.

Section 5231, Code 1907, gives the chancery court jurisdiction to partition by division or to sell for partition, any property, real or personal, held by joint owners or tenants in common, whether the defendant denies the title, or sets up adverse possession or not. This statute, as last amended, was construed in the case of *Brown v. Hunter*, 121 Ala. 210, 25 South. 924, to mean that a complainant need not be in possession in order to maintain a bill for partition. But we do not understand it as holding that she could maintain the bill if she was not entitled to the possession, as it says she must be entitled to share in the distribution, and we think that the complainant must be entitled to possession or the immediate use of the proceeds after the sale in order to compel a sale of the land for partition.

The common-law rule as to partition has been considerably enlarged and extended by our statute, and we have many authorities holding that, when the partition is sought by one having the right to compel same, all interests can be brought in, whether in present or in reversion. We find no case, however, holding that one who has a mere reversionary interest—not right to a present use or enjoyment of the land or of the proceeds of a sale of same—can maintain a bill for partition as against those who are entitled to the present and entire use and enjoyment of same. On the other hand, we find the general rule to be, as laid down by other courts and text-writers, that "a remainderman or reversioner may be made party defendant in an action for partition. He cannot institute the action, at least against others not seised of a like estate in common with them. The right is only given to one having actual or constructive possession of the land sought to be partitioned. A remainderman has neither." *Knapp on Partition*, 24; *Freeman on Co-Tenancy & Par.* § 446, and cases cited in note 1.

In the case of *Tieman v. Baker*, 63 Tex. 641, in discussing who had the right to compel partition, it was said: "When the right to possess the entire property exists in one holding a life estate, if such person has no other estate, no right to partition exists; for it could confer no benefit, as no higher estate can be acquired by partition." This rule has been modified by our statute, only to the extent of permitting partition by one, whether in possession or not, but not so as to authorize one who is not entitled to the present use and enjoyment of the property or the proceeds of a sale to maintain a bill for partition.

In the case at bar, the bill shows that Fies owns the life estate of L. W. Johns in and to the entire property, and that no one else

is entitled to the use or enjoyment of same until the termination of said life estate. The complainant, being a mere reversioner and having no right or interest to the present use and enjoyment of the property, or to the proceeds in case of sale, cannot compel partition as against one holding an outstanding life estate in and to the entire property.

The cases earnestly relied upon by the complainant, in support of her right to a partition, *Fitts v. Craddock*, 144 Ala. 437, 39 South. 508, 113 Am. St. Rep. 53, *McQueen v. Turner*, 91 Ala. 273, 8 South. 863, and *Gayle v. Johnson*, 80 Ala. 895, are not in conflict with the present holding, and are easily distinguished from this case. In the *Fitts Case*, supra, the complainant owned the entire life estate, as well as an undivided half interest in the remainder, and was entitled to a present use and enjoyment of the property, on the proceeds of the sale. In the *McQueen Case*, supra, there was no intervening life estate in and to the entire property to exclude the complainants from the immediate right to the use and enjoyment. There was a life estate in and to an undivided interest of one of the tenants in common, the husband of one of the heirs. The case of *Gayle v. Johnson*, supra, has no application. The partition was sought by the life tenant—one who had a present right to the use and enjoyment of the property.

We do not think that L. W. Johns became a tenant in common with his children, under the terms of section 3762, Code 1907, as he did not take the life estate by descent but got it under section 3765. Should a husband take under subdivision 6, § 3754, then he might take as heir of his wife, but he takes by curtesy under section 3765.

A bill for partition and to remove a cloud from the title is not multifarious. *Tindal v. Drake*, 51 Ala. 574; *Berry v. Webb*, 77 Ala. 507. But we need not consider the demurrers proceeding upon this theory, as the partition feature of the present bill is in effect eliminated.

It is insisted that this case should be affirmed because of the fact that there was a joint appeal, and no summons and severance in the assignment of errors, and that there were no joint demurrers or rulings which affected all of the appellants. It is sufficient to say that errors were assigned separately and severally, and presumably, before the case was submitted, and the appellee should have objected to a severance in the assignment, without permission, before the case was submitted.

As indicated by the opinion of the chancellor, he seems to have proceeded upon the idea that the demurrers all went to the bill as a whole. The last ground, No. 24, assigned all grounds to so much of the bill as sought a partition, and the twentieth ground presents the very question of the complainant's right

to partition, because Fies is entitled to a life estate in the entire property.

The chancellor properly overruled the general demurrer for want of equity, as well as those questioning the complainant's right to a cancellation of the deed, and the decree in this respect is affirmed, but erred in overruling the demurrers going to the complainant's right to a partition, and the decree is reversed in this respect, and one is here rendered sustaining same.

Affirmed in part, and reversed, rendered, and remanded.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

### GREEN v. BESSEMER COAL, IRON & LAND CO.

(Supreme Court of Alabama. May 20, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. MASTER AND SERVANT (§ 256\*)—INJURIES TO SERVANT—ACTIONS—COMPLAINT—SUFFICIENCY.

An averment that plaintiff's intestate at the time of his death was in the employment of defendant in or about the operation of its mine is not equivalent to an averment that plaintiff's intestate was at the time engaged in the performance of a duty imposed by his employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 256.\*]

#### 2. MASTER AND SERVANT (§ 118\*) — SAFE PLACE IN WHICH TO WORK—MINES—SAFETY CATCHES.

Code 1907, § 1028, requiring safety catches to be attached to a cage used to lower and hoist persons into and out of a mine, does not require safety catches upon a tram car operating upon a slope or inclined track, though used for lowering and hoisting persons; for, while there should not be too narrow a construction of section 1028, the fact that the duty thereby imposed is enforced by penal provisions (section 7418) cannot be ignored.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 118.\*]

#### 3. MASTER AND SERVANT (§ 256\*)—INJURIES TO SERVANT—ACTIONS—COMPLAINT—SUFFICIENCY.

A general allegation that plaintiff's intestate was going down the slope upon a tram car "while in the performance of his duties" was sufficient.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 256.\*]

#### 4. APPEAL AND ERROR (§ 1040\*) — HARMLESS ERROR—RULING ON PLEADING.

Error in sustaining a demurrer to a count was without injury where its legal effect was not changed by the amendment made to meet the demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

#### 5. MASTER AND SERVANT (§ 256\*)—INJURIES TO SERVANT—ACTIONS—COMPLAINT—SUFFICIENCY.

A count alleging that plaintiff's intestate had a right to be upon a tram car does not establish the further fact necessary to the maintenance of the action that he was there in the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

discharge of some duty imposed by his employment, and, in the absence of an averment of the latter fact, the count is demurrable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 256.\*]

**6. MASTER AND SERVANT (§ 217\*)—INJURIES TO SERVANT — ASSUMPTION OF RISK — KNOWLEDGE OF DANGER.**

Notice of such danger in riding on a tram car as inhered in its operation under conditions necessarily obtaining, without more, did not put an employé in the attitude of assuming the risk from a defect not known to him, and not so obvious that he must be presumed to have known of it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

**7. MASTER AND SERVANT (§ 144\*)—RULES OF EMPLOYER—CUSTOMARY VIOLATION.**

Where a miner was instructed not to ride on a tram car, any custom to the contrary could not estop the employer to impose his will on the employé in the particular instance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 287; Dec. Dig. § 144.\*]

**8. APPEAL AND ERROR (§ 606\*)—TRANSCRIPTS OF RECORD—REQUISITES AND SUFFICIENCY.**

Rule 26 (Code 1907, p. 1512), requiring the transcript of record to be prefaced by an index of its contents specifying the pages at which the various matters are to be found, and to have marginal references to the several matters to be found throughout the transcript, contributes much to the convenience of the consideration of a cause, and should be observed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2064; Dec. Dig. § 606.\*]

Appeal from Circuit Court, Bibb County; B. M. Miller, Judge.

Action by Mrs. M. A. Green, administratrix of the estate of W. T. Green, deceased, against the Bessemer Coal, Iron & Land Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The following counts of the complaint are referred to in the opinion:

(4) "The plaintiff, as administratrix of the estate of W. T. Green, claims of the defendant, the Bessemer Coal, Iron & Land Company, a corporation, the sum of \$15,000 as damages, for that heretofore, to wit, on the 11th day of March, 1907, the defendant was operating a coal mine at or near Belle Ellen, in Bibb county, Ala., by the slope system, and that on said day plaintiff's intestate was in the service or employment of the defendant in or about the operation of said mine, and that on said day the defendant in the operation of said mine was using a hoisting engine, and with it was letting down tram or dump coal cars into, and pulling them out of, said mine on a tram track by using a cable from said hoisting engine and fastened to said cars, the cars being coupled together, and that the intestate on said day, while in said service or employment, got upon one of said tram or dump coal cars, and the said car was being lowered in the said mine by the means aforesaid with intestate upon it, and before said car had been lowered to the bottom of said mine, and while it was being

lowered or let down the incline of said slope, the car upon which the intestate was riding and while the intestate was upon it, became detached or uncoupled from the car above it, and ran down said incline and killed the intestate as a proximate consequence thereof; and plaintiff avers that said cars became detached or uncoupled, and ran down said slope, and killed the intestate as aforesaid, by reason and as a proximate consequence of the negligence of a person in the service or employment of the defendant who had superintendence intrusted to him whilst in the exercise of such superintendence, viz., whose name is unknown to plaintiff, negligently caused or allowed said car to become detached or uncoupled as aforesaid, and thereby negligently caused the death as aforesaid of plaintiff's intestate."

(9) Same as 4, except that it is alleged that defendant was using the hoisting engine, drum, or machine and coal cars for lowering and hoisting persons into and out of said mine, and while in the discharge of the duties of said employment he was being lowered by defendant by the means aforesaid into said mine, etc., same as fourth count. The negligence alleged is as follows: "That defendant on said day was using said car or cars as cages for the purpose of lowering and hoisting persons into and out of said mine without any approved safety catches attached to the said car or cars then and there being used as aforesaid, which proximately contributed to the injury and death of intestate. (This is the amended count.)

Count 10 is not set out.

(11) Same as 4, except that it is alleged that he was injured while going to his work down a certain slope in said mine of defendant, as he had a right to do, on a trip of cars attached to each other. The negligence alleged in this count is under the first subdivision of the employer's liability act (Code 1907, § 3910).

Plea 4: "Defendant is not liable in this action because plaintiff's intestate had notice that it was dangerous to ride on said tram cars, and had been warned and informed thereof, yet, notwithstanding said warning and knowledge, he negligently got on said car on the morning of the injury complained of, and proximately contributed to the said injury; and defendant says that he assumed the risk as to injuries received on account of his negligence."

Plea 8: "Plaintiff's intestate was himself guilty of negligence which proximately contributed to his death, in this: With knowledge of a safe way to walk to his place of work, and with knowledge of the danger of riding on said tram car, he negligently conducted himself in going to his said work by riding on said car."

Plea 10: "Defendant's foreman warned plaintiff's intestate that it was dangerous to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ride on said tram car, and instructed said intestate not to ride on said tram car."

Plea 11: "Plaintiff's intestate was an employé of defendant, and his duties were in the main way in the said mine, and a safe way was provided for said intestate to walk to his place of work; and defendant says that said intestate was guilty himself of negligence which proximately contributed to his said injuries in this: With knowledge of the safe way to walk to his place of work, and with knowledge that it was dangerous to ride on the tram cars into said mine, negligently undertook to go to his place of work by riding on said cars."

The replications numbered 1, 3, and 4 set up a custom of the employés in riding to their work and an acquiescence with knowledge by the master that the servants were in the habit and custom of riding to their work on the cars as plaintiff's intestate was doing when he was killed. It is deemed unnecessary to set out replication No. 3.

Logan, Vandegraaft & Fuller and Ellison & Collier, for appellant. Joel F. Webb and Lavender & Thompson, for appellee.

SAYRE, J. Count 4 avers that plaintiff's intestate at the time of his injury and death was in the service or employment of the defendant in or about the operation of the defendant's mine. This is not the equivalent of an allegation that plaintiff's intestate was at the time engaged in or about the business of the defendant; that is to say, was at the time engaged in the performance of some duty imposed upon him by his employment. Non constat he was at the immediate time upon some errand or business of his own, although in a general way in the employment of the defendant. There was no error in sustaining the demurrer to this count. Count 9 attempts to state negligence on the part of the defendant in complying with section 1028 of the Code of 1907. It appears from the count that plaintiff's intestate was being lowered into the mine by means of an engine and drum attached, as we must suppose, by wire or cable, or in some such way, to the car upon which he was. The car was a coal car, but was used also for lowering and hoisting persons into and out of the mine. The car upon which intestate was became uncoupled from the car next above it and ran down the incline, thus causing his death. The negligence attributed to defendant consisted in the use of the car without approved safety catches attached to it. Section 1028 provides that approved safety catches shall be attached to the cage used for the purpose of hoisting and lowering persons into and out of mines. Perhaps we cannot judicially know that safety catches are devices which cannot be employed in connection with cars used for the purpose of hoisting coals as well as persons out of mines, or even that such devices would be unavailable in the case of cages used to carry coal and men up and

down a perpendicular shaft if any be so used. However that may be, there is no legislative requirement that cars operated upon a slope or inclined track, though used for the hoisting and lowering of persons, should be equipped with safety catches. We are not disposed toward a narrow construction of the statute, but we cannot ignore the fact that the duty imposed by it is enforced by penal provisions (Code 1907, § 7418), and we are not authorized to extend its application to a case not falling fairly within its letter and spirit. *E. T. V. & G. R. R. Co. v. Bayliss*, 77 Ala. 429, 54 Am. Rep. 69; *Lewis v. Southern Ry. Co.*, 143 Ala. 133, 38 South. 1023. There is no averment of negligence apart from the mere failure to comply with the supposed statutory duty. The reliance is upon the proposition that a failure to attach safety catches to cars operated upon an inclined track for the hoisting of men and coals constitutes negligence per se. We do not subscribe to this interpretation of the statute, and accordingly rule that the demurrer was properly sustained. Nor did the amendment better the count. There is a patent effort to adapt the facts of plaintiff's case to a statute which had no such case in contemplation. The statute was designed to require safety catches on cages operated in shafts, and to require adequate brakes upon "every brake, drum, or machine for lowering and hoisting persons into and out of the mines." The further language of the statute shows that a cage is not the machine to which a brake shall be attached. It proceeds: "And also props and indicators which shall show to the person who works the machine the position of the cage or load in the shaft or on the roadway." We believe we may affirm that the statute does not require safety catches upon "cages" which are attached below other "cages" and run upon inclines or roadways, nor does it require brakes upon cages in any case. As we have seen, there is a requirement of brakes, but they are required in another connection. The conjunction in the count of two ideas, each ineffectual standing alone, falls short of the statement of a cause of action.

The demurrer to count 10 as originally framed seems to have been sustained in response to those grounds of demurrer which took the point that it did not appear that plaintiff's intestate had duty to perform upon the car. After demurrer sustained, plaintiff amended her complaint by averring that it was the duty of her intestate to be upon the car, whereupon the demurrer was overruled. But the original count averred that intestate was going down the slope upon the car "while in the performance of his duties." This general form of allegation was sufficient (*Sloss-Sheffield Co. v. Chamblee*, 48 South. 664), and its legal effect was not changed by the amendment. The error was therefore error without injury.

Count 11 alleges no more in respect to

plaintiff's intestate being upon the car than that he had a right to be there. But it is obvious that his having a right to be there does not establish the other fact necessary to the maintenance of plaintiff's case, viz., that he was there in the discharge of some duty imposed upon him by his contract of employment. In default of an averment of this last fact, the count in question was defective, and the demurrer to it was properly sustained.

The manner of pleading adopted in this case, though not uncommon, did not conduce to an intelligible presentation of issues to the jury. Of the nine counts which withstood demurrer in the court below each differed materially from the others in its presentation of the facts upon which the plaintiff relied for recovery. Eight of them were framed under the employer's liability act (Code 1907, § 3910). One went upon the common law. Twelve pleas were addressed to each count severally and separately, and, we may add, indifferently. An examination of these pleas shows that a number of them are inapt as answers to several counts of the complaint. Demurrer to each plea was framed without any effort to discriminate between the merits of the plea as an answer to some counts and its merits as an answer to others. The judgment also was general and to the effect that demurrer to each plea be overruled or sustained. It is possible that such a judgment as to each plea may be affected with error or not as the plea is referred to one count or another. Briefs of counsel deal with the assignments of error based upon the action of the trial court in overruling demurrers to pleas in the same way. Without undertaking to thread our way repeatedly through the pleading in order to learn the exact application of grounds of demurrer to each plea as an answer to each count, we will consider such questions as counsel have argued, assuming, as counsel appear to have assumed, that they need to be considered only when presenting in facie an appearance of aptness.

Plea 4 was not a sufficient answer to those counts of the complaint which aver that plaintiff's intestate received his injury by reason of a specific defect in the ways, works, machinery, or plant of the defendant while riding upon the car as it was his duty to do. For aught that appears, the notice that it was dangerous to ride upon the cars was no more than notice of such danger as inhered in the operation of cars under conditions necessarily obtaining. Such notice, without more, did not put plaintiff's intestate in the attitude of assuming the

risk arising out of a specific defect not known to him, and not so obvious that he must be presumed to have known it. The demurrer to this plea should have been sustained. The same considerations dispose of the seventh and ninth assignments of error which relate to the action of the court in overruling demurrers to pleas 8 and 11. The argument for these pleas overlooks the allegations of the counts that it was the duty of the plaintiff's intestate to be upon the car. This alleged duty deprived intestate of a choice to go to his work in a different way. Plea 10, however, was not open to any objection assigned to it by the demurrer.

Replication 2, as it appears in the record, is unintelligible, due, no doubt, to errors in transcribing. Replications 1, 3, and 4 were no sufficient replies to plea 10, which alleged that defendant's foreman warned plaintiff's intestate that it was dangerous to ride on said tram car and instructed said intestate not to ride on said car, and this for a reason assigned by the demurrer. It must be conceded that in a number of predicaments general rules of the employer become indecisive factors in determining the conduct of employes, for the reason that the master by habitual or customary acquiescence in their violation, or by imposing duties which cannot be performed except by a violation of them, may estop himself to assert their continued binding force. Labatt, Mas. & Ser. § 366. But in this case plea 10 avers that intestate was instructed not to ride on said car, and, of course, any custom or general rule to the contrary could not estop the employer to impose his will upon the employe in the particular instance by an instruction given for the purpose of controlling the conduct of the employe at the time. Against such an instruction a general rule or custom would not operate as an estoppel.

In conclusion we remark that the transcript of the record falls of compliance with rule 26 (Code 1907, p. 1512) in two respects: It is not prefaced by an index of its contents specifying the pages at which the various matters are to be found. There are no marginal references to the several matters to be found throughout the transcript. This rule contributes much to the convenience of the consideration of causes in this court, and should be observed.

For the error indicated, the judgment of the court below is reversed, and the cause is remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.



## SOUTHERN RY. CO. v. ARNOLD.

(Supreme Court of Alabama. April 22, 1909.  
Rehearing Denied June 30, 1909.)

1. NEGLIGENCE (§ 2\*)—DUTY NOT TO NEGLIGENCE-  
GENTLY INJURE OTHERS.

A person owes his fellow man the general duty not to negligently injure him, and if one places a car so near a track over which cars are being rightfully operated by another as to injure the other, or his servant, while in the discharge of his duty to his master in operating cars over the track, the person so placing the car will be liable for the injury proximately caused by his negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8; Dec. Dig. § 2.\*]

## 2. PLEADING (§ 8\*)—FACTS OR CONCLUSIONS.

Where facts stated in a complaint for negligence are sufficient out of which to raise a duty, a very general averment of negligence is enough.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

3. REMOVAL OF CAUSES (§ 61\*)—SEPARABLE  
CONTROVERSIES — ALLEGATIONS OF PLEAD-  
INGS.

Whether an action against nonresident and resident defendants is separable, so as to warrant a removal to the federal court, must be determined from the record in the state court when the petition for removal is filed, independently of the allegations in the petition for removal or in the affidavit of the petitioner, unless the petitioner both alleges and proves that defendants were wrongfully joined to prevent a removal to the federal court, and in determining the question the averments of the complaint are to be taken as confessed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.\*]

4. REMOVAL OF CAUSES (§ 61\*) — SEPARABLE  
CONTROVERSIES — ALLEGATIONS IN PLEAD-  
INGS.

Where a complaint in a negligence action against a nonresident railroad company and resident defendants alleged that defendants negligently caused a car that injured plaintiff to be or remain in the position where it caused the injury, it could not be said as matter of law on the face of the pleading that it was impossible for all the defendants to have participated in the single act charged in a manner to have constituted it in law the joint act of all, carrying with it a joint and several liability, so as to warrant a removal of the case against the railroad to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.\*]

## 5. FRAUD (§ 49\*)—PROOF.

Fraud, when alleged, must be clearly and satisfactorily proved.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 44; Dec. Dig. § 49.\*]

6. MASTER AND SERVANT (§ 328\*)—INJURY TO  
THIRD PERSONS — ACTIONS — JOINDER OF  
PARTIES.

In actions for damages caused by the negligence of a servant, it is permissible to join the master as a defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1267; Dec. Dig. § 328.\*]

7. PLEADING (§ 399\*)—VARIANCE—FAILURE OF  
PROOF.

In actions of tort against two or more defendants jointly, where the proof fails as to any one, a verdict may be rendered against the

defendants as to whom the proof is sufficient, without thereby in law constituting a variance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1839; Dec. Dig. § 899.\*]

8. RAILROADS (§ 260\*)—COMPANY PERMITTING  
USE OF TRACK BY OTHERS—DUTY TOWARDS  
SERVANT OF OTHER.

Where a railroad company owning a track gives another railroad company the right to use it, it owes the duty to an employee of the other railroad company rightfully using the track not to place cars so near the track as to injure him while on a passing car.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 817-823; Dec. Dig. § 200.\*]

9. RAILROADS (§ 297\*)—ACCIDENTS TO TRAINS  
—QUESTION FOR JURY—CONTRIBUTORY NEGLI-  
GENCE.

In an action for injuries to a railroad employee from being struck by a car while on a passing train, whether he was negligent held under the evidence to be for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 950; Dec. Dig. § 297.\*]

10. APPEAL AND ERROR (§ 743\*) — ASSIGN-  
MENTS OF ERROR—SUFFICIENCY.

An assignment citing the Supreme Court to rulings of the trial court on objections to "several questions on cross-examination of witness Wallace, \* \* \* which several questions begin on page 83 and end on page 36 of the transcript," is too general to be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2999; Dec. Dig. § 743.\*]

11. APPEAL AND ERROR (§ 882\*)—REVIEW—  
RIGHT TO COMPLAIN.

Where before the conclusion of the trial, and while a witness was still in court, appellee offered to withdraw objections to questions asked the witness and allow him to answer the questions, but appellant declined the offer, it could not on appeal complain of the rulings on the objections to the questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3591; Dec. Dig. § 882.\*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Alonzo K. Arnold against the Southern Railway Company and others. From a judgment for plaintiff, against the defendant named, the latter appeals. Affirmed.

Weatherly & Stokely, for appellant. Bowman, Harsh & Beddow, for appellee.

DOWDELL, C. J. The suit was brought against the appellant, Southern Railway Company, and two others, the Sloss-Sheffield Steel & Iron Company and John McDougal. A verdict was returned against the former, the Southern Railway Company, and in favor of the two latter. A judgment was entered on this verdict, and from this judgment the Southern Railway Company appealed.

The action is in tort, and the complaint contained but one count. The damages claimed are for injuries which the plaintiff received because of the alleged wrong of the defendants. After stating the manner in which the plaintiff was injured, and that it was at a time and place when and where the plaintiff had a right to be and was in the discharge

of his duty, it is averred that the injury was the proximate consequence of the negligence of the defendants. The facts stated are sufficiently definite and certain out of which to raise a duty on the part of the defendants not to place, or cause to be placed, the car which injured plaintiff so near the track over which plaintiff in the discharge of his duties had to pass as to injure him. It may be stated to be a sound rule of law that every man owes his fellow man the general duty not to negligently injure him. Certainly, if one negligently places a car so near a track over which cars are being rightfully operated by another as to injure such other person, or his servant, while in the discharge of his duty to his master in operating cars over said track, he should be held responsible for the injury proximately caused by his negligence. So, too, the averment as to the negligence is sufficient. It has been repeatedly ruled by this court that, where the facts stated are sufficient out of which to raise a duty, a very general averment of negligence is enough. The complaint was unobjectionable on demurrer. *L. & N. R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620. Many other of our cases might be cited to the same effect, but it is unnecessary to do so.

The appellant filed a petition for the removal of the cause to the federal court, alleging its nonresident citizenship, and as grounds of said removal it is alleged in said petition, first, that the cause of action is separable; and, secondly, that the defendant McDougal was fraudulently joined as a defendant for the purpose of preventing a removal of the case into the federal court. The first ground, that the cause of action is separable, must be determined from the pleading—the complaint—and not by the allegations in the petition. On this question the averments of the complaint are to be taken as confessed. The complaint in terms alleges that the defendants, meaning, of course, all of them, negligently caused the car that injured plaintiff to be or remain where it was. The “causing of the car to be or remain” where it was describes a simple act, and the complaint avers it as the joint act of all. Negligence is likewise charged jointly. How the alleged wrong was concurred in by all of the defendants is of no consequence, if as a fact it was a joint act of all; and this, in substance, the complaint charges. It cannot be affirmed as matter of law on the face of the pleading that it was impossible for all of the defendants to have participated in the single act charged (the causing of the car to be or remain on the track) in a manner to have constituted it in law the joint act of all, and carrying with it a joint and several liability. The case of *Alabama Southern Ry. v. Thompson*, 200 U. S. 206, 28 Sup. Ct. 161, 50 L. Ed. 441, in which the question we here have under consideration is fully discussed, seems to answer

the contention of the appellant on the subject and adversely to its contention.

The case of *R. & D. R. R. Co. v. Greenwood*, 99 Ala. 501, 14 South. 485, cited and relied on by counsel for appellant, presents a different state of facts, both on the pleadings and the evidence, from the case at bar. In that case there was a collision on the crossing of the two roads between trains operated by the respective defendants. The complaint showed that the servants of the respective defendants operating their respective trains acted independently each of the other, and were guilty of separate acts of negligence in bringing on the collision. The two acts were, it is true, in a sense coincident, but were none the less separate and independent of each other, without any suggestion of community; that is to say, without the one concurring or participating in the negligent act of the other. In the case before us but one single act is complained of, viz., causing a car to be or remain too near the track on which the plaintiff had to pass; and, as stated before, the complaint charges joint negligence in producing this condition. Neither of the other cases cited (*Powell v. Thompson*, 80 Ala. 54; *Larkins v. Eckwurz*, 42 Ala. 322, 94 Am. Dec. 651; *Ensley Lumber Co. v. Lewis*, 121 Ala. 99, 25 South. 729) is opposed in principle to what we have said. The petition for removal was renewed at different stages of the trial; and upon conclusion of the testimony it was again presented to the court on the whole record and the evidence in the case. The only evidence in the case was that introduced by the plaintiff; neither of the defendants offering any.

It is insisted by counsel for appellant that upon a consideration of the entire record, together with the evidence, it is shown that the joining of the defendant McDougal with the other defendants in the case was done with the fraudulent purpose and intent of avoiding the jurisdiction of the federal court. The petition for removal was sworn to, and a counter affidavit was submitted by the plaintiff, denying the allegations of fraud in the petition. In the case of *Louisville & Nashville R. R. v. Wangell*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474, it was said: “It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.” This statement was quoted approvingly in the case of *Alabama Southern Ry. v. Thompson*, supra.

We have seen that on the face of the pleadings no ground for removal is shown. The next question is: Has the alleged fraud been

proven? It is a general rule that fraud, when alleged, must be clearly and satisfactorily proven. There can be no doubt under our own decisions that it is permissible and proper, in an action for damages caused by the negligence of the servant, to join the master as a defendant. This rule is also approved in *Alabama Southern Ry. v. Thompson*, *supra*. It is shown by the evidence that McDougal was the yardmaster of the defendant Southern Railway Company, having superintendence and control of the yard where the track was, and on which it is alleged that the car was negligently caused to be or remain that injured the plaintiff. The Southern Railway Company owned and operated this track. Under this evidence no reasonable inference is afforded of a fraudulent purpose to prevent a removal in joining the Southern Railway Company and McDougal as defendants. The plaintiff did not know which of the servants of the defendant Southern Railway Company caused the car to be or remain on the track; but that some one of its servants did, we think, is manifest from the whole evidence. The fact that the jury returned a verdict in favor of McDougal is insufficient to show a fraudulent purpose in making him a defendant. Taking the whole record, together with the evidence had on the trial, it is our opinion that the mala fides charged in the petition for a removal of the cause from the state to the federal court are not sustained. The affidavit of the defendant accompanying the petition is fully met by the affidavit of the plaintiff denying the alleged fraud.

There is no merit in the contention of a variance between the allegations and the proof. It is a well-settled rule of law that in actions of tort against two or more defendants jointly, where the proof falls as to any one, a verdict may be rendered against the other or others as to whom the proof is sufficient without thereby in law constituting a variance. Nor is there any merit in the contention that it is not shown that any duty was owing by the Southern Railway Company to the plaintiff. The plaintiff was an employé of the Alabama Great Southern Railroad Company, and the evidence shows that the Alabama Great Southern Railroad Company had the right to use, and was in the rightful use of, the track leading to the Sloss-Sheffield furnace at the time of the injury to the plaintiff, its employé; and the duty was on the Southern Railway Company not to place its cars on the delivery track, as shown by the diagram in the record, so close to the track being used by the Alabama Great Southern Railroad Company as to injure its employés on a passing car.

There was evidence from which the jury might reasonably infer that the car that caused the injury was negligently put where it was by the defendant Southern Railway

Company, or its servants; and it was therefore a question properly to be submitted to the jury, and no error was committed in refusing the general charge requested by the defendant.

So, also, we think the question of contributory negligence was one properly left to the determination of the jury. The plaintiff testified that he did not see that the standing car would strike him on his passing car, where he was in the discharge of a duty in kicking off a brake on the car he was riding, until it was too late to avoid the injury; that he was then in about four inches of it. It is true he had, before he went upon the car he was riding when hurt, seen the P. R. R. car that hurt him standing where it was on the delivery track, and he looked down the track to see if it was clear of the Sloss Company's track; that being the track on which his car was moving. He also looked at the car after getting upon his car; but he does not testify whether he saw that he was likely to be struck by the car in passing. It cannot be affirmed as matter of law on this evidence that he was negligent in not knowing that he would likely be struck by the car in passing. He had a right, under all of the circumstances as shown in evidence, to presume that the Southern Railway Company would perform its duties in placing cars on the delivery track, and not place one so near the Sloss Company's main track as to injure those using that track. We are not, however, to be understood, in what we have just said, that the plaintiff was excused from the exercise of due diligence in avoiding the injury because he had a right to presume that the Southern Railway Company would perform its duty; but this, taken in connection with the evidence, rendered the question of contributory negligence one for the jury.

The sixth assignment of error is too general, and we decline for that reason to consider the questions attempted to be raised by it. It cites to us the rulings of the court on objections to "several questions on cross-examination of witness Wallace, \* \* \* which several questions begin on page 33 and end on page 36 of the transcript." Moreover, it appears from the record that there was an offer before the conclusion of the trial, and while the witness was still in court, to withdraw the objections and allow the witness to answer the questions; but the appellant declined the offer. We think by this conduct the appellant placed itself where it has no right to complain of the rulings on the objections to the questions.

We find no reversible error, and the judgment is affirmed.

Affirmed.

ANDERSON, McCLELLAN, and SAYRE, JJ., concur.

STATE ex rel. GARBER, Atty. Gen., v. CAZALAS, Sheriff.

(Supreme Court of Alabama. June 3, 1909.  
Rehearing Denied June 30, 1909.)

SHERIFFS AND CONSTABLES (§ 6\*)—IMPEACHMENT—GROUNDS—"NEGLECT."

A negro confined in a jail for murder was lynched. The sheriff, notwithstanding the public feeling against the negro, failed to give orders to close the doors of the jail, or to take any precaution to prevent the lynching. *Held*, that the sheriff, being under Code 1907, §§ 132, 7191, the legal custodian of the jail chargeable with the duty of excluding intruders therefrom, was subject to impeachment under Const. 1901, § 138, providing that, when any prisoner is taken from jail and killed owing to the neglect of the sheriff, the sheriff may be impeached for neglect as applied to a public officer means a failure on his part to perform some of the duties of his office (quoting Words and Phrases, vol. 5, p. 4740).

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 6.\*]

Anderson and Mayfield, JJ., dissenting.

Impeachment proceeding by the State of Alabama, on the relation of Alexander M. Garber, Attorney General, against Frank Cazalas, Sr., sheriff of Mobile county. Judgment removing sheriff from office.

Alexander M. Garber, Atty. Gen., Thomas W. Martin, Asst. Atty. Gen., N. E. Stallworth, and Palmer Pillans, for the State. Gregory L. & H. T. Smith and Francis J. Inge, for defendant.

SIMPSON, J. This is a proceeding for the impeachment of the defendant.

The facts are undisputed that on Thursday, the 21st of January, 1909, while Phillip Fotch, who was a faithful and efficient deputy sheriff, was attempting to serve a warrant on a negro named Richard Robertson for a misdemeanor, said Robertson, without any excuse or justification, inflicted a mortal wound on said Fotch, from which he died that night; that it was a willful and deliberate murder, and excited a great indignation in the city of Mobile, and that on the night of Friday, the 22d of January, 1909, a party of masked men, estimated at from 10 to 20, entered the jail through the basement, and suddenly confronted two jailers (who were sitting in the guardroom, behind a steel-barred door) with drawn revolvers, and demanded of them to deliver the keys to the cells, which demand was complied with, and the intruders, leaving two armed men to stand guard over said two jailers, proceeded to the cell where said Robertson was confined, took him out, and, at a place not far from the jail, put him to death. It was in evidence that the jail is a modern structure, well arranged and guarded; that there are two steel-barred doors opposite each other, with a space between, leading into the guardroom where the jailers were, but it had been customary

to leave the outer door open, as it was on this occasion; also, that there were strong wooden doors protecting the street entrance to the jail building; and that there was also a strong door leading into the basement which was under the charge of the engineer.

Under the Constitution of 1875 it was provided that sheriffs might be removed from office "for willful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude while in office." Const. 1875, art. 7, §§ 1, 3. Our present Constitution contains substantially the same provisions in so far as the matter now under consideration is concerned (sections 173 and 174), but has added another provision, to wit: "Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death or suffers grievous bodily harm, owing to the neglect, connivance, cowardice or other grave fault of the sheriff, such sheriff may be impeached under section 174 of this Constitution." Const. 1901, § 138. When this section was before the Constitutional convention, it was fully discussed. Some members thought that it was holding the sheriff to too high a degree of responsibility, and it was moved to make it read "gross neglect," but the wording, as reported by the committee, was retained, and the remarks made by the members of the convention show that they intended just what they say, and that a prisoner when he comes into the hands of the officers of the state shall be panoplied about with all the powers of the state, and as sacred from interference "as the ark of the covenant." The Constitution makers evidently intended to place the sheriff in the breach and hold him to the strictest accountability for the safety of the persons committed to his care. It must be admitted that the law is severe and exacting, but the evil which it was intended to correct demands strenuous measures of prevention. In this free government of ours respect for the laws is the very base rock upon which must rest all of our liberties, and, if mob law is ever justifiable, then the most cherished principles of that body of laws which we call common, and which have come to us hallowed by the wisdom of ages, and which we have imbedded into our Constitutions, are wrong, and the boasted rights and liberties of the American citizen constitute a solemn farce. "Neglect is the omission or forbearance to do a thing that can be done, or that is required to be done," "to omit by carelessness or design," or "imports a want of such attention to the nature of probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." "Neglect, as applied to a public officer, means a failure on his part to do and perform some of the duties of his office."

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

5 Words & Phrases, p. 4740; White, Auditor, v. State ex rel., etc., 123 Ala. 577, 28 South. 343; Warren v. U. S., 58 Fed. 559, 562, 7 C. C. A. 368. When the state or county has provided a suitable and well-constructed jail, with strong doors, not only to prevent the escape of prisoners, but also to prevent the unlawful entrance thereto, it is questionable whether it is not the duty of the sheriff at all times to make use of those means of protection against possible intruders. The sheriff cannot presume that those who desire to invade the premises will inform him of the fact, or make such a demonstration on the streets as to advertise their intentions. However that may be, when a crime of peculiar enormity has been committed exciting public indignation, when it is known that such crimes always bring about suggestions that the prisoner be taken out and lynched, and when, in addition to that, the suggestion is made to the sheriff that there is a probability of an attempt to take the prisoner and lynch him, ordinary prudence would suggest that the sheriff should at least give orders that all the doors by which an entrance may be effected into the jail should be closed and take other precautions when he leaves it for the night. It will not do to say that the basement is under the charge of an engineer, and to infer therefrom that the sheriff has no responsibility in relation thereto. He is the legal custodian of both the courthouse and the jail, and it is his duty to exclude intruders therefrom. Code 1907, §§ 132, 7191. If he commits the charge of the basement to an engineer, it is his duty to make such rules and regulations as will insure the building from the entrance of intruders. It was then neglect on the part of the sheriff under the circumstances of this case to fail entirely to give any orders for the closing of the doors before leaving the building for the night. He is not responsible for the negligence of his deputies if he has made proper selections and given them proper directions; but he is responsible for not instructing them to take the proper precautions.

A great many witnesses were examined on the part of the state and of the defendant, occupying the greater part of three days, and it would serve no useful purpose to discuss the same in detail. After a careful consideration of all the evidence, we are satisfied beyond a reasonable doubt that said Frank Cazalas, Sr., has been guilty of neglect within the meaning of the Constitution which has resulted in the taking of a prisoner from jail and his being put to death.

In accordance with the demands of the law, an order will be here entered removing said Frank Cazalas, Sr., from the office of sheriff of Mobile county.

DOWDELL, C. J., and DENSON, McCLELLAN, and SAYRE, JJ., concur.

ANDERSON, J. (dissenting). It is true that section 138 of the Constitution of 1801 in dealing with sheriffs and providing for their impeachment when prisoners are taken from their custody and killed or injured does not require the same degree of neglect of duty as a cause for impeachment as is required in other provisions relating to other officers and other causes; yet I do not think that the word "neglect" as used in said section 138 is intended to make the sheriff an absolute insurer of the safety of a prisoner, or that an ordinary inadvertence or mistake of judgment was contemplated as a cause for impeachment. Infallibility was not expected by the framers of our Constitution, and perfection in any walk in life is unknown to the experience of mankind or to sacred and profane history, except in the single case of Him "who spake as never man spake" "let him who is guiltless cast the first stone." To hold that a sheriff must be impeached for a mere error of judgment or anything short of grave or serious neglect would render the Constitution of a free people despotic, tyrannical, and cruel.

We need not go elsewhere to get a definition of the word "neglect" as used in our Constitution, for this court in the case of White v. State, 123 Ala. 587, 26 South. 346, said: "We cannot doubt that the framers of the present Constitution used the words 'neglect of duty' in the sense and meaning which has been accorded to them by the courts, and, having been thus used, the Legislature cannot enlarge their scope and meaning." "To neglect is to omit by carelessness or design. New York Guaranty Co. v. Gleason, 53 How. Prac. (N. Y.) 127. Neglect means omission or forbearance to do a thing that can be done or that is required to be done." 16 Am. & Eng. Ency. Law, 385, and note 2. There must not only be a failure by carelessness or design to perform the duty required to be performed, but the party must have the capacity to perform the acts required of him, provided the incapacity is not superinduced by his fault or the result of his own misconduct. Here we have a clear definition of official neglect, as defined by our own court, and which must have been put in section 138 of the Constitution with the meaning and interpretation given it, inasmuch as there was no effort to define it otherwise by the instrument itself.

I do not understand the majority of the court to hold that the respondent's misconduct was designed, but they seem to go upon the idea that his failure to resort to preventive measures was such a careless act as to render him guilty of such a neglect as is contemplated by section 138 of the Constitution. First, that the very nature of the crime, the popularity of the deceased, etc., was calculated to make a prudent man apprehensive that an attempt would be made to lynch the prisoner, Robertson; and, second, that Jas. H. Webb had warned him to

expect an attempt to lynch the prisoner. Under the proof in the case, the first proposition must fail. The undisputed evidence shows that from the time of the shooting of Fotch and up to the very hour of the lynching there was no excitement, no congregation of the populace, and that the town was in its usual orderly and normal condition. Witnesses who had passed over every thoroughfare and byway, who visited nearly every popular place of business, testified without contradiction that there was nothing to indicate from the conduct and manner of the public that any violence would be attempted on the prisoner. These witnesses are fully sustained by the fact that the jail was not attacked. There was no mob, and the prisoner was slain by not exceeding a dozen midnight assassins who approached the jail stealthily, and by twos and fours. Again, this respondent had encountered previous lynchings, and preceding them the town was wild with excitement, the streets were paraded, and indignation meetings were held. Compare the two, and it will be found that the respondent's past experience gave him every assurance that the conduct of the public on this occasion gave every indication that there would be no attempt to do violence to his prisoner. True, there were witnesses who heard rumors of a probable lynching, that he ought to be lynched, etc., yet most of them admitted that they attached but little importance to said rumors. They had been in the city on former occasions, knew the temper of the people then, and compared it with the then quiet and orderly condition of the city. Not a single witness who heard said rumors attached enough importance to them to report to the sheriff, the mayor, or chief of police, but this respondent must be chargeable with rumors and conditions not deemed serious by a single man, save Jas. H. Webb, who only communicated his opinion to the sheriff incidentally. That Mr. Webb warned the defendant there can be no doubt. Whether or not respondent heard him there is very serious doubt. Mr. Webb told him in the presence of Judge Alford that Mrs. Hodgson, or the negro woman, had overheard a man say there was going to be a lynching. When Mr. Webb told this respondent what he had heard, Judge Alford and the respondent both expressed no fear, evidently based on the then serene and quiet condition of the city, and Mr. Webb did not then take issue with them, but merely remarked to respondent when they left Judge Alford's office that they were going to lynch that negro "as sure as gun is iron." Did the respondent hear him? His hearing is not good, and he says he did not or did not remember. Mr. Webb did not say that he did hear him, and they parted after this remark.

Conceding, however, that the respondent heard Jas. H. Webb, was it any more than his mere opinion based solely upon what his

client or Mrs. Hodgson told him? On the other hand, Judge Alford, equally as familiar with conditions as Mr. Webb, expressed a different opinion, and the respondent entertained similar views. Mr. Webb's opinion was a mere conjecture, and the opinion of Judge Alford was based upon existing and fortifying conditions. Again, not a single person other than Mr. Webb ever gave the respondent the slightest warning, and it looks unreasonable that if there was any foundation of "a lynching in the air," it would have sufficiently attracted the notice of some conservative and law-abiding citizen to the extent of causing him to impart his information to the sheriff, the mayor, or chief of police. Conceding, however, that this respondent was chargeable with notice that an attempt would be made to get his prisoner, what else could he have done? The majority concede that conditions were not such as to call for the military or an armed guard to surround the jail, but seem to charge his whole dereliction of duty to the fact that he did not instruct his guards to close the wooden doors and the second steel door to the guardroom. It was utterly impracticable to have closed the wooden doors, as other deputies were coming in with prisoners at all hours of the night. Had they been closed, one of the guards would have to open them and would put himself more accessible to would-be intruders than he was by remaining in the guardroom. As to the other steel door, its being shut would not have removed the guards from the reach of the men who covered them. On the other hand, with both doors of the cage closed, they would have been at a disadvantage as to egress in defending entrances or attacks in other parts of the building. Had they locked themselves so that it would have taken them too long to get out, and an attack had been made elsewhere, it might be said that the sheriff was guilty of neglect for not instructing them to keep the doors open so as to have ready access to other parts of the building. The jail was impregnable to a forcible attack, as the state proved this fact beyond question. The prisoner was placed in the most secure cell in the building, and was gotten out only by some one who was doubtless familiar with the jail, and in a way which the sheriff had no reason to anticipate. When leaving for his home, he left five deputies on duty, two in the guardroom and two upstairs. He had every reason to believe that these five men could protect the prisoners in such a modern and well-constructed jail as the one in question. He had ever been faithful to his chief, and he had every reason to assume that his subordinates would be faithful to him, and could and would take care of the premises without any special instructions from him. Yet we find this man condemned and removed from a high office to which he had been elected because, sick though he was,

he merely failed to tell his subordinates to close a certain door. It is always easy to see how a thing could have been prevented after it happens, but a failure to resort to certain preventive means is often a mere error of judgment. It has also been suggested that this man ought to be convicted because he retained the deputies and did not discharge them. In other words, had he condemned them and gotten rid of them, he would have shifted the blame from his own shoulders, and escaped. He said he investigated the matter, and was not satisfied that they were to blame. Like the brave man that he is, he gave his subordinates the benefit of the doubt, and did not shift the responsibility in order to make fair weather for himself.

This is in the nature of a criminal prosecution, and I think the facts fully generate a reasonable doubt as to whether or not this man has been guilty of impeachable conduct. I think this doubt exists from the evidence, regardless of the proof of his good character; but when it is considered with the very weak evidence of the state, much of which has been procured through paid detectives, there can be but little doubt that this man is not guilty of impeachable conduct. The undisputed evidence shows that for 20 years he has been a brave and faithful officer—true to his post in most trying times. When but a deputy, he stood his ground and risked his life in defense of a negro rapist against an outraged and maddened mob. Some say he was standing by a brother deputy when he was killed, but Ex-sheriff Powers said he placed him in another position because he was the bravest and coolest man he had; yet we find a majority of the court convicting this man almost entirely because he did not accept Mr. Webb's opinion, which was not shared in by the respondent himself, Judge Alford, or any other witness who testified in the case or by any other man in the city for that matter, as we find no one informing the sheriff, mayor, or chief of police of any threatened danger, notwithstanding there is a law and order league in the city, and the members of which are presumed to have as high a regard for the preservation of human life as in ferreting out petty offenses or in the conviction of this unfortunate and feeble man. Lynchings are to be deplored, and have unfortunately been a blot upon modern civilization, and the majesty of the law should be upheld at all hazards, and the framers of the Constitution evidently prepared drastic means as to the sheriffs as a panacea for existing woes, and the removal of a sheriff may have a very salutary influence in the future, as was argued by counsel for the state, but an unjust removal of a man who has been elected to a high office by the people, doubtless due to the fact that he was a brave and efficient deputy, is to my mind a great injustice.

The Constitution has singled out sheriffs,

and holds them to a higher degree of accountability for slighter misconduct than it does as to other officials. They are deprived of a right of trial by a jury of their peers—a right sacred to all English speaking people. The state has practically a change of venue, with every means of defraying the expenses of her witnesses. She has been aided by an organization and hired detectives. The respondent has been removed from his home and friends, has had to come nearly 200 miles to stand his trial and bring his witnesses at his own expense; yet with all these advantages in favor of the state we find this man convicted, bankrupted, and humiliated because he failed to act upon the opinion of one man and neglected to tell his deputies to close certain doors, customarily left open, before going home.

My Brothers in their effort to charge respondent with neglect because of a failure to have certain outer wooden doors closed cite section 132, Code 1907, which makes the sheriff the custodian of the courthouse and jail, and requires him to exclude intruders therefrom. While this is true, it must be borne in mind that his possession and control is subordinate to the orders and directions in a measure of the county commissioners or board of revenue. *White v. Hewlett*, 143 Ala. 374, 42 South. 78. The basement door and the outer wooden doors were not openings to the jail alone, but to the building of which the jail proper was but a part, and which included offices which had been assigned by the proper authorities to various and sundry officials. The closing of these doors, therefore, would not only tend to exclude intruders, but would have excluded these officials from convenient ingress and egress to and from their respective places of business. Moreover, the sheriff had nothing to do with the basement door, as the basement had been put in the charge of the engineer by the board of revenue.

It is also suggested that the sheriff is under the statute the jailer of the county. This I do not combat, but I do not think that it means that he must be the actual keeper of the jail, as section 7191 of the Code authorizes him to appoint a jailer, and makes him civilly responsible for his acts. The sheriff in this instance had a jailer who was in full control and charge of the jail with two guards on duty and two deputies upstairs with the prisoners. There was not the slightest proof that this jailer was incompetent; yet the majority seem to think this man was guilty of a neglect because he did not instruct the jailer, who doubtless knew better how to look after and protect the jail than the sheriff. This court sits as a jury as well as judges, and in the consideration of facts should not lose sight of the human phase of the case. What may appear to them as neglect when measured with the exacting lines of their training and theory may be

but an error of judgment upon the part of the average citizen who has had neither a judicial or military training.

I dissent from the conclusion of the majority, and think that this respondent should be discharged.

MAYFIELD, J., concurs in the conclusion of ANDERSON, J.

#### LOUISVILLE & N. R. CO. v. JOHNSON.

(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

#### 1. PLEADING (§ 205\*) — DEMURRER — SUFFICIENCY.

Code 1907, § 5340, provides that no demurrer in pleading can be allowed save to matters of substance, which the party demurring specifies, nor can objection be taken or allowed which is not distinctly stated in the demurrer. Plaintiff was injured by being struck by one of defendant's trains while crossing its track, and defendant demurred to a count in the complaint, stating as the grounds: (1) That the misconduct was not alleged with sufficient certainty; (2) that the averment of intentional misconduct was not sufficient. *Held*, that the specification of the grounds of demurrer was general, and insufficient to raise the question whether the complaint sufficiently averred that the agents or servants of defendant were acting within the scope of their employment at the time the injury occurred.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 205.\*]

#### 2. RAILROADS (§ 344\*)—ACCIDENT AT CROSSING—PLEADING.

In an action against a railroad company for injuries caused by being struck by one of defendant's trains while plaintiff was crossing its track, the complaint averred that defendant on a date specified was engaged in operating a railroad and running engines, etc., thereon, for transporting persons and things for hire; that "defendant's servants or agents then and there operating an engine, to which were attached cars, wantonly or willfully caused or permitted the same to be run upon or against plaintiff," thereby injuring him. *Held*, that the complaint was not insufficient as failing to allege that at the time of the injury the agents or servants of defendant were acting within the scope of their employment, or as failing to charge such actual knowledge on the part of defendant's servants as would show that their conduct was wanton.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.\*]

#### 3. PLEADING (§ 34\*) — CONSTRUCTION OF COUNT.

A count in a pleading must be construed as a whole.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66, 67; Dec. Dig. § 34.\*]

#### 4. RAILROADS (§ 344\*)—ACCIDENT AT CROSSING—DEMURRER.

Where a count, in an action for injuries received while crossing defendant's track by being struck by one of its trains, sufficiently charges wanton or willful misconduct, a demurrer to a plea of contributory negligence, addressed to such count, is properly sustained.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 344.\*]

#### 5. RAILROADS (§ 347\*)—ACCIDENT AT CROSSING—ACTIONS—EVIDENCE.

Plaintiff was injured while attempting to cross defendant's track to take a train at a street crossing to go to his work as a flagman for defendant. It was customary for employees of defendant, who worked at the same place where plaintiff was employed, to take an employees' train at this crossing. *Held*, that evidence that a bulletin was posted naming that street crossing as one of the places at which employees took a train for that place was material, as tending to show the right of plaintiff to be at the crossing on the occasion when he was injured.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 347.\*]

#### 6. TRIAL (§ 76\*)—RECEPTION OF EVIDENCE—TIME FOR INTERPOSING OBJECTIONS.

An objection to a question, after the question has been answered comes too late.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 185; Dec. Dig. § 76.\*]

#### 7. EVIDENCE (§ 501\*)—OPINION EVIDENCE—EXAMINATION OF WITNESS—QUESTIONS.

There was a conflict in the testimony whether there was a light on the rear of the engine which, while backing, struck plaintiff. A question was asked an experienced engineer as to how near the rear of the engine a man on the track could be seen by the engineer, if there was an electric street light at that place. *Held* that, as one of the issues in the case was whether the engineer saw the plaintiff in a position of peril and at what distance he was from him, the question was a proper one, as against objection that it took no account of the headlight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.\*]

#### 8. RAILROADS (§ 376\*)—INJURIES TO PERSONS ON TRACKS—CARE REQUIRED.

After discovering a person in a dangerous proximity to a track, or on the track, it is the duty of the person in charge of an approaching engine to take such steps as will avoid injuring such person, and failure to do so is negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1279; Dec. Dig. § 376.\*]

#### 9. TRIAL (§ 242\*)—CONFUSED OR MISLEADING INSTRUCTIONS.

In an action for injuries from being struck by an engine while crossing defendant's tracks, an instruction that if the jury believed from the evidence that plaintiff, at and before the time of the accident, knew that no trains could approach him on the track on which was running the engine that struck him from the east when the south-bound main line was occupied by a train, and if the jury found from the evidence that such was the fact, then plaintiff would not be excused from looking in the direction from which came the engine that struck him by the fact, if the jury believed it was a fact, that he was looking in an opposite direction, was properly refused as confusing, involved, and calculated to mislead the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.\*]

#### 10. TRIAL (§ 194\*)—INSTRUCTIONS—QUESTIONS FOR JURY.

Where, under the evidence, negligence or contributory negligence is a jury question, a requested instruction that, if the jury believe the evidence, they must find from it that plaintiff was himself guilty of negligence, and that such negligence proximately contributed to his injury, was properly refused.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.\*]



**11. RAILROADS (§ 351\*)—ACCIDENT AT CROSSING—ACTIONS—INSTRUCTIONS.**

In an action against a railroad company for injuries caused by being struck by a switch engine while attempting to cross defendant's track, a requested charge that if the jury believed from the evidence that plaintiff, by looking and listening, could have discovered the approach of the switch engine in time to have gotten out of the way before being struck, then plaintiff was negligent, was properly refused, on the ground that it would make necessary such conduct on the part of plaintiff as would have assured his discovery of the approaching engine in order to acquit himself of negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1215; Dec. Dig. § 351.\*]

**12. RAILROADS (§ 351\*)—INJURIES TO PERSONS ON TRACKS—ACTIONS—INSTRUCTIONS.**

An instruction that, if the jury believe the evidence, they cannot find from it that defendant was guilty of wanton or intentional negligence, was properly refused, as the wanton or intentional misconduct under the evidence was attributable, not to defendant, but to its servants or agents, and also because the evidence tended to show that the engineer saw plaintiff in a position of peril, and either negligently omitted to perform his duty or else wantonly or intentionally caused or allowed his engine to strike plaintiff.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 351.\*]

**13. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICATION TO CASE.**

In an action against a railroad company for injuries while crossing defendant's track by being struck by a switch engine while plaintiff was endeavoring to take a train to carry him to his work as a flagman in the employ of defendant, there was no attempt made to fix defendant's liability as that of a master. *Held*, that requested instructions that plaintiff was not entitled to the measure of care that defendant owed its employes, and that plaintiff did not occupy the relation of employer to defendant, so as to entitle him to demand the measure of care from the defendant that the law exacted with reference to its employes, were properly refused as abstract.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 251.\*]

**14. RAILROADS (§ 351\*)—INJURIES TO PERSONS ON TRACKS—ACTIONS—INSTRUCTIONS.**

An instruction that, if the jury find for plaintiff, they can only award him nominal damages, unless they believe that his injury was proximately caused by the wanton or intentional negligence of defendant, was properly refused, because it excluded plaintiff from his right to recover compensatory damages if the jury found that defendant's servants were negligent after discovery of plaintiff's peril and his injury proximately resulted therefrom, provided it was also found that plaintiff was also not guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 351.\*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Walter H. Johnson against the Louisville & Nashville Railroad Company for injury. From a judgment for plaintiff, defendant appeals. Affirmed.

The pleadings are fully discussed in the opinion. The following charges were refused to the defendant: (1) Unnecessary to be set out. (2) "If the jury believe from the

evidence that the plaintiff at and before the time of his accident and injury knew that no trains could approach him on the track on which he was running the engine that struck him from the east when the south-bound main line was occupied by a train, and if the jury further believe from the evidence that such was the fact, then the plaintiff would not be excused from looking in the direction from which came the engine that struck him by the fact, if the jury believe from the evidence that it was a fact, that he was looking in an opposite direction." (3) "If the jury believe the evidence, they must find from it that the plaintiff was himself guilty of negligence." (4) Same as 3, and adds: "Which proximately contributed to his injury." (5) "If the jury believe from the evidence that the plaintiff could have, by looking and listening, discovered the approach of the switch engine in time to have gotten out of the way of it before being struck by it, then the plaintiff was himself guilty of negligence." (6) "If the jury believe the evidence, they cannot find from it that the defendant was guilty of wanton or intentional negligence." (7) "If the jury believe the evidence in this case, they cannot find, from it that at the time of the plaintiff's injury he was entitled to the measure of care that defendant owed to its employes by law." (8) "The plaintiff in this cause at the time of his injury did not occupy with reference to the defendant the relation of an employe, so as to entitle him to demand the measure of care and duty from defendant that the law exacts of defendant in the management of its engines and trains in favor of its employes." (9) "I charge you that, if you believe the evidence in this case, you cannot find from it that the plaintiff, at the time of his injury, occupied the relation of employe as against the defendant in such sense as to entitle the plaintiff to demand of defendant the measure of duty that defendant owed to its employes in the management of its train and engines." (10) "If the jury believe the evidence and find for the plaintiff, they can only award the plaintiff nominal damages, unless they believe from the evidence that the plaintiff's injury was proximately caused by the wanton or intentional negligence of the defendant." (11) Affirmative charge as to thirteenth count. (12) Same as to fourteenth count. (13) The general affirmative charge. (14) Affirmative charge as to first count. (15) Same as to second count.

The following is a portion of the oral charge excepted to: "After discovering a person in dangerous proximity to the track or on the track, it would be the duty of the person in charge or control of the engine to take such steps as will avoid injuring the person upon the track, and a failure to do

so would be negligence on the part of the person in charge of the engine."

Tillman, Grubb, Bradley & Morrow, for appellant. Gaston & Pettus, for appellee.

MCLELLAN, J. Action for personal injuries. Counts 1, 2, 13, and 14 were those submitted to the jury. Counts 1 and 13 ascribe the injury suffered to negligence attending the operation of an engine and cars at or near a public street crossing in the city of Birmingham. Counts 2 and 14 purport to impute the injury to willful or wanton misconduct on the part of those in control of the engine and cars on the occasion.

The appellant complains of the ruling below holding that counts 2 and 14 were not defective, in that they were silent in the essential averment that the agents or servants of the defendant were acting within the scope of their employment at the time the injury occurred. The demurrer to count 2 was comprised of these grounds: (1) That the misconduct was not alleged with sufficient certainty; (2) that the averment of wanton or intentional misconduct was not sufficient. Under our statute (Code 1907, § 5340) it is evident that these grounds of demurrer did not specify the objection stated above. They were general, and were, hence, properly overruled.

The sixth ground of demurrer to count 14 accurately specified the mentioned objection to this count. It is properly conceded, in substance, in brief for appellant, that there are no patented words for charging the misconduct imputed to have been committed or omitted "within the scope of the servant's employment"; but it is correctly insisted that such fact must appear in a count in such cases, in order to render it immune from demurrer taking the objection. This count did not contain the express averment referred to. Does it contain allegations of fact comprehending it? We are of the opinion that it does. It is averred that the defendant was engaged, in July, 1906, in the business of operating a railroad and running thereon engines, etc., for transporting persons and things for hire; that "defendant's servants or agents then and there operating an engine, to which were attached cars, wantonly or willfully caused or permitted the same to run upon or against plaintiff," thereby injuring him. The former averment is the basis for the latter, and the latter cannot be interpreted without reference to the former. The latter necessarily refers to the business in which the defendant was engaged, as portrayed in the former averment, and the conduct of the servants or agents in the operation of the engine, with cars attached, necessarily implies that those operating the engine and cars were doing so in the course of business in which the defendant was engaged. To take the latter averment as capable of describing agents or servants of

the defendant usurping the function of exercising, for the master, a proper control and use of one of its engines, with cars attached, and to this we are urged for appellant, would be, it seems clear to us, to ignore the antecedent averment of the business pursued by the defendant, and in immediate connection with which the latter averment is employed, descriptive of a damning result attending the operation "then and there" of one of defendant's engines, etc., in the physical control of servants or agents of the defendant. The argument for appellant does not, we think, take due account of all of the averments of the count, but rather would turn the interpretation of the count on the single averment describing the misconduct of the defendant's servants or agents. A count must be construed as a whole. *A. G. S. R. R. Co. v. Williams*, 140 Ala. 230, 37 South. 255, cited for appellant, dealt, in the particular sought to be applied on this appeal, with a cause of action attempted to be stated under subdivision 5 of the employer's liability act (Code 1907, § 3910), whereby "charge" or "control" of any signal, point, etc., are required to be averred. That decision can have no bearing on the present inquiry, where the relation of master and servant is not relied on, in the pleadings submitted to the jury, to fix liability.

It is argued that count 14 was defective because of its omission to charge such actual knowledge on the part of the servants of defendant as would support wantonness, etc., in the act taken or omitted. There was no ground of the demurrer to this count taking that specific objection.

There was no error in overruling the demurrers to counts 2 and 14; and, for like reasons, there was no error in sustaining plaintiff's demurrers to pleas of contributory negligence as addressed to counts 2 and 14, which counts charged wanton or willful misconduct.

According to plaintiff's contention, he was, at the time of the injury, en route to take a train at the Twenty-Fourth Street crossing, where he was injured, to go to Boyles, where he was to take up his duties, as a train flagman, on a train of defendant to be run from Birmingham to Montgomery. There were several parallel tracks at or in this crossing. The evidence tends to show that plaintiff was delayed when he reached a point on the sidewalk between two of the tracks of the defendant. The occasion for the delay was the approach or passage of a long freight train going south. It further appears, from some of the evidence, that plaintiff looked both up and down the track, next that occupied by the freight train, a half minute before he was stricken by an engine on such next track, and that he was in the act of turning his head to again look, in the direction from which this engine came, when he was injured. It was shown that it was

customary for employes of the defendant, whose duties required their presence at Boyles, four miles north of Birmingham, to take an employes' train, operated by the defendant between Birmingham and Boyles at regular intervals, at this crossing. In this connection plaintiff's counsel propounded this question to plaintiff as a witness: "I will ask you if it was not a fact that a bulletin was posted naming that as one of the places?" (meaning places at which this employes' train took up persons going to their work at Boyles). The objection, overruled by the court, to the question, was that it sought immaterial matter. The testimony sought was material in the aspect that it tended to show the right of the plaintiff to be at the crossing on the occasion. Besides, from the bill, it appears that the question had been answered before an objection, stating a ground therefor, was interposed. The objection stated came too late.

The proof tended to show that an electric street light was swung and burning at the crossing, and that the engine inflicting the injury was of the switch engine type, with a sloping water tank. The question, propounded to the witness Hopwood, as to how near the rear of the engine a man on the track could be seen by the engineer from his place in the cab, was objected to. The objection to the question was that it took no account of the headlights. The question was then amended so as to hypothesize the presence of the electric street light, and the objection stated was reinterposed. The court properly overruled the objection. There was a conflict in the testimony whether there was a light on the rear of this engine. It was undoubtedly the right of the plaintiff to elicit the opinion of Hopwood, an experienced engineer, under the circumstances hypothesized and supported by some phases and tendencies of the evidence. One of the issues in the case was whether the engineer saw plaintiff in a position of peril, at what distance from him, and the hypothetical question sought evidence bearing on this issue. These considerations dispose of all the assignments except those based on the oral charge of the court, in one particular to be stated, and on refused special charges.

The fraction of the oral charge set out in the bill is, abstractly, a correct proposition of law, though it is also true that, notwithstanding one may be in a position of danger on or near the track, the engine man may assume, under conditions defined in many cases here, that the endangered party will remove himself from danger. The criticism asserted for appellant is that taken in *L. & N. R. R. Co. v. Young*, 153 Ala. 232, 45 South. 238, 16 L. R. A. (N. S.) 301, to the there quoted part of the oral charge of the court. The part of the oral charge here criticised is squarely within our declaration in the *Young Case*. The charge here was predicated upon the failure "to take such steps" as would

avoid injury. The quoted expression is readily subject to an interpretation rendering it the equivalent of the application of proper means, in proper order, set down in the *Young Case*.

Special charges 1 to 15, inclusive, were refused to defendant. That numbered 1 is a substantial duplicate of charge 19 given at the request of the defendant.

Charge 2 was properly refused, for the reasons, if not others, that it was confusing, was involved, and was calculated to mislead the jury.

Charges 3 and 4 affirmed that the plaintiff was guilty of negligence. Under the evidence in the case negligence, or contributory negligence, *vel non*, of the plaintiff, was plainly a jury question. These charges were well refused.

Charge 5 was correctly refused, because it exacted of the plaintiff, in order to acquit himself of negligence in his conduct, such cautious conduct as would have assured his discovery of the approaching engine in time to have avoided it. The standard, in this as in all cases, for the measurement of conduct with reference to the ascertainment of negligence *vel non*, is defined in *Central of Ga. v. Forshee*, 125 Ala. 215, 218, 27 South. 1006. This charge would have raised that standard. *Dowdell, C. J., and Anderson, J.,* are of the opinion that the charge was properly refused, in that it omits to hypothesize the failure of plaintiff to look and listen.

Charge 6 affirmed that a belief of the evidence forbade a finding "that defendant was guilty of wanton or intentional negligence." The refusal of the charge may be justified on the ground that the wanton or intentional misconduct was attributable, under the evidence, not to the defendant, but to its servants or agents. But, independent of that criticism, there were tendencies in the evidence from which it could have been reasonably concluded that the engineer, Ellison, saw the plaintiff in a position of peril, and either negligently omitted to perform his duty to avert injury, or else wantonly or intentionally caused or allowed his engine to strike plaintiff. It was shown, by some of the testimony, that plaintiff was standing between the track on which Ellison's engine came and a track on which a long freight train was passing; that plaintiff's back or side was toward Ellison's engine; that he did not see it until struck thereby; that the space—"clearance"—between engines and cars on these two tracks was narrow, so narrow as to render it, Ellison testified, dangerous to be there when engines and cars were simultaneously using both tracks. Ellison testified: "I kept a lookout down the crossing when I was coming up to it. I looked out for the crossing. There is a street crossing there to look out for, and also a semaphore there at the railroad crossing. I looked at the semaphore and street crossing, too. Nobody was in my sight. As the engine was backing up, I first

looked at street crossing when I was a car length and a half from it, 50 feet." The engine was backing, there was some evidence tending to show, when plaintiff was struck by it. An electric light was burning at or over the crossing. There was evidence that the fireman said, presumably addressing the engineer, "Whoa!" two or three times. There was testimony to the effect that this engine, running 2 to 5 miles an hour, could have been stopped almost instantly by the application of the emergency brakes. These are some of the facts and circumstances rendering the issues of negligence vel non of defendant's servants, of the contributory negligence vel non of the plaintiff, of wanton or intentional misconduct vel non of defendant's servants, of subsequent negligence after discovery of plaintiff's peril, and of contributory negligence vel non—all within the issues raised by counts 1, 2, 13, and 14, and pleas thereto—triable by the jury. The Bush Case, 122 Ala. 470, 28 South. 168, Young's Case, supra, and B. R., L. & P. Co. v. Hendry Jung (present term) 49 South. 434, are in point, in the important particulars, on the court's duty, observed by it, to submit these issues to jury for decision.

Charges 7, 8, and 9 had reference to the relation of master and servant, mentioned as existing, not then, however, by some of the

evidence offered by plaintiff in explanation of his presence at and purpose in going to the Twenty-Fourth street crossing. None of the four counts, viz., 1, 2, 13, and 14, submitted to the jury, nor any pleading following them, sought to fix liability through the relation of master and servant. No action of the court tended in that direction or to that result. These charges were, therefore, abstract and properly refused.

Charge 10 was faulty, and hence well refused, because it excluded the plaintiff from his right to recover compensatory damages, at least, if, as was possible under the pleading and evidence, the jury found that defendant's servants were negligent, as distinguished from the more aggravated misconduct, after discovery (if so found) of plaintiff's peril and his injury proximately resulting therefrom, provided it was also found that plaintiff was not guilty of contributory negligence bearing the necessary legal relation to such subsequent negligence.

We have considered, treated, and decided every error assigned and urged for appellant, and find no error in the record. The judgment is therefore affirmed.

Affirmed.

DOWDELL, O. J., and ANDERSON and MAYFIELD, JJ., concur

## UNDERWOOD v. UNDERWOOD.

(Supreme Court of Alabama. June 10, 1909.)

## 1. APPEAL AND ERROR (§ 339\*)—TIME TO APPEAL.

An appeal from a decree on demurrer, taken more than 30 days from the rendition of the decree, is not taken in time, and the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 339.\*]

## 2. APPEAL AND ERROR (§ 452\*)—EFFECT OF APPEAL—JURISDICTION OF LOWER COURT.

The trial court may disregard an appeal from the sustaining of a demurrer to the bill with leave to amend, allowed by the register at a time no appeal could be taken, and may annul the allowance of the appeal and dismiss the bill on complainant electing to stand thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2212; Dec. Dig. § 452.\*]

## 3. EQUITY (§ 245\*)—SUSTAINING DEMURRER TO BILL WITH LEAVE TO AMEND—FAILURE TO AMEND—EFFECT.

Where complainant fails to amend his bill on the sustaining of a demurrer thereto, with leave to amend within a specified time, the court must, after the expiration of such time, dismiss it.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 245.\*]

## 4. EQUITY (§ 17\*)—PROTECTION OF FUTURE RIGHTS IN PERSONALTY.

Where there is a future right of enjoyment of personal property, equity will grant relief on a bill quia timet, where there is any danger of loss or deterioration or injury to it in the hands of the one entitled to the present possession.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 42; Dec. Dig. § 17.\*]

## 5. WILLS (§ 614\*)—GIFTS OF PERSONAL PROPERTY—ESTATE CREATED.

In cases of bequests of specific things, such as horses, mules, wagons, buggies, corn, cotton seed, for the use of one for life with remainder over, the use consists in the consumption of the things, and the gift of such property, in most cases, though not necessarily in all, amounts to an absolute gift.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1397; Dec. Dig. § 614.\*]

## 6. PLEADING (§ 8\*)—FACTS OR CONCLUSIONS—PERSONAL PROPERTY—SECURITY FROM LIFE TENANT.

A bill by a remainderman of personal property against the life tenant to require the latter to account for the value of the property and praying for a sale thereof, which alleges generally that the life tenant will convert all the property, without stating facts justifying the conclusion, is insufficient.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 8.\*]

## 7. LIFE ESTATES (§ 15\*)—RIGHT OF LIFE TENANT.

A tenant for life of real estate is entitled to the rents thereof.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 34; Dec. Dig. § 15.\*]

## 8. LIFE ESTATES (§ 21\*)—PERSONAL PROPERTY.

A life estate in personalty gives the donee the right to consume such articles as cannot be enjoyed without consuming them, as well as the right to wear out by use such as cannot be used without wearing out, and the extent

of the liability over to the remainderman must be governed by the intention of the donor.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 30; Dec. Dig. § 21.\*]

## 9. LIFE ESTATES (§§ 6, 27\*)—SECURITY—SALE.

Where a life tenant and a remainderman claim under a will bequeathing personal property to the use of the life tenant for life with remainder over, the intention of the testator, determined from the whole instrument, controls the rights of the respective legatees, and as to whether the property shall be sold, or whether the life tenant shall give security for the preservation of the property.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. §§ 6, 27.\*]

## 10. LIFE ESTATES (§§ 6, 27\*)—SECURITY—SALE.

A farmer devised a part of his real estate and bequeathed all of his personal property, including horses, mules, cattle, hogs, wagons, buggies, and all household and kitchen furniture, to his wife for life, and provided that at her death the personal property should go to a son. *Held*, that the wife was entitled to use for her own benefit the personal property, and the remainder, if any, passed at her death to the son, and he could not require the wife to give security for the preservation of the personalty or require a sale thereof.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. §§ 6, 27.\*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Bill by W. H. Underwood against Piety J. Underwood. From a decree of dismissal, complainant appeals. Affirmed.

Gunter & Gunter, for appellant. Marks & Sayre, for appellee.

MAYFIELD, J. This was a bill filed by a remainderman as to personal property, to require an account of the items and value of the property received by the life tenant under the will of the testator, which also vested a remainder in the complainant, and prayed that all of said property, or such of it as should be, be sold and converted into cash in order to secure to orator, as remainderman, his rights under the fifth clause of the will, and that the use of the property not sold, and the interest of the proceeds of that sold, be secured to the life tenant, and that the property not sold and the net proceeds of that sold be secured to orator as remainderman. The life tenant, who was the wife of the testator (the complainant, remainderman, being the son of the testator), interposed demurrers to the original bill, which were sustained upon a hearing, with leave to amend on the 9th day of August, 1907. On the 20th day of August, 1907, in response to a request, the court assigned definite grounds for sustaining the demurrers. The order states that each and every ground of the demurrer is well taken, except the one which recites that the allegations of the bill are merely a statement of the conclusions of the pleader. Complainant amended his bill on the 30th day of August, 1907, and to the amended bill the respondent again inter-

posed her demurrers, upon the same grounds interposed to the original, and certain additional grounds. This demurrer was heard on the 7th day of September, 1907. The demurrer was sustained by the court, and the complainant was allowed until the first day of the next term in which to amend his bill. On the 24th day of October complainant applied for an appeal and gave security for the costs, and notice of the appeal was on the same day issued by the register and served upon the respondent. On the 13th day of November, 1907, the judge of the court set aside or annulled the order allowing an appeal from the decree on demurrer, on the ground that it was taken after the lapse of 30 days, and, the complainant standing by his bill and declining to amend, the judge dismissed the bill out of the court and taxed the complainant with the costs. From this decree of dismissal the appeal is taken, and complainant here assigns as error the sustaining of the demurrers to the original bill and to the amended bill and the dismissing of the bill without prejudice.

The appellee moves to dismiss the appeal for that it was not taken within the time required by law, in that the first appeal allowed by the register was more than 30 days after the sustaining of the demurrer, and for that, after this appeal was taken, the judge or chancellor had no power or authority to make any further orders or to set aside the appeal allowed by the register. It requires no argument or authority to show that, if the first appeal is the only one shown by the record, it should be dismissed, because it is upon a decree on demurrer and was taken more than 30 days from the rendition of the decree; but, of course, no appeal could be taken at the time the attempt was made by the complainant and the register to perfect the appeal. It was wholly void because not authorized. The trial court, or this court, could not give or accord it any validity, and there was nothing improper in the trial court's disregarding it. Consequently the appeal is taken from the decree of November 13, 1907.

It does not appear that any application was made by the complainant to be allowed to further amend; but it is affirmatively shown that he declined so to do. It likewise does not appear that he requested that the bill be dismissed without prejudice or upon the motion of the complainant; all that the record shows being that the complainant had failed to amend his bill from the 7th day of September, 1907, until the 13th day of November, 1907, and that he was allowed time within which to amend his bill, when the demurrer was sustained. There was no other course open to the trial court than to dismiss the bill; the demurrer having been sustained, and the complainant declining to amend. We find no error in any of the orders or decrees of the trial court in this matter. The bill, we think, is wholly

insufficient as one upon which to grant the relief prayed, or any other relief, so far as its allegations show.

It is true, as stated by this court in the case of *Bethea v. Bethea*, 116 Ala. 271, 22 South. 563 (quoting from the language of Mr. Justice Story), that: "Where there is a future right of enjoyment of personal property, courts of equity will now interpose and grant relief upon a bill *quia timet*, where there is any danger of loss or deterioration, or injury to it in the hands of the party who is entitled to the present possession"—citing a number of Alabama cases. We cannot agree with counsel for the appellant that the case made by this bill is as strong as, or stronger than, any of the cases referred to. It appears from the bill that the testator was the husband of the life tenant and the father of the remainderman, and that, after disposing of his real estate by the fourth item of his will, he gave all his personal property to his wife, the respondent, during her life, and at her death, to complainant, her son. The language of the will is as follows: "Item 4. I further hereby will to my wife, *Plety J. Underwood*, for her use and benefit during her life, all of my personal property including horses, mules, cattle, hogs, wagons, buggy, etc., and all household and kitchen furniture, and at her death that said personal property I will to my son, *William H. Underwood*."

The bill contains an inventory of the property, which is made an exhibit, which shows one mule, one horse, cow and calf, a wagon, a buggy, and harness, from \$125 to \$140 in cash, the proceeds of the sale of cotton raised upon the lands, cotton seed, plow tools, 50 bushels or more of corn, fodder, etc., a watch and chain, and household and kitchen furniture. It clearly appears that it was the intention of the testator that his wife should have the use of this property during her life, and that if anything remained at her death it would go to the complainant or remainderman. To sell this property and allow the wife the interest only would entirely defeat the purpose of the will; while to require her to give bond or security for the same, to the remainderman, to secure his rights under the will, might entirely deprive her of any benefit to be derived from the property, and might impose upon her a burden which she could not discharge. The use of by far the greater part of the property—that is, the most valuable portion of it—would of necessity consume the property. The life tenant may outlive the mule, the horse, or the cow; and the use of the wagon, buggy, and harness, the cash, cotton seed, corn, and fodder, and farming utensils, for any great length of time, of course would consume them. It is this use, during her life, whether that period be long or short, to which she is entitled, and to take this property and sell it, or to sell the other

property which might not be destroyed by its use, such as household and kitchen furniture, would be something clearly beyond the intention of the testator.

If any wrong or fraud, on the part of the life tenant, was shown, or if it appeared that the property was being claimed by some person not entitled to it, or that one was claiming the interest of the remainderman rather than that of the life tenant, there would be some ground for equity to interpose, to preserve the property; but interposition of a court of equity, so far as appears from this bill, would defeat the rights of the life tenant, rather than protect the rights of the remainderman. It certainly cannot be a reason for depriving the life tenant of property, or of the use of property, to which she is legally and equitably entitled, that that is the only property she has, and that if she dies soon enough some other party will have a reversion or remainder in the same property. Nor is it any ground for such a deprivation that the life tenant has denied the remainderman the right to the possession of the property, or that she has converted a part of it. Both in law and in equity she was entitled to the possession of all the property, and was entitled to convert a part of it, because, by its very nature and character, the use thereof by the life tenant would of necessity consume it—and this is especially true of all the most valuable—if the life tenant should live long enough. In cases of bequests of specific things, such as the most valuable in this case—horses, mules, wagons, buggies, corn, cotton seed—for the use and benefit of a person for life, the use of such property of necessity consists in the consumption of it. Consequently a gift of such property for life, in most cases, though not necessarily in all, amounts to an absolute gift, for the very apparent reason that the use of the property and the property itself cannot exist separately. It is true that the bill contains a general averment that the life tenant would convert it all; but no facts are shown to justify this presumption or conclusion, and it is something that the trial court nor this court could not know. It is a conclusion to be drawn from the facts, and there are certainly no facts set forth which would justify the conclusion.

The inventory shows one article to be cash arising from rent of land of deceased. The bill does not show whether the respondent was given a life estate in these lands or not. If she was, she was entitled to the rents; that is to say, if she had the same interest in the lands that she did in the personal property. This was the very interest which she acquired. Consequently it was her property, and as to it the complainant would have no interest. On the other hand, if the lands belonged to the complainant after the death of the testator, then the item has no place in this bill. Personal property is so transi-

tory and destructible in its nature that the right to enjoy it during life necessarily carries with it privileges which do not belong to the grant of life estate in lands. A life estate in personal property undoubtedly gives the donee the right to consume such articles as cannot be enjoyed without consuming them, as well as the right to wear out, by use, such as cannot be used without wearing out. The extent of liability over, to a remainderman, is to be governed by the intention of the donor, as manifested in the instrument which evidences the gift; and, if the parties claim under a will, the intention of the testator is to be collected, not from the particular clause, but from the whole instrument. Personal property is either wholly consumed or at least impaired by use. The person entitled to the use has the right to enjoy and use all the property, according to its character and nature. Those to be consumed become his absolute property, while things not to be consumed may be put to the use for which they were designed, and at the termination of the life estate they go to the remainderman. *Holman's Case*, 24 Pa. 174; *Stoner & Barr's Case*, 2 Pa. 428, 45 Am. Dec. 608; *Baskin's Case*, 3 Pa. 304, 45 Am. Dec. 641; *Armiger v. Reitz*, 91 Md. 334, 46 Atl. 990; *Sutphen v. Ellis*, 35 Mich. 446.

We know of no reason why the intention of the testator should not control, in determining what rights, interest, etc., the respective legatees shall take, in cases like this—whether the property shall be sold for its preservation for the remainderman, whether the life tenant shall be required to give security for its preservation and its delivery to the remainderman at the termination of the life estate. While the entire will is not set out in this case—and consequently we cannot construe it as a whole—yet, from what does appear, it seems that a farmer left a will, by which he devised and bequeathed a part at least of his lands to his wife, for life, with a remainder to his son, and all of his personal property (some of which is specified by items, showing that they were necessary for farming and housekeeping) to his wife, during her life, with a remainder to his son. The conclusion is irresistible that it was not intended that this property should be sold, and the interest of the fund, only, be used by the wife, the principal and accumulation to go to the remainderman; but that the wife should use it, during her life, for the purposes for which it was suitable and intended to be used, and for her own benefit during her life, and that the remainder, if any, at her death, should go to his son. To sell this property for the purposes sought in this bill, or to require the life tenant to give security for its preservation and delivery, would clearly defeat the intention of the testator, rather than promote it.

The bill was unquestionably subject to demurrer interposed, and, complainant declin-

ing to amend, no other course was open but to dismiss it; and, if any injury resulted from dismissing his bill, it was his own fault.

The decree of the lower court is affirmed. Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

W. T. ADAMS MACH. CO. v. TURNER.  
(Supreme Court of Alabama. May 24, 1909.  
Rehearing Denied June 30, 1909.)

1. SALES (§ 285\*)—WARRANTY—CONSTRUCTION—CONDITIONS PRECEDENT.

A contract of sale of machinery contained a warranty and a separate and distinct clause providing that notice of defects should be given to the seller within 10 days after the machinery was received, or the same should be deemed waived; the seller reserving the right to furnish all material and labor to correct the defects. *Held*, that the notice was not a condition precedent to a recovery for breach of the warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 806; Dec. Dig. § 235.\*]

2. SALES (§ 262\*)—WARRANTY—EXAMINATION BY BUYER.

A buyer may rely on an express warranty, except as to patent defects obvious on casual inspection, and is not bound to make any examination.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 738; Dec. Dig. § 262.\*]

3. SALES (§ 280\*)—WARRANTY—INSPECTION BY BUYER—CONSTRUCTION OF CONTRACT.

A stipulation in a contract of sale of machinery, with warranty, that if anything was "found" defective, notice thereof should be given to the seller within 10 days after the machinery was received, the seller reserving the right to correct the same and to furnish the material and labor to obviate the defect, did not require the buyer to inspect the machinery with a view to giving the notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 794; Dec. Dig. § 280.\*]

4. SALES (§ 286\*)—WARRANTY—OPPORTUNITY TO SELLER TO REMEDY DEFECTS—CONSTRUCTION OF CONTRACT.

Under a contract of sale of machinery, with warranty, providing that notice of defects should be given to the seller within 10 days after the machinery was received, and the seller allowed to correct the same, and that no claim for any material furnished or work done by the buyer shall be allowed, as the seller reserved the right to furnish the material or do the work, the dependent right of the seller to furnish the material or do the work became extinct on expiration of the 10 days within which to report discovered imperfections to the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 809; Dec. Dig. § 286.\*]

5. EVIDENCE (§ 539\*)—OPINION EVIDENCE—QUALIFICATION AS EXPERT.

A witness, who qualified as an expert machinist with reference to the setting up and operation of engines and boilers, was properly permitted to state that in his opinion an engine and boiler were properly set up.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2349; Dec. Dig. § 539.\*]

6. DAMAGES (§ 162\*)—PLEADING—OBJECTIONS.

An objection that no averment of damage appears in the complaint should be taken to the pleading, and not by a requested charge.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 162;\* Pleading, Cent. Dig. § 1372.]

7. TRIAL (§ 244\*) — INSTRUCTIONS — UNDUE PROMINENCE TO PARTICULAR MATTERS.

A requested charge, in an action for breach of warranty, that it was the duty of the jury to look to the time when the buyer made complaint to the seller to determine whether any defect existed at the time the machinery was sold, was properly refused as selecting and emphasizing one element of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.\*]

Appeal from Circuit Court, Madison County; D. W. Speake, Judge.

Action by H. C. Turner against the W. T. Adams Machine Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The issues on which the case was tried, together with the facts of the same, sufficiently appear in the opinion of the court. The following charges were refused to the defendant: (1) General affirmative charge. (2) "It is the duty of the jury to look at the time when the plaintiff made complaint to the defendant to determine whether any defect existed in the engine and boiler at the time the defendant sold the engine and boiler to the plaintiff." (3) "Under the terms of the contract offered in evidence the plaintiff had no right to purchase materials or employ labor and charge the defendant with the same without first giving the defendant an opportunity to furnish said material and labor in the repair of the engine and boiler." (4) "Neither count of the complaint avers that the plaintiff sustained any injury in the alleged breach of warranty in the sale of the engine and boiler, and without an averment of injury the jury cannot by their verdict assess damages against the defendant." (5) "It was the duty of the plaintiff within 10 days after the receipt of the boiler to examine it, and if on such examination the scales could have been discovered in the boiler, the facts should have been reported in writing to the defendant; and if the jury find from the evidence that no such examination was made the plaintiff is not entitled to recover damages for any such defect." (6) "Under the terms of the contract executed by the parties to this action, it was the duty of the plaintiff within 10 days after the machine was received to give notice in writing to the defendant of any defect in the engine and boiler sold by the defendant to the plaintiff; and if the jury find from the evidence in this case that the plaintiff did not give such written notice within 10 days from the day the goods were received, the plaintiff cannot maintain this suit, and the verdict of the jury should be for the defendant."

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



Cooper & Cooper, for appellant. S. S. Pleasants and Lanier & Pride, for appellee.

**MCLELLAN, J.** Action by vendee against vendor for breach of warranty in respect of machinery, engine, and boiler.

Unless controlled to the contrary by the legal questions to be determined, it is practically conceded by counsel for appellant that the issues were for the jury's decision.

The main legal inquiry arises over the construction of the written contract between the parties for the purchase of the machinery. One of the presently important features of the instrument is this: "It is agreed that the date for delivery, whether express or implied, is subject to delay caused by strikes, fires, accidents or cause beyond the control of W. T. Adams Machine Company, and if anything is found short, broken, defective, or not as specified, notice thereof shall be given in writing to said company within ten days after machinery is received by me (or us) that said company may correct same, or same shall not be allowed, and no claim for any material furnished or work done by me (or us) shall be allowed as said company reserves the right to furnish said material or work." The other important feature, following the word "warranty," which is in large type, is this: "The above-described machinery is warranted to be made, or that it will be made of, good material, and when correctly and properly set and adjusted that it will do as good work as ordinary machinery of same class and size." The complaints against the machinery's perfection, said by the plaintiff to have wrought a breach of the general warranty quoted, consisted: (1) That the wrist pin on the crank shaft of the engine was not true, thereby causing the engine to knock, at times, violently; (2) that the boiler would not produce the requisite pressure of steam for one of its class—the result claimed being that the machinery failed, though properly installed and operated, to do the work of other machinery of like class and size. No written notice within 10 days after the receipt of the machinery of the imperfections stated having been given, as was conceded by the plaintiff, the appellant contended below, and does here, that the plaintiff, by the terms of the contract, could not maintain this action; the legal effect of the stipulation being to condition a claim for a breach of the quoted express warranty contained in the contract upon an examination of the machinery within the time specified and the giving of written notice to the company of any of the imperfections enumerated in the provision discovered about the machinery. We cannot agree with counsel in the stated insistence. Our reasons will be briefly set down:

The structure of the contract gives no intimation that the comprehensive warranty written in it is qualified to the extreme degree

to which the insistence leads, viz., as a condition precedent to the availing, upon occasion, of the warranty declared. The asserted condition precedent is written in another and different part of the instrument and makes, in terms, no reference whatever to the warranty later appearing therein. It would seem that a provision having so great an effect, as is contended, upon the rights of the parties, as elsewhere provided in the instrument, would not be incorporated so disconnectedly with reference to the warranty expressly given therein. Furthermore, there is no express requirement that the vendee examine the machinery within 10 days after its receipt; and, in that state of the provision, we think the rule applies that permits the vendee to rely upon the warranty, except with respect to obvious imperfections, external and visible to the vendee upon casual inspection. *Brown v. Freeman*, 79 Ala. 406, 410; *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804. The defects complained of do not appear to have been of an obvious character. Indeed, there is no proof that such was their character; and, on the contrary, the defense was, as appears, that they did not exist at all. The proof uncontradictedly shows that more than 10 days elapsed after the receipt of the machinery and before it was fully installed. The application of the contended for effect of the notice feature of the contract would result in an important, vital qualification of the warranty given the vendee. It is a necessary inference from the record that the imperfections in both the engine and boiler could only be discovered, short of an examination, after their use and operation; and, if this be true, the 10-day limitation, as interpreted for appellant, would have, it is readily conceivable, deprived the vendee of several features of the warranty in the instrument. It is not reasonably possible that the parties so intended in this contract. If appellant's contention is sanctioned, the reception of the machinery put in operation a 10-day limitation that to obviate the consequences of which the vendee must have, for all practical purposes, become most skilled and industrious to detect what, within the rule before stated as to obvious and latent defects, it may have been hardly possible, if indeed so, to accomplish, and this notwithstanding the warranty apparently given. That he assumed any such unreasonable obligation under this instrument cannot be held.

But, aside from these considerations, it seems clear to us that by no rational construction of the provision with respect to the notice can it be said that any duty or obligation was assumed by the vendee to inspect with a view to giving the notice stipulated. The condition to the notice is if certain imperfections or absences are found. Evidently the whole purpose was to give the vendor the opportunity to correct the mistake, er-

ror, or imperfection if they came to the knowledge of the vendee within 10 days and to stipulate, on that condition, against the vendee's incurring, for the vendor's ultimate satisfaction, liabilities in the way of the perfection of the machinery. The whole provision, when read together, confirms the interpretation stated. Whatever may be included in the terms descriptive of the imperfections enumerated, it is not shown in this case that such knowledge as affords the condition for the giving notice was possessed by the vendee within 10 days after he received the machinery. The condition itself being absent, the requirement (if so) did not exist. Since the 10 days provided within which the discovered imperfections should be reported to the vendor had expired after the receipt of the machinery, it is hardly necessary to add that the dependent thereon right of the vendor to furnish the material and do the work became extinct; for the provision against claims for material furnished or work done obviously refer to the antecedent stipulations in that connection. The motive for such provision against claims evidently was to retain, under the conditions defined just preceding, the right to correct, under the vendor's supervision, mistakes, errors, or imperfections in the subject of the sale. If read as a stipulation against all claims arising out of the repair or the completion of the article, its effect would be to impair to a large degree the warranty expressed in the contract.

Counsel for appellant here pressed upon our attention, as properly influential on the inquiry treated, the following authorities. *Lewis v. Hubbard*, 1 Lea, 436, 27 Am. Rep. 775; *Fahey v. Esterley Co.*, 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554; *Main v. Griffin*, 141 N. C. 43, 53 S. E. 727; *Russell v. Murdock*, 79 Iowa, 101, 44 N. W. 237, 18 Am. St. Rep. 348; *Davis v. Case Co.* (Ky.) 80 S. W. 1145. The contracts considered in these decisions were very different from that in hand. They provided that notice to the vendor, etc., of defects discovered, etc., should be given either at once or within a reasonable time. Reference to the quoted provision from the contract before us will demonstrate the entire lack of application here of what was held in the decisions noted. The witness Newly had qualified as an expert machinist with reference to the setting up and operation of engines and boilers. He was, hence, properly permitted to give it as his opinion that the engine and boiler were properly set up.

As stated before, the issues in the case were for the jury; each of them finding support in tendencies of the evidence. The weight of the evidence is not so palpably opposed to the verdict as would warrant us, under the oft-written rule here, in disturbing it. There was no error in refusing the

affirmative charge to the defendant, nor in overruling its motion for a new trial upon the ground directed against the weight and sufficiency of the evidence. Our ruling in construction of the contract, as quoted, justifies the action of the court in refusing to defendant special charges 3, 5, and 6.

Special charge 4 is, in effect, the affirmative charge for the defendant and proceeds on the theory, and so states, that no averment of injury appears in the complaint. If this were true, the objection should have been taken to the pleading, which was not done. The counts are, substantially, in Code form, and were, hence, sufficient.

Special charge 2 refused to defendant was properly so treated. It probably has other vices; but it will suffice to note that it undertakes to select and emphasize one element of fact in the evidence.

There is no error in the record, and the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

### JONES v. JONES.

(Supreme Court of Alabama. June 30, 1909.)  
EXCEPTIONS, BILL OF (§ 56\*)—SIGNING—CODE PROVISIONS.

Under Code 1907, § 10, providing that this Code shall not affect any existing right or remedy, the old Code governs as to time and manner of signing bills of exceptions in appeals entered before the new Code became operative.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 56.\*]

Appeal from Probate Court, Limestone County; George Malone, Judge.

Case between Webster L. Jones and B. C. Jones. From the judgment, the former appeals. Affirmed.

M. K. Clements, for appellant. W. R. Walker and H. C. Thatch, for appellee.

MAYFIELD, J. It is to be regretted that the bill of exceptions in this case has to be stricken upon the motion of appellee. The judgment or decree appealed from was entered April 24, 1908, by the probate court. This was six days before the new Code became operative. The appellant, being doubtful as to whether the old Code or the new controlled as to the bill of exceptions, attempted to comply with the provisions of both. The probate judge evidently thought the new Code controlled, and acted under its provisions, and consequently the bill was presented and signed within the time prescribed by the new Code (Code 1907, § 10); but the time was not extended, within which it might be signed under the old Code, and hence it was not signed in the manner and within the time prescribed by the Code of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

1896, or by Gen. Acts 1903, p. 74. This appears to be conceded by the parties to the appeal.

The question is therefore presented to us which of the two Codes applied or controlled as to the signing of the bill of exceptions. It is clear that the old Code applied to all cases of appeal in which the judgment or decree was rendered before the new Code became operative. This is made clear by section 10 of the Code, which has always been the repealing and retaining section of all previous Codes, and is made such as to the present Code, being now substantially as it has always been. This section has always contained the following provisions: "This Code shall not affect any existing right, remedy, or defense, nor shall it affect any prosecution now commenced, or which shall hereafter be commenced, for any offense already committed. As to all such cases the laws in force at the adoption of this Code shall continue in force." The question under consideration clearly falls within this Code provision, and as to it the old Code provisions continue in force. It is true there are qualifications or limitations in section 10, but this case does not fall within any of these.

It therefore follows that the bill of exceptions must be stricken. The bill being stricken, and the record proper being looked to alone, we find no error that can be raised on this appeal. The judgment or decree appealed from must therefore be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., concur.

**HOUSTON COUNTY v. HENRY COUNTY.**  
(Supreme Court of Alabama. June 30, 1909.)  
COUNTIES (§ 16\*)—ALTERATION OF BOUNDARIES—ENFORCEMENT OF LIABILITIES—ADEQUATE REMEDY AT LAW.

Even if Code 1896, §§ 1398, 1399, providing that the inhabitants cut off from any county are liable for their pro rata amount of its existing debt, should be held inapplicable to a new county as a corporate entity, and to operate only upon those of its inhabitants taken from another county, such defense would be available at law, and hence a bill by a new county founded on that theory is without equity.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 16.\*]

Appeal from Chancery Court, Henry County; L. D. Gardner, Chancellor.

Bill by Houston County against Henry County. Decree for defendant, and complainant appeals. Affirmed.

Espy & Farmer, for appellant. P. A. McDaniel, for appellee.

DENSON, J. This is the second appeal in this cause by the respondent. The material facts of the case are stated in the report of

it on the former appeal. 47 South. 710. The present appeal is taken from a decree sustaining the demurrer to the bill as last amended.

The theory of the bill, and the sole insistence of the respondent (appellant), is that sections 1398 and 1399 of the Code of 1896 should be declared not applicable to the county of Houston as a corporate entity; the precise point being that these sections should be so interpreted as to make them apply to the inhabitants of that particular part of Houston county which was, in its formation, taken from Henry county. It is the opinion of the court that there is nothing in the bill as last amended that differentiates it in any material particular from the bill as it stood and was passed upon on the former appeal. *Houston County v. Henry County*, 47 South. 710. It was then said, in substance, that Houston county was not entitled to share any way in the moneys, of whatever fund, in the treasury of Henry county at the time of the creation of the new county of Houston—citing 11 Cyc. 357. So it would seem that, even under the general prayer for relief, the bill cannot be maintained upon the doctrine of equitable set-off.

It was, in the opinion on the former appeal, further said that "existing debts," as applied to the county from which a part of Houston was taken, meant anything then owing by such county, regardless of its assets or of its ability to discharge the existing debts. Manifestly the bill as last amended does not bring the case within the exceptions adverted to in that opinion. There is nothing in the bill looking to an accounting; nor are there any facts stated going to show that an equitable accounting should be had. Even if it were true, as contended for the appellant, that the statutes are not applicable to the county, but operate only upon those of its inhabitants in that part of its territory taken from the county of Henry, that defense would be available in a court of law. Hence, and for this reason, the bill is without equity, and the demurrer to the bill as last amended was properly sustained.

Let the decree of the chancellor be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

**HAYNES MERCANTILE CO. et al. v. BELL.**  
(Supreme Court of Alabama. June 30, 1909.)

1. TENANCY IN COMMON (§ 3\*)—EXISTENCE OF RELATION.

As to cotton raised under an agreement between P. and W., whereby P. was to furnish the land and teams and half the fertilizers, and

W. was to furnish the other half and the labor, they were tenants in common.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 5-17; Dec. Dig. § 3.\*]

**2. JUDGMENT (§ 780\*)—LIEN—PROPERTY AFFECTED.**

One's interest, as tenant in common in cotton, is subject to the lien of a recorded judgment against him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1347; Dec. Dig. § 780.\*]

**3. JUDGMENT (§ 800\*)—LIEN—DESTRUCTION.**

From the fact that defendant, after purchasing the judgment debtor's property on which plaintiff's judgment was a lien, shipped it to market outside the county, the court might infer that plaintiff lost his opportunity to enforce his lien, thereby making defendant liable to him.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 800.\*]

Appeal from Clay County Court; W. J. Pearce, Judge.

Action in case by T. J. Bell against the Haynes Mercantile Company and others for destruction of a lien. From a judgment setting aside the judgment for defendants, and granting plaintiff a new trial, defendants appeal. Affirmed.

Plaintiff had procured a judgment against M. N. & G. W. Warren before a justice of the peace in Clay county, which was registered in the office of the probate court of that county. G. W. Warren and Wiley Powell had raised cotton in the county under an agreement whereby, as claimed by plaintiff, said Warren and Powell were tenants in common of the cotton. Plaintiff claimed his judgment was a lien on the interest of said Warren in the cotton. Defendants purchased the cotton and shipped it out of the county.

E. J. Garrison, for appellants. Whatley & Cornelius, for appellee.

DENSON, J. It was open to the court to find from the evidence that the cotton in controversy was raised under an agreement whereby Powell was to furnish the land and teams and one-half of the fertilizers, and Warren was to furnish one-half of the fertilizers and the labor to cultivate the land. If such was the agreement, then under the law the relation of tenants in common of the cotton subsisted between Powell and Warren, and Warren's interest in the cotton was subject to the plaintiff's recorded judgment lien. *Hendricks v. Clemmons*, 147 Ala. 590, 41 South. 306; *Thompson v. Mawhinney*, 17 Ala. 362. The case of *Kilpatrick v. Harper*, 119 Ala. 452, 24 South. 715, is not opposed to the ruling made in the case of *Hendricks v. Clemmons*, supra, as will be easily discovered upon a comparison of the facts of the two cases.

The registration of the judgment in the office of the judge of probate gave notice of its existence to all persons, by the express terms of the act of February 23, 1899 (Loc. Acts, 1898-99, p. 1809). Moreover, the bill

of exceptions discloses evidence which tends to show notice to defendant of Warren's interest in the cotton at the time the purchase of the cotton was made. After purchasing the cotton at Lineville, in Clay county, defendant shipped the same to market outside of Clay county. From these facts the court might infer that the plaintiff lost his opportunity to enforce his lien.

The court found in favor of the defendant, but upon motion for a new trial set aside the judgment and granted a new trial. We cannot say that the court committed reversible error in setting aside its judgment and granting the new trial.

The judgment granting a new trial is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

**STATE v. CAPITOL BREWING & ICE CO.**  
(Supreme Court of Alabama. June 30, 1909.)  
**INTOXICATING LIQUORS (§ 55\*) — LICENSE — BREWERS—WHOLESALE.**

Subdivision 52, § 4122. Code 1896, as amended by the revenue act of 1903 (Gen. Acts 1903, p. 209), imposes a license tax on wholesale dealers in lager beer exclusively, but provides that any brewer may sell beer of its own production at wholesale without taking out such license, if it has paid for a brewer's license. Held, that defendant, having paid for a brewer's license in M. county, was entitled to sell its beer at wholesale in B. county without taking out a wholesaler's license there.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 55.\*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by the State against the Capitol Brewing & Ice Company. Judgment for defendant, and the State appeals. Affirmed.

Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State. Coleman, Dent & Weil, for appellee.

DENSON, J. The Capitol Brewing & Ice Company was a corporation organized under the laws of Alabama for the purpose of brewing and selling lager beer. Its brewery was located in the city of Montgomery, where, in 1906 and 1907, it was engaged in brewing beer and selling it at wholesale. For the years named the corporation procured, in Montgomery county, licenses to operate a brewery in Alabama. Subdivision 52 of section 4122 of the Code of 1896, as amended by the revenue act of 1903 (Gen. Acts 1903, p. 209), is as follows: "For wholesale dealers in lager beer, exclusively, \$150.00, but any brewery may sell the beer of its own production at wholesale without taking out this license, provided it has paid for a license as a brewery."

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

The company's contention is that, having taken out a license as a brewery, it was authorized to sell the beer of its own production at wholesale anywhere in Alabama, whether within or without the county in which its plant was located, or that in which its licenses were issued; the concrete case being that the company shipped beer of its own production in large quantities to the Greenville Mills & Ice Company, in Greenville, Butler county, where it would be kept by that concern on ice for the defendant company until orders were received from merchants in Greenville for keg lots, at which times beer would be delivered in keg lots, and in no less quantities. The concern at Greenville would collect the bills and, after retaining 45 cents per keg for storing and handling the beer, remit the money to the defendant company. The ice company would phone the dealers in Greenville when it had the beer on hand. No license was taken out by the defendant in Butler county.

There can be no doubt that defendant sold the beer at wholesale. We are constrained to sustain its contention, and construe the law as not requiring a license from it in Butler county. The case of *Reymann Brewing Co. v. Brister*, 179 U. S. 443, 21 Sup. Ct. 201, 45 L. Ed. 269, involved the interstate commerce clause of the Constitution, and sheds no light on the question in hand; neither do the Wisconsin cases cited apply to our question.

The judgment of the city court is affirmed. Affirmed.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

#### McCULLARS v. REAVES.

(Supreme Court of Alabama. June 30, 1900.)

##### 1. EXECUTION (§ 272\*)—BONA FIDE PURCHASERS—NOTICE.

Open possession by a grantee under an unrecorded deed, either personally or by a tenant, is constructive notice to a purchaser at execution sale of a change of ownership.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 781; Dec. Dig. § 272.\*]

##### 2. EXECUTION (§ 272\*)—RIGHTS OF PURCHASER — POSSESSION BETWEEN HUSBAND AND WIFE—UNRECORDED DEED TO WIFE—NOTICE.

Where, a wife, after obtaining a bond for title from her husband, rented the land, and collected the rents, and obtained a deed, which was not recorded until after the levy of an execution on the land as the property of her husband, a purchaser at the execution sale was charged with notice of the transfer.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 781; Dec. Dig. § 272.\*]

Simpson, Anderson, and McClellan, JJ., dissenting.

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Action by D. J. McCullars against Beatrice

A. Reaves. Judgment for defendant, and plaintiff appeals. Affirmed.

Lapsley & Arnold, for appellant. Willett & Willett, for appellee.

SIMPSON, J. This is a statutory ejectment, by the appellant against the appellee. The appellant claims title by virtue of purchase at execution sale on a judgment against James L. Reaves, who is the husband of the defendant. Said judgment was dated at the spring term, 1907, and the execution was issued April 29, 1907, placed in the hands of the sheriff June 4, 1907, levied July 1, 1907, and the property was sold August 12, 1907. The defendant offered a bond for title from her said husband, dated December 22, 1904, also a deed from the same, dated December 22, 1906, which was not recorded until July 10, 1907. Defendant's witnesses testified that she had rented the land to tenants since the latter part of 1904, and had collected the rents. The plaintiff testified that he had no knowledge or notice of the title bond or deed, had never heard of either before he purchased at sheriff's sale, nor had he seen or heard of any one's being in possession of the property, nor of the defendant's claiming any interest therein.

There are a number of cases holding that where a vendee goes into possession, either personally or by tenant, and holds possession opening and notoriously, it is constructive notice of the change in ownership, notwithstanding the deed of conveyance is not recorded. *Scroggins v. McDougald*, 8 Ala. 382; *Harris v. Carter's Adm'rs*, 3 Stew. 233; *Brunson v. Brooks*, 68 Ala. 251; *Powell v. Allred*, 11 Ala. 318; *McCarthy v. Nicrosi*, 72 Ala. 334, 47 Am. Rep. 418. The reasoning of all these cases is that the possession by another than the original owner is visible, open, and notorious, so that the subsequent purchaser is put upon notice as effectively as he would be by the recording of the conveyance. Consequently it is as uniformly held that where there is no open and visible change of possession as where the same tenant occupies under the vendee as under the vendor, it does not operate as notice. *King v. Paulk*, 85 Ala. 186, 4 South. 825; *Griffin et al. v. Hall & Farley*, 115 Ala. 647, 22 South. 156; *Id.*, 129 Ala. 289, 29 South. 783; *Munn v. Achey*, 110 Ala. 628, 631, 18 South. 299.

The evidence does not show whether or not the same tenants had occupied the land under the husband before his sale to his wife; but, however that may be, it is the opinion of the writer, and of Justices ANDERSON and McCLELLAN, that, even if the wife herself had been seen in possession of the land, her possession would have been referred to the title of the husband, as they occupy the lands of both together, and it would not have been such an open, visible, and notori-

ous change of possession as to operate as notice, and the mere fact that the tenants in possession of the land rented from her and accounted to her for the rents is not sufficient to charge a purchaser with notice. The opportunities for collusion and fraud between husband and wife are so apparent that it is important to insist upon the visible change of possession in such cases.

The majority of the court, however, hold that the facts set out in the evidence were sufficient to put the plaintiff on inquiry, and that consequently he was affected by notice of the conveyance to the defendant. The judgment of the court is affirmed.

Affirmed.

DOWDELL, C. J., and DENSON, MAY-FIELD, and SAYRE, JJ., concur. SIMPSON, ANDERSON, and McCLELLAN, JJ., dissent.

**BROMBERG v. EUGENOTTO CONST. CO.**  
(Supreme Court of Alabama. June 30, 1909.)

**1. LANDLORD AND TENANT (§ 48\*)—BREACH BY LESSOR—MEASURE OF DAMAGES.**

The measure of damages to a lessee for deficiency in the dimensions of a storeroom is the difference between the value of the lease, had the store been of the dimensions stipulated, and its actual value; and if the agreement was sufficiently definite the lessee might be entitled to the expense of exchanging his fixtures for others of dimensions suitable to the new store.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 48.\*]

**2. DAMAGES (§ 40\*)—BREACH OF LEASE BY LESSOR—REMOTE DAMAGES.**

Evidence of the amount of lessee's sales in the old building, which existed before the building containing such storeroom was erected, and in a building on another street occupied because of the unsuitableness of the new store, and that the decrease resulted from the change of location, was inadmissible as presenting a claim for remote and speculative damages.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 40.\*]

**3. LANDLORD AND TENANT (§ 48\*)—BREACH BY LESSOR—DAMAGES.**

Such lessee is entitled to damages for the period during which he had the option of extending the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 48.\*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by F. W. Bromberg against the Eugenotto Construction Company. From a judgment in his favor, but for less than his claim, plaintiff appeals. Reversed and remanded.

Tillman, Grubb, Bradkey & Morrow, for appellant. Campbell & Johnson, for appellee.

SIMPSON, J. This action was brought by the appellant against the appellee, claiming \$50,000 as damages for the breach of a contract by which the defendant leased to the

plaintiff, for a period of three years, with the privilege to the plaintiff to extend the period of leasing ten years, a certain storeroom, to be of certain dimensions, therein described, in a building then about to be erected by the defendant. The plaintiff claims that he was occupying, as a jewelry store, a certain storeroom in a building which stood on the ground to be occupied by said new building, having a lease contract for three years; that as a consideration for said leasing contract with defendant the plaintiff gave up and surrendered his lease contract in the old building, and explained to defendant, at the time of entering into the lease contract here sued on, that the new storeroom had to be of the dimensions contracted for in order to accommodate his fixtures, used in the jewelry business; that by reason of the fact that the storeroom as constructed was of less dimensions than that contracted for he could not use his said fixtures therein; that the room as constructed is not reasonably suitable for the conduct of a jewelry business, because of the diminished floor space, and frontage available for display purposes, and complainant was forced to abandon the idea of occupying said premises for a jewelry store, and has ever since been occupying a less desirable location, thereby losing the good will of the location, besides sustaining the damage from having to occupy a less desirable space. The complainant took the premises, however, notifying the defendant that he would claim damages, as claimed, and he has also availed himself of the privilege of extending the lease to the ten-year period, and had sublet it. Judgment was rendered in favor of the plaintiff for \$950, and he appeals, and assigns error in matters of evidence and in part of the oral charge of the court.

The leased store in the new building occupied the same location as had been occupied by the old store, where plaintiff had conducted his jewelry business for several years, and where he claims he had built up a good will. During the erection of the new building, the plaintiff had occupied a building on another street as a jewelry store, and after said erection has continued to occupy the same, claiming that he does so because of the unsuitableness of said new storeroom for his business. The plaintiff sought to introduce evidence showing the amount of his sales in the old building first occupied by him, and the amount of sales in the building on another street occupied by him since he left the original store, and offered to show that the falling off in sales resulted from the change of location. This was for the purpose of fixing the measure of his recovery, by the loss of profits which he would have made if he could have conducted his jewelry business in the new store. This evidence was excluded, and the assignments

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thereon constitute the first point insisted upon by the appellant as error.

It is difficult to see how any satisfactory theory could be worked out, from the evidence proposed, from which to estimate with any degree of certainty the damages which plaintiff sustained from not occupying the new store for his jewelry business, even if it had been shown that it was impossible for him to occupy it. In the first place, his sales in the new store would not necessarily be equal to his sales in the old store. If there were any such thing as good will connected with the old store, it is impossible to say that the same class of customers would be attracted by the appearance of the new store, although it might be located on the same spot of ground as the old one, after a lapse of time. In the next place, the sales in the store spoken of as a temporary place were subject to too many contingencies to say that, if they were less, it was due alone to locality, or that some other locality might not have been selected where the sales would have been as good or better. Of course, the plaintiff took with him whatever of good will depended upon his own personality. The sales, or lack of sales, in the so-called temporary place, might have been influenced by various causes, such as plaintiff's judgment in selecting a good location, the manner in which he attended to his business, the manner in which his store was arranged and furnished and the goods were displayed, the price at which he sold, competition, the money market, and various contingencies too numerous to mention. The plaintiff gave up the old lease for a consideration, and his new lease was for the store in the new building, which he has, and is subleasing at a profit. If, as he contends, it was understood and agreed that the store was to be of certain dimensions to be used as a jewelry store, the measure of his damages would be the difference between the value of the lease if the store had been of the dimensions stipulated and its value as it is; and, if the agreement was sufficiently definite to justify it, possibly he might be entitled to the expense that would be incurred in exchanging his fixtures for others of the dimensions suitable to the new store. The damages sought to be proved by the evidence offered were too remote, uncertain, and speculative. *Nichols v. Rasch*, 138 Ala. 372, 377, 35 South. 409; *Reed Lumber Co. v. Lewis*, 94 Ala. 626, 628, 10 South. 333; *Moulthrop & Stevens v. Hyett & Smith*, 105 Ala. 493, 495, 17 South. 32, 53 Am. St. Rep. 139.

We do not find anything in the cases cited by the appellant that conflicts with the salutary principles laid down in the cases cited by counsel, and in others which might be referred to. The case of *Metzger v. Brincat*, 154 Ala. 397, 45 South. 633, is probably the strongest one in the direction claimed by appellant; but in that case the contract spe-

cially provided against the renting of another fruit stand in the same building, and the profits were shown to be certain and definite, and the damage actually sustained was proved.

The court, in its oral charge, instructed the jury that, "if they found for the plaintiff, in estimating his damages they could only consider the three years of the term of the lease from October 1, 1908, and could not take into consideration any part of the ten years of the extension of the leasehold after the expiration of the three years." The appellee contends that this instruction was not erroneous, because at the time of the breach of the contract the appellant had a lease only for three years. But he had more. He had a lease for three years, with the privilege of extending it for ten years longer; and, if he was entitled to damages by reason of the fact that he could not occupy it as a jewelry store for three years, he was equally entitled to damages by reason of the fact that he could not, by the exercise of the option secured to him in the contract, occupy it as a jewelry store for the additional period of ten years. Whether he exercised the option or not, the contract was one, and he can recover, in one action, all the damage which has accrued to him for the breach, and the right to occupy the store as a jewelry store, at his option, for the additional period of ten years, was as fully guaranteed to him as the right to occupy it for the three years, and whether this additional right be taken as the value of the option, or the value of the store to him, for that period, the measure of his damages to him would be the same, to wit, the difference between the value of the store of the dimensions contracted for and as it is. The only difference would be that, if he did not exercise the option, the rent which he would have had to pay would be deducted from the difference in values.

In estimating the damages for the breach of the said contract, the jury must necessarily consider the fact that the plaintiff had a right to occupy the premises for the additional period of ten years. If it is a valuable privilege, he is entitled to compensation for being deprived of it; if not, there is no damage. It will scarcely be denied that, if the defendant had failed to erect the building at all, or had refused to allow the plaintiff to occupy it at all, he would have been entitled to damages for the entire breach of the contract. We can see no difference, except in degree, between an entire failure and a partial failure. The court erred in the part of the oral charge above set out.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

**BIRMINGHAM RY., LIGHT & POWER CO.  
v. DENISON.**

(Supreme Court of Alabama. June 30, 1909.)  
**APPEAL AND ERROR (§ 1005\*)—REVIEW—NEW TRIAL—DENIAL.**

A judgment denying a new trial for insufficiency of evidence will not be set aside on appeal, unless the verdict is plainly against the weight of the evidence or unsupported by the evidence; it being insufficient that the verdict is merely against a preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3872; Dec. Dig. § 1003.\*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Charles H. Denison against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Tillman, Grubb, Bradley & Morrow, for appellant. Frank S. White & Sons, for appellee.

**DENSON, J.** This action was brought by the plaintiff to recover damages for a personal injury suffered by him on account of alleged negligence on the part of the defendant in and about carrying the plaintiff as a passenger on one of its electric cars. The cause was twice tried in the circuit court; each trial resulting in a verdict and judgment for the plaintiff. On defendant's motion the first verdict was set aside and a new trial granted. A similar motion, made by the defendant after the second trial, was overruled. The defendant appeals, and the only question presented for review is the refusal of the circuit court to set aside the verdict and grant a new trial.

The rules by which this court is to be governed, in reviewing the decision of a trial court granting or refusing to grant a new trial, have been many times declared, beginning with the leading case of *Cobb v. Malone*, 92 Ala. 630, 9 South. 738. It would serve no practical good to review our numerous decisions on the subject. It is sufficient to say that the record has been carefully read and considered, and that "we are not prepared to say that the verdict of the jury is so plainly against the weight of the evidence, or unsupported by the evidence," as to convince us that the circuit court should have granted a new trial. The most that can be said for the defendant, in this respect, is that the verdict is against the preponderance of the evidence, and this is not sufficient. *Cobb v. Malone*, supra; *White v. Blair*, 95 Ala. 147, 10 South. 257; *Dillard v. Savage*, 98 Ala. 598, 13 South. 514; *Peck v. Karter*, 121 Ala. 636, 25 South. 1012; *Anderson v. English*, 121 Ala. 272, 25 South. 748; *Davis v. Miller*, 109 Ala. 589, 19 South. 699; *Terst v. O'Neal*, 108 Ala. 250, 19 South. 307; *Birmingham, etc., Co. v. Cuzzart*, 133

Ala. 262, 31 South. 979; *Montgomery Traction Co. v. Knabe* (Ala.) 48 South. 501.

The judgment of the circuit court is affirmed.

Affirmed.

**DOWDELL, C. J., and ANDERSON, McCLELLAN, MAYFIELD, and SAYRE, JJ., concur.**

**WESTERN UNION TELEGRAPH CO. v.  
JACKSON.**

(Supreme Court of Alabama. June 30, 1909.)

**1. TELEGRAPHS AND TELEPHONES (§ 65\*) — MESSAGES—DELAY IN DELIVERY—ACTION BY ADDRESSEE.**

An action in tort may be maintained by the addressee of a telegram against a telegraph company for negligent delay in delivering a message announcing the death of the addressee's father, without any averment of contractual relations between plaintiff and the company.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 54; Dec. Dig. § 65.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 65\*) — MESSAGES—DELAY IN DELIVERY—PLEADING.**

Where a message announcing the death of the addressee's father was set out in a complaint by him for delay in delivery, it was not necessary that the complaint should also charge that the message was sent for plaintiff's benefit.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 54; Dec. Dig. § 65.\*]

**3. DAMAGES (§ 49\*)—MENTAL SUFFERING.**

Where no recoverable damages for injury to plaintiff's person, reputation, or estate are alleged, damages for mental suffering are not recoverable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 100; Dec. Dig. § 49.\*]

**4. PLEADING (§ 193\*)—DEMURRER.**

Where, in a suit for delay in the delivery of a telegram, items of damages other than for mental suffering were claimed, whether they were recoverable could not be determined by demurrer.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 193.\*]

**5. TELEGRAPHS AND TELEPHONES (§ 67\*) — MESSAGES—DELIVERY—DELAY—DAMAGES — TOLLS.**

An addressee of a message could not recover, in an action for negligent delay in delivery the tolls paid for transmission by the sender, without proof of a contractual relation between plaintiff and the telegraph company.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 64; Dec. Dig. § 67.\*]

**6. TELEGRAPHS AND TELEPHONES (§ 68\*)—DELAYED MESSAGE—DAMAGES—MENTAL SUFFERING.**

Where a telegraph messenger boy was authorized to collect charges written on the message, and charges were so written and collected by defendant's messenger boy, who delivered a delayed paid message to plaintiff, such overcharge was recoverable, and constituted a basis for recovery for mental suffering resulting from the delay.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 69; Dec. Dig. § 68.\*]



**7. TELEGRAPHS AND TELEPHONES (§ 35\*) — MESSAGES—AGENCY IN SENDING—OPERATOR.**

Where the sender of a delayed message, being unable to read or write, requested the sending agent to write the message on one of defendant's blanks, which she did, taking the address from a letter which the sender handed her, she acted as the sender's agent in so doing.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 25; Dec. Dig. § 35.\*]

**8. TELEGRAPHS AND TELEPHONES (§ 73\*) — MESSAGES—DELAY IN DELIVERY—NEGLECT—QUESTION FOR JURY.**

Whether a telegraph company was negligent in not delivering a death message in time to have enabled the addressee to arrive in time for his father's funeral held for the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.\*]

**9. TELEGRAPHS AND TELEPHONES (§ 38\*) — TRANSMISSION OF MESSAGES—DELAY.**

Where a telegram was not filed for transmission until after the close of defendant's office hours, defendant was not bound to transmit it that night; and plaintiff, the addressee, could not recover damages for being prevented from attending his father's funeral because of the delay.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.\*]

**Appeal from City Court of Bessemer; William Jackson, Judge.**

Action by Willie Jackson against the Western Union Telegraph Company for damages for delay in the delivery of a message. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The complaint was in the following language: (1) "Plaintiff claims of the defendant the sum of \$1,000 damages. The plaintiff avers that on, to wit, March 8, 1908, the defendant was engaged in the business of transmitting messages for hire, and that on said date Leonard Blair, who is the uncle of this plaintiff, delivered to defendant's agent to be sent over defendant's telegraph line, the following message, to be delivered to this plaintiff at No. 1902 B street, Bessemer, Ala., which said message is as follows: 'Marion, Ala., March 8, 1908. To Willie Jackson (Col.), No. 1802, Bessemer: Your father died this morning at eight o'clock. Come on first train if possible. Answer quick. Leonard Blair.' And plaintiff avers that said message was delivered by his said uncle, said Leonard Blair, and who paid defendant's agent at Marion, Ala., 37 cents for the transmission and delivery of said message to this plaintiff at said address, and the plaintiff avers that on, to wit, March 9, 1908, at 3:30 p. m., defendant's agent delivered to plaintiff the said message, but not in time for the plaintiff to attend his father's burial, and on delivering the said message to this plaintiff, the defendant's agent, knowing said message had been paid for by the said Leonard Blair, notwithstanding said payment to transmit and deliver to plaintiff's said message, de-

fendant's agent demanded and exacted of plaintiff payment of 75 cents before he was allowed to see or read the contents of said message. Plaintiff avers that, owing to and by reason of the defendant's agent agreeing to transmit and deliver to plaintiff the said message at said address aforesaid, it was and became the duty of defendant to promptly transmit and deliver to plaintiff said message, and the plaintiff avers that the agent of defendant breached said duty to this plaintiff in this: Defendant's agent negligently failed to promptly deliver to plaintiff said message, and as a proximate consequence thereof plaintiff was kept from attending his father's burial, he lost the money paid to defendant, lost the money his uncle, Leonard Blair, paid defendant's agent at Marion, Ala., he made a trip from Bessemer, Ala., to Marion, Ala., after delivery of said message, trying to reach said last-named place to attend the burial of his father, and suffered great mental pain and anxiety of mind, to his damage as aforesaid. Plaintiff avers that he suffered said damages and injuries aforesaid, owing to and as a proximate consequence of the breach of the duty of defendant to this plaintiff in the agent of the defendant negligently failing to promptly deliver to plaintiff said message at said address in Bessemer, Ala." (2) Based on the same allegations of fact, and it is declared that the breach was wanton, willful, or intentional. (3) A practical repetition of 1.

Demurrers were interposed to these counts, raising the points discussed in the opinion relative to the complaint. The defendant filed several pleas, among them plea 5: "Defendant, for further plea to the complaint and to each count thereof, separately and severally says that the sender of said message was not acting as the agent of plaintiff in filing said message for transmission, and that there were no contractual relations between plaintiff and defendant for the transmission and delivery of said alleged message."

The following demurrers were filed to this plea: "(1) The complaint is filed in action of tort, and the plea does not allege any facts which legally obviate or repel the allegations of the complaint. (2) The complaint alleges a breach of duty, and it is immaterial whether the sender was agent of the plaintiff or not, and such plea is no answer to the complaint. (3) The plea does not allege facts which avoid the allegations of the complaint."

The following charges were refused to the defendant: "(2) If you believe the evidence, and you are reasonably satisfied from the evidence that the message sued on by the plaintiff was filed after 6 o'clock, then I charge you that there was no duty on defendant to transmit said message to Bessemer on the night of Sunday, March 8th.

\*For other cases, see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(3) If the jury believe from the evidence that the defendant had established reasonable office hours at Bessemer, by which the Bessemer office was closed between 6 p. m. on Sunday, March 8th, and the following morning at 8 a. m., and that plaintiff was prevented from going to Marion by reason of the fact that the message was received at the initial office after the Bessemer office was closed for the night, your verdict must be for the defendant." "(10) I charge you that the defendant would not be responsible for Miss Holt's negligence in writing down the address, however great such negligence may have been." "(16) I charge you that in writing down the message Miss Holt was the agent of the sender, and that plaintiff is bound by any mistakes or inaccuracies in the address there given."

Campbell & Johnson, for appellant. Pinkney Scott, for appellee.

DENSON, J. The first question presented by this record for decision is: Can an action on the case be maintained against a telegraph company, by the sendee of a social telegram announcing the death of his father, for negligent delay in the delivery of the message, without the averment of contractual relations between the company and the sendee in respect to the message? The principle involved has been decided against the contention of the appellant (telegraph company) by this court in the very recent case of *Anniston Cordage Company v. Western Union Telegraph Company* (present term) 49 South. 770. That was an action by the sendee of a commercial telegram against the company for negligently changing the message before delivery, whereby the sendee was damaged; and it was held that, if it appear that the sendee was to be benefited by the contract for sending the message and that the fact was known to the company when it received the message for transmission, either from the language of the message or otherwise, then the action may be maintained.

In the instant case the message is set out in the complaint, and its wording is such as should have imparted knowledge to the company that it was sent for the benefit of the sendee. Hence the specific averment that it was sent for the benefit of the sendee was unnecessary. On these considerations the court hold that the demurrer presenting the point under discussion was properly overruled; and upon the same considerations the demurrer to plea 5 was properly sustained. *Anniston Cordage Co. v. Western Union Telegraph Co.*, supra, and cases cited in the opinion in that case. See, also, *Western, etc., Co. v. Allen*, 66 Miss. 549, 6 South. 461; *Gray on Commun. Tel.* § 104, note 3; 21 Am. & Eng. Ency. Pl. & Pr. 509. The cases of *Western Union Telegraph Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23,

*Western, etc., Co. v. Adair*, 115 Ala. 441, 22 South. 73, *Postal, etc., Co. v. Ford*, 117 Ala. 672, 23 South. 684, and *Ford v. Postal, etc., Co.*, 124 Ala. 401, 27 South. 409, are cases in assumption for breach of the contract, and are not in point. In the *Ford Case* the question at issue was expressly left at large.

The action here being in case (*Western, etc., Co. v. Kirchbaum*, 132 Ala. 535, 31 South. 607), the further point is made by the demurrer to the complaint that no recoverable damages for injury to the person, reputation, or estate of the plaintiff are shown by the averments of the complaint, and, therefore, that the damages claimed for mental suffering are not recoverable. If the demurrant's construction of the complaint is correct, the court erred in overruling the demurrer on this point. *Blount v. Western, etc., Co.*, 126 Ala. 105, 27 South. 779; *Western, etc., Co. v. Kirchbaum*, 132 Ala. 537, 31 South. 607; *Western, etc., Co. v. Blocker*, 138 Ala. 484, 35 South. 468. While we recognize the principle settled in the cases cited to this point, yet, turning to the complaint, we find that items of damages are claimed other than for mental suffering; and, being claimed, demurrer is not the proper mode of presenting the question as to whether they are recoverable. True, the cases cited were decided on demurrer to the complaint; but it will be seen, by examining them, that no items of damages were claimed in the complaints, except for mental suffering, and hence the complaints stated no cause of action.

However, the record shows that at the request of the defendant the court charged the jury that no recovery could be had for the amount paid at Marion, by the sender, for the transmission of the message, but refused to charge that recovery could not be had for the 75 cents paid the messenger boy, nor for the railroad expenses incurred in going to Marion, and also refused the general affirmative charge requested by the defendant. Confessedly the complaint shows no contractual relation between the plaintiff and the defendant in respect to the message, nor between the plaintiff and the sender of the message. But it affirmatively appears from the complaint that the toll for the transmission and delivery of the message was paid by the sender at Marion, whence the message was sent; and no facts are alleged which have the slightest tendency towards showing that the plaintiff was under any obligation to refund to the sender the amount of the toll paid by him. In this state of the pleadings, it seems clear that the mere averment of the complaint that the plaintiff lost the money paid by the sender to defendant's agent at Marion for sending the message falls short of showing a legal claim against the defendant of such sort as will entitle the plaintiff to recover for it in this action. Furthermore the allegation is in no wise aided by the proof in this respect. It follows that the court properly charged that no recovery could

be had for the amount paid at Marion by the sender.

So far as the item of railroad expenses incurred by the plaintiff in going to Marion after receiving the message is concerned, it would seem that no argument is necessary to show that it cannot in any sense be said, either upon the averments of the complaint or upon the evidence, nor upon both, that the expenses were incurred as a proximate consequence of the negligence complained of, and the court erred in submitting it to the jury as recoverable damages.

As to the 75 cents paid the messenger boy for the message, there is testimony tending to show that the boy was authorized to collect charges when plainly written on the message, and that the charges were so written in this instance. Therefore it was a question for the jury to determine whether the 75 cents was authoritatively exacted by the messenger boy before delivering the message. If so, and it was paid, then it was, under our decisions, recoverable actual pecuniary damages, to which damages for mental suffering might be superadded; and the court committed no error in not excluding that item of damages from the jury.

The uncontradicted proof shows that the sender of the message could neither read nor write, and that, at his request, Miss Holt (defendant's agent at Marion) wrote the message for him, and wrote it on one of the defendant's blanks; that he handed her a letter from which to take the address, and she wrote the address: "Willie Jackson, 1802 B. street." Under a comparatively late decision of this court (*Western Union Telegraph Co. v. Prevatt*, 149 Ala. 617, 43 South. 106), although Miss Holt was defendant's agent for transmitting and receiving messages over the wire, yet in writing the message and address she was the sender's agent; and the defendant (in the absence of fraud) is not responsible for any mistake made by Miss Holt in writing the message or in deciphering the address from the letter handed to her from which to get the address. In this view it must be held that the court erred in refusing charges 10 and 16, requested by the defendant.

The evidence is in conflict as to the time at which the message was delivered at the Marion office for transmission to Bessemer—that offered by the plaintiff tending to show that it was about 2 p. m., while that offered by the defendant tended to show that it was 6:10 p. m. The evidence without conflict shows that the Bessemer office was open from 8 a. m. until 6 p. m., and that about 50 minutes would have been ample time for the transmission from Marion to Bessemer. Notwithstanding the mistake in the street address of the message it was delivered to the plaintiff; and upon the whole evidence the court is of the opinion that whether or not the company was guilty of negligence in not

delivering the message in time to enable plaintiff to take a train that would have put him at Marion in time to attend his father's funeral was a question for the determination of the jury. In this view the affirmative charge requested by the defendant was properly refused.

The testimony without conflict shows that the office hours at the defendant's Bessemer office were from 8 a. m. to 6 p. m. on Sundays; and according to the defendant's evidence the message was delivered at the Marion office after 6 p. m., and defendant's agent notified the sender that it might be delayed on account of the Sunday hours at Bessemer. Upon this phase of the case the court should have given charges 2 and 3 requested by the defendant. *W. U. Tel. Co. v. Hill* (present term) 50 South. 248.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### COOK v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. CRIMINAL LAW (§ 1116\*)—INDICTMENT—MOTION TO STRIKE—REVIEW.

Denial of a motion to strike portions of the indictment, not mentioned in the judgment entry, but shown only by the bill of exceptions, cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1116.\*]

##### 2. CRIMINAL LAW (§ 1169\*)—APPEAL—PREJUDICE.

Error in permitting a witness to testify that defendant executed a mortgage was without prejudice, where the witness immediately produced in evidence the mortgage, which was self-proving.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138; Dec. Dig. § 1169.\*]

##### 3. FALSE PRETENSES (§ 38\*)—INDICTMENT—SURPLUSAGE—VARIANCE.

Where an indictment for false pretenses charged that defendant falsely pretended to prosecutor that he owned 118 acres of land in a stated section, township, and range, the words particularly describing the land were not surplusage; and hence proof that defendant did not describe the land by subdivisions or range, though he probably mentioned the township, constituted a fatal variance.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 53; Dec. Dig. § 38.\*]

##### 4. CRIMINAL LAW (§ 813\*)—ABSTRACT INSTRUCTIONS.

In a prosecution for false pretenses in mortgaging certain real estate to complainant, on the representation that it was free from incumbrance, when it was subject to a mortgage to W. & Co., a request to charge that if W. & Co. told defendant to make other arrangements, and defendant was thereby induced to believe he had a right to mortgage, and if he in fact honestly thought that there was no incumbrance on the land, the jury should find for defendant, was properly refused as abstract.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. § 813.\*]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Charles D. Cook was convicted of procuring money by false pretense, and he appeals. Reversed and remanded.

Omitting the formal part, the indictment charged as follows: "Charles D. Cook did falsely pretend to John Hallford, with the intent to defraud, that he owned in his own right 118 acres of land in section 33, township 1, range 25, which was at the time free from incumbrance, and that there was no mortgage or lien on said land, and executed to John Hallford a mortgage on said land, and by the means of such false pretense obtained from John Hallford \$300, the personal property of such John Hallford, of the value of \$300, against the peace and dignity of the state of Alabama." The bill of exceptions shows that the defendant moved the court to strike from the indictment, the following words: "And executed to John Hallford a mortgage on said land"—on the ground that it was no portion of the false pretense, and was irrelevant and immaterial. The proof of the pretense is sufficiently set out in the opinion.

The following charges were refused to the defendant: (1) The general affirmative charge. (3) "The defendant is shown to be a man of good character. The jury may, on this evidence, entertain a reasonable doubt of the defendant's guilt, when without such evidence there would be no reasonable doubt." (5) "The court charges the jury that if they believe from the evidence that, although Cook had given a mortgage on the land, yet if Cook honestly thought that Wilson had agreed for him to mortgage it, then you will find the defendant not guilty." (6) "If the jury believe from the evidence that Wilson & Co. told the defendant to go ahead and make other arrangements, and if defendant was hereby induced to believe that he had the right to mortgage, and if he in fact honestly thought that there was no incumbrance on it, then you will find the defendant not guilty."

W. O. Mulkey, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DENSON, J. Even were the motion to strike certain portions of the indictment meritorious, yet the action of the court in overruling the same could not be reviewed on this appeal, for the reason that it is shown only by the bill of exceptions. No mention is made of the motion in the judgment entry. *Gaston v. Marengo Improvement Company*, 139 Ala. 465, 36 South. 738; *Crawley's Case*, 146 Ala. 145, 41 South. 175.

Assuming that the court erred in allowing

John Hallford to testify that the defendant executed the mortgage, yet the court is satisfied that the ruling worked no injury to the defendant, as the witness immediately produced the mortgage, which was self-proving, and it was offered in evidence; and, considering that the indictment avers that the mortgage was executed by the defendant, it was competent, relevant, and legal testimony. *Meek's Case*, 117 Ala. 117, 23 South. 155; *Wikerson's Case*, 140 Ala. 155, 36 South. 1004.

The indictment charges that the defendant "did falsely pretend to John Hallford, with intent to defraud, that he owned in his own right 118 acres of land in *section 33*, township 1, range 25." (Italics are the court's.) Hallford testified as follows: "The defendant at the time of the representation did not describe the land by subdivisions, nor by section, nor by range; but he probably mentioned what township it was in." The point was made in the court below, and is urged here, that there was a variance between the description of the pretense in the indictment and the proof thereof. It may be that the pretense was described more minutely in the indictment than was essential. However, only one pretense is alleged, and the words of particularity in respect to it are a part of the indictment, and cannot be regarded as surplusage. 19 Cyc. 423, 438; *Cowan's Case*, 41 Tex. Cr. 617, 56 S. W. 751; *O'Connor's Case*, 30 Ala. 9; *Beasley's Case*, 59 Ala. 20; *Meek's Case*, 117 Ala. 117, 23 South. 155. It is manifest, from these considerations and authorities, that the state failed to prove the pretense as averred; and the court erred in refusing the general affirmative charge requested by the defendant.

The defendant concedes in brief that charge 3 was properly refused. *Scott's Case*, 103 Ala. 59, 16 South. 925, 53 Am. St. Rep. 100.

The defendant might have "thought" that Wilson had agreed for him to mortgage the land, and at the same time the jury might have found that defendant falsely pretended, with intent to defraud, that the land was free from incumbrance—that there was no mortgage upon it. Consequently the court committed no error in refusing charge 5.

Charge 6, in its hypothesis, "and if he in fact honestly thought that there was no incumbrance on it" (the land), is abstract, and for this reason, if for no other, was properly refused.

For the error pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

**HARRIS v. BASDEN.**

(Supreme Court of Alabama. June 30, 1909.)

**1. PLEADING (§ 304\*) — VERIFICATION — PRIVATE WRITINGS—EFFECT.**

The written contract sued on is admissible, where there was sufficient proof of its execution, though its execution was denied by a sworn plea.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 908; Dec. Dig. § 304.\*]

**2. CONTRACTS (§ 346\*) — ACTIONS — ISSUES, PROOF, AND VARIANCE.**

A variance between the contract sued on and that offered in evidence, in the use of the word "and" in describing lands by government numbers where the word "of" should have been used, is immaterial, especially where no objection was made to the contract's introduction on such ground of variance, and the parties made but the one contract sued on, and the two, though very lengthy, were in other respects identical.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1718; Dec. Dig. § 346.\*]

**3. APPEAL AND ERROR (§ 205\*)—RESERVATION OF GROUNDS OF REVIEW — OFFER OF EVIDENCE.**

To put the trial court in error in declining to allow a question to be answered, it must have been suggested to the court what it was proposed to prove and how it would be relevant and competent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 205.\*]

**4. APPEAL AND ERROR (§ 900\*) — REVIEW — PRESUMPTIONS.**

The Supreme Court must presume in favor of the trial court's ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3687; Dec. Dig. § 900.\*]

**5. APPEAL AND ERROR (§ 690\*) — RECORD — SHOWING GROUNDS OF REVIEW—ADMISSION OF EVIDENCE.**

Where an objection to a question is overruled, but the record fails to show what answer witness made, if any, the ruling is not reversible on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2899; Dec. Dig. § 690.\*]

**6. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS.**

In an action for the price of timber cut by defendant or his agents, it was not reversible error to give a request by defendant that "plaintiff would be entitled to recover the value of the amount of the timber which the evidence has satisfied you was cut by defendant, by himself or agent, and not paid for. If the plaintiff claims for more than was cut (if any was cut), but was proved the whole amount claimed, yet if he has proved a certain amount was cut, then your verdict be only for the amount that was proved," though confused and uncertain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.\*]

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

Action by John L. Basden against W. W. Harris. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The following charge was refused to the defendant: "The burden of proof is on the defendant to make good his case, and I charge you that, if you believe from the

evidence that the timber and cross-ties enumerated on the book offered in evidence were cut on the entire 640 acres described in the complaint, then your verdict should be for the defendant."

Kirk, Carmichael & Rather, for appellant. Jackson & Alexander, for appellee.

**MAYFIELD, J.** This complaint contained four counts. The first declared on a written contract for the price of certain timber of plaintiff, alleged to have been cut by defendant or his agents under said contract. The others were the common counts. To the complaint the defendant filed several pleas: First, the general issue; second, non est factum; third, payment. The trial resulted in a verdict and judgment for plaintiff, from which the defendant appeals, assigning numerous errors.

The trial appears to have been had exclusively as to the first count of the complaint.

Recovery seems to have been sought and had under this count alone. There was no error in allowing the introduction of the written contract in evidence. There was sufficient proof of its execution to authorize its introduction in evidence, notwithstanding its execution was denied by a sworn plea.

The alleged variance claimed by appellant between the contract sued on and that offered in evidence is evidently a clerical error in the use of the word "and" for the word "of," and, while it makes the contract introduced in evidence describe more land than the contract declared on, yet it, with the clerical error, describes all the land which is described in the contract sued on. We think it a mere clerical error, self-correcting, because no objection was made to its introduction on this ground of variance or difference in description of the lands, and it was not claimed that the parties ever made but the one contract sued on, and the two, though very lengthy, are identical with this exception of the use of the word "and," in describing the lands by government numbers, where the word "of" should have been used.

We cannot know whether or not there was error in the trial court's declining to allow plaintiff to answer various questions propounded to him as a witness as to an alleged contract made by him with the Florence Wagon Company as to the lands or timber in question. It does not sufficiently appear what the answer would have been, nor does it sufficiently appear from the bill of exceptions that any answer would have been material or relevant to any issue on trial, which is necessary in order to put the trial court in error in declining to allow such questions to be answered. Defendant should have suggested to the court what he proposed to prove by the witness as to such contracts, and how it would be relevant and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

competent as evidence on this trial. The answers to these questions may or may not be relevant. Whether they were or not does not affirmatively appear, without which the trial court cannot be put in error. The presumption must be indulged by this court in favor of the ruling of the trial court.

The same is true as to the questions propounded by defendant to the witness Ashcraft, attorney for the Florence Wagon Company, to the same contracts between the wagon company and plaintiff as to the lands and timber in question. It is not shown what the answers would have been, nor that the answers would be relevant or competent evidence. *Snodgrass v. Caldwell*, 90 Ala. 319, 7 South. 834. So, when an objection to a question is overruled by the court, and the record falls to show what answer the witness made, if any, the ruling of the court is not reversible on appeal. *Hughes v. State*, 75 Ala. 31; *Jackson v. Clopton*, 66 Ala. 29.

It was not reversible error to give the following charge requested by plaintiff: "The plaintiff would be entitled to recover the value of the amount of the timber which the evidence has satisfied you was cut by defendant, by himself or agent, and not paid for. If the plaintiff claims for more than was cut (if any was cut), but was proved the whole amount claimed, yet if he has proved a certain amount was cut, then your verdict be only for the amount that was proved." There must be some clerical error in copying the charge into the transcript. As it is written, it is confused, indefinite, and uncertain, and might authorize a recovery if the timber was cut by plaintiff's agent, without authority from, or consent or knowledge of, defendant; but it could have been corrected by an explanatory charge.

The real disputed question in the case was whether Hall, who executed the contract in defendant's name and cut the timber under the contract, had any authority from defendant to so purchase or cut the timber. Defendant not only denied Hall's authority, but also denied any knowledge of it, until shortly before suit was brought.

Charge 21 stated a correct proposition of law as applied to the facts in this case, and its refusal was error, for which the judgment is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur.

#### CHILDRESS v. SMITH-ECHOLS-BURNETT HARDWARE CO.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. SALES (§ 358\*)—ACTIONS FOR PRICE—EVIDENCE.

Where there was evidence that defendant authorized K. to purchase mantels sued for on her account, evidence that statements of the

account delivered to defendant were retained without objection was admissible.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1049; Dec. Dig. § 353.\*]

##### 2. TRIAL (§ 60\*)—ORDER OF PROOF—AUTHORITY OF AGENT.

Proof of acts of an agent before proof of the agency, which is subsequently established, is not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 144; Dec. Dig. § 60.\*]

##### 3. PRINCIPAL AND AGENT (§ 122\*)—EVIDENCE—DECLARATIONS OF AGENT.

Where mantels were purchased by defendant's alleged agent, it was competent, after proof of the agency, to show the agent's declarations at the time of the purchase as to his authority.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 416; Dec. Dig. § 122.\*]

##### 4. EVIDENCE (§ 354\*)—ACCOUNT BOOK—ORIGINAL ENTRIES.

In an action for the price of mantels purchased by defendant's alleged agent, original entries in plaintiff's book of account concerning them were admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1449; Dec. Dig. § 354.\*]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action in assumpsit by the Smith-Echols-Burnett Hardware Company against Mrs. Nellie A. Childress. Judgment for plaintiff, and defendant appeals. Affirmed.

The subject-matter of the suit was the price of three cabinet mantels, placed in a house built for appellant by one Keown under a contract to furnish materials and labor and construct the house at and for the sum of \$750. It does not appear from the record whether the mantels were included in the specification to which the contract of building referred or not. The testimony for the plaintiff tended to show that Keown purchased the mantels as the agent of the appellant, that credit was given therefor, and the goods charged to her. The testimony for the appellant tended to show that she knew nothing of the purchase of the price paid for the same, but knew that the mantels went into the house, and was under the impression that she paid for the mantels in making a settlement with Keown.

Culll & Martin, for appellant. Hood & Murphree, for appellee.

DENSON, J. This action was brought on an account for goods, wares, and merchandise alleged to have been sold and delivered by plaintiff to the defendant. The proof shows that the goods consisted of three cabinet mantels, that they were purchased by one Keown, and delivered to him for the defendant. There is ample testimony in the record tending to show that defendant authorized Keown to purchase the mantels on her account; and for this reason the evidence showing that statements of the account were delivered to defendant, and that she received them through the United States

mail and kept them, without making any objection thereto, was entirely competent. *Rice v. Schloss*, 90 Ala. 416, 7 South. 802. It makes no difference that the statements were admitted before there was any evidence of the agency. This was irregular; but the subsequent introduction of such evidence saves the rulings of the court, in that respect, from reversible error.

The evidence of agency being in, it was also competent to show what Keown said, at the time he purchased the mantels, in respect to the defendant's having authorized him to make the purchase. For the same reason, coupled with the proof that the entries in the book referred to by witness Smith were original entries, it was competent to refer to such entries, and even to offer same as evidence.

The court properly limited the contract offered in evidence to the purpose of affecting the credibility of Keown's testimony. The defendant's testimony may conflict with that offered by the plaintiff on the question of Keown's authority to purchase the goods, but this would only make that question one of fact to be determined by the court.

We do not find, after considering all the testimony, any error in the record prejudicial to defendant.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### HIGDON, Sheriff, v. GARRETT.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. APPEAL AND ERROR (§ 917\*)—REVIEW—PRESUMPTIONS—DEMURRERS.

It will be presumed that demurrers filed, but not acted on by the trial court, were waived.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3709; Dec. Dig. § 917.\*]

##### 2. TRIAL (§ 68\*)—REOPENING CASE—DISCRETION OF COURT.

It is within the trial court's discretion to allow other testimony by a party after he has closed.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 160; Dec. Dig. § 68.\*]

##### 3. APPEAL AND ERROR (§ 970\*)—DISCRETION OF LOWER COURT—REOPENING CASE.

The trial court's discretion in the matter of allowing other testimony after a party has closed will not be revised.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3851; Dec. Dig. § 970.\*]

##### 4. TRIAL (§ 75\*)—OBJECTIONS TO EVIDENCE—IMPLIED WAIVER.

Where an objection to evidence is limited to a certain point, all other objections are impliedly waived.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 179; Dec. Dig. § 75.\*]

##### 5. CHATTEL MORTGAGES (§ 6\*)—CONDITIONAL SALE—DISTINGUISHED FROM MORTGAGE.

A sale of household furniture, partly on credit, title to remain in the seller until all the notes were paid, and the seller to have the

right to retake the property in case of default, was not a mortgage, but a conditional sale.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 23-41; Dec. Dig. § 6; \**Sales*, Cent. Dig. § 1332.]

##### 6. SALES (§ 465\*)—CONDITIONAL SALES—RECORD.

The statute requiring a conditional sale contract to be recorded is not in force in Jefferson county.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 465.\*]

##### 7 TRIAL (§ 143\*)—DIRECTION OF VERDICT.

A general affirmative charge for a party is properly refused, where there is a conflict in the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 342; Dec. Dig. § 143.\*]

##### 8. SALES (§ 480\*)—CONDITIONAL SALES—CONVERSION—MEASURE OF DAMAGES.

The measure of damages for conversion by defendant of personalty conditionally sold by plaintiff to defendant's debtor is the amount of unpaid purchase money, with interest, if less than its value, but, if greater, then the value of the personalty, with interest.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 480.\*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by W. J. Garrett against E. L. Higdon, as sheriff. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Hinds Peevey and E. C. Crow, for appellant. Kerr & Haley, for appellee.

DENSON, J. This action was brought by Mrs. W. J. Garrett against E. L. Higdon as sheriff of Jefferson county. The complaint contains two counts—one in trespass, for the taking of certain household and kitchen furniture, bedding, etc.; and the other in trover, for the conversion of the same property. Demurrers were filed to the complaint, but they were not acted upon by the trial court. It is therefore presumed that they were waived.

Three pleas were presented by the defendant—first, the general issue; second, that the goods involved in the suit were levied on under an attachment at the suit of Mrs. Nora E. Miller against Mrs. W. H. Greene, to enforce a landlord's lien for rent, and that plaintiff had no claim on the goods; and, third, that plaintiff was estopped from bringing this action because, before the said attachment suit was commenced, the plaintiff had stated to Mrs. Miller, or to her agents, that she had not retained title to the goods levied upon, and that by reason of this statement Mrs. Miller had brought said attachment suit. Demurrers to these pleas were filed; but, as the record fails to disclose that any action was taken upon them, they, too, are presumed to have been waived.

There was evidence on the part of the plaintiff below that she bought the goods described in the complaint and used them in running a boarding house in Birmingham, as a tenant of Mrs. Miller; that in March, 1907,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

she sold out her boarding house business to Mrs. W. H. Greene, who became Mrs. Miller's tenant in the house plaintiff had occupied, and sold to her the goods described in the complaint, partly for cash and partly on credit, taking her notes for the deferred payments; that at the time of the sale there was an oral agreement between them that the title should remain in the plaintiff until all the notes were paid, and that if any of them were not paid at maturity she would have the right to retake the property; that the said property was levied on and taken by the defendant, as alleged in the complaint, and had not been returned to her, and that it was worth \$500; that when the levy was made one of Mrs. Greene's notes for \$22.50 was past due and unpaid; and that the whole amount on said notes unpaid was \$142.50. Plaintiff denied ever having stated that she had not retained title to the property. The deputy sheriff who made the levy testified that before he levied on the goods Mrs. Greene informed him that they belonged to the plaintiff.

There was evidence on the part of the defendant that, before the suit in which the goods were levied upon was brought, plaintiff had told two of Mrs. Miller's agents that she had not retained title to the goods; that the agents told plaintiff they were going to attach the goods for Mrs. Miller's rent, and she repeated that she had not retained the title to the goods, and told them to go ahead and attach. The only evidence as to the value of the goods, except that of the plaintiff, was that of the deputy sheriff who made the levy, to the effect that they were very cheap, that some of the matting was worn out and not worth taking up, that the chairs and tables were broken and in bad fix generally, and that he told the agent of Mrs. Miller that they would not sell for enough to pay for costs in the case, and that of one Dolandson, a furniture dealer, who examined the goods five months after they were levied on, to the effect that they were worth \$150. The jury returned a verdict for the plaintiff for \$250. The court declined to set aside the verdict on the motion of the defendant.

The first assignment of error is based on the overruling of defendant's objection to plaintiff's testifying, in rebuttal, that about \$25 worth of the goods levied on had been removed by some one while the goods were in the possession of the sheriff under the attachment. It is within the discretion of the trial court to allow the introduction of other testimony by a party after he has closed his case, and the exercise of this discretion is irrevocable. *L. & N. R. Co. v. Barker*, 96 Ala. 433, 11 South. 453. The objection being limited to the point that the evidence was not in rebuttal, all other objections that might have been made are im-

pliedly waived. 3 Brick. Dig. p. 444, § 574. No error was committed in overruling the objection.

The second ground in the assignment of errors is based upon the refusal of the court to give the general affirmative charge for the defendant, as requested by him in writing. In support of this it is urged that the agreement claimed to have been made between the plaintiff and Mrs. Greene constituted a mortgage, and not a conditional sale, and that the same was void because not in writing. According to our decisions this contention must be resolved against the appellant. *Piedmont, etc., Co. v. Thomson-Houston Motor Co.* (Ala.) 12 South. 768, and cases there cited. It will be borne in mind that the statute requiring conditional sale contracts to be recorded is not applicable to the present case. *Goodgame v. Sanders*, 140 Ala. 247, 37 South. 200. There was a conflict in the evidence as to whether or not any agreement was made for the retention of the title; and the circuit court properly submitted this issue to the jury, and committed no error in refusing the affirmative charge asked by the defendant.

The evidence does not warrant the assessment of exemplary damages, and the measure of the plaintiff's damages is the amount of the unpaid purchase money, with interest, if that be less than the value of the property wrongfully taken or converted; but, if such amount and interest exceed the value of the property, then the value of the property, with interest, would afford the measure of damages. The undisputed evidence shows that the unpaid balance due the plaintiff on her contract was not exceeding \$142.50. This, with interest, then, fixed the measure of plaintiff's damages, provided the jury should find that the property reached that mark in value. It follows that the damages assessed are excessive, and that the court erred in not setting aside the verdict on this ground. 4 *Mayfield's Dig.* p. 765, § 427; *Id.* p. 764, § 412; *Morton v. Frick*, 87 Ga. 230, 13 S. E. 463; *Bradley v. Burkett*, 82 Ga. 255, 11 S. E. 492; *Johnson v. Whittemore*, 27 Mich. 463; *Rose v. Story*, 1 Pa. 190, 44 Am. Dec. 121; *Woods v. Nichols*, 21 R. L. 537, 45 Atl. 543, 48 L. R. A. 773.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON, ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

#### MCDANIELS v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

#### 1. CRIMINAL LAW (§ 1150\*)—CHANGE OF VENUE—REVIEW.

Denial of accused's application for a change of venue will not be reversed, unless the Su-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



preme Court can clearly see that the determination was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3044; Dec. Dig. § 1150.\*]

## 2. CRIMINAL LAW (§ 511\*)—TESTIMONY OF ACCOMPLICE—CORROBORATION.

An accomplice testified to a conspiracy to kill deceased, describing the circumstances and the method followed, stating that defendant was a party to the conspiracy and watched outside while the murder was being committed. *Held*, that evidence of another witness that, on the Monday night before decedent was killed, she heard the accomplice and others connected with the conspiracy, including defendant, talking in her house about a plot to kill deceased, was sufficient corroboration, under Code, § 7897, forbidding a conviction on the uncorroborated testimony of an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1128; Dec. Dig. § 511.\*]

## 3. CRIMINAL LAW (§ 780\*)—INSTRUCTIONS—ACCOMPLICE'S TESTIMONY—CORROBORATION.

Where, in a prosecution for homicide, the testimony of W. was the only evidence to corroborate an accomplice who connected defendant with the offense, it was error to refuse to charge that if the jury believed from the evidence that the only evidence tending to corroborate the accomplice was W.'s testimony, and if they did not believe her testimony to be true, they must find defendant not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1862; Dec. Dig. § 780.\*]

Appeal from Circuit Court, Hale County;  
B. M. Miller, Judge.

Joe McDaniels was convicted of murder in the first degree, sentenced to death, and he appeals. Reversed and remanded.

The facts are sufficiently stated in the opinion of the court. The following charges noted in the opinion, among others, were refused to the defendant: "(4) The court charges the jury that, if they have a reasonable doubt as to the truth or falsity of the evidence of the woman, Emma Williams, who testified in this case, they must acquit the defendant. (5) The court charges the jury that the only evidence introduced by the state to corroborate the testimony of Charlie Taylor is evidence tending to show the accomplices of this defendant agreed to kill R. W. Drake at Shad Williams' house, and if they have a reasonable doubt of the truth or falsity of that testimony they must acquit the defendant. (6) The court charges the jury that if they believe from the evidence that the only evidence tending to corroborate the testimony of Charlie Taylor that tends to connect the defendant with the commission of the offense is the testimony of Emma Williams, and if the jury do not believe the testimony of Emma Williams to be true, they must find the defendant not guilty."

Charles E. Waller and H. G. Benners, for appellant. Alexander M. Garber, Atty. Gen., and Thomas D. Sanford, for the State.

McCLELLAN, J. The appellant stands condemned to suffer death for the murder of Robert W. Drake. Preliminary to the trial below the defendant moved for a change of venue. The court denied the motion, and this action of the court is the first question presented for review here. This court, in *Hawes' Case*, 88 Ala. 37, 7 South. 302, announced the rule that the action of a trial court in refusing an application for a change of venue will not be reversed unless this court can "see, and see clearly, that its action was wrong"; that the presumption prevails that the ruling was free from error, until error is affirmatively shown. In *Howard's Case* (delivered at this term) 50 South. 954, the *Hawes Case*, in this particular, was followed. After a careful review of the evidence offered on the hearing of the application for change of venue, and with due regard for the rule stated, we are not convinced that error was committed in the refusal of the application.

The important question presented by the record and argued by counsel for appellant raises for our review the inquiry whether the testimony of the accomplice, Charlie Taylor, implicating the defendant, was sufficiently corroborated to render the submission of guilt vel non of the defendant to the jury. Accepting appellant's theory that the witness Emma Williams' testimony was all the evidence offered assuming to afford the necessary corroborating testimony of that given by Taylor, we entertain the opinion that Williams' testimony sufficed for the purpose of corroboration. We will briefly set out our reasons:

Taylor testified that he, Shad Williams, Ed Howard, and defendant concocted, after discussion, the conspiracy to kill Mr. Drake; that on the occasion of his murder all entered his room, one being armed with a piece of iron; that, finding Mr. Drake asleep, it was then arranged for the defendant to "watch" outside, which defendant did; that Williams struck Mr. Drake on the head with the piece of iron, killing him; that one of them secured from his trousers the store (which was nearby) keys; that the four went there, robbed one of the cash drawers, and attempted to open the other cash drawer and the iron safe; that they took an inflammable oil out of the stock, poured it about the building, and set fire to it; that some of the oil was then carried back to the house, the trousers of the deceased were saturated with it, and, placing the trousers beneath the body of the dead man, fire was set to the trousers. These are some only of the details of the tragedy. Emma Williams' testimony, as presently important, was, the record shows, as follows: "On Monday night before Mr. Drake was killed, I heard Shad Williams, Ed Howard, and Charlie Taylor talk-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing at my house. Q. Did you hear any talk between them about a plot to kill Mr. Drake? A. Yes, sir. Q. Who was it you heard talking? A. Shad Williams, Joe McDaniel, and Ed Howard. Q. What did they say? A. Shad Williams say they was going to kill Mr. Drake to get them some money."

In one view, clearly open to adoption, both by the court as a preliminary matter to determine whether it corroborated Taylor's testimony and by the jury upon submission to them, the witness affirmatively stated that defendant was one of the three, with Shad Williams and Ed Howard, she heard talking about a plot to kill Mr. Drake. In this particular Taylor's testimony, detailing the plot to kill Mr. Drake, finds, if credited, direct and material support. After responding to the question as last indicated, the witness said that Williams said "*they* was going to kill Mr. Drake." (*Italics supplied.*) The *they* referred to in the answer of the witness obviously had reference to the parties said to have been then present, and defendant was one of them. These considerations appear conclusive to us against the insistence for appellant that the testimony of the accomplice was uncorroborated. The affirmative charge, requested by defendant, was, hence, properly refused.

The defendant requested, and was refused, several charges postulating an acquittal of the defendant if the jury did not credit the testimony of the sole witness whose statements tended to corroborate the testimony of Charlie Taylor, the confessing accomplice. The rule sought to be announced in these charges should have been applied to the case. The statute (Code 1907, § 7897) forbids a conviction on the testimony of an accomplice, unless corroborated as the statute prescribes. In this case the corroboration (if offered) depended wholly upon the testimony of Emma Williams. Disbelief of her testimony necessarily forbade, under the letter of the statute, a conviction of this defendant.

We have numbered the refused charges for convenience. All of the Justices concur in the conclusion that the court erred in refusing charge 6. Justices ANDERSON and DENSON entertain the opinion that the court also erred in refusing charges 4 and 5. Justice SAYRE holds that charges 4 and 6 should have been given, but that charge 5 might properly have been given, though the court did not err in refusing it, because it placed the burden on the court to declare what the evidence was. The principles announced in Segars' Case, 86 Ala. 59, 5 South. 558, and Johnson's Case, are applicable to these charges. Charge 6 hypothesized the mere belief by the jury of the testimony of Emma Williams, whereas the essential, under the statute, to a conviction, where the corroboration of the accomplice's testimony is offered by a single witness, is that such

witness' testimony shall be believed beyond a reasonable doubt. Charge 6 did not so intend; but its failure in that respect was favorable to the prosecution.

For the error in refusing charge 6, the judgment is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur.

#### SMITH v. STATE.

(Supreme Court of Alabama. June 30, 1909.)  
CRIMINAL LAW (§ 1182\*)—APPEAL—DISPOSITION OF CASE.

Where the record proper is regular and valid, and shows all things necessary to support a judgment of conviction and sentence, and there is no bill of exceptions, the judgment and sentence will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.\*]

Appeal from Law and Equity Court, Lee County; Albert E. Barnett, Judge.

John Henry Smith was convicted of crime, and appeals. Affirmed.

Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. The record proper appears to be both regular and valid. It shows all things necessary to support the judgment of conviction and death sentence. There is no bill of exceptions. Finding no error, the judgment and sentence must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### PHILLIPS v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

1. CRIMINAL LAW (§ 761\*)—WITNESSES—BIAS—INSTRUCTIONS.

Request to charge that certain facts might be looked to, to show prosecutor's biased feelings in giving his testimony against accused, instead of to determine whether prosecutor's feelings were biased against defendant, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771; Dec. Dig. § 761.\*]

2. CRIMINAL LAW (§ 807\*)—INSTRUCTIONS—ARGUMENTATIVE CHARGES.

An instruction that the jury must try accused on the evidence, that public opinion should not be considered, and that each member of the jury must from the evidence believe accused guilty beyond a reasonable doubt, before a conviction would be authorized, was properly refused as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1960; Dec. Dig. § 807.\*]

3. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.

A charge, not supported by any evidence, is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 814.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

#### 4. CRIMINAL LAW (§ 821\*)—INSTRUCTIONS—FORM.

A charge that, if one of the jury have a "reasonable of doubt" of defendant's guilt, he could not be convicted, was properly refused as misleading and unintelligible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1989; Dec. Dig. § 821.\*]

#### 5. CRIMINAL LAW (§ 561\*) — REASONABLE DOUBT—ACQUITTAL.

That one juror has a reasonable doubt of defendant's guilt, while sufficient to stay or prevent a conviction, does not require an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.\*]

#### 6. COSTS (§ 285\*)—CRIMINAL PROSECUTIONS—COLLECTION—STATUTES.

Act Nov. 30, 1907 (Gen. Acts Sp. Sess. 1907, p. 179; Cr. Code 1907, p. 422, note), fixing 40 cents as the rate per day at which convicts shall be sentenced for the costs of prosecution, repeals the former law fixing the rate at 30 cents.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1084; Dec. Dig. § 285.\*]

Appeal from Circuit Court, Randolph County; S. L. Brewer, Judge.

Bill Phillips was convicted for retailing spirituous, vinous, or malt liquors, and he appeals. Affirmed in part.

See, also, 47 South. 245.

The evidence for the state tended to show that, about three weeks before the finding of the indictment, Jack Browning purchased a pint of whisky of defendant, paying him 35 cents therefor. Defendant's evidence tended to show that this was not true, and that Browning was at outs with the defendant.

The following charges were refused to the defendant: "(1) I charge you, gentlemen of the jury, that the fact, if it be a fact, that Jack Browning proposed to Gordon Smith to pay his expenses to court if he would testify against the defendant, that this may be looked to, to show Jack Browning's bias feeling in giving in his testimony. (2) I charge you, gentlemen of the jury, that you must try this defendant on the evidence in this case, and public opinion should not be considered by you, and that each member of the jury must from the evidence believe him guilty beyond a reasonable doubt before you can convict. (3) I charge you, gentlemen of the jury, that if one of your number have a reasonable of doubt of the defendant's guilt you cannot convict the defendant. (4) I charge you, gentlemen of the jury, that each individual of your number must be convinced beyond all reasonable doubt that the defendant is guilty as charged from the evidence in the case, else you will find the defendant not guilty. (5) I charge you, gentlemen of the jury, that if there exists in the mind of any one of you a reasonable doubt of the defendant's guilt, growing out of the evidence, when considered in connection with all the other evidence in the case, then you must find the defendant not guilty.

(6) I charge you, gentlemen of the jury, that if you believe from the evidence that the witness Jack Browning offered to pay Gordon Smith's expenses to court to testify against defendant, that this evidence may be looked to, to show Jack Browning's feelings against the defendant."

Hooten & Overton, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DENSON, J. The defendant was tried and convicted for selling whisky without a license and contrary to law. The evidence for the state tended to show the guilt of the defendant, while that for the defendant tended to show his innocence. The only question reserved by the bill of exceptions relates to charges refused to the defendant.

If charges 1 and 6, in their conclusions, had stated that the facts hypothesized might be considered by the jury, along with the other evidence, in determining whether Jack Browning's feelings were biased against the defendant, instead of concluding with the statement that they might be looked to, "to show Jack Browning's biased feelings in giving in his testimony," we are not prepared to say that the court should not have given them; but in the form requested the charges are objectionable and were properly refused.

Charge 2 was properly refused because it is argumentative. Moreover, the record does not disclose anything in respect to public opinion. Therefore the charge was in reference to that subject abstract.

Charge 3, on account of the use of the word "of" between the words "reasonable" and "doubt," is misleading and unintelligible, and was properly refused.

Charges 4 and 5 were properly refused. That one juror has a reasonable doubt of the defendant's guilt, while sufficient to stay or prevent a conviction, does not require an acquittal. Goldsmith's Case, 105 Ala. 8, 16 South. 933; Cunningham's Case, 117 Ala. 59, 66, 23 South. 693.

The act of November 30, 1907 (Gen. Acts Sp. Sess. 1907, p. 179; Cr. Code 1907, p. 422, note), fixes 40 cents as the rate per day at which convicts shall be sentenced for the costs of the prosecution, and is a repeal of the former law, which fixed the rate at 30 cents. The court erred in sentencing the defendant to work out the costs at 30 cents per day.

The judgment of conviction is affirmed; but as to the sentence the judgment is reversed, and the abuse is remanded, that the defendant may be properly sentenced.

Affirmed in part, and in part reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

# CENTRAL OF GEORGIA RY. CO. v. WILLIAMS.

(Supreme Court of Alabama. June 30, 1909.)

## 1. JURY (§ 17\*)—TRIAL BY COURT—CASES APPEALED FROM JUSTICE'S COURT.

Loc. Acts 1898-99, pp. 197, 198, §§ 4, 5, regulating procedure in the Clay county circuit court, do not include a cause appealed there from a justice's court; but as to such a cause Code 1907, § 4722, controls, and, the amount sued for exceeding \$100, the cause was properly tried by a jury.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 17.\*]

## 2. JUSTICES OF THE PEACE (§ 174\*)—APPEAL—PLEADING—AMENDMENT.

Jurisdiction of an appeal from a justice to the circuit court was not lost by amendment of the complaint in the latter court, adding five counts, each claiming "the further and additional sum" of \$100, which collectively exceeded a justice's jurisdiction; but the circuit court could, during the trial, cure this by allowing another amendment striking out the words "further and additional," so as to show that each count claimed was for the same cause of action originally sued on in the justice's court.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 174.\*]

## 3. COURTS (§ 121\*)—JURISDICTION—REMISSION OF PART OF CLAIM.

The law of remission of enough of a claim to bring it within the jurisdiction of the court is common, and not statutory.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 121.\*]

## 4. APPEAL AND ERROR (§ 1088\*)—HARMLESS ERROR—SUFFICIENCY OF PLEADINGS.

It is unnecessary for the Supreme Court to pass on the sufficiency of counts in a justice's court, where an appeal was taken and trial *de novo* had in the circuit court on a practically new complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4287; Dec. Dig. § 1088.\*]

## 5. APPEAL AND ERROR (§ 192\*)—PRESENTATION OF GROUNDS OF REVIEW—OBJECTIONS TO PLEADINGS.

The Supreme Court cannot consider questions of pleadings in a justice's court as to which no objections were there taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1221-1225; Dec. Dig. § 192.\*]

## 6. RAILROADS (§ 439\*)—INJURIES TO ANIMALS ON TRACK—COMPLAINT—SUFFICIENCY.

In an action for killing a mule on defendant's railroad track, it was not necessary to allege specifically that the trainmen were at the time acting within the scope of their authority; but that might be inferred from other facts well pleaded, and clearly was not necessary where it was alleged that defendant did the wrongful act by and through its servants.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 439.\*]

## 7. LIMITATION OF ACTIONS (§ 127\*)—COMMENCEMENT OF ACTION—AMENDMENT OF PLEADINGS.

Where no one of the counts of an amended complaint filed in the circuit court on appeal from a justice attempted to set up a new cause of action, each related back to the beginning of the action before the justice, and, that having

been brought within time, there was no bar of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

## 8. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—SUSTAINING DEMURRER.

No injury could have resulted from sustaining a demurrer to a plea, where the cause was tried on another plea putting in issue the same matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

## 9. RAILROADS (§ 441\*)—INJURIES TO ANIMALS—PRESUMPTIONS AND BURDEN OF PROOF.

Where the evidence conclusively showed that a mule was killed by defendant's train at one of the places specified in Code 1907, § 5473, the burden was, by section 5476, on defendant to acquit itself of negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1578-1581; Dec. Dig. § 441.\*]

Appeal from Circuit Court, Clay County; John Pelham, Judge.

Action in a justice court by A. J. Williams against the Central of Georgia Railway Company. Plaintiff had judgment, and defendant appealed to the circuit court, where plaintiff again had judgment, and defendant appeals. Affirmed.

Lackey & Bridges and D. H. Riddle, for appellant. Whatley & Cornelius, for appellee.

MAYFIELD, J. The appellant states his case as made on appeal as follows: This is an action on the case, begun in justice court by appellee, as plaintiff, to recover of appellant, as defendant, the sum of \$100 for negligently killing plaintiff's mule, a colt. There were two counts in the complaint in justice court, and in the circuit court plaintiff filed five additional counts to the complaint. In each count thus added by amendment the plaintiff claimed "the further and additional sum" of \$100. The defendant moved to dismiss the suit because the complaint as amended claimed more than the justice court had jurisdiction of, and that the circuit court did not have jurisdiction on appeal. Before the motion to dismiss was ruled on, over the defendant's objection, the court permitted the plaintiff to strike out the words, in each count of the complaint as amended, "further and additional," and the defendant excepted to the court's allowing this amendment before the trial was entered upon in the circuit court. The defendant moved the court to transfer the cause from the jury to the non-jury docket; the cause having been appealed from justice court to the circuit court, and no jury having been demanded. The court overruled this motion, and over the defendant's objection put it to trial before a jury, and to this ruling of the court the defendant excepted. The court overruled defendant's demurrers to the various counts of plaintiff's complaint, and assigns as error the court's

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ruling in overruling demurrers to the fourth count of the complaint. The plaintiff demurred to the defendant's pleas, and the sustaining of the demurrers to plea 4 is assigned as error, and the refusing to give the affirmative charge for the defendant is assigned as error. There was a jury, and verdict for the plaintiff for \$100 and costs, and the defendant appeals.

The trial court properly declined to transfer the case to the nonjury docket and to try the cause without a jury. Loc. Acts 1898-99, p. 196, §§ 4, 5, regulating the practice and procedure in the circuit court of Clay county pertaining to the demands and waiver of jury and nonjury trials, relate solely (by letter and spirit) to "civil cases begun in the circuit court." This does not include actions or causes removed to the circuit court by appeal from inferior courts. As to such cases section 4722 of the Code of 1907 controls. The amount sued for exceeding \$20, the case was properly tried by a jury, and defendant had no right to demand a trial of the facts by the court.

There is nothing in the contention of appellant that the circuit court had no jurisdiction because of the additional counts added in the circuit court by amendment, because, taken collectively with the original counts, the complaint claimed \$700 or \$800, in excess of the jurisdiction of the justice of peace court. The justice court had jurisdiction, and rendered judgment against defendant, from which it appealed to the circuit court; and jurisdiction was thus acquired by the defendant's own appeal, and upon its own petition, if lost or destroyed, by adding to the complaint additional counts which, not singly, but collectively, exceeded the jurisdiction of justice courts. The trial court certainly could, during the trial, cure this by allowing another amendment by striking out of said counts the words or phrase "the further and additional," where the same occurred, so as to show that each count claimed for but one and the same injury and one and the same cause of action, which was the same as originally sued on in the justice court. It would be strange logic and a strange practice if the amendment destroyed the jurisdiction acquired by the appeal, and the court could during the trial correct this error by a proper amendment, which could have been made in the first instance.

If the contention of appellant is correct, that the effect of the amendment was to make the complaint claim \$700 or \$800—that is, that each additional count claimed an additional \$100—then the amendment, by adding the additional counts, was not allowable, because it would be a departure, and also because it would exceed the jurisdiction of justice of peace courts. Surely the plaintiff should have been allowed to correct this error during the trial and before a verdict. However, the last amendment, by striking out such phrases, was wholly un-

necessary. It could neither benefit plaintiff nor injure defendant. Each count of the complaint clearly claimed but one and the same \$100 for but one and the same injury, and was based upon but one and the same cause of action. If each had been based upon a separate and distinct cause of action, there might be some force in appellant's contention; but such was not the case. Counsel for appellant contends, to quote his exact language: "A plaintiff could not before the statute remit a part of his claim, even before suit was brought, to give the court jurisdiction. Am. & Eng. Ency. Law (1st Ed.) vol. 12, p. 183. And under the statute (the Code of 1907) plaintiff is allowed to remit enough of his claim to bring it within the jurisdiction of the court, but this has to be done before suit is brought." If counsel's assertion was true, we cannot see how it could aid him on this appeal; but we cannot agree with him that there is such a statute in the present Code, or that there has ever been such a statute in any of the previous Codes of this state. The law of remittitur referred to by counsel is common, and not statutory. It has been often announced in the decisions of this court, extending over a period of 70 years.

It is unnecessary to here pass upon the sufficiency of the counts filed in the justice court, because the defendant appealed from that judgment and a trial de novo was had in the circuit court on a practically new complaint filed therein, and this appeal is from the judgment in the circuit court, and we cannot here consider questions of pleadings in the justice court as to which no objections were there taken. The complaint filed in the circuit court and each count thereof was sufficient, and was not ill of any of the complaints assigned by demurrer or urged in brief of appellant. It was not necessary to allege specifically that the agents or servants in charge of the train that killed the mule in question were, at the time of committing the wrong complained of, acting within the line and scope of their authority. This may be inferred from other facts well pleaded. In this instant case it was clearly not necessary, because it alleged that the defendant did the wrongful act complained of by and through its agents or servants.

No one of the counts attempted to set up or declare on a new cause of action. They all declared on the same cause of action, based on but one and the same transaction, to wit, the killing of one mule; hence each relate back to the beginning of the original action in the justice court, and, as that was brought within a year, there could be no question as to the statute of limitations of one year being a bar to either count of the complaint, whether it be in trespass or case. No injury could have been done appellant by sustaining a demurrer to plea No. 4. It was a good plea; and this is the most that

appellant could claim. It was only good as a plea of the statute of limitations of one year, and this is all it could have been intended for. The case was tried on plea No. 5 as one of the issues, and it was in the form prescribed by law. It put in issue all matter that plea 4 could have done, so no possible injury could have resulted to defendant by sustaining demurrer to plea 4.

The evidence conclusively showed that plaintiff's mule was killed by the defendant's train, at one of the places specified in section 5473 (3440) of the Code of 1907, within a year before the commencement of the action, and within the jurisdiction of the court. The burden of proof was, therefore, by virtue of the statute (section 5476 [3443]), upon the defendant to acquit itself of all negligence on the part of itself and its agents. To say the very most of the evidence that can be said of it in favor of defendant, it was clearly and certainly a question for the jury to say whether or not it discharged this burden. The jury found that issue against the defendant, after it had been fairly submitted to them, and we do not see that there was any reversible error in their finding, or in the verdict or judgment based thereon. It follows that the trial court properly declined to give these charges requested by the defendant, which were the general affirmative charges in its favor.

Finding no error, the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### STATE v. JETER.

(Supreme Court of Alabama. June 30, 1909.)

CRIMINAL LAW (§ 995\*)—CONVICTION—JUDGMENT—FORM.

Code 1907, § 6720, provides that a conviction by the county court may be in the following form: "On hearing the evidence the court is satisfied of the guilt of the defendant and awards the following punishment (stating the punishment imposed) and the costs of the proceedings." *Held*, that a judgment reciting: "The court, after hearing all the evidence in the case, finds the defendant guilty and assesses a fine of \$150 and costs, and in addition to the fine and costs sentences the defendant to hard labor for the county for three months. The defendant failing presently to pay or secure the fine and costs, he is sentenced to additional hard labor for the county 269½ days, at 75 cents per day, to pay the fine and costs, which is \$201.78. Should the defendant later pay the fine and costs to the clerk, the sentence to hard labor to pay fine and costs will be remitted"—was in substantial compliance with the form prescribed, and sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2518; Dec. Dig. § 995.\*]

Application of Willie Jeter, on habeas corpus, for his discharge from judgment and sentence of the county court of Coffee county. From an order granting his discharge, the State appeals. Reversed and rendered.

The warrant and affidavit under which Jeter was arrested charged simple assault and battery, and was made returnable to the county court of Coffee county, where the same was tried, and the following judgment entry made: "The court, after hearing all the evidence in the case, finds the defendant guilty, and assesses a fine of \$150 and costs, and in addition to the fine and costs sentences the defendant to hard labor for the county for three months. The defendant, failing presently to pay or secure the fine and costs, he is sentenced to additional hard labor for the county 269½ days, at 75 cents per day, to pay said fine and costs, which is \$201.78. Should the defendant later pay fine and costs to the clerk, the sentence to hard labor to pay fine and costs will be remitted."

Alexander M. Garber, Atty. Gen., for the State. J. A. Carnley, for appellee.

SIMPSON, J. The defendant, Willie Jeter, was convicted in the county court of the offense of assault and battery, and was sentenced to pay a fine of \$150, and also to perform hard labor for the county for three months, as shown by the judgment of the court, which will be copied in the statement of this case. A writ of habeas corpus was sued out before the judge of the probate court, under which the prisoner was discharged; and this appeal is by the state from that judgment.

It is evident that the theory on which the prisoner was discharged by the probate judge was that the judgment of the county court was not sufficient in form. The Legislature, recognizing the fact that judges of the county courts are not always learned in the law, has provided a simple form of judgment in such cases. The form is: "On hearing the evidence the court is satisfied of the guilt of the defendant, and awards the following punishment (here state the punishment imposed), and the costs of the proceedings." Code 1907, § 6720. The judgment of the county court is in substantial conformity with the form prescribed. Consequently the judge of the probate court erred in discharging the petitioner.

The judgment of the judge of the probate court is reversed, and a judgment will be here rendered, dismissing the petition, and remanding the petitioner to the custody of the law.

Reversed and rendered.

DOWDELL, C. J., and DENSON and SAYRE, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## TIPPETT v. GANDY.

(Supreme Court of Alabama. June 30, 1909.)

## 1. APPEAL AND ERROR (§ 1078\*) — ASSIGNMENTS OF ERROR—ABANDONMENT.

A party abandons his assignments of error which he does not insist upon in his brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

## 2. PLEADING (§ 142\*)—PLEAS—SUFFICIENCY.

A plea is bad which attempts to plead an award as a set-off and does not sufficiently describe the award, nor show that it was binding on plaintiff, nor aver performance thereof by defendant, nor a willingness or readiness on defendant's part.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290-300; Dec. Dig. § 142.\*]

## 3. PLEADING (§ 142\*)—PLEADING JUDGMENT—SUFFICIENCY.

A plea is bad which seeks to set off a judgment against plaintiff's demand, but does not describe it so that the court or plaintiff could know whether it was valid and binding on plaintiff, but merely avers the amount of the judgment and the court rendering it, without the names of the parties or the terms of the judgment, or a sufficient allegation of ownership in defendant; and to render such a plea good it should allege facts showing a good cause of action in favor of defendant against plaintiff, if their relations as parties were reversed.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 142.\*]

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

Action by J. J. Gandy against T. J. Tippet. Judgment for plaintiff, and defendant appeals. Affirmed.

S. L. Darby and Lackey & Bridges, for appellant. Frank W. Lull and J. M. Holley, for appellee.

MAYFIELD, J. The case made by the record is properly stated by counsel as follows:

"This case is the sequel of *Gandy v. Tippet*, reported in 155 Ala. 296, 46 South. 463. Gandy had attempted to purchase the statutory right of redemption of the widow of a mortgagor, and, having received a deed from such widow, tendered the amount of money required to redeem to T. J. Tippet, purchaser at foreclosure sale. Tippet received the money and signed a deed, but afterwards denied Gandy's right to redeem. Gandy and Tippet agreed to submit the matter of the right to redeem to arbitration, and also to submit to the same arbitrators the question of the value of the land sought to be redeemed, and also the value of certain other real estate owned by Tippet, and which Gandy wished to purchase in case the mortgaged land was redeemed or purchased by Gandy. The arbitrators decided that Gandy had no right to redeem, and proceeded to fix a value upon the lands which Gandy wished to purchase. In the award of the arbitrators it is decided that Gandy 'may purchase' the lands set forth at a price nam-

ed by such arbitrators within a limited time. This court upheld the arbitration, so far as the right to redeem was concerned, holding that the widow of the deceased mortgagor has no statutory right to redeem. *Gandy v. Tippet*, 155 Ala. 296, 46 South. 463. That was the only question before this court. Tippet held the money paid to him by Gandy when Gandy sought to redeem, and this suit is brought by Gandy to recover this money. The action is upon the common counts for money had and received, money loaned by plaintiff to defendant, etc. The defense filed 11 pleas. The first plea was the general issue, and 10 special pleas were filed. The court sustained demurrers to all the special pleas, and the trial was had upon the general issue. The general charge was given to the jury at plaintiff's request in writing, and verdict was rendered for plaintiff for amount sued for.

"Appellant assigns as error the sustaining of plaintiff's demurrers to defendant's special pleas; error being assigned as to each ruling of the court on demurrers. However, in appellant's brief no insistence is made as to any ruling of the court on pleas 4, 8, 9, 10, and 11. Appellant limits his insistence to the rulings of the court on demurrers to pleas 2, 3, 5, 6, and 7, and under the rules of this court he must be held to have abandoned his assignments of error, where same are not insisted upon in his brief. We will only notice such assignments of error as are insisted on by appellant."

Plea 2 was evidently bad, in that it attempted to answer the complaint, when it was not only insufficient, but also inapt as a plea to some of the counts.

Plea 3 was bad, in that it attempted to plead an award as a set-off and did not sufficiently describe the award, nor did it show that the award was binding on the plaintiff, nor did it aver a performance thereof by the defendant, nor a willingness or readiness on the part of defendant. Construing the plea most strongly against the pleader, it sought to bind one party by the award, but not the other.

Plea 4 was bad, in that it sought to set off a judgment against plaintiff's demand, and did not set out the judgment, or sufficiently describe it so that the court or plaintiff could know or say whether it was a valid judgment, binding on this plaintiff, nor does it sufficiently aver ownership in the defendant. No attempt is made therein to aver the parties thereto. Only the amount of the judgment and court in which it was rendered is averred. To render such a plea good as a set-off, it must allege facts and contain allegations which would show a good cause of action in favor of defendant against the plaintiff, if their relations as parties were reversed. This the plea clearly does not do.

Plea 5 is bad for the reason assigned as to plea 4.

Plea 6 is bad for some of the reasons assigned to plea 3. It does not aver performance of the award by the defendant, nor a willingness or readiness on the part of defendant. Construed most strongly against defendant, it seeks to bind plaintiff by the award, but to relieve or excuse defendant from performance. It also shows an award that a common-law court could not enforce against the defendant; that is, one compelling a conveyance of land by him. See former report of this case, in 155 Ala. 296, 46 South. 464.

Plea 7 is bad, in that it is not certain whether it attempts to plead as a set-off an award or a judgment. If it attempted to set up the award as a set-off, it is insufficient for the reasons heretofore assigned as to similar pleas. If it was an attempt to set up a judgment as a set-off, it is insufficient, in that the facts do not show a valid judgment which would support a set-off in this action; nor are the averments as to both the award and the set-off sufficient to constitute a good plea of set-off.

The other pleas were each bad for the same reasons assigned to one or more of the foregoing pleas treated. They are conceded to be similar to those treated. Demurrers upon the grounds treated were sustained to each of the special pleas, as to which there was no error.

Under all the evidence in this case, and even under that of the defendant alone, the plaintiff was certainly entitled to the general affirmative charge as for the amount of the verdict. Therefore no injury was done the defendant, the appellant here.

The judgment is affirmed.

SIMPSON, McCLELLAN, and SAYRE, JJ., concur.

# CAROLINA PORTLAND CEMENT CO. v. ALABAMA CONST. CO.

(Supreme Court of Alabama. June 30, 1909.)

## 1. APPEAL AND ERROR (§ 1078\*)—REVIEW—POINTS NOT INSISTED ON.

Only those grounds of demurrer insisted on in argument will be considered by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

## 2. PLEADING (§§ 195, 362, 428\*)—TRIAL (§ 145\*)—DEMURRER—SET-OFF OR RECOURPMENT—PROPER REMEDY.

A plea of set-off or recoupment is not demurrable, merely because it seeks to set off or recoup some damages not allowable, if it states a good cause of action as to other damages; but the remedy is by motion to strike,

by objections to evidence, or by instructions eliminating such improper damages.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 447, 1147-1155, 1433-1436; Dec. Dig. §§ 195, 362, 428; \* Trial, Cent. Dig. §§ 328; Dec. Dig. § 145.\*]

## 3. PLEADING (§ 138\*)—SET-OFF OR RECOURPMENT—NATURE.

A plea of set-off or recoupment is in effect a declaration by defendant against plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 286; Dec. Dig. § 138.\*]

## 4. SET-OFF AND COUNTERCLAIM (§ 56\*)—RECOURPMENT—ADMISSION OF CAUSE OF ACTION.

Recoupment does not confess plaintiff's action, as does the plea of set-off, but denies the right to recover at all, or to the amount claimed.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 127; Dec. Dig. § 56.\*]

## 5. PLEADING (§ 143\*)—RECOURPMENT.

Recoupment, unlike set-off or counterclaim, is confined to the particular transaction sued on, or at least to matters closely akin thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 292; Dec. Dig. § 143.\*]

## 6. PLEADING (§ 139\*)—NECESSITY OF PLEADING—RECOURPMENT.

Prior to the statute as to recoupment, it was not required to be specially pleaded, but could be shown under the general issue; but under the statute it must be specially pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 287; Dec. Dig. § 139.\*]

## 7. SET-OFF AND COUNTERCLAIM (§ 59\*)—RECOURPMENT.

Where defendant's claim in recoupment equals that of plaintiff, he is entitled to judgment, and, if it exceeds that of plaintiff, to judgment for the excess.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 130-132; Dec. Dig. § 59.\*]

## 8. SET-OFF AND COUNTERCLAIM (§ 6\*)—"RECOURPMENT."

Recoupment is the right of defendant to claim damages, either because plaintiff has not complied with the contract sued on, or violated some duty which the law imposes on him in its performance.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 6; Dec. Dig. § 6.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6015-6018.]

## 9. EVIDENCE (§ 96\*)—RECOURPMENT—BURDEN OF PROOF.

Statutory recoupment is not, as at common law, a new suit by defendant against plaintiff; and a joinder of issue thereon places the burden of proof as to such special plea upon defendant, though the general issue is also pleaded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 120; Dec. Dig. § 96.\*]

## 10. PLEADING (§ 143\*)—RECOURPMENT—FORM AND REQUISITES OF PLEA.

A plea of recoupment must not be vague or uncertain as to the facts showing that defendant was damaged by plaintiff's breach of the contract sued on.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 292; Dec. Dig. § 143.\*]

## 11. SALES (§ 354\*)—ACTION FOR PRICE—RECOURPMENT—SUFFICIENCY OF PLEA.

Pleas of recoupment, in an action for cement sold, that plaintiff breached the contract

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



by delay in shipping the cement, and that by reason thereof defendant's railroad construction outfit was idle for 10 days waiting for the cement, to defendant's loss in the sum of \$120 a day, were sufficient, and not subject to demurrer, because not alleging defendant's inability to procure the cement elsewhere.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 354.\*]

**12. SALES (§ 354\*)—ACTION FOR PRICE—RECoupMENT—SUFFICIENCY.**

A plea of recoupment, in an action for cement sold February 9th, alleging that immediate shipment was to be made, that instead thereof shipment was not made until March 9th, and that by reason of the delay in shipment delivery was not made until April 9th, and that if immediate shipment had been made the cement would have been delivered February 20th, was not demurrable, because showing that shipment was made March 9th and delivery April 9th, thereby showing that the loss suffered by defendant was due to the carrier's negligence in not properly transporting, and not to plaintiff's fault in not promptly shipping.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 354.\*]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Action by the Carolina Portland Cement Company against the Alabama Construction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

James T. Greene, for appellant. Blackwell & Agee, for appellee.

**MAYFIELD, J.** The case made on appeal is substantially as follows: The appellant was the plaintiff in the court below, and brought an action against the defendant for \$198.15, alleged to be due by account. The defendant filed pleas 1, 2, and 3, and thereupon demurrers were interposed to pleas 2 and 3, and the same were sustained. The first plea was the plea of the general issue. After the court had sustained the demurrers to said pleas 2 and 3, the defendant filed additional pleas A and B. Thereupon the plaintiff demurred to said pleas A and B, which demurrers the court overruled, and such rulings of the court are assigned as error.

The account sued upon was for a car load of cement, contracted to be sold on the 9th day of February, 1906, by the plaintiff to the defendant. Pleas A and B were pleas of recoupment. Said plea A alleged, in short, that plaintiff agreed to ship said car load of cement without delay from Atlanta, Ga., to defendant at Roanoke, Ala.; that if plaintiff had complied with its contract to ship the cement from Atlanta, Ga., without delay, it would have reached Roanoke within six days after the 9th day of February, 1906, but that shipment was not made without delay from Atlanta, Ga.; that by reason of the plaintiff's not so shipping it the defendant was injured, in that its work in the construction of a line of railroad could not be finished until after the construction by it of a culvert on said line of railroad for which said cement

was ordered; and that because of the failure of the plaintiff to ship the same from Atlanta, Ga., in accordance with its contract, defendant's contractor's outfit of 65 mules, etc., were kept idle for 10 days, waiting for the cement, to defendant's loss in the sum of \$120 per day. Plea B varied the statement to the extent that it did not allege that it was to be immediately shipped from Atlanta, Ga., but that immediate shipment was to be made, and that, instead of immediate shipment being made in accordance with plaintiff's contract, the shipment was not made until the 9th day of March, and by reason of the delay in shipment until the 9th day of March delivery was not made until the 9th day of April. It was further alleged that, if immediate shipment had been made in accordance with the contract, the cement would have been delivered to defendant at Roanoke on, to wit, the 20th day of February, 1906; that the cement was to be used in the construction of a stone culvert on the line of a railroad which the defendant was building as a contractor, and by reason of the delay in the shipment of the cement to defendant there was a delay in the delivery of the same; that defendant could not complete its contract within the time in which it would otherwise have been able to do, and defendant's teams and railroad contractor's outfit were lying idle for 10 days, awaiting the completion of the work for which said cement was to be used; and that, if the cement had been shipped within a reasonable time under the order to the plaintiff, defendant's work would have been completed 10 days before it was completed, and the defendant offers to recoup the damages caused by the plaintiff's delay in the shipment of the cement to defendant at Roanoke in accordance with its contract.

There were a great number of grounds of demurrer assigned. The demurrers to each plea were overruled, generally, without specifying as to action upon the various grounds. But few of these grounds are insisted upon in argument, and we will, of course, respond only to those so insisted upon. It is insisted (1) that the pleas should have averred defendant's inability to procure the cement elsewhere, and thereby lessened the damages to the plaintiff; (2) that plea B shows that the shipment was made on the 9th day of March, and that delivery was made on the 9th day of April, thereby showing that the alleged idleness and loss of time by defendant's teams was caused by the delay in the delivery, and not by the delay in shipment, and that whatever damage suffered was by delay in delivery and not of shipment. Appellant and appellee coincide that the law and rules as to the measure and as to the admeasurement of damages for the breach of this contract of sale of chattels which are applicable to and must govern in this case

are correctly announced in the cases of *Watson v. Kirby*, 112 Ala. 436, 20 South. 634, *McFadden v. Henderson*, 128 Ala. 221, 29 South. 640, *Chemical Co. v. Geiss*, 143 Ala. 591, 39 South. 255, and *So. Ry. v. Coleman*, 153 Ala. 266, 44 South. 837. Therefore the only disputed question is one of pleading.

A plea of set-off or recoupment is not demurrable, merely because it seeks to set off or recoup some damages which are not allowable, if it states a good cause of action as to other damages. Such pleas should be purged of such damages by motions to strike, by objections and exceptions to the evidence, and by charges so as to eliminate such improper claims. Pleas of set-off and recoupment are in effect complaints and declarations of the defendant against the plaintiff, and they must therefore in a large measure be treated, tested, and cured by the same rules and means as complaints. Recoupment, however, does not confess the action sued on by plaintiff, as does the plea of set-off. It denies the right of plaintiff to recover as or to the amount claimed. It asserts that the plaintiff has no demand, or a less demand than he claims. At common law it went only in abatement or reduction of plaintiff's claim, and no judgment could be obtained for any balance in his favor, as could be under the pleas of set-off or counterclaims. It was in the nature of a plea of failure of consideration. It was then, and is now, enforced, not as an independent claim or debt of the defendant, but by reducing or extinguishing in toto the claim or demand of plaintiff sued on. It, unlike set-off or counterclaim, is confined to the particular transaction sued on, or at least to those closely akin thereto.

Prior to our statute as to recoupment, the defense need not be specially pleaded. It could be made under the general issue. *Washington v. Timberlake*, 74 Ala. 263; *English v. Wilson*, 34 Ala. 201. Under our statute, however, the defendant may specially plead recoupment, and if his claim or demand equals that of plaintiff he is entitled to judgment, and if it exceeds that of plaintiff the defendant is entitled to judgment against the plaintiff for the excess, provided the plaintiff be the party liable to its satisfaction. Recoupment is defined as the right of the defendant in the action to claim damages from the plaintiff, either because he has not complied with some obligation of the contract on which he sues or because he has violated some duty which the law imposes on him in the making or performance of the contract. *Lawton v. Ricketts*, 104 Ala. 430, 16 South. 59. It springs out of the contract or transaction between the parties. Therefore a plea which sets up a breach of a contract in support of a recoupment must be as distinct and certain as if it were a complaint for the same breach of the same contract. *Ansley v. Bank*, 113 Ala. 467, 21 South. 59, 59 Am. St. Rep. 122.

Statutory recoupment with us is, there-

fore, in its nature, unlike at common law, a new suit by the defendant against the plaintiff, and a joinder of issue thereupon places the burden of proof as to such special plea upon the defendant, though the general issue be also pleaded. *Moore v. Barber Asphalt Pav. Co.*, 118 Ala. 563, 23 South. 798. A plea of recoupment, under our statute, must state a good cause of action growing out of the contract or transaction sued upon. It must show that the damages claimed are the natural and proximate consequence of the breach, or of wrongs growing out of the contract or transactions sued on. It must not be too vague or uncertain as to its statement of facts, by which it must be made to appear that the defendant suffered the damages or losses claimed in consequence of plaintiff's breach or wrongs, in connection with the contract or transactions sued upon. The damage claimed must not be too remote or speculative. *Lawton v. Ricketts*, 104 Ala. 430, 16 South. 59. Our statute as to plea of recoupment, as distinguished from that of set-off, does not enlarge the class of demands which may be the subject of recoupment, but does authorize a judgment for the excess in favor of the defendant. *Ewing v. Shaw*, 83 Ala. 333, 3 South. 692; *Martin v. Brown*, 75 Ala. 442.

Tested by these rules, we think the special pleas of recoupment A and B were sufficient, and certainly not subject to the demurrer upon the grounds urged on this appeal. The pleas alleged a breach by the plaintiff of the identical contract sued upon. The breach was alleged with precision and certainty, which was alleged to be delay in shipping the cement. It alleged with certainty the damages suffered by the defendant in consequence thereof. These damages were not too uncertain or speculative in their nature to be recoverable. The pleas do not show that the damages were increased by any act or word of defendant, or that he could or should have purchased the cement from other parties and saved the delay of his teams and laborers in consequence of plaintiff's breach. While if he could have purchased the cement from other parties, and thus reduced his loss from the delay, he should have done so, and held the plaintiff liable only for the difference of the prices and necessary and proper costs of having to so purchase elsewhere, yet the pleas do not show or raise the presumption that he could have saved or reduced his loss by purchasing elsewhere in the market; that is, the pleas do not show that he was negligent in awaiting the arrival of this cement purchased for 10 days, or that he could or would have obtained it from the market or other sellers if he had ordered on the very first day of the delay. This should have appeared from the pleas, to render them subject to demurrer on this ground.

It was not necessary for the pleas to negative the fact that defendant could have purchased the cement in the market and have

obtained it within time to prevent the 10 days' loss of time for defendant's teams, laborers, etc. Defendant was not required to allege this negative. It does not appear from the averments of the complaint or pleas, nor do we judicially know, that the defendant could have saved or reduced this loss or damage after the breach of the contract by the plaintiff. It does not then appear that defendant could have ordered the cement from other persons or places, and received it within time to prevent the loss by the delay of his teams and laborers. If he could have done so, the plaintiff should have set it up by a replication, and proved it, which would have defeated his claim for damages.

The ground of demurrer insisted upon is not well taken, for the reason that pleas do not show that delay or loss suffered by defendant was the result of the carrier's negligence or fault in not promptly transporting and delivering, and not of the fault of the plaintiff in not promptly shipping, as insisted by appellant. The plea, on the contrary alleges, that the delay in the delivery to defendant by the common carrier, was the result of or caused by the fault of plaintiff in failing to ship promptly in accordance with the terms of the contract. Of course, if the plea had shown that the damages complained of were the result of the fault of the common carrier, and not of that of the plaintiff shipper, it would have been subject to the demurrer; but this it did not do.

This disposes of all the questions insisted upon; and, no error therein being found, the judgment of the trial court must be affirmed. Affirmed.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., concur.

#### SCHEUERMANN v. SCHARFENBERG.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. NEGLIGENCE (§ 47\*)—CONDITION OF PREMISES—LIABILITY.

An owner is liable to those lawfully on his premises for an injury by spring guns and pitfalls intentionally or negligently suffered to exist without warning.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 61; Dec. Dig. § 47.\*]

##### 2. COMMON LAW (§ 14\*)—APPLICATION AND OPERATION.

Only the general principles of the common law which are adapted to the situation, government, and institutions of the state, and not inconsistent with the policy thereof, are of force.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 3; Dec. Dig. § 14.\*]

##### 3. ASSAULT AND BATTERY (§ 13\*)—CIVIL LIABILITY—SELF-DEFENSE.

The rule that, where a capital crime is attempted to be committed by force, it may be prevented by force, has been extended to other forcible felonies, such as burglary and arson,

especially where such felony is attempted in the nighttime.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 11; Dec. Dig. § 13.\*]

##### 4. TRESPASS (§ 4\*)—TO THE PERSON—SPRING GUNS.

An owner of a store in which goods are kept for sale or in deposit is not liable in trespass to a would-be burglar, who is shot by a spring gun placed in the store to shoot persons attempting to burglarize it, in violation of Code 1907, § 6415.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 5; Dec. Dig. § 4.\*]

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Action by Joe Scheuermann, pro. ami, against William Scharfenberg. From a judgment for defendant, plaintiff appeals. Affirmed.

John C. Eyster and Lowe & Tidwell, for appellant. E. W. Godbey, for appellee.

MAYFIELD, J. This appeal presents but one question, which is as novel as it is difficult. The question is this: Is the owner of a storehouse, in which goods and other valuables are kept by him for sale and in deposit, liable in trespass to a would-be burglar of such store, who is shot by means of a spring gun placed in the store by the owner for the purpose of shooting persons who might attempt to burglarize it—the gun being discharged by the would-be burglar while in the attempt to enter, but after the breaking is completed? We have been unable to find any case exactly like it, and but few kindred ones.

The case of *Bethea v. Taylor*, 3 Stew. 482, was a case in which the owner of premises set a spring gun therein for the purpose of killing a bear. His neighbor's slave slipped out his master's horse, and rode it onto the premises in which the gun was planted, without the knowledge or consent of the owner of the premises. The horse broke loose, and strayed upon the gun, and was shot by the discharge. Held, that the owner of the premises was guilty of negligence in setting the gun, under the circumstances of that case, but that the owner of the negro and the horse was likewise guilty of negligence, which proximately contributed to the injury, in not keeping the negro and horse at home on his own premises. *Simpson's Case*, 59 Ala. 1, 31 Am. Rep. 1, was a case in which the defendant was indicted under the statute (Rev. Code 1867, § 3670) for an assault with intent to murder one Ford. There was evidence tending to show that Ford was shot by defendant intentionally, and also tending to show that he was shot by a spring gun which defendant had set to shoot Ford if he should trespass upon defendant's premises, and there was some evidence to show that it was set to shoot Ford, whether he trespassed upon defendant's premises or not.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In this case, Brickell, C. J., discussed the law of spring guns at great length, principally, though, as applied to our statutory felony of assault with intent to murder.

The case of *Suell v. Derricott and Franklin* (Ala.) 49 South. 895, was a case in which Suell's intestate and son was killed by Derricott and Franklin while the intestate was in the act of committing burglary, or just after the crime was completed. The action in that case was a civil one, under the homicide statute, for the wrongful death of plaintiff's intestate. The law of self-defense, of the right to protect one's person and property, of the right to kill to prevent a trespass or the commission of a felony, and of the right to kill in order to arrest a felon or to prevent his escape, is discussed at some length, and the authorities cited. Some of the propositions of law announced therein are applicable to this case. The doctrine has also been often announced in this state that the owner of premises is liable in damages to those lawfully coming upon them for any injury occasioned by the unsafe condition of the premises which the owner has intentionally or negligently suffered to exist, without giving warning thereof, such as pitfalls, open wells, cellars, elevators, unguarded steps, springs guns, and the like. *O'Brien v. Tatum*, 84 Ala. 187, 4 South. 158; *West v. Thomas*, 97 Ala. 622, 11 South. 768; *Thompson's Case*, 77 Ala. 448, 54 Am. Rep. 72; *Arnold's Case*, 84 Ala. 159, 4 South. 359, 5 Am. St. Rep. 354; s. c. 80 Ala. 600, 2 South. 337; *McAdory's Case*, 109 Ala. 636, 19 South. 905; *Sides' Case*, 129 Ala. 399, 29 South. 798; *Watson's Case*, 94 Ala. 634, 10 South. 228. The same doctrine is held true in *Bennett's Case*, 102 U. S. 577, 26 L. Ed. 235.

Before there was any statute in England on the subject of spring guns, it was held that a mere trespasser, having no knowledge of the particular spot on which a spring gun was located, but having a general knowledge that there were spring guns in the wood trespassed upon, could not recover for being shot by one of such guns which he discharged while trespassing. *Scott v. Wilkes*, 3 B. & Ald. 304. In another case, where plaintiff had climbed over defendant's wall to catch one of his own fowls, which had strayed onto defendant's premises, and was shot by defendant's spring gun, defendant was held liable. *Bird v. Holbrook*, 4 Brig. 628. There are other English cases, some holding the defendant liable, and others not, for injury suffered on account of spring guns, dangerous agencies, etc., placed upon one's premises, depending upon the facts of each particular case. England finally passed statutes upon the subject (St. 24 & 25 Vict. c. 100; St. 7 & 8 Geo. IV, c. 18, § 1), which made it a crime to place such dangerous agencies upon one's premises, save in the nighttime, and never then except to protect the dwelling. As was said by this court

(*Simpson's Case*, 59 Ala. 13, 31 Am. Rep. 1), the common law of England is not in all respects the common law of this country or of this state. It is only those general principles which are adapted to our situation, government, and institutions, and not inconsistent with our policy, which are of force here and prevail.

In the case of *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18, Hooker set a spring gun in his vineyard, to protect his fruit from trespassers and thieves. Miller, not knowing of the gun, entered the vineyard for the purpose of stealing fruit, and was injured by discharging the gun. Held, that he was entitled to recover of Hooker in trespass. In the case of *Gray v. Combs*, 7 J. J. Marsh. (Ky.) 478, 28 Am. Dec. 431, Combs set a spring gun in a warehouse which some persons had been in the habit of burglarizing in the nighttime. A slave of Gray, who was attempting to burglarize the warehouse at night, came in contact with the string attached to the trigger, and discharged the gun, and was killed thereby. In an action by Gray against Combs for the loss or killing of the slave, the court held the defendant not to be liable. In the case of *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159, it was held that setting spring guns in one's shop for protection against burglars was not an indictable nuisance, though the guns were loaded with large shot and pointed obliquely toward a public highway, and it was possible for some of the shot to pass through the walls of the shop. In the case of *State v. Barr*, 11 Wash. 481, 39 Pac. 1080, 29 L. R. A. 154, 48 Am. St. Rep. 890, Barr owned a cabin or hut in a secluded spot on the ground of another, in which he and a comrade lived. On leaving the cabin for a hunting trip they locked and barred the doors and windows, and set a spring gun so that it would discharge the loads into the doorway if one attempted to open the door. One dark and rainy night two travelers were passing the cabin, and, thinking it vacant, attempted to open the door. The gun was discharged, and killed one of them. Barr was indicted for murder, and was convicted of murder in the second degree, and the Supreme Court affirmed the judgment and sentence.

It will be observed, from these various decisions, that while a man may set springs guns and mantraps upon his own premises to protect them in the nighttime from thieves and burglars, he must see to it that such guns or traps do not inflict injury upon those who go thereon for lawful purposes, and that one has no right to defend his property against mere trespassers by means of such deadly agencies. Liability as to mere trespassers who have no felonious intent depends also upon notice to them of the dangerous agency.

There is another principle of law appli-

cable to this case, which is discussed in these cases cited, and also in others of our own court, which is the right to defend one's property as well as his person against violence and felonies. Mr. Blackstone announced the rule, a long time ago, that where a crime, which is itself punished capitally, is attempted to be committed by force, it may be prevented by force, even to the taking of life. The rule has also been extended to other atrocious and forcible felonies, such as burglary and arson, and this is certainly true where such felony is attempted in the nighttime. 4 Bl. Com. 213, 181. Our court has often announced this same doctrine, first in *Oliver's Case*, 17 Ala. 587, in which the court said: "The law will justify the taking of life when it is done from necessity to prevent the commission of a felony." This case has been often followed, with some qualifications.

The doctrine is stated or quoted thus by Stone, C. J., in the case of *Bostic v. State*, 94 Ala. 46, 10 South. 602: "It is said in 4 Bl. Com. 213, that 'homicide committed for the prevention of any forcible and atrocious crime is justifiable by the law of nature, and also by the law of England, as it stood so early as the time of Bracton, and as was declared by statutes (St. 24 Hen. VIII, c. 5). If any person attempts a robbery or murder of another, or attempts to break open a house in the night (which extends also to an attempt to burn it), and be killed in such attempt, the slayer shall be acquitted and discharged.' Greenleaf states the doctrine substantially the same way. 3 Greenl. Ev. § 115." This common-law doctrine is also quoted thus in *Storey's Case*, 71 Ala. 337: "'A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends, or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary and the like upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him, in so doing, it is called justifiable self-defense.' 1 East, P. C. 271. Of course, where one is attacked in his own dwelling house, he is never required to retreat. His 'house is his castle,' and the law permits him to protect its sanctity from every unlawful invasion. Whart. on Hom. § 541; *Pond's Case*, 8 Mich. 150; 1 Russ. Cr. 544."

A man's place of business (such as the defendant's store in this case) is pro hac vice his dwelling, and he has the same right to defend it against intrusions, such as burglary, as he has to protect his dwelling. *Jones v. State*, 76 Ala. 16. Burglary of a storehouse, such as the one attempted to be burglarized in this case, or in which goods, etc., are kept for sale or in deposit, is by

statute made a felony punishable as if it were of a dwelling. Code 1907, § 6415 (4417). Applying these principles of law, we hold that the owner of such a store is not liable in trespass to a would-be burglar thereof, who is shot by means of a spring gun by such owner placed in the store for the purpose of shooting persons who might attempt to burglarize it; the gun being discharged by the would-be burglar in attempting to enter.

Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### JASPER TRUST CO. v. LAMPKIN.

(Supreme Court of Alabama. June 10, 1909.

On Rehearing, June 30, 1909.)

#### 1. ACCOUNT STATED (§ 1\*)—NATURE—RECIPROCAL ACCOUNTS—"ACCOUNT STATED."

To constitute an "account stated," it is not necessary that there should be mutual or reciprocal accounts; but if one party holds an account against the other, and a statement thereof is made showing the amount due on a particular day, and it is agreed by the other party to be correct, and there is a promise, either actual or implied, to pay it, it amounts to an account stated between the parties.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 1-9; Dec. Dig. § 1.\*

For other definitions, see *Words and Phrases*, vol. 1, pp. 98-98; vol. 8, p. 7561.]

#### 2. LIMITATION OF ACTIONS (§ 146\*)—TOLLING STATUTE—ACKNOWLEDGMENT.

Where a person holds notes against another, and after calculating the interest states the amount due to the other, and he assents to its correctness, the notes are not thereby merged into an account stated, so that the creditor can sue thereon after recovery on the notes has been barred by limitations, especially in view of Code 1907, § 4850, providing that no acknowledgment is sufficient to remove the bar of the statute, except a partial payment made by the party sought to be charged before the bar is complete, or an unconditional promise in writing signed by the party to be charged thereby.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 146.\*]

On Rehearing.

#### 3. ACCOUNT STATED (§ 3\*) — PAST TRANSACTION.

As an account stated necessarily refers to a past transaction, adding the amount of money paid at the time of stating an account could not make the entire amount the subject of an account stated, especially as the basis of recovery on an account stated is a promise to pay money.

[Ed. Note.—For other cases, see *Account Stated*, Dec. Dig. § 3.\*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by the Jasper Trust Company against T. P. Lampkin. There was a directed verdict for defendant, and plaintiff appeals. Affirmed.

The transfer of the judgment referred to as having been made by defendant and his

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

wife is as follows: "State of Alabama, Walker County. For and in consideration of the sum of Seven forty eight, and seventy seven, we, N. M. Lampkin and T. P. Lampkin, her husband, do hereby assign and transfer unto the Jasper Trust Company, the judgment obtained by N. M. Lampkin against H. J. Gravlee, D. W. Gravelee, and D. H. Gravelee, on the 20th day of February 1905 for \$255.81, in the circuit court of Walker county, Alabama, subject to the order given to B. Odom on said judgment, and also all the right, title and interest of said N. M. Lampkin in and to a certain claim now pending in the chancery court of Walker county, Alabama, wherein N. M. Lampkin is complainant, and H. J. Gravlee is respondent, in which cause the original bill is filed on the 3rd day of April, 1894, and a decree rendered therein on the 26th day of April, 1895, and also all the claim of the said N. M. Lampkin in and to the promissory note attached as an exhibit to the original bill, in said cause. The transfers of said judgment and said claim being also subject to the lien of Coleman & Bankhead, attorneys for the fees in said cause. When the said Jasper Trust Company collects the money on said judgment in the circuit court, and said claim in the chancery court, after satisfying the said sum of \$748.77 with the interest thereon, up to the date of the collection hereof, the said Jasper Trust Company will turn over to the said N. M. Lampkin the excess."

Dated and signed June 1, 1895, by N. M. and T. P. Lampkin.

W. C. Davis and A. F. Fite, for appellant.  
Bankhead & Bankhead, for appellee.

SIMPSON, J. All of the counts in the complaint were withdrawn, except the seventh, claiming on an account stated on the 1st day of June, 1895, and the ninth, for money loaned by the plaintiff (appellant) to the defendant (appellee) on the same day. The facts are that, on said 1st day of June, 1895, the defendant was indebted to said plaintiff by four promissory notes, past due, amounting to \$574.93, and by an arrangement between plaintiff and defendant the defendant and his wife assigned to the plaintiff a judgment and a decree which belonged to the wife, by a written instrument, which is set out in the statement of this case by the reporter. Defendant's notes were delivered up to him as canceled, and the plaintiff paid to the defendant the difference between the face value of said judgment and decree and the amount due on said notes. On November 28, 1898, defendant's wife filed a bill in the chancery court to set aside the said assignment and transfer of said judgment and decree on the ground that it was void under the married woman's law of the state, and the said court finally rendered a decree granting the relief prayed.

At the time of the commencement of the present suit the original notes, if in existence, would have been barred by the statute of limitations of six years, so the theory of the plaintiff is that the transaction between plaintiff and defendant amounted to an account stated, on which it is entitled to recover. The statute of limitations of six years was pleaded, as well as the general issue. An account stated is correctly defined in the case of *Ware v. Manning*, 86 Ala. 242, 5 South. 682, as copied in the brief of appellant. This and other cases establish the proposition that it is not necessary that there should be mutual or reciprocal accounts; but if one party holds an account against the other, and a statement of the same is made showing the amount due on a particular day, and the same is agreed by the other party to be correct, and there is a promise, either actual or implied, to pay the same, it amounts to an account stated between the parties. *Ware & Cowles v. Dudley*, 16 Ala. 742; *Loventhal & Son v. Morris*, 103 Ala. 332, 15 South. 672; 2 *Mayfield's Digest*, p. 24 et seq.; 1 *Cyc.* 384; 1 *Am. & Eng. Encyc. Law* (2d Ed.) 437.

The first proposition which presents itself is, where one person holds one or more promissory notes against another, and after calculating the interest states the amount due to the other, and he assents to the correctness of the amount, does that constitute an account stated between them, so as to authorize the creditor to sue and recover on an account stated, in place of suing on the note? At an early day in England it was held that, where a debt was evidenced by an instrument under seal, a recovery could not be had in an action of assumpsit. One reason seems to be that there is no consideration for the new promise, because the party is already bound by a higher evidence of debt to pay, and the court says: "There must be at least some additional consideration, such as items, for instance, foreign to the articles of agreement, introduced into the account and included within the promise, in order to take the claim founded upon it out of the operation of the agreement or contract under seal; otherwise, the plaintiffs below must be confined to their action of covenant, founded upon the articles of agreement, for the recovery of their claim." *Gilson v. Stewart*, 7 Watts (Pa.) 100, 103, 105. It was also decided that "where a sum of money is secured by a deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account and promises to pay it, debt or simple contract on an account stated will not lie, but the action must be brought on the specialty," the court saying: "The defendant is charged with nothing but the money secured by the deed. There is no consideration for the suggested new liability, except the ascertaining how much remains due on

the deed. It is a perversion of language to speak of this as an account stated. It is merely a process adopted for the purpose of ascertaining how much of the original debt has been discharged, and all which is really done is to make out to what extent the defendant remains liable upon the deed." *Midleditch v. Ellis*, 2 Exchequer Reports, 623, 628.

In a case in Wisconsin, where there was evidence of a special contract, and the court had charged the jury on the admission of the correctness of an account presented by silence, the Supreme Court, while holding the charge misleading in other respects, said: "Aside from the fact that this claim is not a matter of book account, or of an account rendered, or bill presented, but the subject of a special contract, and such a principle of law has no application to it, it was unfair," etc. *Valley Lumber Co. v. Smith*, 71 Wis. 308, 37 N. W. 413, 5 Am. St. Rep. 218. In a case where A. gave bond to B. to pay a sum of money, with annual interest, A., as agent of B., holding the bond, annually computed interest and entered the amount due on the bond. At the end of the agency an account was stated between A. and B., based on these annual statements. Held, that there was no sufficient agreement to pay compound interest, and "if there was anything due upon the bond, it could not be recovered in an action as upon an account stated, but that the action should have been on the bond," the court saying: "When a sum of money is secured by a deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account and promises to pay it, an action will not lie on this account or promise, but the action must be brought on the security. A simple contract is merged in a bond, covenant, or other contract, by deed or record; but the greater security is not merged in a lesser." *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99, 108.

It is true that these decisions relate mainly to matters of pleading and also to sealed instruments; but we think the principles are applicable to show that a mere calculation of the amount due on promissory notes cannot merge the note into an account stated. An account stated must still be an account, and the origin of the action shows that it was not intended to be applied to a case like the one now under consideration. The original action was called "insimul computassent," which means "they accounted together," and it was averred "that the parties had settled their accounts together, and defendant engaged to pay plaintiff the balance." *Black's Law Dictionary*. Evidently, when there is no indebtedness except one or more promissory notes, the promisor is as firmly bound to pay the amount, which is definitely fixed by the note, as he could be by any implied promise; also there is no ac-

count for them to settle together. Each one with his pencil can ascertain at any moment just what is due, and the mere affirmation of what they both know and are already bound to cannot form a new contract. Besides, section 4850 of the Code of 1907 provides that "no act, promise, or acknowledgment is sufficient to remove the bar to a suit created by the provisions of this chapter, or is evidence of a new and continuing contract, except a partial payment, made upon the contract, by the party sought to be charged, before the bar is complete, or an unconditional promise in writing, signed by the party to be charged thereby." A stated account, if it is anything, is a new and continuing contract, and it seems that this is the contingency that the statute is intended to provide against. It is true that, from the wording of the first part of the section, it might be liable to the construction that it was referring only to removing a bar which had already taken place; but the other wording shows that it is referring to acts both during the running of the statute and after the bar has been completed. A "continuing contract" can refer only to continuing that which is now binding, and the provision as to payment made before the bar shows the same intention.

If the principle contended for by appellant was admitted, a man could, in defiance of the statute, keep a promissory note running for a lifetime, by simply sending the promisor a statement of the note and interest due at intervals, and thus making a new and continuing contract, and also have the effect of creating a stated account, which would entitle him to interest on interest therein calculated. The plaintiff was not entitled to recover on the complaint, and it is unnecessary to consider other points which might be taken up.

The general affirmative charge was properly given in favor of the defendant, and the judgment of the court is affirmed.

Affirmed.

ANDERSON, DENSON, and MAYFIELD, JJ., concur.

#### On Rehearing.

SIMPSON, J. It is contended by the appellant that the principles announced in the opinion do not apply, because the "account stated" which is sued on does not consist merely of the amount found to be due on the notes, but of the additional amount which was received by the defendant at the time the judgments were assigned. An account stated necessarily refers to a past transaction, and the mere adding of the amount paid at that time could not constitute the entire amount of an account stated. Besides, the basis of recovery on an account stated is the promise, express or implied, to pay money. There was no promise, either express or implied, to pay said money; but,

on the contrary, the money, in connection with the notes, was paid in consideration of the transfer of the judgments, without any intention on the part of either that it was ever to be paid. 1 Cyc. 365, 373, 375.

### SELLERS v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

#### 1. STATUTES (§ 87\*)—"LOCAL LAW."

Gen. Acts 1907, p. 542, which amends Loc. Acts 1907, p. 285, § 11, so as to provide for the organization of grand juries for the circuit court of a designated county, is a "local law," within Const. 1901, § 110, defining a local law as one which applies to any political subdivision or subdivisions of the state less than the whole.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 96; Dec. Dig. § 87.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4208-4213.]

#### 2. AFFIDAVITS (§ 9\*)—SUFFICIENCY.

The test of the sufficiency of a paper as an affidavit is the possibility of assigning perjury on it if false, and it is essential that the name of the officer taking it be disclosed, either by the recitals in the body thereof or by his signature to the jurat.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. § 38; Dec. Dig. § 9.\*]

#### 3. STATUTES (§ 8½\*)—LOCAL LAWS—ENACTMENT—REQUISITES.

Under Const. 1901, § 106, prohibiting the passage of any local law unless notice of the intention to apply therefor shall have been published, and providing that proof by affidavit of the giving of the notice shall be exhibited to each house of the Legislature and spread on the journal, the proof of notice must be spread on the journal of each house; and where, in spreading the affidavit on the journal of the Senate, the name of the notary public is omitted, the local law is invalid, though the affidavit properly appears on the journal of the House.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 8; Dec. Dig. § 8½.\*]

Error to Circuit Court, Coffee County; H. A. Pearce, Judge.

Gulford Sellers was convicted of murder in the second degree, and he brings error. Reversed and remanded.

J. F. Sanders, for plaintiff in error. Alexander M. Garber, Atty. Gen., for the State.

DENSON, J. The plaintiff in error was indicted by the grand jury which was organized at the September term, 1908, of the circuit court, held for Coffee county at Elba, for the crime of murder; and he was tried at the December term of said court, held for said county at Enterprise, convicted of murder in the second degree, and sentenced to the penitentiary for the term of 10 years. He brings his cause to this court by writ of error, and insists that upon the face of the record it appears that the grand jury that preferred the indictment was illegally organized, and, therefore, that the indictment is void.

The Legislature, during its first session in 1907, enacted a law, approved February 28, 1907 (Loc. Acts 1907, p. 279), providing "for

holding separate terms of the circuit court for Coffee county, in the Twelfth judicial circuit, at Enterprise." The act designates the portions of the county over which the court sitting at Enterprise shall have jurisdiction, and makes the jurisdiction of the court at Enterprise over the described territory "exclusive of the jurisdiction the court exercises when sitting at Elba, in said county." Reading sections 8 and 11 of the act together, it is manifest that the legislative intention was to make ineligible for grand jury service at Elba all persons residing within the Enterprise district. Loc. Acts 1907, p. 279. The record shows that in the organization of the circuit court at Elba, in September, 1908, the venire of grand jurors returned by the sheriff was quashed, and a special grand jury was ordered and organized. In respect to this matter we quote from the minute entry: "From the venire facias it appears to the court that the jury commissioners in drawing the said venire did not comply with the law therefor made and provided. Wherefore the court proceeds to inquire and duly ascertains that said venire of grand jurors is drawn from the territory comprised in the Elba division of the circuit court of said county, in violation of the law, which requires that the venire be made up of persons from the whole county. Thereupon the court makes and enters an order quashing said venire of grand jurors. The court makes and enters an order commanding the sheriff to summon 18 persons from the qualified citizens of said county to serve as grand jurors for the present term." In pursuance of the order made by the court the sheriff summoned 18 persons, who appeared, were found qualified, and were organized as the grand jury for that term of the court. It was by this grand jury that the indictment against the plaintiff in error was preferred.

If section 11 of the act above referred to was in force, as it stands in that act, at the time the grand jury was organized, then it must follow that the orders of the court quashing the venire of grand jurors and organizing a special grand jury are void, and, of consequence, that the indictment would also be void. The action of the circuit court is based upon an act of the Legislature approved August 2, 1907 (Gen. Acts 1907, p. 542), which is amendatory of section 11 of the act of February 28, 1907, and which section as amended provides that "there shall be organized two regular grand juries in each year, for the circuit court of Coffee county, one of which said grand juries shall be impaneled for the fall term at Elba, and the other at the spring term at Enterprise, and the persons composing said grand jury shall be selected from the county at large." The act further provides, in effect, that grand juries organized at either place shall have jurisdiction of offenses throughout the county,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



and that indictments found shall be returned according to the district in which the party resides, either to the Elba court or to the Enterprise court. That this is a local law cannot be a subject of doubt. Const. 1901, § 110. The contention of the plaintiff is error is that the act was passed in violation of section 106 of the Constitution, in that proof of notice of the intention to apply for the passage of the law was not spread upon the journal of the Senate, and that, it being so unconstitutional, the act of February 28, 1907, was intact at the time the grand jury was organized.

The bill which by legislation culminated in the act in judgment was introduced in the House, and the notice of the intention to apply for the passage of the law took the form of the bill as it was introduced, and the proof of the notice was in affidavit form. The notice, and the proof thereof, were in form and substance sufficient, and the proof of the notice was duly spread upon the journal of the House. The message from the House to the Senate, in respect to the passage of the bill, was accompanied by the notice and the proof of the same; but in spreading the affidavit (the proof of the notice) on the journal of the Senate the name of the notary public was left out. It does not appear either in the body of the affidavit or to the jurat. The place for such name is left blank. And to the journals we are confined for the notice and proof of the same. *State v. Brodie*, 148 Ala. 381, 41 South. 180; *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484, 24 South. 516, 72 Am. St. Rep. 928. "The true test of the sufficiency of a paper as an affidavit is the possibility of assigning perjury upon it if false. To meet this test it must be sufficient both in form and in substance." 1 Ency Pl. & Pr. 310; 2 Cyc. 22; *Hyde v. Adams*, 80 Ala. 111. While this court has several times held that it is not essential that the officer's name should be attached to the jurat, in legal proceedings (*Watts v. Womack*, 44 Ala. 605; *Hyde v. Adams*, 80 Ala. 111, and cases there cited), yet it has never decided that it is not necessary to the validity of the affidavit that the name of the officer should be disclosed by it in some way. And we now hold that it is essential to the validity of the affidavit that the name of the officer be disclosed either by the recitals in the body of the affidavit or by his signature to the jurat. 2 Cyc. 10, 31; *State v. Hutchinson*, 10 N. J. Law, 242; *Hefernan v. Harvey*, 41 W. Va. 766, 24 S. E. 592. Upon the foregoing considerations it logically follows that proof of the notice was not spread upon the journal of the Senate.

The question then arises: Was the spreading of the proof of the notice on the Senate Journal essential to a compliance with the Constitution, in view of the fact that the proof was spread upon the House Journal? In other words, does the Constitution mean that the proof should be spread on the journal of each

house? We have no case decisive of this precise point; but it would seem that we need to look for no other aid than common understanding of plain words for a correct interpretation of the Constitution on the subject. We transcribe that part of section 106 in judgment: "And proof by affidavit that said notice has been given shall be exhibited to each house of the Legislature and said proof spread upon the journal. The courts shall pronounce void every special, private or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section." See, also, section 107 of the Constitution. Whether considered from a judicial or a grammatical point of view, it must be held that from this plain language of the Constitution there can be evolved no other meaning than that, in order to meet the constitutional requirements, the proof must be spread upon the journal of each house. *Cooley's Const. Lim.* pp. 186, 195, 245, bottom last page; *Jones v. Hutchinson*, 43 Ala. 721; *Moody's Case*, 48 Ala. 115, 17 Am. Rep. 28; *State v. Brodie*, 148 Ala. 381, 41 South. 180; *Childers v. Shepherd*, 142 Ala. 385, 39 South. 235; *Wallace v. Board of Revenue*, 140 Ala. 491, 37 South. 321. The amendatory act of August 2, 1907, was not passed in accordance with section 106 of the Constitution; and by the very terms of that section the court is required to pronounce it void. Such is now our decision.

It follows that the court erred in quashing the venire of grand jurors, that the grand jury that preferred the indictment was illegally organized, and that the indictment will not support the judgment of conviction. Let the judgment of conviction be reversed, and the cause remanded; but the prisoner will be detained in custody until discharged by due course of law.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### ALABAMA WESTERN R. CO. v. TALLEY-BATES CONST. CO.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS—DOING BUSINESS WITHIN STATE.

The doing of a single act of business, if it be in the exercise of a corporate function, by a foreign corporation not having complied with Code 1907, §§ 3642, 3644, prescribing the conditions on which such corporations may do business within the state, is prohibited.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

##### 2. CORPORATIONS (§ 661\*)—FOREIGN CORPORATIONS—RIGHT TO SUE.

A foreign corporation may not sue in the domestic courts until it has put itself in a position to be sued therein, by complying with Code 1907, §§ 3642, 3644, prescribing the conditions

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on which foreign corporations may do business in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2539-2546, 2563-2567; Dec. Dig. § 661.\*]

**3. CORPORATIONS (§ 657\*)—FOREIGN CORPORATIONS—CONTRACTS—OBTAINING PERMISSION TO DO BUSINESS.**

A contract to pay for an act or service promised to be done or performed by a foreign corporation, in violation of Code 1907, §§ 3642, 3644, prescribing the conditions on which such corporations may do business within the state, is illegal, and cannot be enforced in the courts so long as it is executory.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2540; Dec. Dig. § 657.\*]

**4. CORPORATIONS (§ 661\*)—FOREIGN CORPORATIONS—RIGHT TO SUE.**

Where a foreign corporation, not having complied with Code 1907, §§ 3642, 3644, prescribing the conditions on which such corporations may do business within the state, contracted outside the state to construct a railroad in Alabama, the contract providing that any subletting should not relieve the contractor from liability, but that any subcontractor should be considered the contractor's agent, that the contractor thereafter also in another state let the work to independent contractors did not relieve the contractor of its violation of the statute, so as to entitle it to sue for money due under the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2539-2546, 2563-2567; Dec. Dig. § 661.\*]

**5. CORPORATIONS (§ 657\*)—FOREIGN CORPORATIONS—CONTRACTS—COMPLIANCE WITH LAW—TIME.**

Where a foreign corporation engages to perform a railroad construction contract in Alabama, it is its duty to comply with Code 1907, §§ 3642, 3644, prescribing the conditions on which foreign corporations may do business in Alabama, before it does any act toward the performance of the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2546; Dec. Dig. § 657.\*]

**6. MASTER AND SERVANT (§ 316\*)—"INDEPENDENT CONTRACTOR."**

An "independent contractor" is one who renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3542, 3543; vol. 8, p. 7636.]

**7. MASTER AND SERVANT (§ 316\*)—CONTRACTS—SUBLETTING.**

Where a railroad construction contract provided that, in case of subletting, the original contractor should remain liable to the railroad corporation as though no such transfer or subletting had been made, and that the subcontractor should be considered as the contractor's agent, the contractor had more than a mere pecuniary interest in the work; and hence persons to whom portions of the work were let were not independent contractors.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.\*]

On Rehearing.

**8. COURTS (§ 106\*)—PREPARATION OF OPINION—DESIGNATION OF JUDGE—WAIVER.**

Where, after the assignment of a judge of the Supreme Court who had not heard the

oral argument to prepare the opinion, appellee's counsel addressed such judge as a member of the court with a request for an early decision, and stating the reasons therefor, appellee thereby waived his right to have the opinion written by a member of the court who heard the oral argument, as provided by Code 1907, § 4623, even if such section was valid.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 106.\*]

Appeal from Circuit Court, Franklin County; C. P. Almon, Judge.

Action by the Talley-Bates Construction Company against the Alabama Western Railroad Company. From a judgment sustaining a demurrer to defendant's pleas, it appeals. Reversed and remanded.

Percy & Benners, J. M. Dickinson, and Blewett Lee, for appellant. C. H. Trimble, Almon & Andrews, and Samuel D. Weakley, for appellee.

SAYRE, J. All other counts of the complaint having been eliminated by various rulings of the court below and the action of the plaintiff, who is appellee here, this case went to the jury upon the tenth count alone. One defense, much relied upon, was that the plaintiff, being a foreign corporation, had not, at and before the time of its alleged partial performance of the contract between the parties out of which the suit arose, complied with that statute of the state which requires, under penalty, that every corporation not organized under the laws of this state, shall, before engaging in or transacting any business in this state, file an instrument in writing in the office of the Secretary of State, designating at least one known place of business in this state and an authorized agent or agents residing thereat. Code 1907, § 3642. In section 3644 it is provided that it is unlawful for any foreign corporation to engage in or transact any business in this state before filing the written instrument provided for in section 3642. These statutes were passed in aid of well-known constitutional provisions to the same effect. Const. 1875, art. 14, § 4; Const. 1901, § 232. Some propositions in connection with these constitutional and statutory provisions have been settled by the decisions of this court. They constitute a police regulation for the protection of the property interests of the citizens of the state, as much so "as the law forbidding vagrancy among its inhabitants." *Am. Union Tel. Co. v. West. Union Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90. The doing of a single act of business, if it be in the exercise of a corporate function, is prohibited. The policy of the Constitution and statute is to protect our citizens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process from our courts in favor of citizens having cause of complaint. Foreign corporations may not sue until they

put themselves in a position to be sued in domestic courts. *Farrior v. New England Mtg. Co.*, 88 Ala. 275, 7 South. 200. The conditions are fixed, inflexible, and unalterable. *Sullivan v. Timber Co.*, 103 Ala. 371, 15 South. 941, 25 L. R. A. 543. A contract to pay for an act or service promised to be done or performed in violation of this statute is illegal, and, as long as it is executory, the courts will not lend their aid to its enforcement. *Dudley v. Collier*, 87 Ala. 431, 6 South. 304, 13 Am. St. Rep. 55.

Evidently with this statute and these decisions in mind, the pleader in framing the tenth count set himself to the statement of a cause of action which would be beyond the reach of a demurrer asserting their unfavorable application to his case. Under a caption which discloses that the plaintiff is a corporation, without more, it is averred that the parties entered into a contract in the city of Chicago, state of Illinois, by which plaintiff undertook and agreed to build a railroad in the state of Alabama for a compensation to be paid by the defendant; the amount depending upon the quality of earth and rock moved. The allegation then is that in the execution of the contract the plaintiff sublet the work to sundry independent contractors, agreeing to pay them for their work. These contracts of subletting were entered into at Memphis, Tenn., and there, as the count alleges, became effective and binding between the parties thereto. Then follows an allegation, to epitomize it, to the effect that the subcontractors had performed a large part of the work, and had continued to perform it until the defendant refused to pay installments as agreed, whereupon the plaintiff ceased work under the contract. The count seeks to recover a balance due upon the work done, and is a count upon the contract. Nowhere does it appear that the plaintiff was a foreign corporation, and therefore the demurrer, which took the point that the plaintiff had engaged in the work of building the railroad in contravention of the Constitution and laws hereinabove set out, was properly overruled.

The defendant interposed the same defense in the shape of a plea designated as "NN." This plea averred that the plaintiff was a corporation chartered under the laws of the state of Tennessee for the purpose, among other things, or building railroads for other persons or corporations; that it entered into the contract counted on; that in the execution of it the plaintiff did business in the state of Alabama; and that prior to so doing it had not filed an instrument in writing in the office of the Secretary of State of Alabama designating a known place of business in this state and an authorized agent or agents residing thereat. The demurrer to this plea went upon the theory, mainly, that the fact that the work in Alabama had been done by independent subcontractors relieved the plaintiff of the charge of having offend-

ed against those provisions of the Constitution and law to which reference has been made. As it appears to us, this is much, if not altogether, the same thing as to say that the plaintiff may maintain its suit upon the contract by which it undertook to build the railroad, at the same time maintaining, in order to obviate the defense interposed, that it did not do the building. The appellee will not, of course, concede that its contention is fairly capable of statement in this shape; but we believe a consideration of its true inwardness will show it to be in effect, if not in form, nothing more. The cases of *Beard v. Publishing Co.*, 71 Ala. 60, *Sullivan v. Timber Co.*, 103 Ala. 371, 15 South. 941, 25 L. R. A. 543, *International Cotton Seed Co. v. Wheelock*, 124 Ala. 367, 27 South. 517, *State v. Anniston Rolling Mills*, 125 Ala. 121, 27 South. 921, and *Abraham v. Southern Ry.*, 149 Ala. 547, 42 South. 837, except for the general test laid down, which was that there must be a doing of some of the works, or an exercise of some of the functions for which the corporation was created, contribute nothing to the solution of the question here raised. Those cases merely held that the doing of the certain several particular acts there shown did not measure up to the test—did not constitute the performance of the functions for which the corporations were chartered.

In the case under consideration the plea avers that the cause of action declared on arose out of a contract for the building of a railroad in Alabama, and that the plaintiff corporation was organized in the state of Tennessee for the purpose of building railroads for other persons and corporations. The averments of count and plea taken together, plaintiff's avenue of escape from the conclusion that it violated the statute is to be found in its asserted proposition that the building of the railroad was the act of the subcontractors only, and not the act of plaintiff, within purview of statute and Constitution. Accordingly the demurrer took the point that the plea was bad, because it did not deny the averment that the work had been done by independent subcontractors; and now the argument is that the subcontractors were not the agents of the plaintiff, for the reason only that they were contractors and were independent. It might well be considered that the plaintiff closed the door upon this contention when it entered into the contract; for the contract, which is set out in extenso in the count, stipulated that "the contractor shall not be relieved under any circumstances from the immediate charge and responsibility of the work, and no part thereof shall be transferred or sublet to any person or persons, except by the written consent of the railroad company. In case such consent is given, it shall not relieve the contractor from any of the obligations of this contract, and any transferee or subcontractor shall be considered as the agent of the con-

tractor, and as between the parties hereto the contractor shall be and remain liable as if no such transfer or subletting had been made." We make no point here that the contract was not assignable with the subsequently given verbal or implied consent of the defendant. The averment of the count is, not that there was an assignment, but that there was a subletting. But, looking at the question from the standpoint taken by the state when it adopted the constitutional and statutory regulations bearing upon the subject, the character of intervening agencies employed by the plaintiff in carrying out its contract to build the railroad appears to be immaterial. The question is: Did it engage in the business of building railroads? The case of plaintiff's way to the conclusion that it did not is supposed to be increased by the fact that the subcontractors were independent. Rather, it may be said, the entire contention turns upon the merits of the word "independent." If plaintiff and its subcontractors stood to one another in the mere relation of contractee and contractors, then according to the general and correct understanding the relation of principal and agent existed. Does not a corporation engage in the performance of its corporate functions when it secures the doing of the thing it was chartered to do through the employment of contractors; and, if so, does it not transact business at the place where the work is done? We think so.

But the contractors were independent, it is said; and definitions of an independent contractor are quoted to the effect that "an independent contractor acts for himself in doing the work, and simply agrees to give his employer the benefit of the result when the work is completed." Kent, Com. (13th Ed.) 260, note. More accurately, we think, the relation is defined in Rome, etc., R. R. v. Chasteen, 88 Ala. 591, 7 South. 94, quoting from 1 Shear. & Red. Neg. § 164, where it is said: "The true test, as it seems to us, by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." In recognition of the purpose for which this doctrine is applied, it may be conceded that the relation between plaintiff and its contractors conferred upon plaintiff a certain limited exemption from liability for the acts of its subcontractors and the servants, and employes of the latter. The relation between them was nevertheless that of contractee and contractors, principal and agents, and the fact remains that in the discharge of the agency the subcontractors constructed the road. The result contracted for and partially wrought out represented the will of the plaintiff in every sense as perfectly as if it had employed and

superintended by and through its own proper officers the men who handled pick and shovel and plow, and its will was accomplished in Alabama. The exemption from liability for the acts of subcontractors, relied upon as differentiating this from the ordinary case of principal and agent, if pertinent to the issues, is not universal. The plaintiff could not thus evade its public duties. It could not, for example, escape responsibility for the negligence of its subcontractors in crossing roads and streams along which the public travel, and, of course, it could not on this ground evade responsibility to the defendant and its own subcontractors arising out of the physical execution of the contract in this state. If this be not so, the Constitution and statute have contrived to little purpose. Our conclusion, then, is that, if the plaintiff constructed the railroad by the employment of subcontractors under the conditions predicated in the count and plea, it had more than a mere pecuniary interest in the work. It was not a mere guarantor. It was interested as principal. It engaged in the exercise of its corporate functions in this state, notwithstanding it employed independent subcontractors to do the actual work.

We are not inclined to concur in appellant's contention that the contract was void ab initio because compliance with the statute did not antedate its execution. Necessarily, however, the contract was entered into with the purpose that it should be executed in this state. It could not be executed elsewhere. It must be taken to have contemplated legal action by the plaintiff, since compliance with the statute was a condition precedent of plaintiff's right to build the railroad. A promise to comply is implied as an essential and necessary element of the contract, if it is to be sustained and enforced as a valid agreement. When the time came for the execution of the agreement, and the plaintiff failed to take the necessary steps to comply with the statute—thus leaving the defendant without a protection for which he had stipulated, viz., the power to redress any wrong which it might suffer in the courts of this state—the defendant had a right under the law to renounce the contract, then or at any subsequent time, as for a breach by the plaintiff. *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328. The statute requires that an instrument in writing shall be filed with the Secretary of State before engaging in or transacting any business in this state. Its purpose has been stated. That purpose is not to be accomplished by a filing at the pleasure of the corporation, or when it may be to its interest to appeal to the courts of this state. We may safely affirm that nothing short of a compliance before any business is engaged in or transacted in this state satisfies either the literal requirement of the statute and Constitution or their policy. *Pittsburgh Construction Co.*

v. West Side R. R. Co., 154 Fed. 929, 88 C. C. A. 501, 11 L. R. A. (N. S.) 1145.

The plea was not demurrable as stating a mere conclusion. There was no occasion to repeat the averments of the count in respect to the contract and the work done under it. It averred with certainty and necessary particularity the facts which it needed to aver, viz., that the plaintiff was a foreign corporation and had not, prior to the time it did the work, filed an instrument in writing in the office of the Secretary of State designating a known place of business in Alabama and an authorized agent or agents residing thereat. There was error in sustaining the demurrer to the plea, for which the cause must be reversed. This disposes of the case in its broadest aspect. We will not assume that there may be effective response to the plea. The parties at the trial went into the evidence, which showed without contradiction and indisputably that the plaintiff was a foreign corporation and had failed to comply with the statute. We will not, therefore, consider other assignments of error.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

#### On Rehearing.

SAYRE, J. Now, for the first time, counsel for appellee calls our attention to so much of section 4628 of the Code of 1907 as reads as follows: "Whenever a case is argued orally, the opinion must be delivered by a justice who heard the oral argument"—with suggestion that, in view of the fact that this appeal was argued orally at a time when the writer had not yet come upon the bench, the judgment of reversal must be set aside and the cause set down for reargument, in order that there may be a compliance with the statute. Without conceding the power of the Legislature to control this court in the discharge of its constitutional duty to render decisions in causes brought here—for it appears to us to be doubtful, to say the least, whether the Legislature has any such power (*Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565; *Ex parte Griffiths*, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 396, 10 Am. St. Rep. 107; *Clapp v. Ely*, 27 N. J. Law, 622; *Vaughn v. Harp*, 49 Ark. 160, 4 S. W. 751; *Speight v. People*, 87 Ill. 595; *Herdon v. Imperial Ins. Co.*, 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547; *Jordan v. Andrus*, 26 Mont. 37, 66 Pac. 502, 91 Am. St. Rep. 396; *Riglander v. Star Co.*, 98 App. Div. 101, 90 N. Y. Supp. 772, affirmed in 181 N. Y. 531, 73 N. E. 1131—we are of opinion that the appellee is not in a position to invoke the application of the statute. Counsel for appellee, as this court learned while this

cause was being considered, were advised of the fact that the record had been assigned to the writer for the preparation of a statement of the views of the court. That assignment of the cause had been made in accordance with a rule and custom of this court which, as we believe, has been observed from its creation. Counsel acquiesced in the assignment by addressing to the writer, as a member of the court, statements of the reasons which called for an early decision along with a request for such decision. This was an acquiescence in the assignment, and, when viewed in the light of the present application, was a speculation by the results of which, so far as concerns the mouthpiece adopted by the court for the announcement of its decision is concerned, the appellee must be concluded. In justice to the causes pressing for consideration here, rather than for the ease and comfort of the court, reargument must be denied.

So far as the merits of the application are concerned, it has received that consideration at the hands of the court which the novelty of the question and the magnitude of the interests involved seem to demand. We are satisfied with the conclusion heretofore reached.

The application is accordingly overruled.

#### ROBERSON v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. CRIMINAL LAW (§ 627\*)—TRIAL—VENIRE—INDICTMENT—SERVICE.

Code 1907, § 7840, provides that, if a defendant is indicted for a capital offense, a copy of the indictment and of the venire, if a special venire is required, shall be served on him or his counsel one entire day before the day set for trial. *Held*, that such section did not require that the copy of the indictment and venire be served at the same time, and hence service of a copy of the venire on the evening of Saturday and of the indictment on Sunday, the trial being set for the succeeding Tuesday, was sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1399-1412; Dec. Dig. § 627.\*]

##### 2. HOMICIDE (§§ 269, 282\*)—MALICE.

Where defendant killed deceased by shooting him, and the evidence was conflicting as to whether it was accidental or intentional, the degree of homicide and the question of malice were for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 563, 574; Dec. Dig. §§ 269, 282.\*]

##### 3. CRIMINAL LAW (§ 1159\*)—APPEAL—REVIEW.

Findings by a jury on conflicting evidence will not be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

##### 4. CRIMINAL LAW (§ 807\*)—INSTRUCTIONS—ARGUMENTATIVE CHARGES.

A request to charge that the jury, in considering the weight of W.'s testimony, might consider the fact, if it was a fact, with other evidence, that she was the mother of deceased,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and might believe from the evidence, or from the jury's knowledge and experience as applied to the evidence, that she entertained that degree of affection and parental love common to her race, was properly refused as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.\*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Cleve Roberson was convicted of murder in the second degree, and he appeals. Affirmed.

The following charges were requested by and refused to the defendant: "(1) In determining what weight or credit, if any, you will give to the testimony of Lulu Ward, you may consider the fact, if it be a fact, along with all the other evidence, that she was the mother of the deceased, Foy Ward. (2) The court charges the jury that, in connection with the other evidence in the case, you may consider the fact that Lulu Ward was the mother of deceased, and may believe from the evidence, or from your own knowledge and experience as applied to the evidence, that she entertained that degree of affection and parental love that is common to her race."

Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. The defendant was indicted of murder in the first degree, and was convicted and sentenced for murder in the second degree. The special venire for the trial was drawn on Saturday, and the trial was set for the following Tuesday. All the orders of the court for the trial and venire appear to be regular. The sheriff served a copy of the venire on the defendant at 7 o'clock on the evening it was drawn, but no copy of the indictment at that time; but on Sunday he did serve the defendant with a copy of the indictment. This was a sufficient compliance with the statute (section 7840 of the Code of 1907) as to the service of a copy of the indictment and venire for the trial to be had on Tuesday following. The two copies need not be made or served at the same time. Barnett's Case, 83 Ala. 40, 3 South. 612. The service of both was one entire day before the trial, and it is no ground for quashing the copy of the indictment, which was served on Sunday. Defendant had copy of both one entire day before the trial, not including Sunday; hence the motion to quash on this ground was properly overruled.

The evidence showed that defendant killed deceased by shooting him with a gun. The evidence was conflicting as to whether it was accidental or intentional. The verdict of the jury, therefore, properly determined the question of malice, and the degree of the

homicide, which finding we cannot review on this appeal.

The requested charges refused to the defendant were each mere arguments, and were properly refused. Mitchell's Case, 133 Ala. 65, 32 South. 132.

Finding no error, the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### CENTRAL FOUNDRY CO. v. BAILEY.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. MASTER AND SERVANT (§ 185\*)—SAFE APPLIANCES—DELEGATION OF MASTER'S DUTY.

The duty of the master to maintain appliances in good repair may be delegated to a servant, and the master is not liable to a fellow servant for negligence on the part of the servant to whom such duty is confided, though he is liable for negligence in selecting such servant; and in an action for injuries to a servant evidence that another servant charged with the duty of repairing the appliance was negligent did not sustain an allegation that the master was negligent in that respect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 392-410; Dec. Dig. § 185.\*]

##### 2. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—PLEADING—BURDEN OF PROOF.

In an action for injuries to a servant through defective ladders used for carrying molten iron, a count of the complaint alleging that it was defendant's duty to furnish plaintiff safe ladders and to keep them in repair, and that defendant negligently failed so to do, alleged two or more acts of negligence, so as to place on plaintiff the burden of showing that the injury resulted from all of the negligent acts or omissions operating together.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.\*]

##### 3. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT—PLEADING.

The employer's liability act (Code 1896, § 1749, subd. 2) makes a master liable to a servant for injuries caused by reason of the negligence of any person in the master's employ having superintendence intrusted to him, etc. Held, that in a count grounded on such subdivision it is necessary that the name of the superintendent be averred, or that it be averred to be unknown to plaintiff; and where a count averred that the name of the superintendent was unknown, but plaintiff's testimony showed that he did know the name at the time and even before the injury occurred, defendant was entitled to the general charge in respect to such count.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.\*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by C. J. Bailey against the Central Foundry Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Percy & Benners, for appellant. William Vaughan and J. W. Davidson, for appellee.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

DENSON, J. The defendant company (appellant here) was engaged in operating an iron foundry in the city of Bessemer, in Jefferson county. The plaintiff was in the employment of the defendant as a molder in its foundry. While engaged in the performance of the duties required of him by his employment, on the 11th day of July, 1905, plaintiff suffered personal injuries as the consequence of alleged negligence on the part of the master. At the time plaintiff was injured, he was, with a fellow servant, engaged in carrying a load of 200 or 300 pounds of molten iron, heated to 2,500 or 3,000 degrees, from the cupola or furnace, where it was melted, to a spot where a casting was to be made. The iron was being carried in a vessel called a "ladle," with handles attached and extending from it on two sides, so that the ladle could be carried by two men—one in front and one behind. While plaintiff and a man named Latham were carrying this ladle of molten metal, some of it fell through the bottom of the vessel, splashing upon and seriously burning plaintiff, and causing him the loss of one of his eyes.

The proof shows that the duty of furnishing the employes with ladles was imposed upon a man named Miller; further, that in order to prevent the molten iron from burning through the bottom of the ladles it was necessary, every evening, after they had been used, to line them with a mixture of sand and clay made with water into mud, and that this duty of repairing or keeping the vessels in good condition was intrusted to a negro man. The contention of the plaintiff is that, notwithstanding the ladle in question was so lined and placed by the side of the aisle for use, yet it was so worn and defective as to render it unfit for use, and to render the defendant guilty of culpable negligence in placing it along the aisle, with others, for use on the day the injury occurred, and, further, that the ladle was improperly repaired or patched.

In this view, the complaint, in its third count as amended, after setting out the necessary premises in respect to the relation of master and servant between defendant and plaintiff, and plaintiff's injuries, and the manner in which they occurred, continues: "Plaintiff avers that it was the duty of defendant to furnish to plaintiff a safe, sound, and secure ladle or ladles, fit for the work in which plaintiff was then and there engaged, and that said ladle, which was so furnished to plaintiff, and which proximately caused his said injuries, was old, worn, insecurely patched or riveted, unsafe, and unfit to be used as a ladle for carrying said molten iron for the making of said molds or castings; and plaintiff avers that he was hurt and received such injuries by reason of the negligence of the defendant at said foundry, whose duty it was to exercise due and reasonable care, diligence, and discretion in selecting, providing, and keeping in repair

suitable appliances, to wit, safe, suitable, and secure ladles for the making of said molds or castings, and that defendant negligently and carelessly failed to use such care, diligence, and prudence in the selection and maintenance thereof in safe and sound condition and repair, and that defendant knew or ought to have known that the same was not fit for the purposes for which it was being used, wherefore the plaintiff sues."

At the conclusion of the evidence the affirmative charge was requested by the defendant in respect to the case as presented by this third count, as was also this charge: "The defendant would not be responsible for the act of the negro, whose duty it was to line up the ladles." Both charges were refused, and their refusal forms two grounds in the assignment of errors.

There can be no doubt that the gravamen of the count is the alleged breach of the common-law duty of the master to furnish suitable appliances with which the servant might perform the duties required of him in and about the master's business, and the breach of the common-law duty to maintain those appliances in good condition or repair. The common-law duty of the master to exercise due care to furnish reasonably safe appliances to the servant, according to all the authorities, is a nondelegable one; and if the master commit the performance of this duty to another person, who, in respect to the discharge of it, is negligent, to the injury of another servant engaged in the master's business, the master will be held liable although the person guilty of the direct negligence be a fellow servant of the injured one. But according to our decisions (*Woodward Iron Co. v. Cook*, 124 Ala. 344, 353, 27 South. 455) it seems that the duty of maintaining the appliances in good repair may be delegated to another servant, and that the master will not be answerable to a fellow servant for lack of diligence on the part of the servant to whom he confided such duty; although he would be liable for negligence in making the selection of the servant. From the foregoing considerations it would seem to follow that the count under consideration states two causes of action in conjunctive form. But, however that may be, it is not to be denied that two or more acts of negligence are concatenated in such form as (under our decisions) to place upon the plaintiff the burden of showing that the injury resulted, not from one of the negligent acts or omissions averred, but from all of them, operating together to the disaster complained of. *Armstrong v. Montgomery, etc., Co.*, 123 Ala. 233, 246, 26 South. 349.

This brings up for decision the question: Did the plaintiff, in respect to the third count as amended, make out a case by the evidence, in such form as to authorize a submission of it to the jury? There is no testimony tending to show that the ladle was defective when first supplied. Therefore we must assume that it was in good order at that time. The

evidence tends to show that the ladle had been thrown aside on the scrap pile for an indefinite period—a week or more—and that it had been repaired and brought back into service. If the renovation and restoration to service of the discarded vessel be construed as the furnishing of the appliance, and this act construed to be negligence, still the averment of negligence in the repairing or maintaining of the ladle is not proven in such sort as to make the master liable under the third count; and this is true, even though it be conceded that the negro who was intrusted with the duty of repairing was negligent in making the repairs, for, as has been seen, under our decisions (Woodward, etc., Co. v. Cook, supra), his negligence in that respect cannot be considered to be that of the master. It must follow upon these considerations that count 3, in its conjunctive form, was not proved, and that the court erred in not giving the affirmative charge, as requested by the defendant, in respect to that count. *L. & N. R. R. Co. v. Mothershed*, 97 Ala. 261, 12 South. 714; *Birmingham Ry. Co. v. Baylor*, 101 Ala. 488, 13 South. 793; *L. & N. R. R. Co. v. Dancy*, 97 Ala. 338, 11 South. 796; *Armstrong v. Montgomery, etc., Co.*, 123 Ala. 233, 246, 26 South. 349; *Western Ry. Co. v. McPherson*, 146 Ala. 427, 40 South. 934.

It has been several times held by this court that, in a count grounded upon subdivision 2 of the employer's liability act (Code 1896, § 1749), it is necessary, to the completeness of the count and to save it from demurrer, either that the name of the superintendent be averred, or that it be averred to be unknown to plaintiff. *L. & N. R. R. Co. v. Bouldin*, 110 Ala. 185, 20 South. 325; *Woodward Iron Co. v. Herndon*, 114 Ala. 191, 21 South. 430. And, if the name be averred to be unknown to plaintiff, such allegation (it has been expressly decided) must not be lost sight of in the proof—must be sustained by the proof. *A. G. S. R. R. Co. v. Davis*, 119 Ala. 572, 588, 24 South. 862. In the instant case the averment is that the name was unknown; and the averment is not only not proved, but, to the contrary of this, it was affirmatively shown by the testimony of the plaintiff himself that James Miller was the person to whose negligence as superintendent plaintiff attributed his injury, and that his name was known to the plaintiff at the time, and even before the injury occurred. Consequently the court committed reversible error in not giving the general charge requested by the defendant in respect to count 4 of the complaint.

Upon consideration of the evidence, the court is satisfied that whether or not prior to the accident the ladle was defective, and whether or not negligence was attributable to the defendant in not discovering the defect, and whether or not plaintiff was guilty of contributory negligence, cannot be said to be

questions of law for the court, but are properly questions for the jury. Therefore no error was committed by the court in refusing the general charges requested by the defendant in respect to counts 1 and 2.

The preceding discussion covers all assignments of error insisted upon, except that in respect to the refusal of the court to grant a new trial, and it is unnecessary to discuss that.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

### BATSON v. JOHNSON.

(Supreme Court of Alabama. June 30, 1909.)

#### 1. PLEADING (§ 34\*)—CONSTRUCTION.

A pleading must be construed against the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 66; Dec. Dig. § 34.\*]

#### 2. VENDOR AND PURCHASER (§ 303\*)—PAYMENT OF PRICE—INDEPENDENT CONDITION.

A note for the price of real estate, payable on a certain day, without fixing the date for the conveyance, is an independent condition, and the vendor need not consummate the contract before suing on the note.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 852½; Dec. Dig. § 303.\*]

#### 3. VENDOR AND PURCHASER (§ 102\*)—CONTRACTS—RESCISSION.

A vendor, dispossessing the purchaser without violation of the contract, does not thereby rescind the contract of sale.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 176; Dec. Dig. § 102.\*]

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

Action by J. P. Batson against J. H. Johnson. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

S. J. Darby, for appellant. Felix L. Smith, for appellee.

MCCLELLAN, J. The action is by appellant against appellee on a promissory note executed by appellee and others to appellant. Pleas 5 and 6 aver that the consideration for the note was that a good and sufficient title to a certain tract of land, owned by plaintiff, was to be made by plaintiff to defendant and others upon the payment of the purchase money evidenced by the note sued on; that plaintiff executed a bond for title so conditioned; that plaintiff, before suit brought, evicted the defendant and his copartners from the possession, and still retains it; and that plaintiff has failed to execute such conveyance. Wherefore the consideration for the note in suit has failed. The plaintiff's demurrer, which was overruled by the court, took these objections to the pleas: (1) That they are silent in averment of offer to pay the purchase price or a de-



mand for the deed, or the refusal of plaintiff to make the deed; (2) that the right of the plaintiff to take possession of the land is not denied.

As we interpret these pleas, they do not show that the payment of the purchase-money notes was to be a concurrent, contemporaneous act with the execution of the stipulated conveyance by the vendor. Aside from the application of the rule to construe pleadings with disfavor to the pleader, the fact that the note became due and payable upon a day fixed and certain, and the date for conveyance was not specifically stipulated, serves to render the act of payment of the purchase money an independent condition, and not to require of the vendor the doing of any act looking to the consummation of the contract as a condition precedent to suit to enforce the payment of the note. In *Broughton v. Mitchell*, 64 Ala. 210 and *Burkett v. Munford*, 70 Ala. 423, will be found a satisfactory discussion of the question now presented. It is unnecessary, of course, to reiterate.

In respect of the averment of eviction of the purchasers effected by the vendor, it will suffice at this time to simply note that it does not appear from the pleas that dispossession of the purchasers was in violation of the contract between the parties. Hence a rescission of the contract on the part of the vendor is not averred. The demurrers should have been sustained.

The judgment is therefore reversed, and the cause is remanded. All the Justices concur.

#### J. E. HOUGH & SONS v. STYLES.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. PLEADING (§ 248\*)—COMPLAINT—AMENDMENT—ADDING NEW CAUSE OF ACTION.

Where, in an action based on a judgment, the original complaint merely declared on the judgment according to its legal effect, an amendment by adding a count setting out the judgment in *hæc verba* did not present a new cause of action, though the amount of the judgment as shown in said count varied from the amount claimed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

##### 2. PLEADING (§ 248\*)—COMPLAINT—AMENDMENTS—DEPARTURE.

Failure of counts, added by amendment to the complaint in an action on a judgment, to aver that the judgment was one for the conversion of goods, as alleged in the original complaint, did not constitute a departure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

Appeal from Law and Equity Court, Madison County; Tancred Betts, Judge.

Action by J. E. Hough & Sons against W. V. Styles and others. From a judgment for plaintiffs, defendant Styles appealed to the law and equity court, which granted defend-

ant's motion to strike certain counts added to the complaint by amendment, and plaintiffs appeal. Reversed and remanded.

Brickell & Smith, for appellants. W. F. Esslinger, for appellee.

DENSON, J. This action was commenced before a justice of the peace, and is based on a judgment rendered in favor of the plaintiffs against the defendants by a justice of the peace in Madison county June 3, 1903. Plaintiffs were successful before the justice, and from the judgment rendered against all of the defendants, defendant W. V. Styles appealed to the law and equity court.

In the justice court the plaintiffs filed a complaint, composed of one count, which claimed the sum of \$50.60 due by the defendants "upon a judgment rendered by J. W. B. Hawkins, a justice of the peace in and for the county of Madison, state of Alabama, on the 3d day of June, 1903, which sum of money, with the interest thereon, is still due and unpaid; and plaintiffs aver that said judgment was for the conversion of certain goods belonging to plaintiffs." In the law and equity court the plaintiffs amended the complaint by adding counts 2, 3, and 4. It is apparent that no new cause of action was attempted to be presented by either of the added counts. The original count merely declares on the judgment according to its legal effect, and the fourth count sets out the judgment in *hæc verba*; and, whilst it appears that the amount of the judgment as shown in said count is variant from the amount claimed, yet the count evinces the fact that no new cause of action is attempted to be presented, but that the pleader is relying on the same judgment and is merely pleading it in variant forms.

Nor does the failure of the added counts to contain the last averment of the original count, in respect to the judgment's being one for the conversion of goods, constitute a departure. The court is of the opinion that reversible error was committed by the law and equity court in granting defendant's motion to strike the counts added by amendment.

Reversed and remanded.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

#### GRAYSON v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. WITNESSES (§ 374\*)—CREDIBILITY—BIAS—EVIDENCE.

Where defendant was convicted of carrying concealed weapons solely on the evidence of a witness who denied having any malice towards him, defendant could show that the wit-

ness had previously had him searched by a policeman to find a concealed pistol; such evidence tending to show the witness' feeling toward accused, as well as affecting his credibility as a witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1201; Dec. Dig. § 374.\*]

## 2. WITNESSES (§ 370\*)—BIAS.

Bias, however strong, is no ground for exclusion, but may always be shown for the purpose of affecting the credibility and weight of the evidence.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1189; Dec. Dig. § 370.\*]

## 3. WITNESSES (§ 363\*)—CREDIBILITY.

That the state's witness had previously appeared and testified in other cases, his testimony not being connected with accused or the offense with which he was charged, was not a circumstance going to the discredit of the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1177–1181; Dec. Dig. § 363.\*]

Appeal from Circuit Court, Dallas County; B. M. Miller, Judge.

Jake Grayson was convicted of carrying concealed weapons, and he appeals. Reversed and remanded.

A. D. Pitts and John W. Lapsley, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. This defendant was convicted solely upon the evidence of one Majors, who denied having any malice towards him, and the trial court should have permitted the defendant to show that during the same month, and previous to the day he claimed to have seen the pistol, the witness had a policeman to search the defendant in Selma, to see if he did not have a concealed pistol. This would have shown an eagerness on the part of the witness to get evidence, and an effort to make out a similar charge against the defendant, on a former occasion, and was a circumstance to go to the jury as affecting his feeling towards the accused, as well as his credibility as a witness.

Bias, however strong, is no ground for exclusion; but it may always be shown for the purpose of affecting the credibility and weight of the evidence. 2 Wigmore on Ev. § 950; *People v. Lee Ah Chnck*, 66 Cal. 602, 6 Pac. 862; *Scott v. State*, 113 Ala. 68, 21 South. 425; *Burger v. State*, 83 Ala. 36, 3 South. 319. It is true the trial court has considerable discretion upon the cross-examination of witnesses; but we are of the opinion that the defendant was prejudiced to reversible error by the refusal to let him show that this witness Majors had previously had him searched in order to find a pistol upon his person.

The fact that the state's witness had previously appeared and testified in other cases, said testimony not being connected with this defendant or this offense, was no cir-

cumstance going to his discredit in the case at bar. *Mitchell v. State*, 94 Ala. 68, 10 South. 518.

The other objections and exceptions to the ruling upon the evidence are clearly without merit. For the error pointed out, the judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

## LOUISVILLE & N. R. CO. v. BRITTON. (Supreme Court of Alabama. June 30, 1909.)

### APPEAL AND ERROR (§ 231\*)—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS—SCOPE.

Where some parts of documentary evidence were admissible, to render exceptions to it available on appeal, the objection should go, not to the introduction of the whole, but to the admission of the improper parts.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 231;\* *Trial*, Cent. Dig. § 224.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by E. H. Britton against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gregory L. & H. T. Smith, for appellant. Erwin & McAleer, for appellee.

MAYFIELD, J. This is the third appeal in this case. See opinions on other appeals, 149 Ala. 552, 43 South. 108; 145 Ala. 654, 39 South. 585. Some of the questions raised were decided on former appeal. As to these questions it is sufficient here to say that we have examined the opinions in the former cases and find no sufficient reason to change our decisions.

There can be no doubt that there was evidence tending to connect the case of slippers, the subject of this suit, with the case of shoes referred to in letters and other written documents, to the admissibility of which objections were made, and assignments of error are urged. All the documents were sufficiently identified, and sufficiently connected with the subject-matter and with the parties to this action, to be admissible in evidence. While all parts of the letters and other documentary evidence were not admissible, some parts of each were; and to render exceptions to such documentary evidence available on appeal the objection should go, not to the introduction of the whole, but to the admission of those parts not relevant. The letters offered in evidence, and the freight bill, were considered separately on former appeals; and, applying the law as heretofore announced to the facts in this case as shown by the record, we hold

that they were properly admitted in evidence.

The two charges given at the request of appellee involve no question of law not heretofore passed upon. We now hold that they are good—or, at least, that there was no reversible error in the giving of them.

There was sufficient evidence to support the verdict of the jury.

We have examined each assignment of error separately and carefully, notwithstanding some of the questions have been twice passed upon by this court before. We find no error, and the judgment of the lower court must be affirmed.

**Affirmed.**

SIMPSON, ANDERSON, DENSON, McCLELLAN, and SAYRE, JJ., concur.

STATE ex rel. GARBER v. SEMMES, Judge. (Supreme Court of Alabama. June 30, 1909.)

INDICTMENT AND INFORMATION (§ 8\*)—NECESSITY OF INDICTMENT.

Gen. Acts 1907, Sp. Sess. p. 189, dispensing with indictments in prosecutions for the sale, barter, or exchange of intoxicating liquors, does not dispense with indictments in prosecutions for giving away to induce trade, furnishing at public places, or otherwise disposing of the same; sales, barter, and exchanges not necessarily including giving away, furnishing at public places, etc.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 20; Dec. Dig. § 3.\*]

Petition by the State, on the relation of A. M. Garber, for mandamus or other remedial writ against O. J. Semmes, as Judge of the City Court of Mobile. Denied.

Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for petitioner. O. J. Semmes, pro se.

ANDERSON, J. In the recent case of Nash ex rel. v. Semmes, 50 South. 120, we held that the Constitution authorized the Legislature to dispense with indictments in prosecutions for misdemeanors, and that Acts Sp. Sess. 1907, p. 189, was not subject to certain constitutional infirmities suggested and argued in brief of counsel for the petitioner, Nash. This case, however, as indicated by the respondent's answer and the brief of counsel, presents a question not argued in the brief in the Nash Case supra.

Acts 1907, Sp. Sess., p. 189, purports both by the title and the body to dispense with indictments only in prosecutions for the "sale, barter or exchange of intoxicating liquors." It does not dispense with indictments in prosecutions for giving away to induce trade, furnish at public places, or otherwise dispose of same. Sales, barter, and exchanges do not necessarily include "giving away, furnishing at public places or otherwise dis-

posing of liquors," etc. The act does not, therefore, dispense with an indictment when a defendant is prosecuted for giving away or otherwise disposing of liquors, as it is confined in operation to "sales, barter or exchange." The affidavit, in the case at bar, charges the defendant with "giving away, furnishing at a public place, or otherwise disposing of liquor," etc., in addition to selling, bartering, or exchanging same; and this defendant, being thus charged, was entitled to an indictment before being put to trial upon the charge preferred against him, and the judge of the city court properly struck the case from the trial docket. It may be that the Legislature desired to dispense with indictments in prosecutions for all violations of the state-wide prohibition law; but such an intention cannot be gathered from the language of the act. The act in question does not specifically refer to the state-wide law, if such could make it applicable, under section 45 of the Constitution, which is doubtful, but which point we need not decide, as it only attempts by reference or otherwise to dispense with indictments for prosecutions for a "sale, barter or exchange."

The mandamus is denied.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

MEYERS et al. v. MARTINEZ et al.

(Supreme Court of Alabama. June 30, 1909.)

1. APPEAL AND ERROR (§ 105\*)—ORDERS APPEALABLE.

An order overruling a motion to dismiss a bill in equity for want of jurisdiction appearing on its face will not support an appeal; for the motion is not a plea to the jurisdiction, so that the order is a decree on the sufficiency of such a plea, nor a motion to dismiss for want of equity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 720; Dec. Dig. § 105.\*]

2. APPEAL AND ERROR (§ 21\*)—JURISDICTION—CONSENT OF PARTIES.

The question of a judgment which will support an appeal is jurisdictional in the Supreme Court, and cannot be waived, though the parties consent to and insist on a review in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 88; Dec. Dig. § 21.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action between Elizabeth D. Meyers and others and Mary J. Martinez and others. From a decree overruling a motion to dismiss the bill, Meyers and others appeal. Appeal dismissed.

Fitts & Leigh, for appellants. Brooks & Stoutz, for appellees.

MAYFIELD, J. A motion was made in the lower court to dismiss the bill for want of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jurisdiction appearing on the face of the bill. The motion was overruled, and from that order this appeal is attempted.

It is insisted by appellant that this is a plea to the jurisdiction, and that the order overruling the motion is a decree on the sufficiency of the plea, and will therefore support an appeal. This cannot be. A plea must deny or confess and avoid. The motion does neither. It was not set down for hearing on its sufficiency, and could not have been so set down, because it averred no facts to avoid, and did not deny any part of the bill. It is not a motion to dismiss for want of equity. The equity of the bill is not denied. The motion only denies the jurisdiction of the parties. There is no decree on demurrers. The order overruling the motion will not support an appeal.

The question of a judgment or decree in the lower court which will support an appeal is jurisdictional in this court, and cannot be waived, though all parties consent to and insist upon consideration and review in this court. We see no merit in the motion, but we cannot, and do not, so decide.

Appeal is dismissed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### GRAY et al. v. SOUTH & NORTH ALABAMA R. CO. et al.

(Supreme Court of Alabama. June 30, 1909.)  
INJUNCTION (§ 235\*)—BONDS—ACTIONS—TIME TO SUE.

An injunction bond, conditioned on the payment of damages and costs which any person may sustain by the suing out of the injunction, if the same is dissolved, is breached on the dissolution of the injunction as to one of the parties enjoined; and in the absence of a statute to the contrary an action thereon may be brought before the final disposition of the suit.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 529-537; Dec. Dig. § 235.\*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by the South & North Alabama Railroad Company and others against Henry B. Gray and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Phares Coleman, S. H. Dent, Jr., and Robert H. Thatch, for appellants. Fred S. Ball, for appellees.

DENSON, J. This is an action on an injunction bond, conditioned, as required by the statute, to pay "all damages and costs which any person may sustain by the suing out of said injunction, if the same is dissolved." The complaint alleges that a bill in equity was filed in the city court of Montgomery by H. B. Gray, one of the defendants, against plaintiffs, seeking, among other

things, to restrain and enjoin one of the plaintiffs, the South & North Alabama Railroad Company, from the further prosecution of a suit brought by it against the Louisville & Nashville Railroad Company, another of plaintiffs, in the chancery court of Jefferson county; that upon the making of the bond above referred to the injunction was issued and served upon plaintiffs; that the South & North Alabama Railroad Company employed attorneys to procure the dissolution of the injunction; that motion for its dissolution, on the ground that there was no equity in the bill in so far as it sought to restrain said South & North Alabama Railroad Company from the prosecution of said suit in the chancery court of Jefferson county, made in the city court of Montgomery, being overruled, appeal was taken to the Supreme Court, where the action of the city court was reversed, and a decree was rendered dissolving the injunction; and that application for rehearing in the Supreme Court was denied. This action is in the name of all the defendants named in the bill for injunction, and is brought for the use of the South & North Alabama Railroad Company.

Demurrers were interposed to the complaint, but were withdrawn by leave of the court, against the objections of the plaintiffs, and defendants were allowed to file a plea, which is styled a "plea in abatement," but which, looking to the substance of it, appears to be a plea in bar. This plea, without denying the facts alleged in the complaint, sets out that the writ of injunction described in the complaint enjoined other parties than the South & North Alabama Railroad Company in other matters besides the suit in Jefferson county; that this writ has never been dissolved, except in so far as it restrains the South & North Alabama Company from the prosecution of the suit in the chancery court of Jefferson county; that there has never been a final determination of the suit in which the injunction was issued; and that said suit is still pending in the city court of Montgomery. The assignments of error relate only to the pleadings, and raise only one question, and that is: Is it necessary, before a recovery can be had for the breach of an injunction bond, that the suit in which the injunction issued should be finally disposed of?

There appears to be a conflict of authorities on this question; but our court is committed to the proposition that a final determination of the suit is not necessary, since, under the condition of the bond, the maker becomes liable for damages and costs if the injunction is dissolved, and there is nothing in the bond nor in the statute which postpones the right of action until a final hearing. *Jesse French Piano & Organ Co. v. Porter*, 134 Ala. 302, 32 South. 678, 92 Am. St. Rep. 31. There are no cases in this juris-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

diction which militate against this view. The case of *May v. Walter*, 85 Ala. 438, 6 South. 610, is cited in 16 Am. & Eng. Ency. Law, p. 454, as sustaining the proposition that a final determination of the suit is necessary to a recovery on the bond; but that case was decided on the point, as the opinion shows, that there had been no dissolution, and consequently no breach of the bond. In the case of *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5, the bond was conditioned to pay damages if the injunction should be dissolved by the chancery court. That court refused to dissolve the injunction, and on appeal it was dissolved by the Supreme Court. It was held that the attorney's fees in procuring the dissolution of the injunction in the Supreme Court were recoverable. The court said in the opinion: "Injunctions restrain action, and the maintenance of breach of the bond depends on the failure or success of the suit or litigation in aid of which it is obtained."

But we apprehend that this is not a universal rule. There may be cases in which a temporary injunction would be rightfully dissolved, and yet relief be given on final hearing to the party obtaining the injunction. In *Jackson v. Millsbaugh*, 100 Ala. 285, 14 South. 44, the point presented to this court for decision was, not whether counsel fees incurred by the parties enjoined in resisting the reinstatement of an injunction dissolved on the denials in the answer were recoverable in an action on the bond, but whether all the expenses incurred by the parties enjoined in preparing the suit for final hearing were recoverable; and it was held that these expenses were recoverable, because the injunction in that case was not dissolved until the final hearing on the merits.

There is no error in this record, and the judgment of the city court will therefore be affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

#### LANG v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

INFANTS (§ 13\*)—BETTING WITH MINORS—STATUTES—CONSTRUCTION.

Code 1907, § 6989, providing that any person of full age who bets with a minor, or who allows any minor to bet, at any gaming table kept or exhibited by him, or in which he is interested, shall be fined, prohibits adults from betting with minors under any circumstances; and hence, where defendant and his minor partner engaged in betting jointly against others, defendant violated the act.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 13.\*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Harv Lang was convicted of gaming, and he appeals. Affirmed.

John A. Lusk, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. Section 6989 of the Code of 1907 is intended to prevent adults from betting with minors under any circumstances, and also to prohibit any one from permitting them to bet on any gaming table kept or exhibited by them, or in which they may be interested. If an adult bets money, etc., with a minor under any conditions, he violates the law; and if he permits him to bet on a table kept by him, or in which he is interested, whether with him or not, he violates the law. It matters not whether the minor is his partner or adversary in the betting. If as partners they jointly bet with others, the defendant would be betting with the minor. The statute is intended to prevent bets with or against a minor; that is, betting with the minor as an adversary, or betting jointly with the minor against others. The undisputed evidence shows that the defendant played with John Boyce, as his partner, against two others, and as such they jointly bet upon the result, and won money from their opponents; and the trial court did not err in giving the general charge requested by the state. The judgment of the circuit court is affirmed.

Affirmed. All the Justices concur.

#### PACE v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

CRIMINAL LAW (§ 368\*) — EVIDENCE — RES GESTÆ.

The conversation of the state's two witnesses, without the presence or hearing of defendant, relative to a proposed purchase by one of them of liquor from defendant, which would cause defendant to violate the prohibition law, was not res gestæ of the alleged subsequent sale by him to such witness, and so not admissible on prosecution therefor.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 806-821; Dec. Dig. § 368.\*]

Simpson and McClellan, JJ., dissenting.

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Ike Pace was convicted for violation of the prohibition law, and appeals. Reversed and remanded.

The evidence tended to show that Henry Jones bought some whisky from the defendant, a pint, paying 25 cents therefor. The state was permitted to show, over the objection of the defendant, what Jim Davis said to Henry Jones, and what Henry Jones said to Jim Davis, about buying the whisky before Henry Jones went to the defendant's house. The conversations were in reference to Davis having given Jones the money to go buy the whisky, and what was said between them concerning what Jones was about to do. The court admitted this evidence from a number of witnesses.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Alexander M. Garber, Atty. Gen., for the State.

SAYRE, J. Conversation between the two witnesses for the prosecution, without the presence or hearing of the defendant, in the preparation of their design to procure the defendant to violate the law, afforded clear illustration of the purposes of the witnesses, but shed no light upon the subsequent conduct of the defendant. Its only effect was to lend color of probability to so much of the testimony of the witnesses as was competent, which adventitious aid it did not in law deserve, however trustworthy it was in fact. It was not, in our opinion, of the res gestæ of the alleged subsequent purchase of whisky by one of the state's witnesses from the defendant, and was not admissible in evidence.

Justice SIMPSON is of opinion that the error was harmless, while Justice McCLELLAN thinks the evidence properly admitted as a part of the res gestæ.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON, DENSON, and MAYFIELD, JJ., concur. SIMPSON and McCLELLAN, JJ., dissent.

#### ROLL v. PURITAN MFG. CO.

(Supreme Court of Alabama. June 30, 1909.)  
EVIDENCE (§ 442\*)—PAROL EVIDENCE—ADMISSIBILITY.

A contract for sale of merchandise, which states that the trial order is composed of assorted patterns of jewelry, and which stipulates that the buyer waives the right to claim failure of consideration, or goods not according to order, unless he has exhausted the terms of the warranty and exchange, and which provides that the seller guarantees, if the retail sales from the jewelry do not equal a specified amount, it will buy back at the original invoice price to make up the deficiency, and which requests the seller to ship the goods on the conditions specified and no others, shows on its face that former conversations are merged in it and that it is the sole evidence of the agreement, and the buyer may not avoid paying the price by setting up other matters not provided for in the contract.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 442.\*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by the Puritan Manufacturing Company against J. H. Roll. From a judgment for plaintiff, defendant appeals. Affirmed.

W. T. Hill and James A. Mitchell, for appellant. Von L. Thompson, for appellee.

SIMPSON, J. This suit was brought by the appellee against the appellant; there being several of the common counts, and others describing a certain contract, under which certain articles of jewelry were sold to

the defendant. Said contract is copied in the bill of exceptions. It does not contain an itemized statement of the articles sold, but states that "this trial order is composed of assorted patterns of articles below, made in sterling silver, rolled gold plate, gold front, gold filled, and oxidized finished goods, at prices ranging from lowest to highest prices mentioned," and then states the articles generally as "belt buckles or pins, from 25 cents to \$1.50 each," etc., and written under the printed part of the contract these words, "principally ladies' and children's goods, enameled pins," etc., and the whole bill summed up as "amounting to \$250." Preceding the list are these words, to wit: "Purchaser hereby waives right to claim failure of consideration, or goods not according to order or like samples, unless he has exhausted the terms of the warranty and exchange." Then follows: "Our warranty: Any jewelry in this assortment, failing to wear satisfactorily, will be replaced by new articles free of charge, if returned to us within five years from date of invoice. Exchange plan: Any jewelry in this assortment, not selling readily, may be exchanged for new styles and patterns of any jewelry in our stock, provided same is returned to us for exchange within one year from date of purchase." Then follow the terms of payment. The parties entered into a written agreement to plead in short, by consent, "with leave to prove thereunder anything that might constitute a defense to the action as if specifically pleaded," and the defendant, among other pleas, pleaded that "the goods and merchandise alleged to have been sold to defendant were not of the quality they were sold for and represented to be." The defendant examined as a witness one Lynch, shown to be an expert jeweler, whose testimony tended to show that the goods received did not answer the description in the written contract. On motion by the plaintiff, all of the testimony of said Lynch was excluded, and the court gave the general affirmative charge in favor of the plaintiff.

The contention of the plaintiff (appellee) is that the written contract is the sole expositor of the agreement between the parties, and that it is binding on the defendant, so that his only remedy was to avail himself of the "warranty" or "exchange" plan, and that no evidence could be introduced in regard to representations made or samples exhibited by the traveling salesman who took the order of the defendant, which order was thus expressed and signed by defendant, to wit: "Please ship, at your earliest convenience, the above order, upon the terms and conditions herein specified, and no others." If this was an unconditional sale of the goods, there would be force in the contention of the appellee that the plaintiff could not by contract take from the defend-

ant the right to claim that the goods received did not answer to the description in the contract. It could not contract for immunity against its own fraud; but, in addition to the provisions above cited, the contract also provided that the "Puritan Manufacturing Company guarantee, if the retail sales from the above assortment of jewelry in the undersigned merchant's store do not equal the amount of purchase price (\$250) by the expiration of 12 months from date of invoice, that the Puritan Manufacturing Company will buy back, for cash, at the original invoice price, sufficient jewelry from the merchant to make up the deficiency, and remit for same by New York Exchange." So it was really a trial order, in which the company was engaging to do the advertising and guarantee the sales, provided the defendant would comply with the terms on his part, selling the goods and returning any that proved not satisfactory. It appears, also, from the letters in evidence, that the defendant did not refuse to accept the goods because they were not in accordance with the contract, but after receiving them proposed to send them back, because they were not like the samples showed him by the salesman. After having full knowledge, from an examination of the goods, he wrote a letter to the plaintiff, saying that he had concluded to take the goods and carry out the contract to the letter.

The contract, showing on its face that all former conversations were merged into it, is the sole expositor of the agreement between the parties, and the defendant acknowledges that he has not availed himself of the warranty clause, or the exchange plan. The defendant could not avoid paying the money called for by the contract by setting up other matters not provided for in the contract. Hence there was no error in the action of the court in excluding the evidence offered by the defendant, and in giving the general affirmative charge in favor of the plaintiff. The judgment of the court is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

#### GANDY v. COWART.

(Supreme Court of Alabama. June 30, 1909.)

TROVER AND CONVERSION (§ 34\*)—ACTIONS—ISSUES.

In trover by a mortgagee of a tenant against the landlord for conversion of mortgaged grain, evidence that the landlord had applied the proceeds of the property taken to payment of de-

mands due him for provisions furnished the tenant and to payment of a note secured by him to a third person for advances for a previous year, which the landlord claimed constituted a lien upon the property, was admissible under a plea of the general issue.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 34.\*]

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

Action by Robert A. Gandy against Charles Cowart. Judgment of nonsuit, and plaintiff appeals. Affirmed.

S. J. Darby, for appellant. E. V. Jones and Felix L. Smith, for appellee.

MAYFIELD, J. Appellant, as mortgagee, sued appellee in trover to recover damages for the conversion of a lot of corn and cotton, and in case for the destruction of plaintiff's lien upon the same property. The corn and cotton were raised by a tenant of defendant during the year 1907. To the complaint the defendant pleaded the general issue alone. The plaintiff proved that he held a mortgage upon the property for \$100, which was unpaid, that defendant had acquired the property from the mortgagee and converted same to his own use, and that the defendant's rent had been paid by the mortgagor, and rested his case.

The trial court, over the objection of plaintiff, allowed the defendant to prove that he (defendant) applied the proceeds of the property taken to the payment of the demands due the landlord on account of provisions and supplies furnished the tenant, and to the payment of a note secured by the defendant to a third party for advances for a previous year, which defendant claimed constituted a lien upon the property in question. The plaintiff objected to the introduction of each part of this evidence, and excepted to the various rulings of the court allowing it, and moved the court to exclude same. The court overruled plaintiff's objections and motions, to which he excepted; and in consequence thereof the plaintiff suffered a nonsuit, reserving such rulings for decision by this court in a bill of exceptions as provided under section 3017 of the Code.

The trial court was not in error as to these rulings. The evidence was admissible under the pleadings and general issue. It did negative the material allegations of the complaint. Such evidence is admissible under the general issue in an action of trover. *Barrett v. City of Mobile*, 129 Ala. 179, 30 South. 36, 87 Am. St. Rep. 54. The judgment is affirmed, on the authority of the above case.

Affirmed.

DOWDELL, C. J., and DENSON and SAYRE, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

## WEBB v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

## 1. CRIMINAL LAW (§ 753\*)—INSTRUCTIONS—AFFIRMATIVE CHARGE.

Where the evidence justified the refusal of affirmative charges for accused as to both counts of the indictment, the court did not err in refusing the affirmative charge as to the first count, because it gave it as to the second, though the jury returned a verdict of not guilty as to the second and guilty on the first.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1727; Dec. Dig. § 753.\*]

## 2. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—FORM.

An instruction that, if the jury have a reasonable doubt of the truth of the statements as testified to by the state's witnesses they cannot convict accused, is properly refused, because it fails to hypothesize materiality of the statements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1906; Dec. Dig. § 789.\*]

## 3. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction that if, after considering the evidence, unless the jury can say that they have a fixed opinion of the truth of the charge, they are not satisfied beyond a reasonable doubt, and they must acquit, is properly refused, because misleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1906; Dec. Dig. § 789.\*]

## 4. CRIMINAL LAW (§ 796\*)—INSTRUCTIONS—LANGUAGE USED.

An instruction that the jury, finding accused guilty, "must" assess a fine of not less nor more than certain specified sums, is properly refused, because of the use of the word "must," instead of the word "may."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1932; Dec. Dig. § 796.\*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Mitchell Webb was convicted of selling intoxicating liquors, and he appeals. Affirmed.

The following charges were refused to the defendant: "(2) If you have a reasonable doubt of the truth of the statements as testified to by the state's witnesses, you cannot convict the defendant. (3) If, after considering all the evidence in this case, unless you can say that you have a fixed opinion of the truth of the charge, you are not satisfied beyond a reasonable doubt, then you should acquit. (4) If the jury find the defendant guilty under the first count of the indictment, the jury must assess a fine of not less than \$20, nor more than \$500."

Canterbury & Gilder, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DENSON, J. There are two counts in the indictment. The first, in the usual form, is for selling spirituous, vinous, or malt liquors without a license and contrary to law; while the second is for selling or giving away such liquors in violation of a local prohibition law. The indictment was filed on the 4th day of May, 1907. At the request of the defendant the court gave in his favor the

general affirmative charge as to the second count, but refused a similar charge as to the first count.

Upon the evidence disclosed by the record the court might properly have refused both of the charges; but because it gave one of them affords no valid reason for the argument that it committed error in refusing the other. Nor does the fact that the jury returned a verdict of not guilty as to the second count and guilty upon the first furnish any ground for predicated error of the court's ruling refusing the affirmative charge requested by the defendant as to the first count.

Charge 2 was properly refused. Besides other infirmities, this charge possesses that of failure to hypothesize materiality of the "statements" of the witnesses.

Charge 3 is misleading, and was properly refused, on the authority of Adams' Case, 115 Ala. 90, 22 South. 612, 67 Am. St. Rep. 17.

Without discussing any other phase of the proposition presented by charge 4, it suffices to say of it that the use of the word "must," instead of "may," therein, condemns the charge. Undoubtedly the testimony tended to show defendant's guilt under section 5076 of the Code of 1896, and that section, which was of force all over Marengo county, authorized the fine assessed by the jury and the punishment administered by the court.

There is no error, and the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

## CITY OF WOODLAWN v. DURHAM.

(Supreme Court of Alabama. June 30, 1909.)

## 1. EQUITY (§ 214\*)—PLEADING—MODE OF OBJECTION.

The sufficiency of an answer to a bill in equity can be tested only by exceptions thereto, and not by demurrer and motion to strike.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 487; Dec. Dig. § 214.\*]

## 2. EQUITY (§ 373\*)—HEARING ON BILL AND ANSWER.

Under Chancery Rules 35-37 (2 Code 1907 pp. 1538, 1539), a cause in chancery can be set down for hearing on the bill and answer without taking proof.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 711; Dec. Dig. § 373.\*]

## 3. MUNICIPAL CORPORATIONS (§ 446\*)—STREET IMPROVEMENTS—SPECIAL ASSESSMENTS—DEFENSES.

The owner of property abutting on a street improved by the city cannot avoid an assessment against the property by showing that the improvement was not done in accordance with the contract, as that defense must be raised at the confirmation of the assessment, made at a hearing of which he had notice as provided by law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1066; Dec. Dig. § 446.\*]



Appeal from Chancery Court, Jefferson County; Alfred H. Benners, Chancellor.

Suit by the City of Woodlawn against J. A. Durham. From a decree for defendant, plaintiff appeals. Reversed and rendered.

Kennedy & Ballard, for appellant. Powell & Blackburn, for appellee.

**MAYFIELD, J.** The sufficiency of an answer to a bill in equity under our law and rules of chancery practice can be tested only by exceptions thereto. However defective, it cannot be stricken. A demurrer to an answer in equity is unknown to our chancery practice. Of course a cause in chancery can be set down for hearing on the bill and answer without taking proof. *May v. Williams*, 17 Ala. 23; *Glasser v. Meyrovitz*, 119 Ala. 152, 24 South. 514; Chancery Rules, 35, 36, and 37 (2 Code 1907, pp. 1538, 1539); *Slms*, Ala. Ch. Pl. & Pr. § 514. The court, therefore, properly disallowed complainant's demurrer and motion to strike respondent's answer, or portions thereof.

The bill as amended was to declare and enforce a lien in favor of the appellant municipality against certain abutting property of appellee for street and sidewalk improvements made by the municipality in front of the property. The municipality was authorized by its charter to make the improvements and to assess and levy an assessment or betterment tax upon the property in question. The charter provided the mode by which the improvements of the streets and sidewalks should be made, and the manner in which the assessments or betterment taxes should be made and levied upon the abutting property of the owners, and provided for notice, by public posters or by publication in a newspaper, to the owners of the property, to contest the proceedings to assess and levy the assessments and betterment taxes, and provided for appeals from such assessments and levies. The bill averred all the facts necessary to create the lien upon the property and all matters necessary to show the right and remedy to enforce it in equity. In fact, the charter of the municipality and the act of the Legislature confer the right and remedy under the facts set forth in the bill. The facts as averred are substantially proven.

The appellee attempted to avoid the assessment, levy, and liability by denying that the improvement in front of his property was well done, or done in accordance with the specifications or contract between the city and the contractors, and in accordance with the charter and ordinance provisions on the subject, and averring that the work as done was of no benefit to the property, and that he was charged as for other items than the improvements. These questions could not be litigated in this suit. He should have made this defense at the confirmation of the assessments by the municipal board, and if not

satisfied with the assessment and levy made by the municipality he should have appealed from that assessment. Then he could have litigated these questions. Notice and publication of the hearings for the assessments and confirmation, having been given as provided by law, and he not having appeared and contested as provided by law, the decree, orders, or judgments of confirmation were binding upon the property owners.

It therefore follows that the decree of the chancery is erroneous, and the amount of the tax or assessment is made definite and certain, it being, to wit, \$102.81, and a decree will be here rendered decreeing that complainant is entitled to the relief prayed in its bill, and that respondent be perpetually enjoined from obstructing the alley, as prayed in the bill. The decree is reversed and rendered.

Reversed and rendered.

**DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.**

#### PATE v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

#### 1. HOMICIDE (§ 188\*)—SELF-DEFENSE—EVIDENCE—ADMISSIBILITY.

Evidence that decedent was, according to general reputation, a dangerous and bloodthirsty man, who would act treacherously, is competent on the issue whether accused had a right to think that his life was in danger.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 391-397; Dec. Dig. § 188.\*]

#### 2. HOMICIDE (§ 188\*)—REPUTATION OF DECEDENT—EVIDENCE—ADMISSIBILITY—"CHARACTER."

A witness, testifying to the general character of decedent in the community in which the latter lived, could also testify to such character in the community in which the witness lived, eight miles distant, though the witness lived in another state; "character" being the reputation one bears in the neighborhood in which he may reside or in which he is known.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 391-397; Dec. Dig. § 188.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1061-1063.]

#### 3. CRIMINAL LAW (§ 390\*)—EVIDENCE—UNCOMMUNICATED INTENTIONS.

Accused cannot testify as to his uncommunicated intentions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 858; Dec. Dig. § 390.\*]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Allan Pate was convicted of manslaughter in the first degree, and he appeals. Reversed and remanded.

W. O. Mulkey, for appellant. Alexander M. Garber, Atty. Gen., for the State.

**SIMPSON, J.** The appellant was indicted for murder in the second degree, and was convicted of manslaughter in the first degree. The witness Jacobs and others had testified

that the deceased was a dangerous, blood-thirsty man, particularly when drinking, and said witness was asked by the defendant, on cross-examination, "whether or not he knew the character of the deceased as being a man that would slip up on his adversary and take him unawares." The state objected to this question, and the objection was sustained.

If the general character of the deceased may be shown, in order to throw light upon the fact as to whether the defendant had a right to think that his life was in danger, there seems to be no good reason why the witness, in testifying to his general character, may not be asked to state in what manner he had the general character of acting. If, according to general reputation, he was not only a bloodthirsty man, but one who, in carrying out his bloodthirsty designs, would act stealthily or treacherously, it would furnish an additional reason why one should be particularly on his guard against him. It is upon this principle that it is allowable to prove that the deceased was in the habit of carrying a concealed weapon, within the knowledge of the defendant. *State v. Ellis*, 30 Wash. 369, 70 Pac. 903; *Rodgers v. State*, 144 Ala. 32, 40 South. 572. The defendant is presumed to know the general reputation of the deceased, as that means that it is generally known in the community. The Supreme Court of North Carolina holds that it is competent to show the general reputation of the deceased for a particular character of violence, to wit, that his reputation was that of a man who "would walk up to a man and ask him for his right hand and stick a knife in him with his left hand." *State v. Sumner*, 130 N. C. 718, 721-723, 41 S. E. 803, 805. The court erred in excluding this evidence.

The court erred in excluding the testimony of the witness Caleb Crutchfield as to the general character of the deceased in the community in which the witness lived. A place eight miles distant is practically in the same community, and the fact that an imaginary state line runs between does not make it any the less the same community. The testimony only showed that the character of the deceased was so pronounced that it extended as far as eight miles from his home. It was not testimony as to the character which the deceased had made in another community, but testimony as to the character which he had made at his home, the repute of which had extended thus far. Character is "the reputation he bears in the neighborhood or society in which he may reside or in which he is known." *McQueen v. State*, 108 Ala. 55, 18 South. 843. The witness testified to his general character in the community in which the deceased lived, and he could also testify to said character in the community in which the witness lived.

The defendant, in testifying, stated that just before the killing he "walked from be-

hind the counter towards the back end, to get a package which he had, preparatory to going home." The state moved to exclude that part of said expression, and the court excluded the same. The defendant invokes the rule in other jurisdictions, and insists that this court should overrule its decisions to the effect that a witness cannot testify as to his uncommunicated intentions. This court is not disposed to recede from its position. There was no error in the action of the court in excluding said testimony.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

# MONTGOMERY IRON WORKS et al. v. CAPITAL CITY INS. CO.

(Supreme Court of Alabama. June 30, 1909.)

## APPEAL AND ERROR (§ 1205\*)—RULING ON APPEAL—REMAND—INTEREST.

An original decree, having adjudged the liability of defendant B. at \$9,200, divided \$5,520 as principal and the remainder for interest from the filing of the bill on June 17, 1896, was reduced as to the principal on appeal to \$4,600, but the decree was affirmed in all other respects and the cause remanded. *Held*, that the original decree entered May 23, 1904, was merely corrected on appeal, and the trial court properly calculated interest on the amount fixed as B.'s liability by the Supreme Court from June 17, 1896, to the date of the decree, and took such sum as a new principal on which to allow interest from that date.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1205.\*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action between the Montgomery Iron Works and others and the Capital City Insurance Company. From a judgment in favor of the latter, the former appeal. Affirmed.

See, also, 154 Ala. 663, 44 South. 1044.

Horace Stringfellow, for appellants. Gunter & Gunter, for appellee.

PER CURIAM. The original decree, as rendered below, adjudged the liability of Baldwin to be \$9,200, \$5,520 being principal and the remainder interest from the date of the filing of the bill, viz., June 17, 1896. On appeal this court found the principal sum erroneous, holding that it should have been \$4,600 instead of \$5,500. As to Baldwin the decree appealed from was in all other respects affirmed, but the cause was remanded for further proceedings below. Proceeding there, the court calculated the interest on the sum fixed by this court from June 17, 1896, to the date of the decree (May 23, 1904), corrected by this court, and, constituting that combined sum principal, then rendered

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment for that sum, with interest thereon from May 23, 1904, and directed execution to so issue.

As we understand the objection to the decree, it is that a rest on interest should not have been taken as of the date of the May 23, 1904, decree, or, otherwise stated, that the interest accruing up to May 23, 1904, should not have been treated as principal, upon which interest was chargeable. The contention of appellant cannot be sustained, unless the decree of this court can be held to have annulled the decree of May 23, 1904, rendered by the city court. The decree here cannot be given that effect. As to Baldwin the decree of May 23, 1904, was affirmed as rendered, except that the amount thereof was found by this court to be excessive. This court took the course of correcting, not of reversing, the decree below in that particular. The correction was accomplished by the substitution of a correct sum for the incorrect sum adjudged in the decree of May 23, 1904. The effect of the course and action taken was not to render a decree here in lieu of that the city court should have rendered. If such had been the purpose of this court, it could only have done so by reversing that decree in the particular in which it was found erroneous, and then either remanding the cause for the ascertainment by the lower court of the principal sum for which Baldwin was liable, or proceeding here to render the decree that should have been rendered in ascertainment and adjudication of the principal for which Baldwin was so liable. Avoiding either of these courses, this court sustained the decree as to Baldwin's liability, after merely correcting it as to amount of the principal. The interest was, of course, merged into the principal, and into the judgment of May 23, 1904, and the aggregate of that sum created a new principal, upon which, from May 23, 1904, interest was chargeable. The court below so ruled, and its action must be sustained.

**Affirmed.**

SAYRE, J., not sitting.

### ANDREWS v. BURTON.

(Supreme Court of Alabama. June 30, 1909.)

#### 1. APPEAL AND ERROR (§ 532\*)—RECORD—INTERMEDIATE COURTS.

The assignment of error of defendant, in an action commenced before a justice and first appealed to the circuit court, that the record shows no judgment was rendered in the justice court, is without merit, where the recitals of the appeal bond executed by defendant to carry the case to the circuit court show a certain judgment for plaintiff was rendered by the justice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2399; Dec. Dig. § 532.\*]

#### 2. APPEAL AND ERROR (§ 223\*)—OBJECTION NOT MADE BELOW.

Objection that the judgment was for more than claimed in the complaint cannot be made for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1347; Dec. Dig. § 223.\*]

#### 3. APPEAL AND ERROR (§ 1082\*)—PRESENTATION OF OBJECTIONS—QUESTIONS IN INTERMEDIATE COURTS.

Under Code 1907, § 4720, providing that a case appealed from a justice to the circuit court must be tried de novo, without regard to any defect in process or proceedings before the justice, the point that no papers in the case and no officially signed statement of the case and of the judgment rendered by the justice in the cause were returned by the justice to the circuit court, even if having merit, was waived by not being made in the circuit court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1133; Dec. Dig. § 1082.\*]

Appeal from Circuit Court, Chambers County; S. L. Brewer, Judge.

Action by Charles Burton against Walter Andrews. From a judgment of the circuit court for plaintiff, on appeal by defendant from a justice, defendant again appeals. **Affirmed.**

E. M. Oliver and R. B. Barnes, for appellant. Hines & Fuller, for appellee.

DENSON, J. This action was commenced before a justice of the peace. From the judgment rendered by the justice against the defendant, he appealed to the circuit court. In that court trial was had, and judgment was rendered on the verdict of a jury against the defendant for \$53.66. The defendant has appealed the cause to this court, and seeks a reversal on account of supposed fatal defects in the record of the proceedings; there being no bill of exceptions.

First, it is assigned for error that the record shows that no judgment was rendered in the justice court; second, that the judgment in the circuit court is for an amount greater than that claimed in the complaint; and, third, that the record shows that no papers, and no officially signed statements of the case and of the judgment rendered by him in the cause of Charles Burton v. Walter Andrews, were returned by the justice of the peace to the clerk of the circuit court. In the appeal bond executed by the defendant to carry the cause to the circuit court, the recitals show that a judgment was rendered by the justice in favor of the plaintiff and against the defendant in the sum of \$50. Therefore the first assignment of error is without merit. *Oklahoma, etc., Co. v. Kaupp*, 136 Ala. 629, 33 South. 868, and cases there cited.

The record shows that the point presented by the second ground of error was not made in the circuit court; hence it is without merit in this court. *Smith v. Dick*, 95 Ala. 311, 10 South. 845.

If the point made by the third ground of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

error assigned ever possessed merit (*Larcher v. Scott*, 2 Ala. 40; *McAlpin v. Pool*, Minor, 316; *Oklahoma etc., Co. v. Kaupp*, supra), it was waived by the appellant's failure to make it in the circuit court. Code 1907, § 4720.

There is no error in the record, and the judgment of the circuit court must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### MAY v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. LARCENY (§ 32\*)—INDICTMENT—OWNERSHIP OF PROPERTY.

A buyer of a buggy, title to which is to remain in the seller until the price is paid, who obtains possession thereof, and who delivers it to a third person for delivery to the seller, has the title as against all except the seller until the third person has delivered the same to the seller; and an indictment for the larceny thereof, committed while the same was in possession of the third person, properly laid the ownership in the buyer.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 81; Dec. Dig. § 32.\*]

##### 2. LARCENY (§ 40\*)—ISSUES AND PROOF.

One may be convicted of grand larceny under an indictment alleging the value of the property stolen at \$100, on the state proving that it was worth \$25 or over.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 125; Dec. Dig. § 40.\*]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

Andrew May was convicted of grand larceny, and he appeals. Affirmed.

The indictment charges that Andrew May feloniously took and carried away one buggy, the property of Lula Harris, of the value of \$100. It seems from the evidence that Lula Harris purchased the buggy from one Matthews, who retained title in the buggy until it was paid for; but the buggy was still in the possession of Lula Harris, and had not been returned to Matthews. It appears, further, from the evidence, that Lula Harris contemplated going to Savannah, and, not having paid for the buggy, she turned it over to Bob Battle to be delivered to Mr. Matthews; but he kept it at the home of Lula Harris for about a month, when it was stolen. Williams was called as a witness by the state, and was asked, "Was it reported to you about the loss of your buggy?" and answered, "Yes." "Did you find that buggy?" and answered: "I found the buggy in Louisville, Ky. I got it there." "Was that buggy ever identified?" answered, "Yes." "Did you have a description of the buggy?" answered, "Yes." "Did the buggy that you found in Louisville, Ky., fill the description?" answered, "Yes; the buggy filled the descrip-

tion." "Did you bring the buggy back?" answered, "Yes; I had it shipped back." "Did any one in the presence of defendant in Louisville make any statement in regard to the defendant?" answered, "Yes; a policeman in the presence of defendant in Louisville stated that the defendant was trying to sell the horse and buggy there." Objection was interposed to each question, and overruled, and motion made to exclude the answers thereto, which was overruled. It was shown by other evidence that Andrew May was seen with the buggy in Birmingham, and that it was the buggy of Lula Harris.

The following charges were refused to the defendant: "(3) Unless you believe from the evidence beyond all reasonable doubt that the buggy alleged to have been stolen was at the time of the alleged felonious taking of the value of \$100, you must find the defendant not guilty." "(5) I charge you as a matter of law under the undisputed evidence in this case, if you believe such evidence, you cannot find that Lula Harris was in possession of the said buggy at the time of the alleged felonious taking. (6) I charge you that if you believe the evidence you cannot find that Lula Harris was the owner of the buggy alleged to have been stolen at the time of the alleged taking." "(8) I charge you that if you believe the evidence in this case you must find that Bob Battle was the person in possession of the property alleged to have been stolen, and the ownership of such property should have been laid in him." (9) Affirmative charge for the defendant. (10) Same.

The following portions of the oral charge of the court were excepted to: "It appears from the evidence that Bob Battle was in possession of the buggy. If you believe from the evidence that he held possession for Lula Harris, or for both Lula Harris and P. D. Matthews, I charge you that the ownership of the buggy was properly laid in Lula Harris"—and "If you believe from the evidence that Bob Battle was holding possession of the buggy until the debt upon the same was settled, then I charge you that the ownership was properly laid in Lula Harris."

Gaston & Pettus, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. Lula Harris was the owner of the buggy, notwithstanding she held under a conditional sale from Matthews, who had a claim or title thereto, and the ownership could have been laid in her. She had the possession and control of same, and the title thereto, as against all except her vendor, Matthews. It is true she delivered it to Battle to return to Matthews before leaving for Savannah; but it was taken from her agent before he delivered it to Matthews, whose possession was her possession,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and she could not have been ousted of her ownership of said buggy until it was restored to the vendor, Matthews. There was no reversible error in the oral charge of the court, excepted to, or in refusing charges 5, 6, 8, and A, requested by the defendant.

There was no error in refusing charge 3 requested by the defendant. The state did not have to prove that the buggy was worth \$100, but could convict for grand larceny if it was worth \$25 or over.

There was no error in refusing charges 9 and 10 requested by the defendant.

The ruling of the trial court upon the evidence was either free from error or was error without injury.

The judgment of the criminal court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

### BENTLEY et al. v. BARNES.

(Supreme Court of Alabama. June 30, 1909.)

#### 1. PARTIES (§ 35\*)—NECESSARY PARTIES—DEFENDANT.

One cannot be made a party complainant without his consent, and when he is a necessary party, and refuses to be made a party complainant, he must be made a party defendant.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 54, 55; Dec. Dig. § 35.\*]

#### 2. EQUITY (§ 273\*)—PLEADING—AMENDMENT AFTER DEMURRER—MULTIFARIOUSNESS—ELECTION.

Complainant may, after the sustaining of a demurrer to his bill for multifariousness, select which of the purposes of the bill he will insist on, and a bill so amended is not objectionable for departure.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 562; Dec. Dig. § 273.\*]

#### 3. SPECIFIC PERFORMANCE (§ 26\*)—CONTRACTS—ENFORCEMENT.

That a purchaser of real estate, in seeking to enforce the contract to convey, seeks to require the vendor and a third person, to whom a part of the property had been conveyed with knowledge of the interest of the purchaser, to account for the proceeds of such property sold and converted, does not change the nature of the contract, which relates to land.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 26.\*]

#### 4. SPECIFIC PERFORMANCE (§ 43\*)—PART PERFORMANCE—EFFECT.

A parol contract to convey land, executed by the payment of the purchase money and the delivery of possession of the property, is enforceable, notwithstanding the statute of frauds.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 130; Dec. Dig. § 43.\*]

#### 5. SPECIFIC PERFORMANCE (§ 65\*)—CONTRACTS ENFORCEABLE—EXECUTION OF CONTRACTS.

A contract binding one to convey real estate to another on the latter taking up mortgages thereon, executed by the payment of the price and the delivery of the possession of the property, is not fully executed, and the latter

may compel the execution of a conveyance of the legal title.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 196; Dec. Dig. § 65.\*]

#### 6. SPECIFIC PERFORMANCE (§ 106\*)—PARTIES.

One taking with notice a conveyance of the property from a vendor occupies the position of a trustee with the vendor, and is a proper party in a suit by the purchaser to compel the specific performance of the contract to convey and to account for the proceeds of the property sold and converted.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 343; Dec. Dig. § 106.\*]

Appeal from Chancery Court, Covington County; L. D. Gardner, Chancellor.

Suit by W. R. Barnes against A. J. Bentley and another. From a decree for complainant, defendants appeal. Affirmed.

C. E. Reid and Powell, Albritton & Albritton, for appellants. Foster, Samford & Prestwood and Henry Opp, for appellee.

SIMPSON, J. This case was before this court at a previous term, and a full statement of the case as it then stood will be found in Bentley et al. v. Barnes, 155 Ala. 659, 47 South. 159. In that case the bill was held to be multifarious.

According to the original bill it was alleged that said Bentley, being the owner of certain real estate, agreed with the complainant to convey the same to him, if complainant would take up certain mortgages thereon; that complainant did take up said mortgages, and was placed in possession of said property by said Bentley; but that afterward said Bentley excluded complainant from possession and continued to carry on the turpentine business on said land. Subsequent to the former decision of this court, for the purpose of eliminating the multifarious feature of said bill, the same was amended, by striking out all provisions seeking the settlement and accounting of the partnership of W. R. Barnes & Co., and the bill as it now stands seeks only the specific performance of the contract to convey the property, and, as incident thereto, that said Bentley be held to be a trustee in invitum of the property, while the complainant was kept out of the possession thereof, and that said Bentley and the Ash-Carson Company, to whom said Bentley had conveyed part of the property with full knowledge of the interest of complainant therein, be required to pay to the complainant the amount due for proceeds of the property sold and converted while plaintiff was kept out of possession by them. The Naval Stores Company is interested with the complainant in the property, and the bill alleges that said company refused to be made a party complainant to this bill, on which refusal the complainant makes said company a party defendant to the bill.

The first insistence of appellee is that

said Naval Stores Company is a necessary party complainant, and that the making of it a party defendant does not satisfy that requirement. A party cannot be made a party complainant without his consent, and when he is a necessary party, and refuses to be made a party complainant, the proper course is to make him a party defendant. 15 Ency. Pl. & Pr. 672, 673, 989, 990; 1 Dan. Ch. Pr. 273.

It is next insisted that the bill as amended is an entire departure from the original bill, because the main purpose of that bill was to settle the partnership of W. R. Barnes & Co. There is no force in this contention. When a demurrer is sustained for multifariousness, it is manifestly the right of the complainant to select which of the purposes of the original bill he will insist on.

It is next insisted that the bill is without equity, because the contract which it seeks to enforce has been executed. This position is not tenable. The contract related to land, and the fact that, in enforcing his contract, the complainant seeks also to require the defendants to account for that part of the property which has been disconverted into personal property and disposed of, does not change the nature of the contract. While the payment of the purchase money and the delivery of possession of the property relieves the contract of the statute of frauds, yet the contract is not fully executed, and the complainant has a right to have it completely executed by the conveyance of the legal title. *Brewer v. Brewer & Sagen*, 19 Ala. 481, 488; *Arrington v. Porter*, 47 Ala. 714, 721; *Bretling's Adm'r v. Clarke & Co.*, 49 Ala. 450, 452.

Without rehearsing the rules with regard to multifariousness, which were stated in this case when it was before this court at a previous term, we hold that the bill as it now appears is not multifarious. The Ash-Carson Company, by taking an interest in the property with Bentley with full notice, occupies the same position as a trustee in invitum as said Bentley, and it is proper to make all persons through whose hands the proceeds of the property has passed parties defendant. 22 Ency. Pl. & Pr. 199; *Decatur Land Co. v. Cook* (Ala.) 27 South. 559.

The decree of the chancellor is affirmed. Affirmed.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

#### CARNLEY v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

#### 1. CRIMINAL LAW (§ 218\*)—WARRANT—RETURN.

Where the affidavit and warrant were in fact returned to the county court, and the trial

was had in and by such court, and not by the judge thereof, as distinguished from the court. It was not a fatal defect that the warrant was returnable to the judge, and not to the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 452; Dec. Dig. § 218.\*]

#### 2. HUSBAND AND WIFE (§ 312\*)—ABANDONMENT—ISSUES AND PROOFS.

Where accused was charged conjunctively with abandonment of both wife and child, in violation of Code 1907, § 7843, the proof must show an abandonment of both in order to sustain a conviction.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 312.\*]

#### 3. HUSBAND AND WIFE (§ 312\*)—ABANDONMENT—PROOF.

Where accused was charged with abandoning his wife and child, proof of the marriage and of the paternity of the child alleged to have been abandoned was necessary.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 312.\*]

#### 4. WITNESSES (§ 61\*)—HUSBAND AND WIFE—ABANDONMENT.

A wife is a competent witness against her husband in a prosecution for abandonment.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 61.\*]

#### 5. WITNESSES (§ 61\*)—HUSBAND AND WIFE—PATERNITY—ABANDONMENT.

In a prosecution of a husband for the alleged abandonment of his wife and child, evidence of the wife that accused was the father of the child was competent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 163, 174; Dec. Dig. § 61.\*]

#### 6. HUSBAND AND WIFE (§ 313\*)—ABANDONMENT—PATERNITY—EVIDENCE.

Where, in a prosecution for abandonment of a wife and child born out of wedlock, accused denied the paternity of the child, accused was entitled to testify that he was not the father, and to prove by another witness that such witness had had intercourse with the wife within the period of gestation of the child whose paternity was in issue.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 313.\*]

#### 7. CRIMINAL LAW (§ 420\*)—HEARSAY—ABANDONMENT—ADULTERY.

In a prosecution for abandonment, adultery of the wife cannot be proved by hearsay or rumors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. § 420.\*]

#### 8. HUSBAND AND WIFE (§ 305\*)—ABANDONMENT—MISCONDUCT OF WIFE.

Code 1907, § 7843, defines a vagrant to consist of "any able-bodied person who shall abandon his wife and child or either of them without just cause, leaving them without sufficient means of subsistence or in danger of becoming a public charge." *Held*, that such act does not make it a crime to abandon a wife and child on all occasions, nor where accused married his wife after the institution of bastardy proceedings against him, and he was fraudulently induced to believe that he was the father of the child, which he subsequently discovered was not so.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1103; Dec. Dig. § 305.\*]

Appeal from Geneva County Court; P. N. Hickman, Judge.

Tat Carnley was convicted of abandonment, and he appeals. Reversed and remanded.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

W. O. Mulkey, for appellant. Alexander M. Garber, Atty. Gen., for the State.

**MAYFIELD, J.** The defendant was charged and convicted of vagrancy by abandoning his wife and child, as declared and defined by section 7843 of the Code of 1907. The prosecution was instituted by affidavit and warrant made returnable to the "judge of the county court of Geneva county." The local acts for that county (Loc. Acts 1903, p. 40) created the Geneva county court, conferring criminal jurisdiction on the court to try misdemeanors, and provided that prosecutions might be had in such court by the transfer of indictments from the circuit court, or by affidavit and warrant made returnable to that court.

It is first insisted by appellant that as the warrant in this case was made returnable to the judge of the county court, and not to the court, the court acquired no jurisdiction. This contention cannot be sustained. The affidavit and warrant were as a matter of fact returned to the court, and the trial was had in and by the county court, and not by the judge, as distinguished from the court. Moreover, the warrant provides that the defendant "shall appear at the next term of the county court of Geneva county and from time to time until discharged by law." The rights or the results could not have been different, had the warrant recited that it was returnable to the "county court."

It is unnecessary to decide in this case whether a man must have both a wife and child in order to be guilty, under the statute (Code 1907, § 7843), of abandoning either. The defendant in this case was charged conjunctively of abandoning both, and, of course, the proof must correspond with the charge. The offense must be proven as alleged. The defendant was also charged with abandoning "his" wife and child, not those of some other person; and, of course, this allegation must be proven. Proof of the marriage, together with that of the paternity of the child alleged to have been abandoned, was, therefore, both proper and necessary. The undisputed testimony showed the marriage, and the birth of the child before the marriage; and the court did not err in allowing the wife (she being a competent witness against the husband in this particular case) to testify that her husband, the defendant, was the father of the child.

For the same reason the court erred in declining to allow the defendant to deny or disprove that he was the father of the child. The fact that it was born out of wedlock is not conclusive proof of the paternity, when that fact is a material issue, as it is in this case. Of course, if the question should arise collaterally, it might be conclusive, but not when the paternity is a material issue, and certainly not when, as in this case, it is shown that the child was born before marriage and while the mother was a single wo-

man. The case of *Hall v. State*, 100 Ala. 86, 14 South. 867, does not deny proof of such facts, but, on the contrary, recognizes the admissibility and relevancy thereof, if it does not so decide. This court, in that case, construing a similar statute, said that the statute "cannot be construed to mean that it is criminal under any and all circumstances, for the husband to abandon the wife. He may do so for divorceable cause." In *Carney's Case*, 84 Ala. 10, 4 South. 285, it was held that, if the wife be guilty of adultery, the husband may abandon her without violating the statute. These cases hold, however, that neither adultery of the wife after abandonment, nor adultery, can be proven by hearsay testimony or by mere rumors. Therefore such evidence was properly disallowed on this trial.

The defendant should have been allowed to prove, however, by the witness Carnley, that the witness had had sexual intercourse with defendant's wife within the period of gestation as to the child, the paternity of which was in question. It is undenied that the husband and wife had sexual intercourse with each other before their marriage, and that bastardy proceedings were pending against the defendant, as to the child in question, when the marriage took place. The wife claimed, and was allowed to testify on this trial, that the defendant was the father of the child, and was the only person who had ever had sexual intercourse with her. If the defendant was the father of the child, he did right in condoning the wrong by marrying the woman and thus legitimatizing the bastard; but, if he was not the father of the child, then he was wronged, and we are not prepared to say that the law would require him to live and support the woman who had been guilty of perpetrating the wrong upon him, after he had discovered that she had lived in adultery with other men and that he was not the father of the child. It would be a harsh law that would require a man to live with a woman as her husband, and to provide and care for her and her child, when he knows that he is not the father of the child.

The statute does not make it a crime to abandon the wife or child on all occasions, but makes it a crime only when he abandons them "without just cause." Of course, proof of the paternity of the child or of the infidelity of the wife should not be made by mere rumors, suspicions, or hearsay evidence; but a part of the evidence offered by the defendant was not hearsay. It was direct. He offered to prove by a witness that such witness had had sexual intercourse with the wife of the defendant during the period of gestation of the child as to which the paternity was in question. This was competent, and it was reversible error to decline to allow it.

For the error noted, the judgment of con-

viction must be set aside, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

### STATE v. SMITH.

(Supreme Court of Alabama. June 30, 1909.)

STATUTES (§ 13\*)—MANNER OF ENACTMENT—REFERENCE TO COMMITTEE.

Act Nov. 23, 1907 (Sp. Acts 1907, p. 49), having been referred in the Senate to the standing committee on local legislation, and having been reported back to the senate by the judiciary committee, without any report of the committee to which it was originally referred, and then finally passed after three readings in the Senate, was passed in violation of Const. 1901, § 62, and a nullity.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 10; Dec. Dig. § 13.\*]

Appeal from Order of Judge of City Court of Montgomery; W. H. Thomas, Judge.

Petition by York Smith for habeas corpus. From an order discharging petitioner, the State appeals. Affirmed.

Alex M. Garber, for the State.

DOWDELL, C. J. This appeal is prosecuted by the state from an order of the judge of the city court of Montgomery discharging the defendant from custody on his petition for writ of habeas corpus. No brief has been furnished this court on behalf of either the state or the defendant.

So far as the record discloses, but one question is presented for our consideration and determination, and that is the constitutionality vel non of the act approved November 23, 1907, entitled "An act to repeal an act entitled 'An act to define who are delinquent children, and to provide for their arrest, care and reformation,' approved March 12, 1907, and acts amendatory thereof." Sp. Acts 1907, p. 49. The act of March 12, 1907, sought to be repealed, now constitutes chapter 185 (embracing sections 6450 to 6465, inclusive) of the Code of 1907. If the said repealing act is valid, the judge of the city court committed error in discharging the petitioner. If, on the other hand, the act was void because of a failure to comply with constitutional requirements in its passage, then, on the admitted facts, the order of discharge of the petitioner was free from error.

It affirmatively appears from the journal of the Senate that, in the passage of the said repealing act through that body, the bill was, upon the first reading, referred to the standing committee on local legislation. No action was taken by this committee on the bill, but instead thereof, as further appears from the journal, it was acted on and reported

back to the Senate by a different committee—the judiciary committee—and then proceeded to the second and third readings in the Senate, and its final passage by that body. This was in plain violation of section 62 of the Constitution of 1901, and as a consequence the act is a nullity. The said repealing act being void, it follows that the order of the judge of the city court, appealed from, must be affirmed.

Affirmed.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

### HARRISON v. ROGERS et al.

(Supreme Court of Alabama. June 30, 1909.)

DEEDS (§ 196\*)—ACTION TO SET ASIDE—UNDUE INFLUENCE—BURDEN OF PROOF.

In an action to set aside a deed for undue influence, it appeared that defendant, a prominent and influential white man, had for many years rendered financial assistance to the grantor, an illiterate negro in failing health, lending him money, advising him, and advising and assisting him to pay for the land involved, and that for four or five years prior to the grantor's death his property was left in the hands of defendant, who collected the rents, paid them to the grantor, etc. Held to show that a relation of trust existed between the grantor and defendant, throwing on the latter the burden of proving by clear testimony that the transaction was fair and the result of the grantor's free will.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.\*]

Appeal from Chancery Court, Marengo County; Thomas H. Smith, Chancellor.

Action by Enos Rogers and others against W. C. Harrison. Judgment for plaintiffs, and defendant appeals. Affirmed.

Pettus, Jeffries & Pettus and B. F. Elmore, for appellant. George Peagram, for appellees.

McCLELLAN, J. This bill was filed by appellees against appellant, seeking the cancellation of a deed of date July 22, 1905, an instrument tokening, of course, a transaction inter vivos, on the ground of undue influence exercised by appellant on Syd Catlin, now deceased. The seventh paragraph of the answer of appellant is in part as follows: "Respondent avers that for years, probably 20 or 25 years, respondent has rendered financial assistance to the said Catlin, who was a poor, hard-working, humble negro when respondent first knew him at Faunsdale; that respondent loaned the said Catlin money with which to go into the business of selling meats, etc., at Faunsdale, and that at divers times he has advised with the said Catlin how to run his (the said Catlin's) business; that it was on respondent's advice



and suggestion that the said Catlin purchased the lands herein described, and through his assistance that the said lands were paid for. Respondent alleges that some four or five years prior to the death of the said Catlin the said Catlin moved away from Faunsdale, and left his property in the hands and in charge of respondent; that each and every month the rents and incomes from said property were paid to the said Catlin during his lifetime. \* \* \* On the cross-examination respondent testified in part: "I don't know what amount of insurance Syd had in the Knights of Pythias. I have been paying his dues. \* \* \* He owned property at Faunsdale when he left there, and when he left he left me as his agent. I collected his rents, paid his dues in K. of P., and paid his taxes. I got about \$8.50 to \$10.50 per month rent. There were some months I didn't collect at all. I charged him 10 per cent. for collecting. I collected his rents up to the time he came home. \* \* \* The last annual settlement I had with Syd was in January, 1905."

Under repeated decisions of this court these facts, taken from the formal answer of the respondent and from his testimony in the cause, show beyond doubt that a relation of trust and confidence existed between Syd Catlin and respondent at the time the conveyance assailed was attempted to be executed and perfected. *Holt v. Agnew*, 67 Ala. 367; *McQueen v. Wilson*, 131 Ala. 606, 31 South. 94; *Harraway v. Harraway*, 136 Ala. 506, 34 South. 836. Such being the status, the burden was on the alleged grantee, respondent, to show by clear and convincing testimony that the transaction was fair and just, and that the act under investigation was the result of the free will of the grantor, or, conversely, was not the product of an undue influence exerted upon the alleged grantor by the grantee. *Malone v. Kelley*, 54 Ala. 538, and authorities, *supra*. The purported grantee was a prominent, intelligent, and influential member of the dominant race. The purported grantor was an illiterate negro and in failing health, at least. The evidence shows beyond any real doubt that the lands described in the assailed instrument were worth many times the value paid or promised to be paid therefor by the purported grantee. It will serve no useful purpose to discuss the evidence in detail. A careful consideration of it does not convince that the learned chancellor erred in his conclusion that the respondent had not discharged the burden of proof in the premises resting upon him. We therefore affirm the decree appealed from.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

# LANGLEY v. PULLIAM et al.

(Supreme Court of Alabama. June 30, 1909.)

## 1. VENDOR AND PURCHASER (§ 232\*)—BONA FIDE PURCHASER—NOTICE—RIGHTS OF THIRD PERSON.

Where a husband conveyed a lot to his wife by deed, which was not recorded, and there was no change of possession, even if the husband and wife, who lived together, afterwards lived on the lot conveyed, it would not afford notice of the wife's rights as against those claiming as bona fide purchasers through the husband.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 561; Dec. Dig. § 232.\*]

## 2. VENDOR AND PURCHASER (§ 244\*)—BONA FIDE PURCHASER—NOTICE—TITLE OF THIRD PERSON.

Where a husband conveyed a lot to his wife and executed a mortgage on it, which was assigned before the deed was filed for record, and the lot was purchased at foreclosure after the recording of the deed, to render the purchaser exempt from the effect of notice to the mortgagee of the existence of the wife's title before the mortgage was executed there should be proof of a valuable consideration for the mortgage or for the assignments at the time made, and neither the foreclosure proceedings, the recitals in the mortgage, nor those in the assignments could operate against the wife as proof of consideration paid.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 244.\*]

Appeal from Circuit Court, Tallapoosa County; A. H. Alston, Judge.

Action by E. T. Langley against John Pulliam and others. There was a directed verdict for defendants, and plaintiff appeals. Reversed and remanded.

James W. Strother, for appellant. E. M. Oliver, for appellees.

DENSON, J. In this case our first impression was that the bill of exceptions should be stricken from the record, upon the idea that the date of the adjournment of the circuit court was not shown by the record. Upon another inspection of the record we find that the date of adjournment is properly shown, and therefore the bill cannot be stricken, and the cause must be considered on its merits.

The action is statutory ejectment to try title to a town lot in Camp Hill, Ala. The plaintiff relied for recovery upon a deed executed to her by her husband, W. T. Langley, on the 15th day of June, 1893, but which was not filed for record until the 6th day of January, 1903. The deed was made upon a recited consideration of \$400; but, aside from the recitals of the deed, there is no evidence that any consideration ever passed between the grantor and grantee. There was no change of possession of the lot, from the husband to the wife, after the execution of the deed. The husband and wife lived together, and, even if they lived on the lot conveyed, there was, in this state of the case, no notice of her title or rights as against those claiming as bona fide purchasers through the

husband. *Motley v. Jones*, 98 Ala. 443, 13 South. 782; *Kindred v. New England, etc., Co.*, 116 Ala. 192, 23 South. 56.

The defendant Walter Andrews offered in evidence a mortgage executed by W. T. Langley (husband of the plaintiff) to A. H. Slaughter on the 16th of June, 1894, conveying the lot in controversy, as well as other realty, to secure a debt of \$2,579.68, recited as being at that time due from said Langley to said Slaughter. The record shows an assignment of this mortgage by Slaughter to S. M. Inman & Co., and one by Inman & Co. to J. E. Andrews. It also shows that a bill was filed in the chancery court of Tallapoosa county by J. E. Andrews against W. T. Langley, A. H. Slaughter, Inman & Co., and others, claiming through Langley, to foreclose said mortgage. It was averred in the bill that on the day the mortgage was executed W. T. Langley was indebted to the mortgagee, A. H. Slaughter, in the sum recited in the mortgage, and that the mortgage was given to secure the payment of that indebtedness. All of the defendants disclaimed any interest in the subject-matter of the litigation, or suffered decrees pro confesso to be entered against them, except W. T. Langley, the mortgagor, who filed an answer denying the indebtedness recited in the mortgage, and setting up as a further defense that the execution of the mortgage was procured through duress. In December, 1902, on final hearing of the cause, the chancery court rendered a decree, on the pleadings and proof, ascertaining and decreeing that the debt recited in the mortgage and interest (amounting to something over \$4,000) was due on the mortgage, and decreeing a foreclosure of the mortgage, and a sale of the land conveyed thereby. An appeal was taken from that decree to this court, and in February, 1905, a decree was here rendered, affirming the decree of the chancery court. Pending the litigation the complainant, J. E. Andrews, died, and the cause was revived in the name of Walter Andrews as his administrator. Sale was made by the register under the decree of December, 1902, and Walter Andrews (the defendant here) individually became the purchaser of the lands, including the lot here involved. The register's report shows a compliance with the terms of the sale by the purchaser, payment in full of the purchase money by him, and the report was confirmed, and a deed was made by the register to Walter Andrews, on March 20, 1905, conveying title to the lot there involved.

The proceedings of the chancery court and the register's deed were offered as evidence by the defendant, and were admitted over the objection of the plaintiff that she, not being a party to the proceedings, was not bound thereby. The record shows that the mortgage was assigned by Slaughter, the mortgagee, to Inman & Co., and by In-

man & Co. to J. E. Andrews, before the plaintiff's deed was filed for record; but there is no proof to the effect that the mortgage or either of the assignments was based on a valuable consideration. The appellee insists that the foreclosure proceedings, upon this proposition, are binding against all persons whomsoever, whether parties or not, and in support of the insistence cites 23 Cyc. 1286, and the Alabama cases cited in the note to the text. The Alabama cases are *Moore v. Curry*, 106 Ala. 284, 18 South. 46, *Bain v. Wells*, 107 Ala. 562, 19 South. 774, and *Sibley v. Alba*, 95 Ala. 191, 10 South. 831, and they only hold the proposition that a judgment, after its rendition, is conclusive evidence of the existence of the debt at the time of its rendition, but that it does not relate back and operate as proof of the consideration of the instrument upon which the judgment was rendered at the time of its execution.

It may be that the foreclosure proceedings were competent evidence, as connecting links between the purchaser's (Walter Andrews') deed from the register and the mortgage foreclosed; but he became the purchaser after the plaintiff's deed was filed for record, and to render him exempt from the effect of the notice to the mortgage it was indispensable that there should be proof of a valuable consideration for the mortgage, or that the assignments were based upon valuable considerations at the time made. Neither the foreclosure proceedings, the recitals in the mortgage, nor those in the assignments, can operate against the plaintiff as proof of consideration paid. *Buford v. McCormick*, 57 Ala. 428. The defendant's title depended upon the mortgage, and, in the absence of proof of consideration for it or for the assignments, plaintiff should have been allowed to make proof of notice to the mortgagee of the existence of her title before the mortgage was executed; and the court erred in giving the general charge at defendant's request.

The same considerations adverted to, in respect to lack of proof of consideration for the mortgage and assignments, show the error of the court in not allowing plaintiff to prove notice to Campbell of her title before he received his deed from W. T. Langley to the lot.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAY-FIELD, JJ., concur.

STATE v. SLOSS-SHEFFIELD STEEL & IRON CO.

(Supreme Court of Alabama. June 30, 1909.)

1. TAXATION (§ 493\*)—ASSESSMENT—REVIEW.

On appeal to the circuit court from a tax assessment, reviewed by the county commission-

ers. the hearing is de novo, as provided by Code 1907, §§ 2148, 2265.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 881; Dec. Dig. § 493.\*]

## 2. TAXATION (§ 491\*)—ASSESSMENT—REVIEW.

In a proceeding by a tax commissioner to raise the assessed valuation of the property of a corporation, instituted in the commissioners' court, as provided by Code 1907, § 2250 (Gen. Acts 1903, p. 295), it is not necessary that the commissioner's assessment should follow the assessment made by the tax assessor, or the return of the taxpayer.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 491.\*]

## 3. TAXATION (§ 474\*)—ASSESSMENT—REASSESSMENT.

A tax commissioner is authorized to make an additional assessment against any person or property, when in his opinion there has been an undervaluation, and to return such reassessment to the commissioners' court.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 474.\*]

## 4. TAXATION (§ 474\*)—REASSESSMENT—PROCEEDINGS.

Where a tax commissioner makes a reassessment, he is required to return it to the commissioners' court, which, if satisfied that there has been no undervaluation, dismisses the proceeding; but, if not, notice must be given to the taxpayer as required by Code 1907, § 2148, and the commissioners must then proceed as in other cases of undervaluation.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 474.\*]

## 5. TAXATION (§ 486\*)—REASSESSMENT—PROCEEDINGS.

Where a reassessment is returned to the commissioners' court and an issue is made thereon, the question is not whether the reassessment by the commissioner is proper, but whether the assessment by the tax assessor is correct.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 486.\*]

## 6. TAXATION (§ 491\*)—REASSESSMENT—DUTY OF COMMISSIONERS.

Where a reassessment of property for taxation by a tax commissioner is returned to the commissioners' court, the commissioners are required to fix the value of the property on the evidence before them, without reference to the return or motion of the tax commissioner; the original assessment, and not the proposed assessment by the tax commissioner, being the basis of the court's action.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 491.\*]

## 7. TAXATION (§ 493\*)—ASSESSMENT—APPEAL.

On appeal from the findings and assessment made by the commissioners' court, the circuit court's duties are the same as those of the commissioners' court, the proceedings being based on the original assessment, and not on the return of the tax commissioner or the decree or findings of the commissioners' court; and hence neither party can object to the return or reassessment by the tax commissioner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 870-883; Dec. Dig. § 493.\*]

## 8. TAXATION (§ 493\*)—ASSESSMENT—APPEAL TO CIRCUIT COURT—VALUATION.

On appeal from the commissioners' court to the circuit court in a tax assessment proceeding, the state may file a complaint, claiming a valuation in excess of that suggested by the tax com-

missioner, or that returned by the taxpayer, or that found by the commissioners' court.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 493.\*]

## 9. TAXATION (§ 493\*)—APPEAL—DECLARATION.

A declaration, on appeal from the commissioners' court to the circuit court in a tax assessment proceeding, properly made no reference to the reassessment of the tax commissioner, or to the judgment or findings of the commissioners' court.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 498.\*]

Appeal from Circuit Court, Franklin County; A. H. Alston, Judge.

Proceeding by the State against the Sloss-Sheffield Steel and Iron Company for the reassessment of taxes against defendant's property. From a judgment quashing the proceedings, the State appeals. Reversed and remanded.

Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State. Almon & Almon and Tillman, Grubb, Bradley & Morrow, for appellee.

MAYFIELD, J. This is an appeal by the state from a judgment of the circuit court of Franklin county in a proceeding by the tax commissioner of Franklin county to raise the assessed valuation of the property of the defendant corporation in that county for taxation. On the hearing before the county commissioners the assessment of the corporation was raised as to realty, but allowed to remain as to personalty as originally assessed. The corporation appealed from that assessment to the circuit court as provided by statute, in which court the trial or hearing as to whether or not the assessment shall be raised is had de novo. Code 1907, §§ 2205, 2148. At the first hearing in the circuit court the corporation moved to quash the proceeding for various reasons, among them, for that the property was assessed in solido, and not separately, and for that other property than that assessed by the owner was returned by him, and demurred to the declaration or claim of the tax commissioner upon which the increase in the assessment was based. This motion and demurrer appear not to have been acted upon by the court at this term, but pleas thereto were filed, and a trial was had, resulting in mistrial. At the next term the corporation by leave of court withdrew its pleas, and renewed its motion to quash the proceedings. On the hearing of this motion, which was argued by counsel, no evidence pro or con being introduced, the court granted the motion, quashed the proceedings, and dismissed the cause, taxing the state with the costs. From this judgment the state appeals.

The trial court was in error in quashing the proceeding and dismissing it out of court. The proceeding was instituted in the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date; & Reporter Indexes

commissioners' court in the manner the law directs. Code 1907, § 2250; Gen. Acts 1903, p. 295. It was not necessary that his reassessment should exactly follow the assessment made by the tax assessor, or the list or schedule for assessment as returned by the taxpayer. The tax commissioner is required or authorized to make an additional assessment against any person or property when, in his opinion, there has been an undervaluation. He is required to return this reassessment to the commissioners' courts, and the courts first hear him on his proposed reassessment. If the courts are satisfied that there has been no undervaluation, this is the end of the matter; but if they find it to exist, or are not fully satisfied that it does not exist, they then give notice to the taxpayer, as required by section 2148 of the Code of 1907, and proceed in the matter as provided in other cases of undervaluation. When the taxpayer appears, and the issue is made up and tried, that issue is, not whether the reassessment made by the commissioner is proper or true and correct, but whether or not the assessment made by the tax assessor is correct—whether the property of the taxpayer liable to assessment has been properly assessed, whether all of it was assessed, and whether it was assessed at a fair and reasonable valuation. The commissioners are to determine and fix the value of the property on the evidence before them, and without reference to the return or motion of the tax commissioner, whereby he described certain property, alleges certain values, and prays increases in assessments. The commissioners are not bound to assess all the property returned by the tax commissioner, nor to fix the values named by him, nor are they precluded by his return from fixing a greater amount than he specifies. They find his return to be either true or not true, in whole or in part. It is the original assessment that the court takes as a basis, and not the return or proposed assessment made by the tax commissioner.

An appeal from the findings and assessments made by the court of commissioners may be taken by either party, the state or the taxpayer, to the circuit court, where a trial is had de novo. The powers and duties of the circuit court are precisely those of the commissioners' court. It does not look to the return of the tax commissioner, but, like the commissioners' court, to the original assessment, and the decree or finding of the commissioners' court is not reviewed by the circuit court. The trial there had proceeds in all respects as if originally begun in that court. On this appeal neither party can object to the return or reassessment made by the tax commissioner. It is not considered for any purposes of the trial. Its only object or purpose is to call the attention of the commissioners' court to the original as-

essment of the taxpayer—to the supposed undervaluation—and to suggest an increase therein. His estimate of the value is not binding on the court, on the taxpayer, or on the state. It may be wholly disregarded by the courts, both commissioners' and circuit, either of which may decline to go into an inquiry as to the reassessment. On appeal to the circuit court the state may file a complaint, claiming a valuation in excess of that suggested by the tax commissioner, of that returned by the taxpayer, or in excess of that found by the commissioners' court.

No matter what were the defects of the additional assessment made and returned by the tax commissioner to the commissioners' court, the circuit court should have proceeded to determine the issues there for trial—to cause to be answered or pleaded to the declaration or complaint filed by the state, which was as follows:

"State v. Sloss-Sheffield Steel & Iron Company. On Appeal from the Commissioners' Court, Franklin County, Ala., Spring Term, 1906. Comes the state, by its solicitor, and asks that the valuation of lands as returned by the defendant and assessed for taxation for the year 1905 by the tax assessor and described in said return and assessment be increased to \$500,000. A. H. Carmichael, W. H. Key, Solicitors for State.

"Filed May 8, 1906. D. A. Malone, Clerk."

This declaration properly made no reference to the additional assessment made by the tax commissioner, nor to the judgment or finding of the commissioners' court. Consequently the motion to quash the additional assessment made by the tax commissioner or the commissioners' court was no proper or appropriate answer to the declaration, nor was any defect in either the additional assessment or that made by the tax commissioner or the court any ground or reason for quashing the proceeding in the circuit court. T. C. I. & R. R. Co. v. State, 141 Ala. 103, 37 South. 433; Sullivan v. State, 110 Ala. 97, 20 South. 452.

For the error in sustaining appellee's motion to quash, and in dismissing the proceedings from the circuit court, the judgment of the lower court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

#### DAVIS v. SIMPSON COAL CO.

(Supreme Court of Alabama. June 30, 1909.)

#### 1. APPEAL AND ERROR (§§ 494, 501\*)—REASS- VALUATION OF GROUNDS OF REVIEW.

Under Gen. Acts 1907, p. 570, § 17, relating to the law and equity court of Mobile, and providing that in the trial of any cause at law without a jury either party may by bill of ex-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ceptions present for review the conclusions and judgment of the court upon the evidence, a judgment cannot be reviewed by the Supreme Court, where the bill of exceptions does not contain such conclusions and judgment of the court, nor show any exception reserved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2300-2305; Dec. Dig. §§ 494, 501.\*]

**2. LANDLORD AND TENANT (§ 190\*)—RENT—ACTIONS—DEFENSES—EVICTION BY PUBLIC AUTHORITIES.**

If a person leased premises, knowing that they included a part of a city street, in the absence of a covenant in the lease by the lessor as against any interference by public authorities with the lessee's occupancy, he could not, when evicted by the city from occupancy of the street, hold the lessor guilty of a breach of the lease and thereby defeat an action for rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 765; Dec. Dig. § 190.\*]

**3. PLEADING (§ 8\*)—CONCLUSIONS.**

A charge of fraud in a pleading, without a statement of facts constituting it, is but a statement of a conclusion of the pleader, and insufficient when assailed by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 28½; Dec. Dig. § 8.\*]

**4. APPEAL AND ERROR (§ 1040\*)—REVIEW—HARMLESS ERROR—RULING ON DEMURRER.**

Where a plea passed out on demurrer, the overruling of a demurrer to a special replication to it, if error, was harmless, since the replication went out with the plea to which it was addressed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4095; Dec. Dig. § 1040.\*]

**5. LANDLORD AND TENANT (§ 40\*)—ACTION ON LEASE—ADMISSIBILITY OF EVIDENCE.**

Where a lease contract sued on referred in terms to a lease of the premises from a third person to the lessor, evidence of that lease is admissible.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 104; Dec. Dig. § 40.\*]

**6. LANDLORD AND TENANT (§ 231\*)—ACTION ON LEASE—ADMISSIBILITY OF EVIDENCE.**

Where a lease contract sued on referred in terms to a lease of the premises from a third person to the lessor, which provided that there should be no subletting without the consent of the lessor therein, the third person's testimony that he had consented to the transfer of the lease was admissible.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 927; Dec. Dig. § 231.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Simpson Coal Company against H. Ellis Davis. Judgment for plaintiff, and defendant appeals. Affirmed.

Gordon & Eddington, for appellant. Bestor, Bestor & Young, for appellee.

DOWDELL, C. J. This is a suit by the appellee to recover a balance alleged to be due as rent on a lease contract in writing for certain described premises. The case was tried by the court without a jury. Section 17 of an act "to establish the law and equity court of Mobile" (Gen. Acts 1907, pp. 562-570), is the same in its provision as section 14 of an act creating the city court of Selma (Acts 1875-76, p. 390). The bill of exceptions in the present case does not contain the con-

clusions and judgment of the court upon the evidence, nor does it show any exception reserved. Under the authority of *Morey v. Monk*, 142 Ala. 175, 38 South. 265, and authorities there cited, the appellant here can take nothing by the assignment of error in respect to the rendition of the judgment.

The sixth count of the complaint, upon which the case was tried, and to which by agreement of the parties all pleadings and the rulings thereon are directed, sets out in *hæc verba* the lease contract, the foundation of the suit, out of which the balance claimed as being due for rent arose. A breach of this lease contract by the plaintiff was sought to be set up by the defendant in several pleas, to which demurrers were interposed and sustained. The breach consisted in an alleged eviction of the defendant from a portion of the rented premises by the public authorities of the city of Mobile; the said portion from which the defendant was evicted being a part of a public street in said city. The lease which is set out in the pleadings does not contain the ordinary covenants of warranty and seisin, but instead thereof contains the following express covenant: "That for and in consideration of the rents and covenants hereinafter named the said party of the first part does by these presents lease to the said party of the second part, heirs and assigns, commencing on the 1st day of January, 1906, and ending on the 1st day of January, 1908, unless this trust is terminated before said date, all the wharf property and rights that are vested in them by virtue of a lease held by them from Z. M. P. Inge, trustee, lying at foot of Congress street," etc., describing the property.

If the defendant entered into the lease contract with knowledge that the leased premises extended to and included a part of a public street or highway in the city of Mobile, in the absence of any covenant in the contract by the lessor as against any interference by the public authorities of his occupancy and use of the same, he could not in such case, when evicted by the city from the occupancy of the street, hold the lessor (the landlord) guilty of a breach of the lease contract, and thereby defeat the landlord in his action for rent. *McLarren v. Spalding*, 2 Cal. 510; *Hitchcock v. Bacon*, 118 Pa. 272, 12 Atl. 352. In the case of *Copeland v. McAdory*, 100 Ala. 553, 13 South. 545, which is cited and relied on here by counsel for appellant, the facts are different from the case before us. In that case the deed contained covenants of seisin and warranty. There are no such covenants here, the only covenant expressed is limited to the rights vested in the lessor "by virtue of a lease held by them from Z. M. P. Inge, trustee," etc. What these rights are do not appear from the pleadings in this case.

Neither of the pleas numbered 2 and 3,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
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and of date of filing April 2, 1908, deny that the defendant had notice, at the time of entering into the contract sued on, that the rented premises covered in part the public street, and being part from which he claims he was evicted. It is true plea 3 states "that he did not know that part of said property was public property," but it does not aver that this want of knowledge existed at the time he executed the lease contract. Moreover, the description of the property as contained in the lease was sufficient to put him on notice that a part of the rented premises, and the part from which he was evicted by the city, extended into the public street. There was no error in sustaining the demurrer to these two pleas.

For the same reasons pleas numbered 2, 3 and 4, and filed of date April 25, 1908, were bad, and subject to the demurrer interposed. These pleas admit that the defendant had knowledge of the fact that the portion of the rented premises from which he claims he was evicted by the city was in the public street of the city, and there is no averment in the plea that the lease contract contained any covenant against eviction by the city. The allegations in the plea of representations made by the plaintiff, on the facts stated in the plea, may be regarded as representations of matters of law, since there is no denial but that the plaintiff at the time had a license from the city to the use of the street. If the representations were as to matters of law, the defendant is presumed to be as well informed in this respect as the plaintiff as to the rights of the parties in the use and occupancy of the street, and the liability to be at any time removed therefrom by the city.

The fourth plea concludes with a general averment of fraud in the execution of the contract. A charge of fraud, without a statement of facts constituting the fraud, is but a statement of a conclusion of the pleader, and insufficient in pleading when assailed by demurrer. the demurrer to the fourth plea, among other grounds, takes this point.

It appears from the record that a demurrer was sustained to the fifth plea, both as originally filed and as amended; but this ruling is not assigned as error. The fifth plea passing out on demurrer, the special replication to it also went out. The overruling of the demurrer to this special replication, if error, was error without injury, since the replication went out with the plea to which it was addressed.

There was no error in admitting evidence of the lease from Z. M. P. Inge, trustee. This lease was referred to in terms in the lease contract sued on, and was thereby made relevant. There was no error in admitting in evidence the acts of the Legislature referred to in the Inge lease contract. The evidence of the witness Inge as to his consent to the transfer of the lease was properly

admitted. The lease provided that there should be no subletting without his consent. This evidence, therefore, was competent and relevant.

We find no reversible error in the record, and the judgment is affirmed.

Affirmed.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

### ELDER v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

#### INTOXICATING LIQUORS (§ 17\*)—STATUTES—CONSTITUTIONALITY.

Act Aug. 13, 1907 (Gen. Acts 1907, p. 696), entitled "An act to prohibit the sale of hop-jack," etc., "or other beverages, the product of maltose or gencose, at any place where the sale of spirituous, vinous or malt liquors are prohibited by law," is unconstitutional.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 21; Dec. Dig. § 17.\*]

Dowdell, C. J., and Denson and McClellan, JJ., dissenting.

Appeal from City Court of Selma; J. W. Mabry, Judge.

Frank Elder was convicted of crime, and appeals. Reversed.

Pettus, Jeffries & Pettus, Coleman, Dent & Well, and A. D. Pitts, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

DOWDELL, C. J. The defendant was convicted on an indictment preferred against him for the violation of the statute approved August 13, 1907 (Gen. Acts 1907, p. 696), entitled "An act to prohibit the sale of hop-jack, hop-tea, hop-weiss, hop-ale, malt tonic, or other beverages, the product of maltose or gencose, at any place where the sale of spirituous, vinous or malt liquors are prohibited by law." The indictment contained three counts. The third count having been charged out, on the conclusion of the evidence in the case, at the instance and request of the defendant, what we may have to say will have reference only to the first and second counts.

The first question presented for our consideration goes to the constitutionality of the act under which the defendant was indicted and convicted. This question is raised both by demurrer to the indictment and by written charges requested to be given to the jury. The constitutionality of the act is assailed upon several grounds; the first being that there was a failure to comply with certain provisions of the Constitution in the passage of the act. The point taken is that the bill as passed by the Senate is not the same bill as the original bill introduced in and passed by the House, and that the bill

as signed by the Governor is not the same as either the bill passed by the Senate or that passed by the House.

The bill in which the act in question had its inception was originally introduced into the House, and was known as "House Bill No. 928," and bore the title hereinabove set out. The journal of the House shows (and this is not disputed) that there was a strict compliance with all constitutional requirements in its passage through that branch of the General Assembly. The journal of the Senate shows that in the "message from the House," reporting the passage of House Bill 928, the word "glucose" appears in the title of the bill, instead of the word "gencose" as contained in the title of the bill as the same passed the House. This word "glucose," as appears from the Senate Journal, was retained in the title to the bill through its course of passage in the Senate, up to and including the final vote upon third reading. The House Journal then shows that, in the "message from the Senate" of the passage of the bill by that body, the word "gencose," and not "glucose," appears in the title of the bill as originally introduced into the House and passed by that body. There is nothing in the Senate proceedings to show that the bill, in its passage through that body, was ever changed by amendment made for that purpose, nor is there any pretense in argument that such thing was done. It further appears that in the title to the bill (House Bill 928), as signed by both the Speaker of the House and the President of the Senate, the word used is "gencose," and not "glucose." From this history of the passage of the bill through both houses, we are of the opinion that the word "glucose," where it appears in the Senate proceedings, is merely a clerical misprision, and, being such, will not affect the validity of the law.

The next point taken is that the journal of the Senate does not show a signing of the bill, as it passed the two houses, by the President of the Senate. This insistence is based upon the following recital in the journal of the Senate: "The President of the Senate, in the presence of the Senate, immediately after their titles had been publicly read at length by the Secretary, signed the above Senate Bills, the titles of which are set out in the foregoing message from the House; the reading at length of said bill having been dispensed with by a two-thirds vote of a quorum of the Senate present." Immediately preceding this recital, recorded on the journal of the Senate, is the message from the House, which is as follows: "Mr. President: The Speaker of the House having signed the following House Bills, your signature thereto is requested." Then follow the House Bills specified, included in which is the House Bill in question. It is evident that the words "Senate Bills," employed in the recital from the journal above set out, in the con-

nection and order in which they are used, are merely a clerical misprision, and that "House Bills" (and not "Senate Bills") were intended.

The next point taken is that, in section 1 of the body of the act as approved by the Governor, the words "maltace" and "gencase" are used, instead of the words "maltose" and "gencose," as employed in section 1 of the act as passed by the House and Senate. It is insisted in argument, for this reason, that the bill as passed is not the one signed and approved by the Governor, and, therefore, is offensive to the Constitution. To demonstrate that this is another clerical error, occurring in the enactment of this law, it is only necessary to set out in full section 1 of the act, which is as follows: "That it shall be unlawful to sell, give away, or otherwise dispose of hep-jack, hop-tea, hop-weiss, hop-ale, malt tonic or any other beverage which is the product of maltace or gencase, or, in which maltose or gencose is a substantial ingredient, at or in any place where the sale of spirituous, vinous or malt liquors is prohibited by law." It is evident, we think, from the context, that the words "maltose" and "gencose" were intended in the statute, where "maltace" and "gencase" are used. The words "maltose" and "gencose" are the ones employed in the title to the act. Moreover, when taking into consideration the fact that there are no such words as "maltace" and "gencase" (and, we may add, we know of no such word as "gencose"), there can be no doubt that the employment of these words is a mere clerical error, and that only "maltose" and "gencose" could have been intended. Clerical errors, which are patently such on their face, will not operate to invalidate an otherwise valid enactment. It would be unreasonable to hold that the lawmakers intended to render nugatory a law of their own creation by the employment of meaningless words in its enactment.

The constitutionality of the act is further assailed upon the ground that the attempted legislation is not within the police power of the state and is an unwarranted invasion of the rights of the citizen. The argument is based upon the theory that the Legislature has no power to prohibit the sale of an article which is not injurious to either the health or morals of the people. If it should be conceded that the articles, the sale of which is prohibited by the act, are not in themselves injurious to health or morals, still there can be no doubt, under former decisions of this court, that to prohibit the sale of the articles mentioned is not without legislative competency. To prohibit the sale of malt liquors is undeniably within the police power of the state. The exercise of this power by the Legislature, in the prohibition of the sale of malt liquor, is upon the idea of the conservation of public morals. To this end it must logically follow that it is equally

within the police power of the state, through its lawmakers, to enact any and all laws in their wisdom necessary to prevent any evasion of the primary purpose. If, in the wisdom of the Legislature, in order more thoroughly to prohibit the sale of malt liquor, which is known to be an intoxicant, and to safeguard against evasions of such law, it should be deemed necessary to prohibit the sale of any and all beverages containing as an ingredient "maltose," a known constituent of malt liquor, we are unable to see why such legislation would not reasonably come within the exercise of the state's police power.

In *Feibelman v. State*, 130 Ala. 122, 30 South. 384, it was said by this court, speaking through McClellan, C. J.: "It is common knowledge that most malt liquors are intoxicating and harmful when used excessively, and are capable of excessive use as a beverage. The sale of all such, of course, the Legislature has the power to prohibit. But if the prohibition should in terms go only to the sale of intoxicating malt liquors, *there would be left open such opportunities for invasions [evasions] of the law and there would arise such difficulties of proof as that the law could not be effectively executed*; and the lawmakers having the undoubted power to prohibit and to prevent the sale of intoxicating malt liquors, and to enact to that end a law which can be executed so as to secure it, and, *finding that this cannot be accomplished without extending the prohibition to all malt liquors, whether intoxicating or not, such extension, necessary to prevent the sale of intoxicants, is as essentially the proper exercise of the police power as the inhibition with reference to intoxicants.*" (Italics ours.) See, also, the following cases: *Dinkins v. State*, 149 Ala. 49, 43 South. 114; *Lambie v. State*, 151 Ala. 86, 44 South. 51; *Marks v. State* (decided at the present term) 48 South. 864; *Eaves' Case*, 113 Ga. 749, 39 S. E. 318; *O'Connell's Case*, 99 Me. 61, 58 Atl. 59. On the authority of the cases cited above, and for the reasons that we have stated, without hesitancy we reach the conclusion that the passage of the act in question is entirely within legislative competency, and not opposed to any of the rights of the citizen guaranteed by the Constitution.

The question of the repeal of the act here under consideration by the subsequent act, approved November 23, 1907 (Gen. Acts Sp. Sess. 1907, p. 71), commonly known as the "State-Wide Prohibition Law," is also raised on the record; but we think that this point is not very seriously contended for in argument. The latter act contains a general provision of repeal of all laws and parts of laws in conflict with it, but no express repeal of the former act. That the act under consideration covers matters not covered by the state-wide prohibition law is plainly to be

seen, and hence the two acts have different fields of operation and may consistently stand together, and without any conflict operate in harmonious conjunction to the accomplishment of the same general purpose.

Many of the questions reserved on the introduction of evidence and on the refusal of written charges requested by the defendant, and here presented on the record for our consideration, require no further discussion by us in detail, as the same can find an answer and ready solution in an application of the principles we have already stated above.

Dr. B. B. Ross, professor of chemistry of the Polytechnic Institute at Auburn, and ex officio state chemist, was examined as an expert witness in the case. Two bottles that were shown to have been sold by the defendant, one containing a liquid called "Mead," and the other a liquid called "Schlitz-Fizz," were analyzed by Dr. Ross. This witness testified that the liquid called "Mead," as shown by his analysis, contained quantitatively 1.27 per centum of maltose, and that the liquid called "Schlitz-Fizz" contained 2.89 per centum of maltose. He further testified that 95 per centum, or more, of the liquids, as a whole, was water, and that the same, together with the maltose and other ingredients, constituted the mixture a beverage. This witness also testified that the ingredient of maltose gave to it a sweetish taste and also a nutritive element. He further testified that, relatively speaking, maltose as an ingredient, compared with the whole, was small, but, when compared with the other ingredients going to constitute the drink a beverage, it was very large.

On this undisputed evidence, it certainly could not be said that maltose, as an ingredient in the makeup of the beverage, was not a substantial ingredient, within the meaning of the statute. On the examination of this witness as an expert it was entirely competent to show by him the nature and character of maltose, its taste, potency, and activity, as an ingredient of the beverage, as well as the other ingredients, and their nature, kind, and character, entering into said liquids examined and analyzed by him. We fail to discover that the trial court committed any reversible error in the admission of evidence on the examination of this witness.

A number of the charges refused to the defendant find substantial duplication in charges given at the request of the defendant, and hence no error was committed in the refusal of such charges.

We have examined the written charges refused to the defendant, and that are here insisted on in brief and in argument by counsel for appellant. As above stated, the questions raised by these charges are covered by the principles that we have already laid down, and in their refusal no reversible error has been committed.

Finding no error in the record of which



the appellant can complain, the judgment appealed from is affirmed.

Affirmed.

DENSON and McCLELLAN, JJ., concur.

SIMPSON, J. (concurring). It is very difficult to draw the line, by a distinct definition, as to what the Legislature may do on the subject of prohibiting the sale or otherwise disposing of spirituous, vinous, or malt liquors or beverages. I take it to be an acknowledged principle that the citizen's right to property is protected by the Constitution, and that the right of property carries with it the right to sell or dispose of it. At the same time it is recognized that, on account of the injury and danger to the public, the Legislature has the right to prohibit absolutely the sale of all intoxicating beverages. I am of the opinion, also, that as a concomitant of this right a reasonable discretion must be lodged in the Legislature to pass all laws which are reasonably necessary to prevent the evasion of its laws on that subject. A careful author says: "It has occasionally been argued that the Legislature has no power to declare that to be intoxicating which is not so; that the use of any beverage which is not capable of producing intoxication can have no possible influence upon the public health, safety, or morals; and that, therefore, if the Legislature should attempt to include any such innocent article in its prohibition, the statute would be to that extent invalid. It is probable that the courts would accede to this reasoning in a very strong case, a case where there could be no possible doubt as to the innocent nature of the liquor in question; but they are disposed to leave much to the legislative judgment and discretion, and act with caution in taking judicial notice of the properties of such articles." *Black on Intoxicating Liquors*, § 43.

I think, therefore, that the Legislature has the right to select such beverages as are recognized as convenient vehicles for the evasion of the prohibition laws, and to exercise a reasonable discretion in prohibiting the sale, etc., of such; and I cannot say that in this case the Legislature has gone beyond the bounds of its legislative discretion. This disposes of all questions raised by the pleadings and record in this case.

Therefore I concur in the conclusion of the opinion of the Chief Justice.

ANDERSON, J. (dissenting). To my mind the conclusion of the majority of the court is not only far-reaching, but most dangerous in its results, and is directly in the teeth of the Constitution. The property right of every citizen is protected by both the federal and state Constitutions, and the right to dispose of property is essential to the enjoyment of same. The majority do not pretend, as I understand them, that the drinks involved

in the case at bar are calculated to produce intoxication, or will, per se, have any influence upon the public health or morals, except in so far as they may be used as a means for evading the prohibition laws. They therefore base their holding that the Legislature has the right to prohibit these harmless drinks solely and entirely upon the idea that the dealing in same will afford a means to sell prohibited drinks in disguise. I cannot understand why they can be so used, unless it be that they may resemble certain intoxicating drinks which might be sold in the name of these nonintoxicating drinks, and which would be a violation of the law, regardless of the name under which they are sold. Iced tea resembles malt drinks as well as whisky diluted, as also do ginger ale, cider, and many other harmless beverages or drinks; yet, under the holding of the majority, the Legislature can prohibit the sale of these harmless drinks simply because they may resemble certain intoxicating liquors.

These drastic prohibitory laws are doubtless intended for the moral benefit and elevation of mankind; but their moral purpose or beneficent results must not be considered, to save them, when they invade the sanctity of the constitutional rights of our citizens. Reforms come and go, often doing good; but occasionally they merely disturb and interfere with the serenity of conservatism and quietude under existing conditions. But Constitutions should ever remain as barriers to legislative or judicial interference with the inalienable right of enjoyment of life, liberty, and the pursuit of happiness, which includes the right to own and dispose of property, so long as it does not, per se, interfere with the public morals or health.

These views are concurred in by Justices MAYFIELD and SAYRE.

#### On Rehearing.

SIMPSON, J. As the title of the act in question covers only those beverages which are "the product of maltose or genchese," I think that portion of the act which prohibits the sale of beverages "in which maltose or genchese is a substantial ingredient" is not included in the title, and is therefore invalid under section 45 of the Constitution.

The word "produce" is from "pro" (before) and "duco" (to lead), and means "to be the cause of." "Product" is "anything obtained as a result \* \* \* and anything produced." "The result obtained by multiplication, as, 24 is the product of 6 multiplied by four." *Standard Dictionary*, and *Webster's International*. "The word 'product' imports an article which is made of something, and which, when made, has characteristics which are apparent to the senses." *6 Words & Phrases*, p. 5655.

Ingredient, from in (in) and gradi (to walk): "That which enters into a compound, or is a component part of any combination

and mixture; an element; a constituent." Webster's International Dictionary.

Substantial means "belonging to substance; actually existing; real; \* \* \* not seeming or imaginary; not illusive; real; solid; true; veritable." Webster's International Dictionary.

I therefore concur in the granting of the rehearing, and in the reversal of the case.

Justices ANDERSON, MAYFIELD, and SAYRE concur in the granting of the rehearing and in the reversal of the case, for the reasons set out in their original dissenting opinion.

#### HAGOOD v. SMITH et al.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. CORPORATIONS (§ 320\*)—WRONGS AGAINST CORPORATION—ACTIONS—RIGHTS OF STOCKHOLDERS.

An action to redress wrongs committed against a corporation, or for money due it from its officers, must ordinarily be brought in the name of the corporation; and a stockholder cannot sue in his own name, unless he shows that he has done all in his power to obtain within the corporation itself redress, and, failing with the officers, that he has applied without avail to the stockholders as a body.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1427; Dec. Dig. § 320.\*]

##### 2. CORPORATIONS (§ 320\*)—WRONGS AGAINST CORPORATIONS—ACTION BY STOCKHOLDERS.

A stockholder, suing a corporation and an officer for an accounting for moneys received by the officer for the corporation, who shows that his wife and the officer's wife are sisters, and that they and some of their nephews and nieces are owners of the stock, does not show an excuse for not applying to the stockholders as a body to redress the wrong, justifying the denial of relief.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1427; Dec. Dig. § 320.\*]

Appeal from Chancery Court, Jefferson County; Alfred H. Benners, Chancellor.

Suit by Rufus H. Hagood against Thomas S. Smith and another. From a decree dismissing the bill, plaintiff appeals. Affirmed.

W. C. Ward, for appellant. Frank S. White & Sons, Tillman, Grubb, Bradley & Morrow, and M. M. Baldwin, for appellees.

DENSON, J. This was a bill filed by Rufus H. Hagood, as the owner of stock in a private corporation, against the corporation and Thomas S. Smith, who is alleged to be the secretary and treasurer of the corporation, to compel an accounting by Smith of certain moneys alleged to have been received by him from the sale of certain lands owned by the corporation, and which the corporation authorized him to sell. Upon the final submission of the cause on bill and answer, motion to dismiss the bill for the want of equity was made, and upon the proof the chancellor decreed that the complainant was

not entitled to relief, and dismissed the bill.

Ordinarily actions must be brought in the name of the corporation for the redress of wrongs committed against it, or for money due to it by its officers or by other persons; or, to put the proposition differently, before a stockholder can maintain a suit in his own name against the corporation of which he is a member and an officer of such corporation for money belonging to the corporation and which has been converted to the officer's use, he must show that he has done all in his power to obtain, within the corporation itself, redress of the wrongs complained of, that he has made an honest effort to get the governing body of the corporation to remedy the wrong, and, failing with them, that he then applied to the stockholders as a body to take action towards redressing the grievances complained of, without avail. *Montgomery, etc., Co. v. Lahey*, 121 Ala. 131, 25 South. 1006; *Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 37 South. 371; *Tillis v. Brown*, 154 Ala. 403, 45 South. 589, and cases there cited.

The bill explicitly avers an application by the complainant to the directory of the corporation, and a refusal by that board to act, and it may be conceded that the proof supports these allegations. The bill then undertakes to aver an excuse for not applying to the stockholders; but the court is of the opinion that the averments in this respect would be subject to the criticism (if it had been made) that they are merely a statement of the opinion of the pleader—even conceding that the matter referred to in the averments. If properly pleaded, could be made the predicate for an excuse for not applying to the stockholders. But the bill was not demurred to. *L. & N. R. R. v. Neal*, 128 Ala. 149, 29 South. 865. Nevertheless, proof, unless the excuse be admitted in the answer (which is not the case here), to make out a case entitling the complainant to relief, is as essential as the averment of excuse; and the extent of the proof in this respect, shown by the record, is that complainant's wife and respondent Smith's wife are sisters, and they and some of their nephews and nieces are owners of the stock of the corporation. We do not think that this can be said to sustain the averment that an application to the stockholders to bring the suit in the name of the corporation would have resulted in failure or have been in vain. At any rate, the chancellor was warranted in holding that it cannot, and his decree denying relief to the complainant should be affirmed.

Other reasons might be given in support of the decree, but the considerations adverted to are deemed sufficient.

Affirmed.

SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## TAYLOR v. TAYLOR et al.

(Supreme Court of Alabama. June 30, 1909.)

## 1. EXECUTORS AND ADMINISTRATORS (§ 454\*)—ACTIONS—EXECUTION—PROPERTY SUBJECT.

An execution against the personal representative of a decedent in his personal or representative capacity cannot run against the lands of the decedent's estate; such lands descending immediately to decedent's heirs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1915; Dec. Dig. § 454.\*]

## 2. PARTITION (§ 108\*)—PROCEEDINGS—COLLATERAL ATTACK.

Under Code 1896, § 3176, providing that no partition can be made when an adverse claim is asserted, that purchasers at an execution sale of a decedent's lands under a judgment against the administrator contested an application by heirs for partition of the lands did not destroy all jurisdiction theretofore acquired, or render all subsequent proceedings void, so that they could be collaterally attacked in ejectment by the contestants against the purchasers at partition sale.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 340; Dec. Dig. § 108.\*]

Appeal from Circuit Court, St. Clair County; A. H. Alston, Judge.

Ejectment by W. R. Taylor against Ruthy Taylor and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

The cause was tried on an agreed statement of facts as follows: That one William Taylor, deceased, was at the time of his death on the \_\_\_\_\_ day of \_\_\_\_\_ the owner of the following described lands, to wit: (Here follows a description of the land.) That on the \_\_\_\_\_ day of \_\_\_\_\_ Joseph Taylor, a son of the deceased, qualified in the probate court of St. Clair county, Ala., as the administrator of the estate of the said William Taylor, and that pending his said administration, and more than six months after he had so qualified, Ruthy Taylor, Martha Taylor, and Margaret Taylor instituted suit in the circuit court of St. Clair county against the said Joseph Taylor, as such administrator of said estate, for the recovery of the sum of \$500 alleged to be due them from the estate of said William Taylor, deceased, being a debt alleged to be due them from said deceased. That pending such suit said Joseph Taylor was removed from such administration of such estate, and one Buel Taylor was appointed and qualified as the administrator de bonis non of said estate, and that said suit was revived in the name of such administrator de bonis non, and on the 15th day of April, 1903, at a regular term of the circuit court of said county, said plaintiffs recovered judgment against the said Buel Taylor as such administrator de bonis non for the sum of \$500 and the cost of suit, which judgment it is agreed was a valid judgment in all respects. That subsequent to the rendition

of such judgment said Taylor resigned as such administrator de bonis non of such estate and made his final settlement of such administration; such judgment not having been paid or otherwise settled. That, prior to the resignation and prior settlement of said Buel Taylor, execution was duly issued out of such circuit court on said judgment against the said Buel Taylor as such administrator and placed in the hands of the sheriff of St. Clair county, Ala. That subsequent to the resignation of said Taylor as such administrator de bonis non the said lands hereinbefore described were levied on and sold by J. L. North, as such sheriff, for the satisfaction of such judgment so rendered against said Buel Taylor as said administrator in the said circuit court. That said levy and sale was in all things in conformity to the law with reference to sales of real estate under execution from the circuit court. That on the 27th day of March, 1905, the lands were sold under this execution at public outcry, and that the plaintiffs in the judgment bought at and for the sum of \$450 and received a sheriff's deed therefor, a copy of which is made an exhibit to this agreement. It is then agreed substantially that these execution purchasers resided on part of the land at the time they received their deed, and that they thereupon set up claim to all the land, although there was no visible change of possession, as they only actually occupied and cultivated a portion of said land. It is then agreed that on the 15th day of June, 1905, Sis Mize, A. J. Taylor, and others filed in the probate court of St. Clair county a petition for the sale and equitable partition and division of said land (the petition is made an exhibit); that said petitioners were heirs at law of said William Taylor, and that said Ruthy Taylor, Martha Taylor, and Margaret Taylor were named as joint owners, they being also heirs at law of said William Taylor; that these three last-named parties were cited to appear, and did appear in the probate court, and contested said application to sell, and filed their answers setting up claim to said land under such alleged execution sale. It is then agreed substantially that on the 14th day of May, 1906, the probate court made and entered a decree of sale and appointed a commissioner, who made the sale of the lands under the decree in conformity to law, and made his report, which report was confirmed, and deed ordered made to the purchaser; that the purchaser at said last sale was C. S. Taylor. It is agreed that the sale was in all respects regular and in accordance to law. It is then agreed that C. S. Taylor made deed to W. R. Taylor, the plaintiff in this suit, and that he went upon the lands with W. R. Taylor and put him into possession of the same. It is further agreed that at the time of sale

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

under execution the estate of William Taylor owned no personal property. It is further alleged that the money which the lands brought at the partition sale was paid into court, and by the court paid out to all the owners except the three defendants in this suit, and that their money is yet in the hands of the court unclaimed by them. It is further agreed that, if C. S. Taylor would be entitled to recover, then this plaintiff would be entitled to recover.

J. P. Montgomery, for appellant. M. M. Smith and James A. Embry, for appellees.

MAYFIELD, J. This was a statutory action of ejectment. Both parties claimed title through a common source, viz., William Taylor, deceased, who was also the father and common ancestor of all the parties. Plaintiff bases his claim and title on a commissioner's deed and a sale of the lands in the probate court of St. Clair county, under section 3178 et seq. of the Code of 1896, for division and distribution between the heirs of William Taylor, the joint owners of the lands. The defendants base their claim and title upon a sheriff's sale and deed under an execution against the personal representative of Wm. Taylor, the common ancestor, which antedated the sale in the probate court. The trial was had upon an agreed statement of facts, which the reporter will set out in substance at least. The trial court gave the general affirmative charge for the defendants, and refused a like charge to the plaintiff, and these two rulings are assigned as error.

Both assignments are good, and must be sustained. An execution against the personal representative of a deceased person in his personal or representative capacity cannot run against the lands of the decedent's estate. *Spigener v. Farquhar*, 82 Ala. 569, 3 South. 47; 3 *Mayfield's Digest*, p. 756. The lands of an intestate, at common law and under our statutes, descend immediately to his heirs. The administrator takes no estate or interest in them; hence a judgment against him in any capacity cannot bind the lands. It has always been the policy of the law to prevent lands of a decedent from being subject to legal process issuing against personal representatives. Lands of an intestate are liable to process issuing against the heirs, because they are the owners, but not to that issuing against the personal representative, because he is not the owner, and has no interest therein, except that which the statute gives him of intercepting the possession and retaining it, if necessary, to collect rents, or to sell to pay debts in such cases, and in such mode and proceedings, and such only, as the statute authorizes and directs, and the statutes have never authorized him or the creditors to sell it under an execution against the personal representative. If there be no ne-

cessity for renting, or for the sale of the lands for the purpose authorized by the statutes, the personal representative, of course, cannot intercept the possession for the purposes of thus administering the land. The administrator has no authority to charge the lands for any purpose, except as given him by statute; for at common law lands could not be sold for the debts of the decedent, and under our law they can be sold for such purposes only under the conditions and in the modes prescribed by the statute. Every step the personal representative takes as to the lands is antagonistic to the rights of the heirs or devisees. *Chandler v. Wynne*, 85 Ala. 309, 4 South. 653; *Lee v. Dowley*, 68 Ala. 98. It follows, therefore, that no title passed to the defendants, appellees here, by virtue of the sheriff's deed, based solely, as it was, upon a levy and sale under an execution against the administrator.

It is admitted as a part of the agreed statement of facts upon which the trial was had that the probate court acquired jurisdiction to sell the lands in question for division among the joint owners, the parties to this suit, if the petitioners were such joint owners, and if the jurisdiction was not defeated and destroyed by the assertion of an adverse claim or title to the lands by the defendants who claimed under the execution sale. It is unnecessary to decide whether or not the asserted adverse claim in the probate court was sufficient to prevent the sale or further proceeding in the probate court. Under section 3176, whatever might be the merit in the adverse claim, or whatever the probate court should have done in the premises when the claim was asserted, it was not sufficient to destroy all jurisdiction theretofore acquired, nor to render all subsequent proceedings therein absolutely void, or void in such manner that they could be assailed in a collateral attack like this. When the claim was first asserted in the probate court, it seems, that court ruled that it could proceed no further in the matter, and an appeal was taken by the petitioners to the circuit court, and that ruling of the probate court was reversed by the circuit court, after which the probate court proceeded to judgment and ordered the sale, which was made and confirmed by the court, and a deed was made by the commissioner to plaintiff, as purchaser, in accordance with the decree of the court. All parties interested in the land were properly served, and appeared as provided by law, and contested the proceedings in the probate court. No appeal was taken from the decree of the probate court ordering, or from that confirming, the sale. They stood, at the time suit was brought and at the time of trial, as apparently valid judgments or decrees of a court of competent jurisdiction; and the proceedings are certainly not void on their face, like the sheriff's levy and sale under the execution was. No

direct attack seems to have been made on the proceedings in the probate court, and they cannot be assailed in a collateral attack, like this action of ejectment. *Whitlow v. Echols*, 78 Ala. 206, and cases cited.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., concur.

PATTERSON v. GRAND LODGE K. P.  
(Supreme Court of Alabama. June 30, 1909.)

1. INSURANCE (§ 815\*) — LIFE INSURANCE — COMPLAINT—SUFFICIENCY.

A complaint in an action on a life policy, which alleges in one count that plaintiff claims of defendant a specified sum due on a policy whereby defendant on January 1, 1902, insured for one year the life of a third person, who died on April 10, 1905, of which defendant has had notice, and that the policy is the property of plaintiff, and which alleges in another count the same facts, except that the insurance is alleged to have been issued on January 1, 1905, for one year, is demurrable for not showing that the third person died within the term for which his life was insured, that the policy was in force at the time of his death, that it was payable to plaintiff, and that he had an insurable interest in the life of the third person.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1896; Dec. Dig. § 815.\*]

2. INSURANCE (§ 815\*) — LIFE INSURANCE — COMPLAINT—SUFFICIENCY.

A complaint in an action on a life policy, which alleges in one count that plaintiff claims of defendant a specified sum on a policy whereby defendant on September 10, 1902, insured for his natural life a third person, who died on April 10, 1905, of which defendant had notice, and that the policy is the property of plaintiff, and which alleges in another count that plaintiff claims of defendant a specified sum due on a policy whereby defendant on September 10, 1903, insured the life of a third person, and promised in case of his death during the third year of the policy to pay plaintiff a specified sum, and that the third person died on April 10, 1905, of which defendant has had notice, is in code form (Code 1907, p. 1196, form 12), and states a cause of action as against a demurrer.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 815.\*]

3. INSURANCE (§ 815\*)—MUTUAL BENEFIT INSURANCE—ACTIONS — COMPLAINT — SUFFICIENCY.

A complaint which alleges that plaintiff claims of defendant a specified sum; that defendant is a benevolent association issuing policies on the lives of its members; that on September 10, 1902, defendant issued a policy on the life of a third person, who was at that time a member, wherein it agreed to pay to the widow, heirs, or legal representatives of the third person a specified sum in case of his death during the third year of his membership or thereafter; that the third person died during the third year of such membership or thereafter, on April 10, 1905, of which defendant has had notice; that plaintiff is the son of the third person, who left surviving him no other children or widow; that he left no will; and that no administration has ever been granted on his estate—states a cause of action.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 815.\*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by Willie Patterson against the Grand Lodge of Knights of Pythias. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The complaint contained the following counts: (1) "Plaintiff claims of the defendant the sum of \$400, with interest thereon, due on a policy whereby the defendant on, to wit, the 1st day of January, 1902, insured for the term of, to wit, one year the life of Daniel Patterson, who died on, to wit, the 10th day of April, 1905, of which the defendant has had notice. Said policy is the property of the plaintiff." (2) Same as 1, except that the insurance is alleged to have been issued on the 1st day of January, 1905, for the term of one year. (3) "Plaintiff claims of defendant the further sum of, to wit, \$400, with interest thereon, on a policy of insurance whereby the defendant on, to wit, the 10th day of September, 1902, insured for the term of, to wit, his natural life, Daniel Patterson, who died on, to wit, the 10th day of April, 1905, of which the defendant has had notice. Said policy is the property of the plaintiff." (4) Same as 3. (5) "Plaintiff claims of the defendant \$350, with interest thereon, due on a policy whereby the defendant on, to wit, the 10th day of September, 1903, insured the life of Daniel Patterson, and agreed and promised, in case of the death of said Patterson during the third year of said policy, to pay plaintiff \$350; that said Daniel Patterson died on, to wit, the 10th day of April, 1905, of which defendant has had notice. Said policy is the property of the plaintiff." (6) "Plaintiff claims of the defendant \$350, with interest thereon, for that the defendant is a fraternal or benevolent association issuing policies of insurance upon the lives of its members; that on, to wit, the 10th day of September, 1902, the defendant issued a policy of insurance upon the life of one Daniel Patterson, who was at that time a member of such association, wherein it agreed to pay to the widow, heirs, or legal representatives of said Daniel Patterson the sum of \$350 in case of the death of said Daniel Patterson during the third year of his membership or thereafter; that said Daniel Patterson died during the third year of such membership or thereafter, on, to wit, the 10th day of April, 1905, of which defendant has had notice; that plaintiff is the son of said Daniel Patterson, and that Daniel Patterson left surviving him no other children, nor the descendants of deceased's children; that he left no will, and no administration has ever been granted on his estate; that he left no widow surviving him."

Demurrers were interposed to the suit as follows: Counts 1, 2, and 3 of the complaint: "(1) It does not show that the insured died within the term for which the life was in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sured. (2) It does not show that the policy sued on was in force at the time of the death of the insured. (3) It does not show that the policy was payable to the plaintiff. (4) It does not show that the plaintiff had an insurable interest in the life of the insured. (5) It does not show what relation the plaintiff bears to the insured. (6) It does not show how the policy is the property of the plaintiff." No other demurrers appear in the record.

Arrington & Houghton, for appellant.  
Fred S. Ball, for appellee.

ANDERSON, J. Counts 1 and 2 are bad, and were subject to the demurrers interposed thereto.

Counts 3, 4, 5, and 6 were not subject to the demurrers, which should have been overruled. Form 12, p. 1186, of the Code of 1907. Nor can we say that amended count 6, the one upon which the case was tried, covered the other counts, or that it affirmatively appears beyond dispute that the policy described in said sixth count was the only one ever issued to Daniel Patterson.

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### DUY v. HIGDON et al.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. CONTRACTS (§ 206\*)—RESCISSION—GROUNDS.

A party who has been fraudulently betrayed into making a contract may resume possession of his property on returning that which he himself has received.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1186; Dec. Dig. § 206.\*]

##### 2. CONTRACTS (§ 270\*)—RESCISSION—TIME.

One seeking to rescind a contract must be reasonably diligent in repudiating it, and must allege precisely the basis of the complaint, and prove it fully.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1189; Dec. Dig. § 270.\*]

##### 3. VENDOR AND PURCHASER (§ 44\*)—MISREPRESENTATION AND FRAUD BY VENDOR—SUFFICIENCY OF EVIDENCE.

In an action by a vendee to rescind purchases of land, evidence held insufficient to show false representations by the vendor or fraud by her agent in her behalf.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 76; Dec. Dig. § 44.\*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by G. B. Duy against Alice S. Higdon and another. Decree for defendants, and complainant appeals. Affirmed.

George W. Huddleston, for appellant. W. K. Terry, for appellees.

DENSON, J. The purpose of this bill is to rescind two purchases of land on account of alleged fraudulent misrepresentations. The first purchase, made March 31, 1904, was of a one-half interest, and the second, made the 20th of September following, was of the remaining half interest in the same property and of the entire interest in an additional tract. The bill was filed in June, 1905.

"The right to rescind or avoid a contract proceeds upon the ground that a party has been fraudulently betrayed into making it, and, having thus been induced to part with his own property, may resume possession of it on returning that which he himself has received, and thus placing the other party in the same position that he was in before the contract was made." This is the general law of rescission. Steele v. Kinkle, 3 Ala. 352; Beck v. Simmons, 7 Ala. 71; Parks v. Brooks, 16 Ala. 529; Jones v. Anderson, 82 Ala. 302, 2 South. 911; Snow v. Alley, 144 Mass. 546, 11 N. E. 764, 59 Am. St. Rep. 119. The principles controlling the action of the court in rescinding contracts, and those in specifically enforcing them, are in many respects the same. The party complaining must be reasonably diligent, prompt in the repudiation of the contract, and must allege precisely the basis of the complaint, and prove it with fullness, so that the court, in giving relief, may not assume the function of making the contract for parties. Pomeroy's Eq. §§ 889, 897; Bogan v. Daughdrill, 51 Ala. 312; Bell v. Lawrence, 51 Ala. 160; Bailey v. Litten, 52 Ala. 282; Johnson v. Rogers, 112 Ala. 576, 20 South. 929; N. B. & L. Ass'n v. Ballard, 126 Ala. 160, 27 South. 971.

In this case the complainant resided in Vicksburg, Miss., and the respondent in Birmingham, Ala., and they were associated together in a brokerage business in the latter city; the complainant being represented therein by his son-in-law, Dozler, and the respondent by her husband, Higdon. Respondent was the owner of a fruit and poultry farm of 200 acres, about 25 miles distant from Birmingham, on the railroad, known as "Fruitcliff Farm," and Dozler had visited it a number of times with Higdon, prior to the 31st of March, 1904, when through his instrumentality complainant became the purchaser of a half interest therein, and through Dozler as his agent went into joint possession. The farm was situated in a wild, uncleared country, and comprised five contiguous 40's, though the land was not in a compact body. The numbers are E. ½ of N. E. ¼ of section 1, on the west, the N. W. ¼ of the N. W. ¼ of the adjoining section, on the east, and an 80, cornering with this 40 in the northeast, thus forming an irregular tract, extending a mile east and west and three-fourths of a mile north and south. The clearing extended northeast and southwest, connectedly, in the three western 40's, and there

was a separate clearing in the eastern 40's, and all together about 45 acres were cleared. This clearing had small corners 3 or 4 acres in all—between the corners of abutting 40's not belonging to respondent; and some of the improvements, including a small dwelling, were located across the line on one of these outside 40's.

Respondent's husband suggested to Dozler to induce his father-in-law, the complainant, to buy a half interest in this farm, and he accordingly visited complainant, at Vicksburg, for that purpose. The bill alleges, in respect to the first purchase, that appellee was in possession of a body of land (without describing it) known as "Fruitcliff Farm," which had on it improvements of great value (specified or enumerated), and that she, through her husband, represented to the complainant that she was the owner of "the said lands" (without otherwise designating them), and of "the improvements situated thereon," and that the purchase was made under the inducement of this representation, which was false, in that a portion of the clearing, and of the land on which some of the valuable improvements were situated, did not belong to her. This transaction, which was consummated on March 31, 1904, by a deed conveying a half interest in respondent's five 40's, by government numbers, was brought about entirely by and through the two agents—Dozler, representing complainant, and Higdon, the respondent.

The proof on the part of the complainant, respecting these representations, is made entirely by Dozler. He testifies that he was on the place with Higdon several times prior to the purchase, and that on these occasions the latter stated to him that he "was the owner of the farm, that the title thereto was perfect, that the same comprised 200 acres, that the improvements thereon consisted of a five-room dwelling, several chicken houses, several stables, and a laborer's house, and that about 45 acres of the land was under cultivation, on which there were about 10,000 fruit trees, and that the land under cultivation was all a part of the farm, together with all the buildings." He further says, "These statements were made to me by E. L. Higdon during two or three conversations had about a month before March 31st," and that they were repeated and dilated on and explained at length. He says that none of the lines were pointed out to him, except in a general way; that he was in the dwelling, and that he was shown all the improvements. And finally he states: "At this time I had no idea of acquiring an interest in the land, nor of suggesting to Mr. Duy that he do so." The witness further testifies that he communicated the representations made by Higdon, at the latter's request, to complainant. It turned out that about 3 acres of the clearing, with some 40 fruit trees, were on corners of adjoining 40's not belonging to respondent, and that some of the improvements

—including the two-room dwelling—were across the line, on one of these outside 40's, which was subsequently bought by the defendant for \$40.

On the part of the respondent there is an absolute denial that any such representations were made to Dozler. Higdon testifies that, on the contrary, when he showed Dozler the farm, he told him that he owned the improvements, but that there was some doubt about the line's taking in about 2 acres of the land, including the dwelling. By the terms of the first purchase, the cash payment of \$2,500 was, in part or altogether, to be expended in improvements on the farm by Higdon, who remained in management on joint account until September; and it appears that \$1,200, at least, of this sum, was so expended, and in part in improvements across the line. As respondent did not own the adjoining lands, it would seem unreasonable to suppose (independently of the testimony) that there was any conscious false statement in reference to the lines, because respondent would not, in such case, have continued to improve lands known to belong to others.

During the occupancy between March and September, Higdon proposed to Dozler to separate the business connection by selling all the farm to complainant and taking over the brokerage business for his wife, or vice versa. This proposition being communicated to complainant, he went to Birmingham, took up the negotiations for himself, and made the second purchase. As to this second purchase, while the bill alleges that the same representations were made, concerning the property, that were made in connection with the first transaction, yet there is no proof of any of the statements charged to have been made by respondent or her husband as an inducement to the trade. The respondent merely offered to sell her remaining interest in the farm, together with 200 acres of other land; and the sale (as in the first instance) was concluded by a deed conveying the land by government numbers only. Each transaction embraced personal property, and the first the release of a debt of some \$1,200 against a third party.

We think it would be exceedingly difficult, if not impossible, to restore the status quo of the parties; but, on the whole evidence, we are compelled to agree with the chancellor that the complainant failed to prove his case. While it is evident that the purchases were made under a misapprehension as to the location of the lines of the land, it is impossible to trace any false representations to the respondent, or fraud to her agent in her behalf. She sold all her land by government numbers, and made no representations as an inducement to the sale.

Let the decree of the chancellor be affirmed. Affirmed.

SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

## JONES et al. v. SOUTHERN RY. CO.

(Supreme Court of Alabama. June 30, 1909.)

## EMINENT DOMAIN (§ 281\*)—RIGHTS ACQUIRED.

A railroad company, authorized by its charter to condemn land, entered on land under eminent domain proceedings against trustees to whom the legal title had been devised, to apply the proceeds to the support of the trustees and their families and on the death of all the trustees to divide the corpus, and believed that the proceedings were valid, and constructed and operated a railroad on the land. *Heid*, that the company, offering to pay such amount as should be decreed to be due for taking the land, was entitled to an injunction restraining the trustees from suing in ejectment.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 281.\*]

Appeal from Chancery Court, Hale County; Thomas H. Smith, Chancellor.

Suit by the Southern Railway Company against Madison Jones and another. From a decree overruling demurrers to the bill and refusing to dissolve an injunction, defendants appeal. Affirmed.

De Graffenried & Evins, for appellants. Pettus, Jeffries & Pettus, for appellee.

SIMPSON, J. This is an appeal from a decree overruling demurrers to the bill and refusing to dissolve an injunction. The appellants sued the appellee in ejectment to recover a parcel of land constituting the right of way of appellee. The appellee filed its bill to enjoin said action of ejectment, alleging that the ejectment suit is by Madison Jones and Napoleon B. Jones, as trustees under the last will and testament of William Jones, deceased; that the predecessor of complainant, "the Selma, Marion & Memphis Railroad Company," was incorporated under a special act of the Legislature (Acts 1868, p. 566); that under and by its charter it was authorized to condemn lands, etc.; that condemnation proceedings were allowed to be had before a justice of the peace; that the lands in question were held by said M. and N. B. Jones, with Wm. A. Jones (since deceased), as trustees as aforesaid; that by said will it is provided that said Wm. A. Jones and his wife should be allowed to occupy said lands as a residence during their lives, or the lives of either of them; that condemnation proceedings were had before a justice of the peace; that at that time said Wm. A. Jones had departed this life, and that said Madison Jones and Napoleon B. Jones, as surviving trustees, together with Margaret K. Jones (the widow of Wm. A.), and the children of said Wm. A. and Margaret K. Jones, who were minors, were made parties defendant to said proceedings; that the amount of condemnation money was paid to said defendants, the part due to said minors being paid to their said mother, who

was their legal guardian, appointed by the probate court; that said railroad was constructed on said lands, and large amounts have been expended thereon, and the same is now occupied by complainant for its railroad, which is now in operation; that said trustees claim that said condemnation proceedings are void, and that the long and uninterrupted adverse possession of the complainant and its predecessors is unavailing as a defense to said action of ejectment, for the reason that they could not sue until after the death of said Margaret K. Jones, which has occurred recently; that the amount of condemnation money paid is just and reasonable, but complainant submits itself to the jurisdiction of the court, and offers to pay such amount as shall be decreed by the court to be due.

A writ of injunction was issued, in accordance with the prayer of the bill, demurrers were interposed to the bill, and an answer was filed, which in terms denies the allegations in regard to the charter of the original railroad company and the condemnation proceedings, but goes on to allege that said company was chartered, that its charter did confer the right to condemn before a justice of the peace, but that provisions of the act are unconstitutional. It also denies in the allegation in regard to the original ownership of Wm. Jones, deceased, etc., but goes on to allege that said Wm. Jones did own the said lands at the time of his death on the 19th day of January, 1862, that he did leave a will providing substantially as alleged in the bill, and attach a copy of the will as an exhibit; and it alleges that, immediately upon the probating of said will; said trustees entered upon the performance of their trusteeship, that Wm. A. Jones took possession of the land in question, retained possession of it until his death, and his wife, Margaret K. Jones, occupied it until her death, about April 20, 1904, leaving surviving her Thomas K. Jones, Annie Jones (now married), Henry A. Jones, and Margaret Jones (now married). It acknowledges that the condemnation proceedings were had, and that said Margaret K. Jones and her said children, who were then minors, were made parties, with said trustees; but they state that the condemnation proceedings did not include all of the lands sued for, that the respondents do not know whether the money due to said minors was paid to their said mother, who was their guardian, but, if it was, it was without authority of law, that said trustees had no right to interfere with said lands until after the death of said Margaret K. Jones, and that said condemnation proceedings were void, that no compensation was paid to the respondents, that the road was constructed and has been operated as alleged, but that they had no right to maintain any action until the death of said Margaret K. Jones.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



The will, which is made an exhibit to the answer, conveys the lands to said trustees and their survivors in fee simple, providing that if either dies his portion goes to his children, etc. The codicil provides that the property devised to said trustees and the survivors of them shall be held in trust, that the proceeds shall be applied to the support of said trustees and their families, and the overplus to be invested, and on the death of all the corpus to be divided between their families; and it directs that his said son, Wm. A. Jones, "be permitted to use and occupy the land in question as a residence during his life, and his wife be permitted to occupy it during her life for herself and children."

This court, at an early day, in speaking of the case where a railroad company had entered upon lands as a trespasser, said: "Though the appellee was a trespasser, by reason of the neglect to pursue the proper remedy for acquiring the lands, acquiring them without the consent of the owner, there is, in the right continuing in him to pursue the remedy, rendering the possession rightful, and by which title may be acquired, a plain distinction between the appellee and a common trespasser. No remedy is given the trespasser by which he may acquire the use and enjoyment of, or title to, the lands. There is also another distinguishing fact: The structures of the appellee were dedicated, not to the use and enjoyment of the freehold, but to public uses," etc. *Jones v. N. O. & S. R. R.*, 70 Ala. 232. In that case it was held that, though the railroad company had entered as a trespasser, it could institute proceedings to condemn the land, which should be assessed as of its value when taken.

This court has also held that, where the owner in fee of lands subject to a vendor's lien conveyed a right of way thereon, upon a bill filed to enforce the vendor's lien, the complainant was not entitled to have the roadbed and right of way sold to satisfy his claim, but could only compel the railroad company to make just compensation for the lands conveyed to and appropriated by it, and that it would be inequitable to apply the rule that fixed improvements become a part of the realty, "when the right of eminent domain exists, and parties in good faith, under a purchase of land from the owner in fee, enter into possession and subject the property to the same uses to which it might have been subjected by ad quod damnum proceedings." *First Nat. Bank of Gadsden v. Thompson et al.*, 116 Ala. 166, 22 South. 668. Also that if the owner of land suffers another to purchase and spend money on it under an erroneous opinion or mistaken belief of title, without making known his own claim, he cannot afterwards assert, in equity, his right or title against such purchaser. *S. & N. R. R. Co. v. Ala. Grt. So. Ry. Co.*, 102

Ala. 236, 14 South. 747; *Cowan v. Southern Ry. Co.*, 118 Ala. 554, 23 South. 754; *Hendrix v. So. Ry. Co.*, 130 Ala. 205, 30 South. 596, 89 Am. St. Rep. 27.

In this case the railroad company did not enter as a trespasser, but entered under proceedings which were thought to be valid, to which proceedings the trustees to whom the legal title to the lands was conveyed were parties, and said trustees now bring the ejectment suit. It is unnecessary to decide whether the permissive use of the land as a residence by Wm. Jones and his wife created a life estate in them, or whether said trustees, holding the legal title, could not have instituted some proceedings to force a condemnation of the lands, or whether the proceedings had were valid or void. Under the principles adverted to, it would be inequitable to permit said trustees to recover in ejectment, and the serious damage which would result from a dissolution of the injunction, as compared with the mere delay to the other party, indicates that the injunction should not be dissolved. *Mobile & W. Ry. Co. v. Fowl River Co.*, 152 Ala. 320, 44 South. 471.

There was no error in overruling the demurrer to the bill, or in refusing to dissolve the injunction. The decree of the court is affirmed.

Affirmed.

DOWDELL, C. J., and DENSON and McCLELLAN, JJ., concur.

#### SMITH v. SHARP et al.

(Supreme Court of Alabama. June 30, 1909.)

#### 1. ASSUMPSIT, ACTION OF (§ 5\*) — WHEN MAINTAINABLE.

Indebitatus assumpsit, under the common counts, cannot be maintained on a sealed instrument.

[Ed. Note.—For other cases, see *Assumpsit, Action of*, Cent. Dig. § 15; Dec. Dig. § 5.\*]

#### 2. ASSUMPSIT, ACTION OF (§ 6\*) — UNSEALED INSTRUMENTS.

Even as to unsealed instruments, in order to maintain indebitatus assumpsit on the contract, plaintiff must have performed all of the stipulations of the contract on his part, leaving nothing for the other party to do but to pay the money.

[Ed. Note.—For other cases, see *Assumpsit, Action of*, Cent. Dig. § 27; Dec. Dig. § 6.\*]

#### 3. BROKERS (§ 82\*)—ACTION FOR COMMISSION —VARIANCE.

In an action for commissions on the sale of land, that in stating the legal effect of the contract of employment no mention was made of a provision therein that the commissions were to be paid out of the first purchase money did not constitute a substantial variance.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 82.\*]

#### 4. WORK AND LABOR (§ 14\*)—EXPRESS CONTRACT—MODIFICATION.

A modification of the requirements of a contract by mutual consent constitutes a waiver.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er of special stipulations thereby rendered impossible, and the party consenting to such modification is liable for reasonable compensation to the other party, whose work and labor has been accepted.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 31-33; Dec. Dig. § 14.\*]

**5. BROKERS (§§ 54, 56\*)—RIGHT TO COMMISSION.**

A broker employed to sell land is entitled to his compensation, if he brings to the seller a purchaser able, ready, and willing to purchase on the terms named, or if he brings the parties together and a sale is afterwards consummated by the seller himself.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81, 85-89; Dec. Dig. §§ 54, 56.\*]

**6. BROKERS (§ 57\*)—WAIVER OF TERMS OF CONTRACT—RIGHT TO COMMISSION.**

Where a broker introduces a prospective purchaser, and the seller undertakes to conduct the negotiations, and finally sells the property for less than the terms named in the contract of employment, he thereby waives his right to insist on the terms of the contract in that respect, and is liable at least for a reasonable commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.\*]

**7. BROKERS (§ 85\*)—ACTION FOR COMMISSION—EVIDENCE.**

In such case the original contract is admissible, in an action by the broker, as a basis for the ascertainment of reasonable compensation.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 106; Dec. Dig. § 85.\*]

**8. BROKERS (§ 46\*)—EXCLUSIVE EMPLOYMENT.**

The owner of real estate, by employing an agent to effect a sale thereof, does not thereby preclude himself from employing other agents to sell it, or from selling it himself, provided he acts in good faith.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 47; Dec. Dig. § 46.\*]

**9. BROKERS (§ 42\*)—FAILURE TO TAKE OUT LICENSE—EFFECT ON CONTRACT.**

That a broker employed to sell land had not taken out a broker's license did not invalidate his contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 43; Dec. Dig. § 42.\*]

Appeal from Circuit Court, Lauderdale County; E. P. Almon, Judge.

Action by John A. Smith against Andrew Sharp and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Mitchell & Hughston and Emmett O'Neal, for appellant. George P. Jones, for appellees.

**SIMPSON, J.** This action was brought by the appellant against the appellees to recover \$1,000 claimed to be due to the plaintiff as a broker for services rendered in and about a sale of certain property which belonged to the defendants. The defendants interposed a plea of the general issue, and also a special plea, to the effect that plaintiff had not taken out a license as a real estate broker. A demurrer to this second plea was interposed, and was overruled by the court. At the conclusion of the evidence the court,

on the written request of the defendants, gave the following charge, to wit: "The jury will return a verdict for the defendants."

The first count alleges that on 26th of March, 1906, defendants employed plaintiff, "on a reasonable commission, to make a sale or find a purchaser" for the land, giving him the exclusive right to sell for six months; that, before the expiration of six months, plaintiff introduced to defendants one Ashcraft as a prospective purchaser; that immediately thereupon defendants, at the instance and request of plaintiff, undertook the negotiation of said sale, and concluded the same within a short time at the price of \$13,000; that \$1,000 is a reasonable compensation, etc. A demurrer was sustained to the second count, and no insistence of error on this account is made in the brief of appellant. The third count alleges the contract, as in the first, except that the compensation was definitely agreed on, in case the land should be sold for as much as \$20 per acre, and alleges the introduction, and that the defendants "through such introduction" sold the land, and that \$1,000 is a reasonable compensation. Counts 4 and 5 are common counts for "work and labor" and on account.

The only evidence of employment shown by the bill of exceptions is a written contract, under seal, dated March 26, 1906, by which the exclusive right to sell the land is given to the plaintiff for six months, and it states: "We also agree that, if the said John Smith secures a purchaser for the above described farm at \$20 per acre, we will pay him \$1,000 for making the sale; his commissions to be paid out of the first purchase money." It is insisted by the appellee that the general charge was properly given in favor of the defendant, because of a variance between the allegata and probata. This principle is undoubtedly sustained by numerous authorities, and some of them hold specifically that an allegation of a verbal contract, or of one not under seal, cannot be sustained by proof of a sealed instrument. It is also stated that *indebitatus assumpsit*, under the common counts, cannot be maintained on a sealed instrument. *Nesbitt v. Ware & McClanahan*, 30 Ala. 69, 74; *Sommerville v. Stephenson & Johnson*, 3 Stew. 271, 276, 277; *Hatch v. Crawford*, Admx., 2 Port. 54; 4 Cyc. 323, 324. It is also true, even as to unsealed instruments, that, in order to maintain *indebitatus assumpsit* on the contract, the party suing must have performed all of the stipulations of the contract on his part, leaving nothing for the other party to do but to pay the money. *Darden v. James*, 48 Ala. 34; *Ezell v. King*, 93 Ala. 470, 473, 9 South. 534; *Maas & Swartz v. Montgomery I. Works*, 88 Ala. 323, 329, 6 South. 701; *Wilson v. Smith*, 111 Ala. 170-176, 20 South. 614; *Martin v. Massie*, 127 Ala. 504, 508, 509, 29 South. 31; 4 Cyc. 326-328.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But we do not understand that, in this case it is necessary to resort to the common counts, nor do we think there is any substantial variance between the allegations of the complaint and the evidence. The fact that, in stating the legal effect of the contract, no mention was made of the provision that the commissions were to be paid out of the first purchase money, does not constitute a substantial variance. *Finch v. Guardian Trust Co.*, 92 Mo. App. 263. The gravamen of the cause of action under the special counts is that the defendant had previously entered into an agreement with the plaintiff, stating in legal effect what that agreement was; that after the plaintiff had performed services under that contract, and had introduced to the defendants a prospective purchaser, the defendants (by an agreement between the plaintiff and themselves) undertook to carry on the further negotiations for the sale of the property, and did consummate a sale, and that thereby the defendant undertook and assumed to pay the plaintiff a reasonable compensation for his services. While the original contract may be introduced in evidence, and would furnish a basis for the ascertainment of reasonable compensation, yet the suit is essentially upon the new or modified contract, and not upon the sealed instrument. It will not be disputed that, if the defendants had effected a sale at \$20 per acre, they would have been liable for the \$1,000 agreed to be paid; for they were, by agreement, acting in place of the plaintiff in consummating the sale. It is also evidently true that if the plaintiff had continued the negotiations, and had finally, by the consent and acquiescence of the defendants, effected a sale for a less amount, he would be entitled to some compensation. If, then, the defendants, acting in place of the plaintiff in conducting the negotiations and at the same time representing themselves, concluded a sale for a less consideration, which was satisfactory to themselves, it is difficult to see how they could thus absolve themselves from all obligation to compensate the plaintiff for the services which he had rendered and of which they had availed themselves.

At an early day in Alabama, when the distinction between sealed and unsealed instruments was probably more marked than at this time, it was said: "Covenant can only be maintained upon a writing under seal. If a contract be unattested by seal, or is unwritten, the action by which redress can be had for nonperformance is debt or assumpsit, or either, according to the subject-matter. If new terms are introduced into a contract, other duties imposed, or another day provided for its consummation, it is clear that the original contract does not remain unimpaired, so that an action would then lie for a breach of its stipulations." The court went on to hold that the remedy was on the modified parol agreement. *McVoy v. Wheeler et al.*, 6 Port. 201, 205, 206. To the same effect are

the cases holding that, when a written building contract is subsequently modified by the parties, the contractor may recover on a quantum meruit. *Hutchison v. Cullum*, 23 Ala. 622. It is a general principle, frequently applied to builders' contracts and to others, that a modification of the requirements by mutual consent will be a waiver of special stipulations thereby rendered impossible, and that the party who consents to such modification is liable for reasonable compensation to the other party, whose work and labor has been accepted and availed of. *Cornish v. Suydam*, 99 Ala. 620, 622, 13 South. 118; 6 Cyc. 84; *Davis v. Badders & Britt*, 95 Ala. 348, 359, 11 South. 422.

Coming particularly to the rights of real estate brokers, it may be stated as a general proposition that a broker employed to sell land is entitled to his compensation if he brings to the seller a purchaser able, ready, and willing to purchase on the terms named, or if he brings them together and the sale is afterwards consummated by the seller himself. Again, if he introduces a prospective purchaser, and the seller undertakes to conduct the negotiations, and finally sells the property for less than the terms named in the contract, he thereby waives his right to insist on the terms of the contract in that respect, and is liable at least for a reasonable commission, and the contract may be introduced as a guide for the jury in arriving at what is reasonable compensation. *Jones v. Henry*, 15 Misc. Rep. 151, 36 N. Y. Supp. 483; *Plant v. Thompson*, 42 Kan. 664, 22 Pac. 726, 16 Am. St. Rep. 512; *Sylvester v. Johnson*, 110 Tenn. 392, 75 S. W. 923; *Stinde v. Blesch*, 42 Mo. App. 578; *Ratts v. Shepherd*, 37 Kan. 20, 14 Pac. 496; *Martin v. Silliman*, 53 N. Y. 615. It is true, also, as a general proposition, that if a person enters into a contract with an agent authorizing him to sell land, and the agent fails after a reasonable time to effect a sale, or according to some authorities at any time, the principal may sell his own land, or do so by another agent, unless he has bound himself not to do so. *Sibbald v. Bethlehem I. Co.*, 83 N. Y. 378, 88 Am. Rep. 441. In this case it is said: "If, after a broker has been allowed a reasonable time, \* \* \* the seller in good faith and fairly has terminated the agency," the agent is not entitled to commissions on a sale otherwise made, although the sale is made to one who has been introduced by the agent. 83 N. Y. 390, 88 Am. Rep. 451.

In the view all take of this case it is not necessary to determine whether the fact that the contract gives the exclusive right to the agent and fixes a definite time within which the sale shall be made modifies this principle, though it would seem that the time fixed by the parties in the contract would be persuasive to show what was a "reasonable time." The New York Court of Appeals has held that, when a person has given an agent the exclusive right to sell, the principal can-

not relieve himself from paying the commissions by selling the property. *Moses v. Bierling et al.*, 31 N. Y. 462. So held the Supreme Court of Iowa; but there were special provisions in the contract. *Metcalf v. Kent*, 104 Iowa, 487, 73 N. W. 1037. On the other hand, the same court has held that, where there were no special provisions negating the right of the principal to sell, he could sell to another person, not brought to him by the agent. *Ingold v. Symonds et al.*, 125 Iowa, 82, 99 N. W. 713, citing cases. Our own court has held that "the owner of real estate, by employing an agent to effect a sale thereof, does not thereby preclude himself from employing other agents to sell it, or from effecting a sale himself, provided that in making the sale himself he acts in good faith"; also that "the owner of real estate cannot avail himself of the services of an agent employed by him, who procured a purchaser, to effect the sale himself to such purchaser, and thereby deprive the agent of his commissions; nor can he, merely to save the commissions agreed to be paid to the agent, effect such sale at a small reduction of price," or by making immaterial changes; and in that case it was said that "fair dealing between the parties would demand of the owner that he disclose his intention to the agent before concluding the sale." The testimony is not set out in that case, but the judgment for the defendant was sustained. *Cook & Bro. v. Forst et al.*, 116 Ala. 393, 22 South. 540.

Much stress is laid in the cases on the facts whether the agent has had a reasonable time to effect the sale and failed, whether the contract has been terminated, and wheth-

er the principal acted in good faith. In a case where a sale was effected by the principal to the party with whom the agent had previously been negotiating, we said: "Under these authorities, and in view of the conflict in the testimony as to the nature of the contract between the parties, and as to whether there was a revocation of the authority to the plaintiffs to sell, there was no error in the refusal of the court to give the general charge in favor of the defendant. If, as claimed by the plaintiffs, they were interrupted in their negotiations for a sale of the property by the request of the defendant to hold the proposition for a few days, until he could ascertain whether he could borrow the money, and during said few days, without terminating the agency, defendant continued the negotiations along the same line, and concluded the sale even at a less purchase price, the brokers would be entitled to their commissions." *Hutto v. Stough & Harnsby* (Ala.) 47 South. 1031, 1034.

Under these authorities, we hold that the court erred in giving the general charge in favor of the defendants.

The fact that Smith had not taken out license as a broker did not invalidate his contract. *Sunflower Lumber Co. v. Turner Supply Co.* (Ala.) 48 South. 510. The evidence showed, at any rate, that he was not engaged in that business.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and DENSON and MAY-FIELD, JJ., concur.

(124 La.)

No. 17,808.

## Ex parte RYAN.

(Supreme Court of Louisiana. Aug. 27, 1909.)

## 1. HABEAS CORPUS (§ 44\*)—MANDAMUS (§ 60\*)—JURISDICTION—ORIGINAL JURISDICTION.

That the trial court improperly failed to bring the issues raised in habeas corpus proceedings to trial would not justify the Supreme Court in granting the writ under its original jurisdiction; a proper administration of justice requiring that the trial court be compelled by mandamus to perform its duties.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 60; Dec. Dig. § 44.\* Mandamus, Cent. Dig. § 70; Dec. Dig. § 60.\*]

## 2. MANDAMUS (§ 168\*)—PROCEEDINGS—EVIDENCE.

Upon application for mandamus and certiorari to compel a district court to proceed with habeas corpus proceedings, prior proceedings therein held not to show that respondent purposely delayed the trial, so as to prevent relator from obtaining relief.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 168.\*]

## 3. HABEAS CORPUS (§ 1\*)—CHARACTER OF REMEDY—HEARING.

While habeas corpus is a summary proceeding, and generally requires prompt action, it cannot be expected that it should obviate all delay incident to legal proceedings.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 1.\*]

## 4. CONSTITUTIONAL LAW (§ 327\*)—RIGHT TO JUSTICE—"WITHOUT DELAY."

The requirement of the administration of justice "without delay" means without unreasonable and unnecessary delay.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 962; Dec. Dig. § 327.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7506.]

## 5. CONSTITUTIONAL LAW (§ 327\*)—RIGHT TO JUSTICE—"DENIAL OF JUSTICE."

In the latter part of June plaintiff petitioned respondent for habeas corpus to secure possession of his child, and the writ issued, commanding the production of the child at 11 o'clock July 3d, together with the cause of her detention, and was served on defendant at 12 o'clock July 3d, and after hearing the case was continued until July 8th, when defendant answered and proceedings were adjourned until July 20th; the clerk of the court not then being present. At the last adjournment relator's attorney made a remark about applying to the Supreme Court for relief, which respondent understood as an abandonment of the proceeding before him, and did nothing further in the case. Held, that the delays shown did not amount to a denial of justice, or show that relator would not hear the case in future fairly and as promptly as possible.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 962; Dec. Dig. § 327.\*]

## 6. MANDAMUS (§ 178\*)—DISCONTINUANCE OF JUDICIAL PROCEEDINGS.

Where the trial judge discontinued the hearing of habeas corpus proceedings because of a misapprehension that relator's counsel intended to abandon them and apply to the Supreme Court for relief, but it appeared in mandamus that he was willing to continue the proceedings, they should be taken up where discontinued and prosecuted to completion.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 178.\*]

In the matter of the application of John F. Ryan for a writ of habeas corpus, or for certiorari and mandamus to compel respondent to hear an application for habeas corpus. Habeas corpus denied, and respondent directed to proceed with habeas corpus proceedings. See, also, 50 South. 161.

John C. Wickliffe, for relator. Respondent Judge, pro se.

## Statement of the Case.

NICHOLLS, J. In the petition of John F. Ryan applying for relief herein it is alleged:

"That he is the father and only surviving parent of Frances Elizabeth Ryan, a minor, aged 18 years. That he is her natural tutor, and as such entitled to her care, custody, and control. That her mother is dead. That one Edward Peter, residing at Chalmette, in the parish of St. Bernard, has said minor girl, Frances Elizabeth Ryan, in his custody and control, and is detaining her from your petitioner without right, cause, or warrant of law. That he has demanded the surrender to him by the said Peter of his said daughter, and that said Peter refused to surrender her, but persists in keeping her confined, as set out above.

"Petitioner further shows that, on the 16th day of June, 1909, petitioner presented to Hon. R. Emmett Hingle, judge of the Twenty-Ninth judicial district of the state of Louisiana, in which district is situated the parish of St. Bernard, a petition for a writ of habeas corpus in due form of law, praying that said judge issue a writ of habeas corpus to the said Edward Peter, directing and commanding him to produce said Frances Elizabeth Ryan before said judge at a time and place to be fixed by said judge, together with the reason and cause of her detention by him before the said judge at the stock landing in St. Bernard parish on the 3d day of July, 1909, and there make answer to said writ as the law directs. That he caused said writ to be served upon the said Edward Peter by the sheriff of the parish of St. Bernard. That upon said 3d day of July, 1909, he repaired to the stock landing in the parish of St. Bernard with his witnesses and counsel to prosecute said writ. That said Edward Peter was there with the said minor child, Frances Elizabeth Ryan. That the Hon. R. Emmett Hingle, judge aforesaid, together with the clerk of his said court, was there. That said R. Emmett Hingle, judge as aforesaid, then declared that he would not compel the respondent, Edward Peter, to answer said writ on so short notice, the sheriff of the parish of St. Bernard having failed to serve said writ until the morning of said July 3d, and thereupon continued said hearing until the 10th day of July, 1909, at the same place.

"That upon said 10th day of July, 1909, he, accompanied by his counsel and his witnesses, repaired to said stock landing, prepared to prosecute said writ. That the defendant, Edward Peter, again appeared, bringing with him said minor child, and through his counsel presented to the said judge a pretended response to said writ, in which he set up that he had detained said child from petitioner, for the reason that petitioner was not a proper person to have charge of said child. That petitioner, through his counsel, objected to said return. That petitioner was a citizen and resident of the parish of Orleans. That the domicile of the said child was the parish of Orleans, and that the court of said domicile, to wit, either the civil district court for the parish of Orleans or the juvenile court for said parish of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Orleans, were the only courts which had and possessed jurisdiction to pronounce upon the fitness of petitioner to have the custody and control of his daughter, and moved the court to strike from the response in the writ as much thereof as set up said charge. That said Hon. R. Emmett Hingle, judge as aforesaid, did not pass upon said motion and objection. That the defendant, Edward Peter, then through his counsel moved the court to continue said hearing of said writ to some future day, to enable said Peter to procure the attendance of a witness whose name he alleged was unknown to him, but who, he thought, he could find in the city of New Orleans, to which city he (said witness) was expected to return at some future day, by whom he would prove that petitioner was an unfit person to have the control of his said daughter. That thereupon the said Hon. R. Emmett Hingle, judge as aforesaid, declared that he could not hear and decide said application for the writ of habeas corpus, and said writ, for the reason that the clerk of his court was not present, and he had no one to keep and record the minutes of his court, and then, over the protest and objection of petitioner, made through his counsel, ordered the hearing to be further continued until the 20th day of July, 1900, at the said stock landing, at the hour of 10 o'clock. That he, with his counsel and witnesses, repaired to the said stock landing, to the building in which the said judge usually held the sessions of his said court at that place, at the hour of half past 9 o'clock in the morning of said 20th day of July, 1900, and that said Edward Peter also attended there with the said child and a witness. That petitioner remained at said place until half past 12 o'clock p. m. of said date, awaiting the arrival of said judge; but that said judge did not attend said place of trial as fixed by him. That petitioner made and caused to be made diligent search in and about the said stock landing, at all the public places thereof, for the said judge; but that he could not be found, and that thereupon petitioner, with his counsel and witnesses, left said place and returned to New Orleans, and the said Edward Peter took petitioner's child off with him. That the above acts amount to a denial of justice to him, and are a disregard of the writ of habeas corpus and a nullification of this most sacred, solemn, and peremptory writ known in the jurisprudence of Louisiana, and of all other Anglo-Saxon states and countries, is a virtual suspension of the said writ in the parish of St. Bernard, and that he verily believes, and so charges, that he will not be able to have said writ tried and his said daughter restored to him unless by the intervention of this honorable court. That he has given due notice of this application to the said Hon. R. Emmett Hingle, judge aforesaid, and to the counsel of the said Edward Peter, as the law and the rules of this honorable court require, by filing with the clerk of said Twenty-Ninth judicial district court, at his office at St. Bernard, in the parish of St. Bernard, notices addressed to said judge and said counsel to the said effect.

"In view of the foregoing facts, and from the fact that is clearly deducible therefrom that he cannot procure a hearing and trial on said writ of habeas corpus in the court of the parish of St. Bernard in the speedy and summary manner in which the laws and Constitution of the state of Louisiana guarantee to him, that there issue out of this court a writ of habeas corpus to the said Edward Peter, directing and commanding him to produce before this court, or some justice thereof, at a time and place to be fixed in said order, the body of the said Frances Elizabeth Ryan, together with the cause and reason of her detention; that after due hearing said writ of habeas corpus be made absolute; and that said Edward Peter be ordered and commanded to release the said Frances Elizabeth Ryan from his custody and con-

trol, and to surrender her to petitioner, her father. In the alternative, and in the event that the foregoing prayer be refused and denied, petitioner prays that there issue from this court a writ of certiorari and mandamus to the said Hon. R. Emmett Hingle, judge of the Twenty-Ninth judicial district of Louisiana, sitting in and for the parish of St. Bernard, directing and commanding him to send up to this court for inspection and review the proceedings in said court, entitled 'In re John F. Ryan, Praying for a Writ of Habeas Corpus,' referred to above, with the record therein, and copies of all the orders entered therein by the said court, or the said judge in chambers, and all matters and things pertaining thereto, and that the said Hon. R. Emmett Hingle, judge aforesaid, be ordered to show cause why he should not be directed to try and determine this cause."

This petition is sworn to by the petitioner.

On reading this petition the Chief Justice of this court ordered and directed Hon. R. Emmett Hingle to show cause why the application of John F. Ryan, relator, for a writ of habeas corpus, should not be tried and determined by him.

R. Emmett Hingle, judge of the Twenty-Ninth judicial district court for the parish of St. Bernard, upon his judicial oath, for answer to the demand of relator for writs of mandamus and certiorari, averred that the application of relator for a writ of habeas corpus reached respondent by mail on June 17th, accompanied by a letter from relator's attorney requesting that the matter be heard at respondent's convenience during the week within which petition was filed; that relator's attorney made the further request or suggestion that the matter be heard at the stock landing, which is at the extreme upper end of St. Bernard parish, about 12 miles from the courthouse, where the clerk of court resides, and, in the event that respondent was unable to try said cause during said week, that the matter be fixed for hearing at some later date, at respondent's discretion, since he (relator's attorney) had to go to Houma, La., in the interest of the Oyster Commission of Louisiana, all of which led respondent to believe that this matter was not of the urgent nature now presented by relator. Respondent avers that it was impossible for him to try the said cause during the week beginning June 17th, both because he was then engaged in the work of a special jury term in Plaquemines parish, and because there would not have been sufficient time (allowing for transmission of petition, etc., through the mails), in respondent's opinion, for service upon defendant. He, therefore, did not sign the order until the completion of his work in the parish of Plaquemines, and until he could see the relator's attorney, for the purpose of his insuring the attendance of the clerk of court at the stock landing, by paying the said clerk's expenses—a rule at times customary in the said parish of St. Bernard, on the trial of causes in which the parties and witnesses are residents of the upper end of the parish, or of the city of New Orleans; the court in such

cases leaving the matter of the attendance of the clerk to the attorney or attorneys interested, and not assuming any responsibility for his attendance or nonattendance. Respondent avers that after finally reaching relator's attorney, though having endeavored several times to phone him at his office, from respondent's house at Pointe a la Hache, La., he signed the order for the return for 11 o'clock a. m. July 3, 1909, at stock landing, parish of St. Bernard. Respondent avers that he went up to the stock landing on said July 3, 1909, to consider said cause, but was informed upon his arrival that no service of plaintiff's petition had been made upon defendant, Edward Peter, because of the fact that no deposit to cover the sheriff's costs, as required by law, had been made by relator until the morning of July 3, 1909, and that a deputy sheriff had been sent to make the service, but had not returned at the hour fixed for the consideration of the cause. Respondent specially denied that Edward Peter, the defendant, who lives three miles below the stock landing, or the child in controversy, was present in court up to the time of respondent's departure, about 12:30 p. m. Respondent further alleged that he did then cause an order in open court to be entered on the minutes, fixing the matter for Saturday, July 10, 1909, to which both relator and his attorney yielded seeming assent, since no request was made for a speedier hearing, though respondent could not have fixed the matter for an earlier date, since the week following July 3, 1909, was the week designated by the rules of his court for the session thereof in the parish of Plaquemines. Respondent further avers that he returned to stock landing on July 10, 1909, and was informed that the clerk of court was absent because of illness. Whereupon defendant, Edward Peter, through his attorney, objected to any consideration of the cause without a clerk, who was a necessary officer at the sitting of the court, and on the further ground of absence of a material witness for the state. Respondent considered the former objection well taken, and upon expressing his intention to write out an order fixing the cause for July 20th, at the courthouse, relator's attorney arose, and not altogether respectfully exclaimed:

"I withdraw my application for a writ of habeas corpus in this matter and will go to the Supreme Court."

Respondent avers that he intended fixing the cause for the 20th of July, at the courthouse, because it was the next regular day of his term in said parish of St. Bernard, but that he did not appear at said courthouse on said date because relator's counsel was taken seriously by respondent, when he, relator's attorney, said he withdrew his application, and that your respondent had not, therefore, written any order or otherwise legally fixed

the trial of said cause. Respondent further alleges that he stands ready to perform his duty in this matter, having, in his opinion, shown an inclination so to do by actual attendance at court on two different occasions, and that the application of relator is, therefore, without reason or foundation, and should be hence dismissed, at his costs. Respondent annexes a duly certified copy of this suit in obedience to the writ of certiorari, as well as the affidavit of the Hon. N. H. Nunez, district attorney for the Twenty-Ninth judicial district.

The affidavit of N. H. Nunez, referred to, is to the effect that he was present at the stock landing in the parish of St. Bernard on July 3d and July 10th, when the case of John F. Ryan, praying for a writ of habeas corpus, was called, and the case went over from the 3d to the 10th of July, 1909, for the reason that no return of service had at that time been made, the deposit, as required by law, having been made on July 3d, on which day the service was made; that on the 10th of July, 1909, the judge ruled that he could not try the case, the clerk not being present, and continued the case to the 20th of July, 1909, when Mr. Wickliffe, representing the plaintiff, informed the judge that he withdrew the case and would apply to the Supreme Court; that the exact words of Mr. Wickliffe at the time, to the best of his recollection, were as follows:

"No; no; no. I withdraw my application. I will go to the Supreme Court."

The relator, John F. Ryan, alleging that he had obtained leave of the court so to do, filed a traverse of the return of the judge of the district court. He specially denied that either he or his attorney ever, formally or informally, or in any manner, withdrew or offered to withdraw his application for the writ of habeas corpus made by him to the Hon. R. Emmett Hingle, judge of the Twenty-Ninth judicial district of the state of Louisiana. He shows that on the 10th day of July, 1909, after the said judge had, without cause or reason, in the opinion of relator's counsel, continued the hearing of said writ for more than 10 days, and after the said judge had adjourned whatever of a session of his court he had been holding, as relator's counsel was leaving the room, where the said judge had been sitting, he, relator's counsel, said to the said judge, who was following immediately behind said counsel:

"If we cannot get this writ tried, we might as well withdraw the application; but we will go to the Supreme Court, and see if we cannot get a hearing."

But no withdrawal of said application for a writ was made by his counsel with any authority from relator.

He specifically traversed the allegation in the response of the said judge to the effect that the defendant in said writ, Edward Peter, was not at the stock landing, the place

where said writ was made returnable, with his said child, on July 3, 1909, the day where said writ was first made returnable. Relator alleges that he knows both his own child and the said Peter, who was a brother of relator's deceased wife, and that he saw them both within a hundred feet of the room where the said judge was holding whatever of a session of his said court that he held that day, and before said judge left said stock landing, and that on that occasion he attempted to speak to his said child, and was prevented from so doing by those who had her in charge.

Relator specially traverses that portion of the said response wherein the said judge alleges that he continued the trial of said writ on Saturday, July 17, 1909; but he alleges and charges that at first said judge did fix said date at the time to which he would continue said trial, and then changed it to Tuesday, July 20, 1909. And relator further showed that said fact was so well known to all parties that on said Tuesday, July 20, 1909, not only relator and his counsel and witnesses, but the respondent, together with relator's child and respondent's counsel and alleged witness, were all at the said stock landing on said last-named date to go on with the hearing of said writ. Relator hereto attached his affidavit and that of his counsel in this traverse, and asks that same be made and considered a part hereof. The affidavit referred to of relator's counsel was to the effect that all the allegations of the traverse are true and correct, that he never withdrew or attempted to withdraw the application filed by said Ryan for a writ of habeas corpus for his child; that after the said Hon. R. Emmett Hingle, judge as aforesaid, had refused to hear the application for a writ of habeas corpus and try and determine the same on July 10, 1909, and had closed whatever session of his court he may have been holding, at a time when affiant was leaving the room where the said judge had been sitting, followed by said judge, both wearing their hats and walking towards the door of the room, affiant, in a temper at the manner in which the case was being treated, said to the said judge:

"If we cannot get the writ of habeas corpus tried, we might as well abandon (or withdraw—which word affiant used he cannot now say) the application; but we will apply to the Supreme Court, and see if we cannot get redress in this matter"

—meaning thereby that he would invoke the supervisory power of the Supreme Court to procure a hearing of this matter. Affiant further declares that after hearing arguments from counsel in a cause, whose title he does not remember, the said judge announced that, as the clerk of his court was not present, he could hold no session of his court and hear the writ of habeas corpus, alleging that there was no one to keep the minutes or take down the testimony; that he

had simply heard the arguments of the counsel who had just closed in chambers as a courtesy to them. Affiant further declares that the said Hon. R. Emmett Hingle is learned in the law, and knows that the Twenty-Ninth judicial district court is a court of record, and that all proceedings had and taken in matters of litigation therein must be done and had in writing; that said judge had not declared that he had not held any session of his said court, and could not hold one on account of the absence of the clerk thereof, and, therefore, no motion, either written or verbal, even if a verbal motion could suffice in a court of record, could be filed to dismiss said proceeding. Affiant further declared that the application for said writ was never withdrawn, either by himself or his client, or by any one for him.

A copy of the proceedings sent up shows that the relator in the latter part of June, 1909, petitioned the judge of the Twenty-Ninth judicial district court to issue a writ of habeas corpus directing and commanding Edward Peter to produce the body of relator's daughter, Frances Elizabeth Ryan, at such time and place as the court might fix and select, together with the cause and reason for her detention, to the end that the holding and detention of said child might be inquired into, and praying that upon the hearing of the writ he have judgment against Edward Peter, ordering and commanding him to release said child and surrender her to petitioner; that upon reading said application said judge ordered a writ of habeas corpus to issue, commanding said Edward Peter to produce the body of said child at the stock landing at 11 o'clock July 3, 1909, together with the cause of her detention by him. A writ issued and was served on the defendant at 12 o'clock July 3, 1909. Copy of the minutes show that on that day the writ came on for trial; J. C. Wickliffe, attorney for plaintiff, and F. J. Nunez and Fred Ahrens, attorneys for defendant. After hearing counsel for plaintiff and defendant, it was ordered by the court the hearing of the writ be continued to Thursday, July 10, 1909, at 10 o'clock a. m. The record shows nothing on July 8th or July 10th of any action taken on the call, other than on July 8th the defendant in the writ filed an answer in the case. Nothing appears to have been done with reference to this answer.

On the 8th of July, 1909, the defendant answered the writ of habeas corpus served upon him, declaring that he produced before the court the child named in the writ. He denied that the said child was illegally detained by him, and averred that he was by law entitled to the care and custody of said child for the following reasons, to wit: That, although relator is the father of the child, he was not the proper party to have possession of the said child, for this, to wit: That relator had been and was now living as man and wife with a certain person by the name of —,



who was not his lawful, wedded wife, and that the said woman was herself a married woman, not divorced from her said husband, but whose said husband was then seeking a divorce; that the relator lived with this said woman prior to his marriage with his late deceased wife, the mother of the child now at issue; that of this unlawful living together of this man, the relator herein, and of this woman, there was born a child; that the relator herein had often tried to make this lawful child, produced here, recognize as her brother this illegitimate child of this unlawful living together of these said persons; that, if the possession of this child is given to the relator, he would take her to his home, at which home there lives this woman as his wife, although not married to him and having a living husband, who is not separated from her; that she will be compelled to recognize as her brother this illegitimate boy; that the house of the relator was not the proper place to take a young girl 14 years old; that for seven months relator failed to recognize the child at issue as his child; that during this time he ignored her and failed to support her; that he never inquired as to her health or welfare—in fact, he had abandoned her; that this unnatural father only began to support his said child when he was compelled by an order of court from the parish of Orleans, and only after he had been forced to serve 3 weeks in the parish jail in the city of New Orleans; that, considering all the facts herein given, he (respondent) did not think that the place relator desired to take this girl to was the proper place to raise the said girl. Respondent shows that he was the uncle of the said girl; that he maintained her at his home with the rest of his family, and that he desired to continue to retain her and raise her up; that the surroundings where she now lived are the best that she could obtain anywhere; that she was now with him by her own free will and consent; and that it was best for the said child physically, as well as for her moral welfare, that she should remain with respondent.

#### Opinion.

The first prayer of relator for relief under his allegations and in his argument is that this court, or some justice thereof, issue a writ of habeas corpus, directed to Edward Peter, commanding him to produce before it the body of Francis Elizabeth Ryan, and to assign the reason of her detention, and that after due hearing the writ of habeas corpus be made absolute, and said Edward Peter be ordered and commanded to release her from his custody and control, and to surrender her to relator, her father.

If it were conceded that the judge of the Twenty-Ninth judicial district court, after having been applied to, to issue a writ of habeas corpus directed to the respondent Peter, had done so, and had subsequently, by reason of improper and illegal means, failed

to bring the issues raised in the writ to trial, as alleged by the relator, that condition of things would not have warranted or justified this court in granting the relief so herein prayed for, and in assuming original jurisdiction in this matter and issuing its own writ of habeas corpus in the premises, ignoring and passing by, without comment, the culpable action of the district judge.

A proper administration of justice would require that the district judge be compelled, by mandamus, to perform his duties. This seems to have been the view taken, and properly taken, by the Chief Justice, in his order upon the present application.

The only issue before us on this rule is whether the judge of the Twenty-Ninth judicial district court should be commanded by mandamus to try and determine a writ of habeas corpus which was issued by the Twenty-Ninth judicial district court in and for the parish of St. Bernard, on the application of John F. Ryan, in the matter entitled "In re John F. Ryan, Praying for a Writ of Habeas Corpus for Frances Elizabeth Ryan," No. 748 on the docket of said court.

I have examined the proceedings in the matter referred to. It contains nothing that leads me to suppose that the delay which has arisen in this case should be attributed to a desire or intention on the part of the district judge to purposely procrastinate and delay the trial of the writ of habeas corpus which he had caused to be issued, so as to thwart the relator in his endeavor to have the child surrendered to him.

The writ of habeas corpus is summary in character, calling in most cases for prompt action; but, however summary in character a remedy is designed to be, it is not expected that that fact should do away with all drawbacks standing in the way of immediate action in legal proceedings. It is true the law requires justice to be administered without delay, but that means without unreasonable and unnecessary delay. We have heretofore had occasion to refer to this matter. See *State ex rel. Baumann v. Sheriff*, 44 La. Ann. 1014, 11 South. 541.

There have been delays in this case, but none which, in my opinion, have worked in the past "a denial of justice" as charged, and none giving rise to a presumption that the district judge proposed to deal in the future, with respect to the relief demanded through him, otherwise than fairly, impartially, and with such promptness as he could, in view of the business of his court and the claims of other parties. I do not find that the district judge has "refused to perform" any judicial duty demanded of him. If the writ of habeas corpus does not stand presently fixed for trial, fixed for a day certain, it has been because of the belief on the part of the judge that relator had stated that he withdrew the application made to him for the writ and would have recourse to the Supreme Court for relief. Had the dis-

strict judge not so believed, we have reason to think he would have continued the writ for trial at the courthouse in the parish of St. Bernard at a future day, which he proposed to designate. He announces his entire willingness to do so now. A suspension of the proceedings in this case has resulted from misapprehension. This should be corrected, and the proceedings taken up where the interruption took place, and carried forward to completion.

For the reasons assigned, R. Emmett Hingle, judge of the Twenty-Ninth judicial court, is hereby directed and ordered to take up the proceedings entitled "In re John F. Ryan, Praying for a Writ of Habeas Corpus for Frances Elizabeth Ryan," No. 748 on the docket of the Twenty-Ninth judicial district court of the parish of St. Bernard, at the point where the proceedings therein were suspended, and to carry them forward to final decision by himself; and to that end he is hereby ordered to issue all orders necessary in the premises and have all legal notices and process served upon the parties in interest.

It is further ordered that the hearing of said writ of habeas corpus take place at the courthouse of St. Bernard.

(124 La.)

No. 17,748.

#### STATE v. HOLTGREVE.

In re HOLTGREVE.

(Supreme Court of Louisiana. July 20, 1909.)

John J. Holtgreve was convicted of crime, and applies for writs of certiorari and prohibition. Application dismissed.

Walter Lomann and John H. Pugh, for relator. Respondent Judge, pro se.

**PROVOSTY, J.** The objections upon which the present application is based are purely of a technical nature, such as might be considered on appeal, were an appeal allowed by the Constitution in a case of this kind. No arbitrary action of the trial judge, or any substantial denial of justice, such as might move into action the extraordinary powers of this court, appears from the record. Were the court to consider and pass on the several technical objections made to the bill of information in this case, it would mean that every case not appealable could be brought to this court by writ of review. Such never was the intentment of the Constitution. Had the Constitution intended that technical objections of this kind should be reviewed by this court, it would have granted an appeal in every case.

The rule nisi herein is now therefore recalled, and the application of the relator is dismissed, at his cost.

#### SOUTHERN RY. CO. v. SMITH.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. RAILROADS (§ 394\*)—INJURIES TO PERSON ON TRACK—COMPLAINT—SUFFICIENCY.

A complaint in an action for the death of a child six years old struck by a train, which alleges that the child was on the track, and that the trainmen discovered him in time to avoid injuring him by the exercise of due care, but

negligently permitted the train to kill him, is sufficient, without alleging that the trainmen discovered that he could not or would not extricate himself from his peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1335; Dec. Dig. § 304.\*]

##### 2. RAILROADS (§ 378\*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE—PRESUMPTIONS.

The presumption that one on a railroad track will move off on seeing a train approaching does not apply to a child only six years old.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1280; Dec. Dig. § 378.\*]

##### 3. RAILROADS (§ 369\*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE.

The rule that trainmen need not keep a lookout for a trespasser on the track applies to children and adults.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1262; Dec. Dig. § 369.\*]

##### 4. RAILROADS (§ 367\*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE.

Where a railroad runs through a thickly populated locality, where persons are in the habit of crossing in such numbers and with such frequency that the trainmen have reason to believe that there are persons in exposed positions on the track, the trainmen must keep a lookout to avoid injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1258; Dec. Dig. § 367.\*]

##### 5. RAILROADS (§ 394\*)—INJURIES TO PERSON ON TRACK—COMPLAINT.

The complaint in an action for injuries to an infant or adult struck by a train must show that the person injured was not a trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1332; Dec. Dig. § 394.\*]

##### 6. NEGLIGENCE (§ 2\*)—"ACTIONABLE NEGLIGENCE."

"Actionable negligence" is a failure to discharge a legal duty to the person injured; and, where there is no duty, there is no negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4; Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 148-149; vol. 8, p. 7563.]

##### 7. RAILROADS (§ 394\*)—INJURIES TO PERSON ON TRACK—COMPLAINT—SUFFICIENCY.

A complaint in an action for the death of a child struck by a train, which alleges that the child was on the track at a place at which numerous persons at frequent intervals were passing, that the trainmen discovered his peril in time to avoid injuring him by due care, and that they negligently failed to keep a lookout, etc., is demurrable for failing to allege facts showing that the child was not a trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1332; Dec. Dig. § 394.\*]

##### 8. TRIAL (§§ 240, 252\*)—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

An instruction, in an action for the death of a child struck by a train, that in determining whether the engineer was negligent the jury must consider, not only his duty with reference to persons on the track, but also his duty to the passengers and as carrying the United States mail on schedule time, was properly refused as argumentative and abstract, in the absence of evidence that his duties to passengers and the United States mail conflicted with his duty to persons on the track.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 561, 596-612; Dec. Dig. §§ 240, 252.\*]

##### 9. TRIAL (§ 240\*)—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

An instruction, in an action for the death of a child struck by a train, that the engineer did not discover the child until he became aware

that the object he saw on the track was a human being was properly refused because argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.\*]

**10. TRIAL (§ 240\*)—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.**

An instruction, in an action for the death of a child struck by a train, that the fact that persons were accustomed to walk on the track at the place where the child was killed, if known to the trainmen, did not charge them with notice that any one would likely lie down on the track, nor charge them with notice that a child unable to take care of himself would be allowed to go unattended on the track, and that the failure of the engineer to blow the whistle or ring the bell when he saw the child on the track was not negligence, etc., was properly refused because argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.\*]

**11. RAILROADS (§ 396\*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE—BURDEN OF PROOF.**

One suing for the death of a child struck by a train has the burden of proving the failure of the trainmen to exercise due care after the discovery of the peril of the child.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1342; Dec. Dig. § 396.\*]

**12. STATUTES (§ 147\*)—CONSTRUCTION—REVISION OF STATUTES.**

The language of a statute as revised, or the legislative intent to change the former statute, must be clear before the court can adjudge that there is a change of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 216; Dec. Dig. § 147.\*]

**13. RAILROADS (§ 396\*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE—BURDEN OF PROOF.**

Code 1907, § 5478, providing that a railroad must show a compliance with the sections relating to the giving of signals on approaching public crossings, etc., places on a railroad the burden of showing compliance with the statutory requirements when an injury occurs to persons at any one of the places mentioned in the statute; and, where the injury occurred at any other place, it is not necessary to show such compliance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1342; Dec. Dig. § 396.\*]

**14. RAILROADS (§ 359\*)—TRESPASSERS—WHO ARE.**

A child lying down on a railroad track between the rails, with his foot over a rail, is a trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1239; Dec. Dig. § 359.\*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by Albert J. Smith, as administrator of Robert Taylor Smith, deceased, against the Southern Railway Company, for damages for the death of the deceased. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Count 4 is as follows: "Plaintiff, Albert J. Smith, suing as administrator of the estate of Robert Taylor Smith, deceased, claims of the defendant, the Southern Railway Company, a corporation, the sum of \$20,000 as damages, for this: On or about the 30th day of July, 1908, the defendant was, by and through its servants and employees, engaged in running and operating

locomotives and trains of cars over the Southern Railroad through and past the village of Larkinsville, Jackson county, Ala., and on said date plaintiff's intestate, a child six years of age, was on the track of said railroad at or near said village of Larkinsville, and at such time and place defendant's employees and servants, while operating and running a locomotive and train of cars, and within the scope of their employment, discovered plaintiff's intestate on the track in time to avoid injuring him by the exercise of due care and preventive effort, and after the discovery of such peril negligently propelled or permitted said locomotive to run against and kill plaintiff's intestate, to his damage as aforesaid."

Count 5: Same as 4, down to and including the words, "was on the track of said railroad," and concludes as follows: "That the place where said child was on the track was one in which persons at frequent intervals and in large numbers used said track in passing into and out of said village of Larkinsville, or in crossing the railroad; that this fact was known to the employees and servants in charge of a locomotive and train of cars at that time; that such employees then and there had good reason to apprehend that some one or more persons were on the track; that in the observance of ordinary and reasonable care, under the circumstances, it was the duty of those in charge of the said locomotive to keep a lookout for persons on the track at said time and place; that said employees, acting within the scope of their employment, negligently failed to keep a lookout for such person, and as a proximate result of such negligence said employee, or one or more of them, negligently ran said locomotive against and killed plaintiff's intestate."

The grounds of demurrer are discussed in the opinion of the court.

The following charges were refused to the defendant:

"(2) The burden of proof, in so far as count 4 of the complaint is concerned, is upon the plaintiff to show to your reasonable satisfaction that defendant's employees, in charge and control of the engine which killed the plaintiff's intestate, discovered said intestate on the track in time to have avoided injuring him by the exercise of due care and preventive effort, and that after the discovery of such peril they failed to exercise such care as a reasonably careful man would have exercised to prevent the injury."

"(7) I charge you that the burden of proof is on the plaintiff to show to your reasonable satisfaction that the defendant, whose negligence was alleged in the complaint, was guilty of wantonness or willfulness in causing the injury. (8) The burden of proof is upon the plaintiff, in so far as he seeks to recover under the fifth count, to prove to your reasonable satisfaction the allegations

of fact therein, and that the defendant's employes were guilty of negligence as therein averred. (9) I charge you that plaintiff's intestate was a trespasser on the track, and defendant's employes owed him no duty, except not to injure him negligently after discovering his peril, or not to injure him wantonly or willfully." (15) The fact, if it be a fact, that people were accustomed to walk along said track at and about the place where plaintiff's intestate was killed, if known to defendant's employes in charge of the train, did not charge him with notice or knowledge that any one would likely lie down on said track. (16) The fact, if it be a fact, that people were accustomed to walk along the track where Robert Taylor Smith was killed, did not charge defendant's employes in charge of the train with notice or knowledge that a child unable to take care of itself would be allowed by its parents to go unattended upon the track, or to lie down thereon." (21) The fact, if it be a fact, that the engineer failed to blow the whistle or ring the bell when he saw the child on the track, would not be negligence which would authorize plaintiff to recover in this case." (24) The fact, if it be a fact, that the train was running at such a rate of speed as that it could not be stopped in less than 100 yards, would not be such negligence as would entitle plaintiff to a verdict in this case." (26) Under the evidence in this case, it was not the duty of defendant's engineer to keep a special lookout for persons on the main track at the place where intestate was killed." (38) In determining whether the engineer was negligent in the operation and running of the engine at the time of the injuries to plaintiff's intestate, you are to take into consideration, not only the engineer's duty with reference to persons on the track, but also his duty to the passengers on the train, and his duty with reference to carrying the United States mail on schedule time. (39) The engineer did not discover the plaintiff's intestate, within the meaning of the complaint in this case, unless or until he became aware that the object he saw on the track was a human being."

Paul Speake, for appellant. Virgil Boul-  
din, for appellee.

**SIMPSON, J.** This action was brought by the appellee to recover damages for the death of his intestate, Robert Taylor Smith, alleged to have been caused by the negligence of the defendant in running its train of locomotive and cars.

The first assignment of error insisted on is to the action of the court in overruling the demurrer to the fourth count of the complaint. We think that, when the said count alleges that the employes of the company "discovered the plaintiff's intestate on the track in time to avoid injuring him," the plain and obvious meaning is that they discovered that it was a small child on the

track, and if that was not true, but they merely discovered some object which they did not recognize as a child, that would be proper subject for a plea, and not a demurrer; nor do we think it was necessary for the pleader to allege that the defendant's employes discovered that he could not or would not extricate himself from his perilous position. The presumption that one on a railroad track will move off on seeing a train approaching does not apply to a child only six years old. "It is not to be supposed that one of such tender age would appreciate the perilous situation, or have sufficient judgment and discretion to extricate herself." *So. Ry. Co. v. Forrister, Adm'r* (Ala.) 48 South. 69. There was no error in overruling the demurrer to said fourth count.

The next insistence is that the court erred in overruling the demurrer to the fifth count. This court has frequently held that the employes of a railroad company are not under any obligation to keep a lookout for a trespasser, and that this rule applies equally to children as to grown persons. It has also held that where the road runs through a thickly populated locality, where persons are in the habit of crossing in such numbers and with such frequency, which is known to the person in charge of the train, that he has reason to believe there are persons in exposed positions on the track, he will be held to a knowledge of the probable consequences of maintaining great speed at such places, and must consequently keep a lookout, in order to avoid injury. *Ga. Pac. Ry. v. Lee*, 92 Ala. 262, 9 South. 230; *Ala. Grt. So. R. R. v. Moorner*, 116 Ala. 642, 645, 22 South. 900; *So. Ry. v. Bush*, 122 Ala. 470, 26 South. 168; *N., C. & St. L. Ry. v. Harris*, 142 Ala. 249, 37 South. 794, 110 Am. St. Rep. 29; *s. c.* (second appeal) 44 South. 963; *Highland Ave. & Belt R. R. v. Robbins*, 124 Ala. 114, 116, 118, 27 South. 422, 82 Am. St. Rep. 153. This court has also held that, it is necessary in a complaint to aver facts showing that the person injured, whether infant or adult, was not a trespasser. *Gadsden & Attalla H. Ry. v. Julian*, 138 Ala. 371, 32 South. 135; *So. Ry. v. Bush*, *supra*, 122 Ala. 481, 482, 26 South. 168. Where a child 19 months old, in crossing a railroad near a crossing, "turned up the track," she thereby became a trespasser, and the railroad company owed it no duty, save to avoid injuring it after discovery of its peril. *N., C. & St. L. Ry. v. Harris*, *supra*. The court, also, in recognizing the duty to keep a lookout in populous localities, said: "But, actionable negligence being a failure to discharge a legal duty to the person injured, if there is no duty there is no negligence. And, even if the defendant owed the duty to keep a lookout for persons rightfully on the track, but owed none to the plaintiff, because he was a trespasser, no action will lie, for the duty must

be to the person injured" (Birmingham Ry., L. & P. Co. v. Jones, 45 South. 179, 180); and it has recently been held that a complaint is demurrable because it "fails to show either that plaintiff's intestate, when injured, was not a trespasser on defendant's track, or that defendant's servants in charge of the train became aware of her perilous position on the track, and were thereafter guilty of actionable misconduct." *So. Ry. v. Forrister*, supra. Count 5 does not allege facts showing that the intestate was not a trespasser. From all that appears in the count, the child may have been lying down on the track, walking up and down thereon, or in various other ways may have been a trespasser, in which case the duty to keep a lookout would not apply. Construing the count strictly against the pleader, the demurrer should have been sustained.

There was no error in the refusal to give charge 38, requested by the defendant. The charge is argumentative and abstract. There was nothing in the evidence tending to show that the engineer's duties to passengers and the United States mails conflicted in any way with his duty to look out.

Charge 39, requested by the defendant, is argumentative, and was properly refused.

Charge 26, requested by the defendant, was properly refused. While we do not feel called upon to decide that the evidence shows that the place in question was in such frequent and constant use as to require the lookout, yet we are not prepared to say as a matter of law, that it was not.

Charges 16, 15, 24, and 21, requested by the defendant, are argumentative, and were properly refused.

Charges 8, 7, and 2, requested by the defendant, should have been given.

Section 1406, Rev. Code 1867, being a codification of Acts 1851-52, p. 45, made a railroad company liable for all stock killed. Subsequently (Acts 1857-58, p. 15) a railroad company was made liable for injuries to persons or stock from failure to comply with regulations at certain places, and by a later act (Act Jan. 31, 1861, p. 37, § 1) it was provided that the railroad company should be liable for damages to persons or stock resulting from a failure to comply with previous sections, "or any negligence," and that, "whenever stock is killed or injured, the burden is on the railroad to show that the requirements of the preceding sections were complied with, at the time and place when and where the injury was done." Rev. Code 1867, § 1401. This court held that the effect of these statutes was that, if the injury to stock occurred at one of the places mentioned, the burden was on the railroad company to show compliance with the statute, if at any other place the burden was on the railroad company to show that it was not the result of negligence. *M. & O. R. R. Co. v. Williams*, 53 Ala. 595, 599, 600. This last proposition is based upon the fact

that the owner cannot know what train killed his stock, or who had charge of it (page 600).

Section 1700 of the Code of 1876 is substantially the same as 1401 of the Code of 1867, and this court held that the statute had been re-enacted with the construction. *E. T., Va. & Ga. R. R. v. Bayliss*, 74 Ala. 150, 159. Section 1147 of the Code of 1886 is the same, except that the burden of proof in regard to stock killed is placed on the railroad company only when killed or injured "at any one of the places specified in the three preceding sections." The act of February 28, 1887 (Pamph. Acts 1886-87, p. 146), which is copied in a footnote to said section 1147, Code 1886, provides that, "when any person or stock is killed or injured from a failure, etc., or any negligence, the burden of proof \* \* \* is on the railroad company to show that the requirements of the preceding section \* \* \* were complied with at the time and place where the injury was done." It will be seen that this is the same as section 1401, Code 1867, except that it is applied to persons as well as stock. It was held, under this act, that the burden is placed upon the railroad company only as to proof of those specific requirements which are mentioned, and that as to all other matters of negligence the burden remains on the plaintiff. *Ga. Pac. Ry. v. Hughes*, 87 Ala. 610, 616-617, 6 South. 413; *Ala. Grt. So. R. v. McAlpine*, etc., 75 Ala. 114, 118. The *Hughes* Case was followed as to persons (*Montgomery & E. R. v. Perryman*, 91 Ala. 413, 416, 8 South. 699); but these cases were overruled, in a stock case (*Birmingham Mineral Railroad Company v. Harris*, 98 Ala. 326, 332, 13 South. 377), and this last case followed in *L. & N. R. v. Davis*, 103 Ala. 661, 664, 16 South. 10.

Section 3443 of the Code of 1896 provides for the liability on account of persons or stock "resulting from a failure to comply with the three preceding sections, or any negligence on the part of the company or its agents, and then provides that when any person or stock is killed or injured at any one of the specified places the burden is on the railroad to show compliance with the sections and that there was no negligence. The decisions under this section are that, in order to place the burden on the defendant, the plaintiff must prove that the injury occurred at or near a crossing, etc. *A. G. S. R. v. Boyd*, 124 Ala. 525, 27 South. 408. Section 5476 of the Code of 1907 is a copy of section 3443 of the Code of 1896, except that the words "at any one of the specified places" are omitted, and is therefore a copy of the act of February 28, 1887, except that it also follows section 3443 of the Code of 1896, in adding, to the proof required of compliance with the requirements of the preceding sections, the words "and that there was no negligence."

It will be noticed that, up to the time of the adoption of our present Code, the only requirements were in regard to injuries occurring at the places mentioned in the statute; for, while the act of February 28, 1887, does not have the clause "at any one of the places specified," yet it required only that the burden was on the railroad company to show that the requirements at such places were complied with, and consequently it could not involve any other negligence. It is stated, as a rule of construction of revisory statutes, where there has been an alteration of phraseology, that "the language of the statute as revised, or the legislative intent to change the former statute, must be clear before it can be pronounced that there is a change of such statute in construction and operation," and also, "before the courts can pronounce that the law is changed, the legislative intent to change it must be evident. Language must be employed which is not susceptible of any other just construction." *Lindsay v. U. S. Savings & Loan Co.*, 127 Ala. 366, 371, 28 South. 717, 51 L. R. A. 393, and authorities cited.

The history of the successive statutes on this subject shows that the matter which the Legislature had in view was only injuries occurring at the places specified, and section 5476 itself places the burden on the railroad company "to show a compliance with the requirements of such sections, and that there was no negligence on the part of the company or its agents." There would be no reason in requiring proof of the compliance with the requirements of said sections when the injury occurred at any other place, and it would be impossible to show what place is, referred to where the injury occurred between two road crossings. Consequently we hold that the effect of this statute is only to require that, when an injury occurs to persons at any one of the places mentioned in the statute, the burden is on the railroad company to show compliance with the requirements of the statute, and also that there was no other negligence.

Charge 9, requested by the defendant, should have been given. The intestate's brother, Milton Smith, testified that he saw the child walking down the road shortly before the accident, and the engineer testified that when he first discovered him the boy was lying down, between the rails, with his foot or feet over one rail. These facts were not controverted by any other evidence, and they show that the boy was a trespasser.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

**STATE ex rel. NORWOOD v. GOLDSMITH,**  
County Treasurer.

(Supreme Court of Alabama. June 30, 1909.)

**1. TAXATION (§ 535\*) — RECOVERY OF TAX PAID.**

Code 1907, § 2340, providing that any person who through mistake in the assessment or collection of taxes has paid to the county tax collector money that was not due from him for taxes, may file a petition in the court of county commissioners asking that a warrant be drawn, etc., refers merely to cases where there has been some clerical mistake in the assessment or collection of taxes, and was not intended to clothe the county commissioners or board of revenue with the judicial function of passing upon the validity of a taxation law; that being a matter for the adjudication of a duly constituted court.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 535.\*]

**2. COUNTIES (§ 204\*)—CLAIMS AGAINST—AUDIT AND ALLOWANCE—NATURE OF POWER.**

The audit and allowance of claims against a county is the exercise of administrative or executive, not of judicial, power.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 312-321; Dec. Dig. § 204.\*]

Mayfield, J., dissenting.

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Mandamus by the State, on relation of Joseph Norwood, against Robert L. Goldsmith, as Treasurer of Lowndes County. From an order refusing to grant a rule nisi, relator appeals. Affirmed.

Troy, Watts & Letcher, for appellant. Marks & Sayre, for appellee.

SIMPSON, J. This is an appeal from an order of the judge of the city court of Montgomery, refusing to grant a rule nisi on an application for a writ of mandamus to compel appellee to pay a warrant issued by the board of revenue of Lowndes county in favor of the relator.

On August 2, 1907, the Legislature enacted "An act for the improvement of the public roads of Lowndes county." Said act creates the office of supervisor of roads, provides for his election and salary, also provides for overseers, their salary, etc., and provides for the levy of an annual tax of 25 cents on each \$100, etc. Loc. Acts 1907, p. 684. The petition alleges that petitioner paid said tax for the years 1907 and 1908, amounting to \$289.08, under protest; that said act is unconstitutional; that he filed with the board of revenue of said county a petition setting up the unconstitutionality of said act; that said board allowed his claim and issued to him a warrant upon the treasurer of said county for said sum of money, "to be paid out of the moneys in the treasury created by the collection of such taxes"; that he presented said warrant to said treasurer, and he refused to pay the same, although he had in his hands a sufficient amount of the funds created by the collection of such taxes to satisfy the same.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In order to authorize a resort to this summary process to enforce the refunding of taxes which have been paid into the treasury, it is evident that resort must be had to statutory authority. The petitioner alleges that his application to the board of revenue for said warrant was "by virtue of article 16, chapter 45, Code of 1907." The first section of that article (section 2340) provides that "any person \* \* \* who, through a mistake, or error, in the assessment or collection of taxes has paid to the county tax collector money that was not due from him for taxes, may file a petition in the court of county commissioners, asking that a warrant be drawn," etc. It is evident that this section refers merely to cases where there has been some clerical mistake or error in the assessment or collection of taxes, and was not intended to clothe the county commissioners or board of revenue with the judicial function of passing upon the validity of an act of the Legislature.

This court has held that "the audit and allowance of claims against the county is the exercise of administrative or executive, not of judicial, power." *Jeffersonian Pub. Co. v. Hilliard*, 105 Ala. 578, 17 South. 112; *State ex rel., etc., v. Rogers et al.*, 107 Ala. 444, 456, 19 South. 906, 32 L. R. A. 520; *Com'rs' Court v. Moore*, 53 Ala. 25, 27. The Legislature subsequently provided for cases where the payment of taxes had been made "under mistake of law, or fact, upon any illegal tax assessment made under color of law," and very properly provided that "the same shall be recoverable by appropriate proceedings at law, or in equity, against the proper parties, or their successors." *Gen. Acts 1907, p. 639; section 2345, Code 1907.*

It was certainly proper that so serious a matter as the constitutionality of an act of the Legislature should be referred to the adjudication of a duly constituted court. This the Legislature has done. The judge of the city court committed no error in refusing to grant the rule nisi, and his judgment is affirmed.

**Affirmed.**

DOWDELL, C. J., and ANDERSON, DENSON and SAYRE, JJ., concur.

MAYFIELD, J. (dissenting). The case made by the relator is as follows: This is an appeal from an order of Hon. Armstead Brown, associate judge of the city court of Montgomery, refusing a rule nisi on an application for mandamus to compel appellee to pay a warrant issued by the board of revenue of Lowndes county in favor of the relator. The warrant, for the sum of \$289.08, shows on its face that said amount was allowed relator on account of his having paid same as special road taxes for years 1907 and 1908 under color of an act (*Loc. Laws 1907, p. 684*), that said act is unconstitutional, and that said amount is to be paid out of moneys in the treasury created by the collection of said tax.

The only question which arises is the constitutionality of the act, entitled "An act for the improvement of public roads in Lowndes county," approved August 2, 1907. By said act the Legislature levied a special annual tax of one-fourth of 1 per centum on all property in the county "assessed for taxation and subject to taxation under the general laws of the state to be assessed and collected in the same manner as other taxes for county purposes are assessed and collected"; but the act further provided that "the tax collector \* \* \* shall include such tax of twenty-five cents on the hundred dollars in the taxes collected by him for the year of 1907," notwithstanding that under the existing provisions of the general law the assessment of taxes for that year had been made prior to the passage of the act. The tax so levied was collected with other taxes for the years 1907 and 1908. Relator owned property in the county subject to taxation under the general laws, and was forced to pay and did pay said special tax under protest, and afterwards on the 8th day of February, 1909, in accordance with article 16, c. 45, Code of 1907, filed with the said board of revenue a petition setting up the unconstitutionality of the act and praying that all amounts paid by him under color thereof be returned. In addition thereto, on the same day, he filed with the said board of revenue an itemized verified claim, setting out that he had paid said amount as said special taxes under protest, and requested the return of the said amount, whereupon said board of revenue audited and allowed the claim and issued the warrant, which the treasurer failed and refused to pay, although he had in his hands at the time sufficient funds, in said fund so created, and not otherwise appropriated, and over and above current warrants against said fund.

I agree to and concur in the conclusion reached in this case, but cannot so agree and concur as to the construction placed upon and effect given to *Gen. Acts 1903, p. 278 et seq.*, and of *Gen. Acts 1907, p. 639*, as they now appear as article 16, c. 45, of the Code of 1907 (sections 2340-2347). These acts were intended, as clearly appears on their face, and as we know from the judicial history of this state, to confer rights of actions which had not theretofore existed in favor of the taxpayer, against the state, counties, and municipalities, for taxes wrongfully or illegally assessed, levied and collected. They conferred the right of action, but provided no exclusive remedy, though they did direct how the claims should be presented, allowed, and collected, without suit. They did not attempt to provide a specific remedy, in case suit must be brought, to enforce the right of action conferred.

If relator's petition is true, he was clearly within the provisions of the act of August 6, 1907 (*Gen. Acts 1907, p. 639*, now

appearing as section 2345 et seq. of the Code of 1907), and had his right of action against the county of Lowndes for the taxes paid under a void law, a mere "color of law." He made out and presented his claim as required under section 2 of that act (section 2346 of the Code of 1907), and it was recognized and allowed by the board of county commissioners, as provided by both this statute above referred to and the general law (section 147 et seq. of the Code of 1907), and a warrant was issued for the amount allowed by the probate judge of the county as provided by section 146 of the Code. This was prima facie a valid claim against the county treasury. If the warrant was valid, and it was certainly prima facie so, nothing remained but the payment thereof by the county treasurer out of the county funds against which it was directed, and which were shown to be in the hands of the county treasurer. If valid, it was clearly his duty to pay it; if invalid, it was his duty to refuse payment. If valid, it was a breach of his official duty and of his bond to refuse payment, which gave a right of action against him and his official bondsmen. Of course, if the warrant was invalid, no action would lie against him or his bondsmen for refusing to pay.

County warrants import a prima facie, though not a conclusive, liability against the county. The warrant is a mere command or order from one public county officer to another to pay from the county funds as therein directed. Strictly speaking, no action can be maintained upon the warrant against the county, or any officer or person. If the treasurer has funds in his hands lawfully applicable to the payment of the warrant, it is his official duty to pay it; but he is not bound by virtue of any contractual obligation as a party to the instrument. For his wrongful refusal to pay he is liable officially, and, being liable officially, his official bondsmen are also liable. The action, however, is not on the warrant, but is for a breach of his official duty. *Savage v. Mathews*, 98 Ala. 535, 13 South. 328; *Grayson v. Latham*, 84 Ala. 546, 4 South. 200, 866. No action can be brought against a county on a claim until it has been presented to the court of commissioners, as required, and until it is disallowed or reduced by the court, and the reduction refused by the claimant. *Looney v. Jackson Co.*, 105 Ala. 597, 17 South. 105. Of course, there are certain claims against a county, such as warrants and bonds, and also some claims against special funds, that need not be presented or disallowed. *Limestone County v. Rather*, 48 Ala. 433. When a claim against a county has been audited and allowed, and a warrant issued therefor, it ceases to be the subject of a suit against the county. If there be no funds with which to pay it, the commissioners may be compelled to levy a tax in order to provide funds with which to pay. If

there be funds which should be applied to the payment, it is a breach of the official duty of the county treasurer to fail and refuse to so apply the funds.

It therefore follows that if the local act for Lowndes county was void, and it seems to be so conceded in this case, then from the relator's petition he has a complete and adequate remedy against the county treasurer and his bondsmen to recover the amount of his claim and damages. This being true, of course, mandamus will not lie against him. Both remedies cannot exist at the same time for the same relief as between the same parties. Mandamus only lies in the absence of other appropriate and adequate remedy. If the local act be valid, then, of course, relator has no claim, right of action, or remedy. The whole right of relator depends upon the invalidity of the local law under which the tax was levied and collected. This question can, and, of course, must, be tried in the action against the county treasurer and his bondsmen. In fact, it appears that this is the only question to be litigated. Of course, the commissioners' court passed upon this question; but it is not conclusive. The county treasurer has the same right to pass upon the constitutionality of the local act as did the commissioners. The decision of neither, however, is conclusive of the rights of the taxpayer, or of those of the county. Its constitutionality must be finally determined as is that of all other statutes like it.

#### DARRINGTON v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

##### 1. STATUTES (§ 109\*)—TITLE—SUFFICIENCY.

The requirement of Const. 1901, § 45, that each law shall contain but one subject, which shall be expressed in the title, is met where the provisions of a statute are referable and cognate to the subject expressed in the title.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 136-139; Dec. Dig. § 109.\*]

##### 2. STATUTES (§ 118\*)—TITLE—SUFFICIENCY.

Under Const. 1901, § 45, providing that each law shall contain but one subject, which shall be expressed in the title, the title of Gen. Acts 1907, p. 366, entitled "An act to define, prohibit and punish aiding or abetting, or counseling or procuring an unlawful sale, purchase, gift, or other unlawful disposition of \* \* \* liquors," etc., is sufficient to include in the body of the act clauses relating to the indictment in prosecutions for violations of the act.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 158; Dec. Dig. § 118.\*]

##### 3. STATUTES (§ 138\*)—AMENDATORY STATUTES.

Gen. Acts 1907, p. 366, punishing any person making, aiding, or abetting an unlawful sale, purchase, or gift of intoxicating liquors, and providing that a conviction may be had for a violation of the act under an indictment for retailing liquors without a license, is in form original and complete, and is not, when applied to an act prohibiting the sale of intoxicating liquors in a designated county, obnoxious to Const. 1901, § 45, providing that no law shall be amended by reference to title only.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 138.\*]



#### 4. INTOXICATING LIQUORS (§ 167\*)—ILLEGAL SALES—STATUTES.

Under Acts 1886-87, p. 609, prohibiting the sale or giving away of intoxicating liquors in a county, and Gen. Acts 1907, p. 866, punishing any person making or aiding in an unlawful sale, purchase, or gift of intoxicating liquors, one who at the request of a third person purchased for the third person whisky from another, and who acted merely as a friend of the third person, without having any interest in the transaction, and without acting for the seller, could be convicted under an indictment charging him, in the form prescribed by Code 1907, § 7353, with selling intoxicating liquors without a license and contrary to law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 182; Dec. Dig. § 167.\*]

Denson, Mayfield, and Sayre, JJ., dissenting.

Appeal from Washington County Court; D. J. Long, Judge.

John Darrington was convicted of selling intoxicating liquors, and he appeals. Affirmed.

Charles L. Bromberg, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DENSON, J. The sale, giving away, or otherwise disposing of spirituous, vinous, or malt liquors has been prohibited by law in the county of Washington ever since February 24, 1887. Acts 1886-87, p. 609. The prohibition act referred to was in force at the time the defendant was tried and convicted in this case; and in connection with it the conviction of the defendant was secured, and is here sought to be sustained, under the act of the Legislature of March 12, 1907, entitled "An act to define, prohibit and punish aiding or abetting or counseling or procuring an unlawful sale, purchase, gift, or other unlawful disposition of spirituous, vinous, or malt liquors, or other liquors prohibited by law from being sold, given away, or otherwise disposed of." Gen. Acts 1907, p. 866.

Section 1 of the act provides: "That any person who makes, aids or abets, or counsels or procures an unlawful sale or unlawful purchase or unlawful gift or other unlawful disposition of spirituous, vinous or malt liquors or other liquors prohibited by law from being sold, given away or otherwise disposed of; or any person who shall act as agent, or assisting friend of the seller or purchaser in procuring or effecting the unlawful sale or purchase of any such liquors, must on conviction," etc. This section of the act concludes as follows: "And a conviction may be had for a violation of this act under an indictment for retailing spirituous, vinous or malt liquors without a license and contrary to law."

It is here insisted that so much of the act of March 12, 1907, as relates to the indictment in prosecutions for violations of its provisions, is offensive to section 45 of the Constitution of 1901, and is therefore void. Section 45 of the Constitution of 1901, amongst other things, provides that "each law shall contain but one subject, which shall be clearly expressed in its title, \* \* \* and no

law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as revived, amended, extended or conferred, shall be re-enacted and published at length." The question of but one subject in the title of an act, to be clearly expressed therein, is threadbare in discussion. All the court has to do is to apply the established rules to the case in judgment. The title may be very general, and need not specify every clause of the statute; "but the requirement of the Constitution is met if they are all referable and cognate to the subject expressed."

It seems clear that a clause providing for the procedure or indictment against offenders against the statute is not only germane to the title of the present act, but results as a complement of the thought and is included in it. *Ex parte Gayles*, 108 Ala. 514, 19 South. 12; *Ex parte Mayor, etc.*, 116 Ala. 186, 22 South. 454. The act does not purport to be revisory or amendatory, but is original in form, complete, and intelligible. Therefore it is not obnoxious to the latter part of the section of the Constitution above quoted. *Sisk v. Cargile*, 138 Ala. 164, 35 South. 114; *Phoenix, etc., Co. v. Fire Department*, 117 Ala. 631, 23 South. 843; *Cobb v. Vary*, 120 Ala. 263, 24 South. 442.

We have discussed the only points urged in respect to the validity of the act, and find no fault with it.

The indictment contained two counts; but the second was eliminated by the solicitor's announcing to the court, before the case was submitted to the jury, that he did not insist on a conviction upon that count. The first count is in the general form, viz.: "The grand jury of said county charge that before the finding of this indictment John Darrington sold spirituous, vinous, or malt liquors without a license and contrary to law, against the peace and dignity of the state of Alabama." The evidence in the case is brief and without conflict, and is as follows: The state proved that John Darrington, at the request of John Onderdonk, purchased for said Onderdonk a bottle of whisky from Hub Smiley on the 1st day of October, 1907, in Washington county, Ala., at Lewis' still; that in making said purchase defendant acted merely as a friend of said Onderdonk, and had no interest whatever in said transaction, and did not act in any manner for the seller of said whisky. Upon this evidence and the indictment as set out above, the court, at the request of the state in writing, gave the general affirmative charge, with proper hypothesis, against the defendant.

The general statute (section 7353 of the Code of 1907) prescribes the form of the indictment for selling spirituous, vinous, or malt liquors without a license (the form used in the instant case), and provides that "for any violation of any special and local laws regulating or prohibiting the sale of spirituous, vinous, or malt liquors \* \* \* such

form shall be held good and sufficient," and yet under an indictment in the form prescribed it has been distinctly held by this court that proof of a gift in violation of a prohibition statute will not support a conviction under such an indictment—one charging only a sale. *Williams' Case*, 91 Ala. 14, 8 South. 668; *Guarreno's Case*, 148 Ala. 637, 42 South. 833. In the *Williams Case* the court said: "The section of the Code referred to, and which permits the common form of indictment used, is for the violation of any local and special law 'regulating the sale' of spirituous liquors, or 'prohibiting' the sale of spirituous liquors. If 'sale' has a technical legal meaning, well known, and does not include in its signification 'to give,' the section of the Code relied upon cannot authorize this common form of indictment in cases of 'giving' liquor in violation of the law, but restricts it to cases of selling. To convict a person of 'giving' away liquor contrary to law, he must be indicted or charged with the offense of 'giving' contrary to law, and not for selling."

So, upon the same considerations, in the present case it seems clear that, the indictment charging only a sale, the proof, to authorize a conviction thereunder, should show a sale by the defendant. In other words, the writer is of the opinion that, although the statute authorizes the general form of indictment for retailing liquors, it *ex vi termini* restricts it to illegal sales, and does not cover the case of one who acts merely as the "assisting friend" of the seller or purchaser, and who, under a proper indictment, might have been convicted as such under the statute. As well might a person be convicted of larceny under an indictment charging murder or an assault and battery. It is clear from the evidence in the case that the defendant was not guilty of the offense charged in the indictment; and, in the opinion of the writer, it should follow that the court erred, both in giving the affirmative charge for the state and in refusing it to the defendant. *Young's Case*, 58 Ala. 358; *Campbell's Case*, 79 Ala. 271; *Morgan's Case*, 81 Ala. 72, 1 South. 472.

The foregoing are the views of the writer, concurred in by Justices MAYFIELD and SAYRE; but the other Justices, constituting a majority, take a different view, and hold that, under the indictment and the evidence, the defendant was properly convicted, and they order an affirmance of the judgment.

**Affirmed.**

DOWDELL, C. J., and SIMPSON, ANDERSON, and McCLELLAN, JJ., concur. DENSON, MAYFIELD, and SAYRE, JJ., dissent.

#### COX v. STATE.

(Supreme Court of Alabama. June 30, 1909.)

#### 1. CRIMINAL LAW (§ 1153\*)—APPEAL—CROSS-EXAMINATION—REVIEW.

On cross-examination, the witness may be interrogated, for the purpose of testing his mem-

ory, sincerity, etc., as to matters irrelevant to the issue, though the extent of such cross-examination is within the sound discretion of the trial court, which may arrest the same whenever it seems proper to do so; and as long as its discretion is not abused its action will not be reviewed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3064; Dec. Dig. § 1153.\*]

#### 2. WITNESSES (§ 329\*)—CROSS-EXAMINATION AS TO IRRELEVANT MATTERS.

Refusal of the trial court to permit an extended cross-examination of a witness as to matters irrelevant to the issue, for the purpose of testing his memory, sincerity, etc., cannot be said to be an abuse of discretion, nor a denial of the right of cross-examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1104, 1105; Dec. Dig. § 329.\*]

#### 3. LIBEL AND SLANDER (§ 155\*)—CRIMINAL RESPONSIBILITY—EVIDENCE.

In a trial for publishing a defamatory letter, the letter was admissible, in connection with evidence that it was written by defendant.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 430; Dec. Dig. § 155.\*]

#### 4. CRIMINAL LAW (§ 370\*)—EVIDENCE—OTHER OFFENSES.

As a rule, evidence of the commission of another offense than the one charged is inadmissible to show defendant's guilt, though, where guilty knowledge is an element, such evidence is admissible to show the scienter.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 825; Dec. Dig. § 370.\*]

#### 5. LIBEL AND SLANDER (§ 155\*)—CRIMINAL PROSECUTION—MALICE—EVIDENCE.

In a trial for publishing a defamatory letter, those parts of other letters written by defendant at different times, which were substantial repetitions of the libelous matter charged, were admissible to show malice.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 435; Dec. Dig. § 155.\*]

#### 6. CRIMINAL LAW (§ 491\*)—EVIDENCE—COMPARISON OF HANDWRITING.

In a trial for publishing a defamatory letter, other letters, claimed to have been written by defendant at different times, each of which constituted a separate libel and another offense from the one charged, being otherwise incompetent, were not admissible for the purpose of a comparison of the handwriting with that of the letter described in the indictment and admitted in evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1080; Dec. Dig. § 491.\*]

#### 7. CRIMINAL LAW (§ 379\*)—EVIDENCE—CHARACTER OF ACCUSED—GENERAL REPUTATION.

Accused, having testified as a witness in his own behalf, was subject to impeachment as any other witness would be, and to this end was subject to impeachment on his general reputation; but, not having otherwise put his general character in issue, evidence as to his general bad character was incompetent for the purpose of showing guilt, and hence, in a trial for writing a defamatory letter, evidence that defendant's character was bad for writing libelous letters was inadmissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 844; Dec. Dig. § 379.\*]

Dowdell, C. J., and Simpson, J., dissenting in part.

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Cris Cox was convicted of publishing a defamatory letter that had a tendency to provoke a breach of the peace, and he appeals. Reversed and remanded.

The indictment was as follows: "Cris Cox unlawfully and maliciously published of and concerning Lula Thompson, Willie Thompson, Tempy Thompson, and Dolly Thompson the following false, defamatory, and libelous matter in writing, and with the intent to defame the said Lula Thompson, Willie Thompson, Tempy Thompson, and Dolly Thompson, to wit: 'Miss Loula Thompson: I heard that you was keeping company with that red-eyed, rotten, clappy Dave Swords. Some say that Dave and his two bastard nephews is as good as the Thompsons. People say that Emiline Thompson and Dave Swords' sister was rotten with the clap. People say that all the Thompsons is got the clap (meaning that Lula Thompson, Willie Thompson, Tempy Thompson, and Dolly Thompson, who are sisters, had the clap). They say that the Thompson gals (meaning that the said Lula, Willie, Tempy, and Dolly Thompson) caught the clap from those drummers.' Which said libelous matter had a tendency to provoke a breach of the peace—against," etc. The other letters referred to in the opinion are similar in character to the one set out in the indictment, except that they have reference to all the Thompson family, as well as some others. It is not deemed necessary to set out the charges.

John A. Lusk, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DOWDELL, C. J. A wider latitude is allowable on the cross, than upon the direct, examination of a witness. It is permissible upon a cross-examination, for the purpose of testing the memory, sincerity, etc., of the witness, to interrogate him as to matters wholly irrelevant to the issue in the case. The latitude and extent of such cross-examination, however, is a matter that must, of necessity, rest largely, if not exclusively, within the sound discretion of the trial court, and, so long as that discretion is not abused, the action of the trial court will not be revised on appeal. The refusal of the trial court to permit an extended cross-examination as to irrelevant matters, for the purpose of testing the witness along the lines suggested, cannot be said to be an abuse of discretion, nor denial of the right of a cross-examination, and hence can furnish no just ground of complaint on appeal, to a reversal of the cause. It is within the discretion of the trial court, likewise, *ex mero motu*, to arrest such a cross-examination whenever in its sound judgment it seems proper to do so. We fail to see that the trial court committed any error, or that there was any abuse of sound discretion, in the rulings upon the cross-examination, by the defendant, of the state's witness, Malam Bishop.

The letter constituting the alleged libel, and described in the indictment, was admissible in evidence in connection with evidence tending to show that it was written by the defendant. While an exception was reserved

to the admission of this evidence on the trial; counsel in brief for appellant concedes that there was no error in this ruling and that the letter was properly admitted.

The court erred in admitting in evidence, against the objection of the defendant, the letters designated in the bill of exceptions as Nos. 2, 3, 4, 5, 6, and 7. Each one of these letters constituted a separate and distinct libel, and each another and different offense from the one charged in the indictment, and for each of which the defendant was indictable if he was the author thereof. So far as the record shows, they were not signed, and were written at different times. In one of them, at least, no reference whatever is made to the persons named in the indictment. As a rule, evidence of the commission of another and different offense than the one charged is irrelevant and inadmissible to show the guilt of the defendant. Jones on Evidence, § 243 et seq.; Mayfield's Dig. vol. 1, p. 333, § 431 et seq. Of course, there are exceptions to this rule, as, for instance, where guilty knowledge is an element, and the evidence is offered to show the scienter.

Nor were the letters competent for the purposes of a comparison of the handwriting of these letters with that of the one described in the indictment and which had been admitted in evidence. *Washington v. State*, 143 Ala. 62, 39 South. 388; *Griffin v. Working Woman's Ass'n*, 151 Ala. 597, 44 South. 605.

The defendant, having testified as a witness in his own behalf, was subject to impeachment as any other witness would be, and to this end was subject to impeachment on his general reputation; but, not having otherwise put his general character in issue, it was not competent for the state to offer evidence of general bad character, for the purpose of showing guilt. Evidence of his general bad character was only competent as affecting his credibility as a witness. The court therefore erred in admitting evidence that the defendant's character was bad for writing libelous letters. This evidence should have been excluded on the defendant's motion. *Sweet v. State (Ala.)* 47 South. 194.

Charges refused to the defendant, numbered from 1 to 6, inclusive, were properly refused. The vice of each of said charges is apparent on its face, and calls for no special comment to show its fault. Indeed, counsel for appellant, in argument and brief, does not contend that there was any error in refusing said charges.

Justice SIMPSON concurs in the foregoing views of the writer. Justices ANDERSON, DENSON, MAYFIELD, and SAYRE concur, except as to what is said in regard to the admission in evidence of the letters designated as Nos. 2, 3, 4, 5, 6, and 7. They are of the opinion, and hold, that those parts of these letters which were substantial repetitions of the libelous matter charged were admissible in evidence on the theory of showing malice, and cite in support of their holding *Scott v.*

McKinnish, 15 Ala. 662, Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489, Willie Butler v. State, *infra*, and cases cited there, and 1 Wharton on Ev. (2d Ed.) § 32.

For the error pointed out in the admission of the evidence as to the defendant's character's being bad for writing letters, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, J., concurs. ANDERSON, DENSON, MAYFIELD, and SAYRE, JJ., think the letters admissible, but concur in reversal.

#### BUTLER v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

#### 1. LIBEL AND SLANDER (§ 152\*)—ORAL DEFAMATION — PROSECUTION — INDICTMENT — SUFFICIENCY.

Under Code 1896, § 4896 (Code 1907, § 7134), providing that the indictment must state the offense in ordinary language, so that a person of common understanding could know what is intended, an indictment for defamation, charging that defendant "falsely spoke of A. P. in the presence of," etc., "charging her with a want of chastity in substance as follows: That Dr. A. said that he was called to see her, meaning that said A. P., who was then and there a single woman, never having been married, and that she miscarried, and that her mother, G. P., buried it, meaning the remains," etc., was sufficient; the language charged imputing a want of chastity.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 417-424; Dec. Dig. § 152.\*]

#### 2. LIBEL AND SLANDER (§ 155\*)—CRIMINAL RESPONSIBILITY—PROSECUTION — EVIDENCE — MALICE.

Under Code 1896, § 5065, providing that any person who speaks of any woman, falsely and maliciously imputing to her a want of chastity, etc., must be punished, etc., evidence of repetition of the words charged to have been spoken, or the utterance of words of similar import, after the commencement of the prosecution, concerning the female named in the indictment, was competent to show malice, but not to prove that accused had used the language at the time charged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 435; Dec. Dig. § 155.\*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Willie Butler was convicted of defamation, and appeals. Reversed and remanded.

Omitting the formal charging part, the indictment was as follows: "Willie Butler did falsely and maliciously speak of and concerning Alta Petty, in the presence of Sam Kennamer, charging her with a want of chastity, in substance as follows: That Dr. W. P. Allen said that he was called to see her, meaning that said Alta Petty, who was then and there a single woman, never having been married, and that she miscarried, and that her mother, Grace Petty, buried it, meaning the remains, in the garden, against," etc. (This is a copy of the corrected indictment, sent up in response to a certiorari to perfect the record.)

The demurrers were as follows: "(1) It does not impute any want of chastity to Alta Petty to say that Dr. Allen was called to see her. (2) Because the language charged against the defendant does not impute a want of chastity to Alta Petty. (3) Because the indictment avers as a matter of fact that the said Alta Petty did miscarry. (4) Because the indictment avers that, as a fact, Grace Petty buried the remains."

Street & Isbell, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DENSON, J. The defendant was convicted, under section 5065 of the Code of 1896, of the crime of defamation; and from the judgment of conviction he has taken this appeal.

While the indictment is not a model for good pleading, the court entertains the opinion that the demurrer leveled against it is nothing more than a grammatical criticism, which can avail the defendant nothing, provided that to a person of common understanding the language attributed to the defendant by the indictment plainly imports a want of chastity in the female referred to therein. That the language of the indictment carries such imputation on its face, we think, there can be no reasonable doubt. Therefore the court trying the case properly held that the demurrer was not well taken. Code 1896, § 4896; Code 1907, § 7134; Reid's Case, 58 Ala. 402, 25 Am. Rep. 627.

Repetition of the words charged to have been spoken, or the utterance of words of similar import, after the commencement of the prosecution, concerning the female named in the indictment, was competent to be proved, to show the animus with which the words charged were spoken; malice, under the statute as it stood in the Code of 1896, being an essential ingredient of the crime charged. Riley's Case, 182 Ala. 13, 31 South. 731; Grant's Case, 141 Ala. 96, 37 South. 420; Stayton's Case, 46 Tex. Cr. R. 205, 78 S. W. 1071, 108 Am. St. Rep. 988; Gambrill v. Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427. But the evidence of such repetition should have been confined by the court, in its effect, to the purpose for which it was competent, and in instructing the jury that they might consider the repetition of the language attributed to the defendant, in determining whether he used the same at the time the state contended he did, the court committed reversible error. 13 Ency. Pl. & Pr. (e), p. 110; Scott v. McKinnish, 15 Ala. 662; Stayton's Case, 46 Tex. Cr. R. 205, 78 S. W. 1071, 108 Am. St. Rep. 988; Brittain v. Allen, 14 N. C. 167.

For the error pointed out, the judgment of conviction must be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

## RED SNAPPER SAUCE CO. v. BOLLING.

(No. 13,997.)

(Supreme Court of Mississippi. June 21, 1909.)

## 1. EVIDENCE (§ 441\*)—PAROL EVIDENCE—WRITTEN CONTRACT.

Antecedent or contemporaneous parol agreements, contrary to the terms of the writing, cannot be proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2030; Dec. Dig. § 441.\*]

## 2. EVIDENCE (§ 445\*)—PAROL EVIDENCE—WRITTEN CONTRACT—SUBSEQUENT ORAL MODIFICATION.

A subsequent oral modification of a written contract, not required by law to be in writing, may be proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2032; Dec. Dig. § 445.\*]

## 3. SET-OFF AND COUNTERCLAIM (§ 27\*)—RECOUPMENT.

In a suit for breach of a written contract to purchase from plaintiff certain farm products, the court erred in refusing to permit defendants to show their damage by plaintiff's failure to fulfill his contract, and to recoup the same in such suit.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 46; Dec. Dig. § 27.\*]

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

Action by R. A. Bolling against the Red Snapper Sauce Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

In November, 1907, the Red Snapper Sauce Company contracted with R. A. Bolling and others to take from them certain produce to be grown by Bolling on the latter's farm during that year. This produce consisted in a certain quantity of onions, peppers, tomatoes, etc., and the contract was in writing and signed by both parties. Some time in January, 1908, Bolling sued the Red Snapper Sauce Company, claiming damages for the alleged violation of this written contract, and made this contract an exhibit to the declaration. On the trial of the case Bolling offered testimony of oral agreements, which he claimed were made with him by the defendant company prior to the execution of the contract, but not placed in same. This testimony was in contradiction of the terms of the written contract, and the court excluded this testimony from the jury. The record in the case shows that all the breaches of the contract, if breaches there were, were breaches of these oral agreements; but the testimony failed to show that there was any violation of the written contract on the part of the defendant company. Notwithstanding this, the court allowed the matter to go to the jury, and there was a verdict in favor of the plaintiff, from which an appeal is prosecuted.

Bramlette & Tucker, for appellant. Shannon & Jones and E. G. Shannon, for appellee.

MAYES, J. The court properly excluded from the consideration of the jury all but the

written contract sued on. The appellee undertakes to show a contract partly in writing and partly verbal, but entered into contemporaneously. This violates the parol evidence rule. Thus Mr. Bolling states in his direct examination that he claims that there was no written contract, because it was not delivered or signed, but that there was a verbal contract, agreeing that he should not be required to carry out the contract as written, and that he would not have attempted so to do. Yet in the declaration filed the cause of action is predicated on the written contract, supplementing its agreement by certain oral agreements, which the testimony shows were entered into contemporaneously with the written contract. Thus, on the cross-examination of Mr. Bolling, he states: "Q. You say there was no contract? A. I said we did have a contract. Q. Didn't you say that the contract was never delivered? A. Yes, sir; it was delivered. Q. Did't you say a while ago that it had never been delivered? A. I said that Mr. Hines and I had a verbal contract about the written contract. The written contract was delivered. Q. The verbal contract was, then, a part of the written contract before it was delivered? A. Yes, sir."

Until delivered and accepted there was no written contract, and when delivered and accepted the written contract became necessarily the sole repository of all the terms of the agreement up to that time, excluding all prior negotiations or contemporaneous oral agreements; and all testimony relating to the oral agreement, which varied or changed in any way the terms of the written contract, was and should have been excluded by the court. When this was done, there was no testimony left on which to predicate any recovery against appellant by appellee. This case is not a case where there has been a subsequent oral modification of a written contract, not required by law to be in writing. Of course, this may be done.

The record in this case is a very confusing one, but its confusion arises from the fact that there is an attempt to ingraft on a contract which the parties have voluntarily reduced to writing other and different oral agreements, varying and adding to its terms and made contemporaneously with the delivery of the written contract; and this cannot be done without doing violence to the parol evidence rule, and bringing into the contract those very uncertainties which it is the design of the rule to eliminate, and out of which grew the wholesome rule under consideration.

We may also add that the court erred in refusing to allow appellant to show that it had sustained damage by reason of the failure of appellee to fulfill the contract, and to recoup same in this suit.

Reversed and remanded.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**McCRARY v. BROWN.**

(Supreme Court of Alabama. June 2, 1909.)

**1. EXCEPTIONS, BILL OF (§ 39\*)—TIME FOR PRESENTATION.**

Where on March 25, 1907, the trial court rendered final judgment for plaintiff, and also overruled defendant's motion to vacate the judgment and dismiss the cause, and thereafter, on September 3d, defendant's motion to retax the costs was denied, and he was allowed 30 days to present his bill of exceptions, a paper in the record on appeal dated October 1, 1907, and purporting to be a bill of exceptions, could be considered only for the purpose of reviewing the ruling on the motion to retax the costs.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 54-56; Dec. Dig. § 39.\*]

**2. APPEAL AND ERROR (§ 1078\*)—ASSIGNMENTS OF ERROR—WAIVER.**

An assignment of error not insisted on in appellant's brief will be treated as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

**3. ASSUMPSIT, ACTION OF (§ 19\*)—PLEADING—COMPLAINT.**

A common count for work and labor which fails to aver, as in Code 1896, p. 944, form 10, that the work and labor was done at defendant's request, is demurrable.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 81-99; Dec. Dig. § 19.\*]

Appeal from Clay County Court; W. J. Pearce, Judge.

Assumpsit by S. J. Brown against John D. McCrary. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Whitley & Cornelius, for appellant. Rowland & Allen, for appellee.

**TYSON, O. J.** On the 25th day of March, 1907, the trial court rendered the final judgment for the plaintiff, and also overruled the defendant's motion to vacate that judgment and dismiss the cause. Subsequently, on the 3d day of September following, the motion of defendant to retax the costs was denied, and he was allowed 30 days within which to prepare and present his bill of exceptions. The paper in the record purporting to be a bill of exceptions is dated October 1, 1907. It is apparent from this statement that it can be considered only for the purpose of reviewing the ruling upon the motion to retax the costs. While this ruling is assigned as error, that assignment is not insisted on in brief of appellant's counsel, and therefore must be treated as waived. While, perhaps, the ruling of the court in allowing the plaintiff to amend her complaint—by substituting for same (which contained nothing more than the common counts) a new complaint, containing the common counts, differing from the original only in respect to the amount claimed and the dates when due—may not technically be presented for review, yet the writer feels no hesitancy in expressing the opinion that the

amendment was allowable. The amendment clearly introduced no new cause of action, and therefore was not a departure. It amounted to no more than a simple correction of the averments. *Chambers v. Talladega R. E. & L. Ass'n*, 126 Ala. 296, 28 South. 636; *Karter v. Fields*, 140 Ala. 363, 37 South. 204; 4 Cyc. 346. The Justices sitting hold the view that the question of the allowance of the amendment is not presented, and therefore express no opinion on the point.

The third count of the substituted complaint, which is a common count for work and labor done, fails to aver that the work and labor was done at the request of defendant. This defect was specifically pointed out by the demurrer interposed to the count. The demurrer should have been sustained (Form 10, in Code, p. 944; 2 Ency. Pl. & Pr. 1004), non constat the work and labor was performed gratuitously, or the defendant neither accepted nor received the benefit of such labor. For the error pointed out the judgment is reversed, and the cause remanded.

Reversed and remanded.

**DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.**

**LORD et al. v. CALHOUN.**

(Supreme Court of Alabama. June 30, 1909.)

**1. PLEADING (§ 392\*)—ISSUES AND PROOF.**

Where complainant alleged a joint liability of both defendants, and the proof showed that only one of the defendants was liable, and there was a conflict as to which one, there was a fatal variance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1316; Dec. Dig. § 392.\*]

**2. PLEADING (§ 237\*)—JOINT LIABILITY—EVIDENCE—AMENDMENT.**

Where a joint liability is alleged, and there is evidence going to discharge one of the defendants only, the complaint may be amended, and a recovery had against the other.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.\*]

**3. FRAUDS, STATUTE OF (§ 153\*)—PLEADING—BURDEN OF PROOF.**

Where issue is taken on a plea of the statute of frauds, the burden is on plaintiff to establish either a contract in writing signed by the party to be charged or a contract not required to be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 373; Dec. Dig. § 153.\*]

**4. LIMITATION OF ACTIONS (§ 195\*)—BURDEN OF PROOF.**

When the statute of limitations is pleaded, the burden is on plaintiff to prove a cause of action within the period of the bar.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711-716; Dec. Dig. § 195.\*]

**5. FRAUDS, STATUTE OF (§ 26\*)—ORIGINAL PROMISE.**

Where lands are rented to one and goods sold to her on credit given entirely to another.

the latter's liability is original, and not within the statute of frauds; the former not being liable at all.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 35-42½; Dec. Dig. § 26.\*]

**6. EVIDENCE (§ 106\*)—RELEVANCY—MISCONDUCT OF PARTIES.**

In an action on an account, evidence of the existence of immoral relations between the defendants, not to impeach their testimony, but to prejudice the jury, was incompetent.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 177-187; Dec. Dig. § 106.\*]

Anderson and Denson, JJ., dissenting in part.

Appeal from Circuit Court, Houston County; Terry Richardson, Judge.

Action by H. P. Calhoun against Y. J. Lord and another. Judgment for plaintiff against both defendants, and they appeal. Reversed and remanded.

W. L. Lee, for appellants. Espy & Farmer, for appellee.

**MAYFIELD, J.** This was an action by the appellee against the appellants to recover on an account which appellee claims was due him from appellants by account for rent and supplies for the year 1902. Both defendants pleaded the general issue, and the defendant Lord interposed special pleas of the statute of frauds and set-off. No demurrers were filed to the complaint or to the pleas, and the trial was had upon these issues, resulting in a verdict and judgment for the plaintiff against both defendants. From this judgment they appeal, and here separately assign errors.

The trial seems to have been had upon an entire misapprehension of the pleadings; in fact, counsel state that there was a plea of the statute of limitations filed by Lord. We find no plea of the statute of limitations, but, on the other hand, we find a plea of the statute of frauds, which seems to have been entirely ignored in the trial below, by both court and counsel. The action is on a joint account against the defendants jointly. The evidence of the plaintiff in the court below tended to show that the defendant Lord was liable, and not the defendant Mixon; while the evidence offered by the defendants tended to show that the defendant Bettie Mixon alone made and owed the account. In either event, there was an entire variance. The action being a joint one, and the evidence of the plaintiff tending to show that one of the defendants was liable, and that of the defendants tending to show that the other was liable, does not prove the complaint, nor the joint account sued on in this complaint. *Garrison v. Hawkins Lumber Co.*, 111 Ala. 308, 20 South. 427; *Gamble v. Kellum*, 97 Ala. 677, 12 South. 82. Of course, a joint liability having been alleged, and there was evidence going to the discharge of one of the defendants only, the complaint could have been amended and a recovery had against

the other defendant; but aside from this error and defect, which is fatal to any judgment against the defendants, there was no color of right in law to support a judgment against the defendant Lord, for the reason that it indisputably appeared that the land was rented by Bettie Mixon, and that all the goods were furnished by the plaintiff to her, and the color of liability as against Lord was that he agreed to pay the rent and the account—that is to say, some of the plaintiff's evidence probably tended to show that but for the statute of frauds he might have been liable—but, the statute of frauds being pleaded and issue being joined upon that plea, the burden of proof is on the plaintiff to show a valid contract. This is the exception to the rule that the burden of proof as to special pleas rests upon the defendant. When a plea of the statute of frauds is interposed, it is incumbent on the plaintiff to establish either a contract in writing, signed by the party to be charged, or a contract not required by the statute to be in writing. Also, when the statute of limitations is pleaded, the burden rests upon the plaintiff to prove the cause of action within the period of the bar. In each case the plaintiff must show facts which avoid the effect of the plea, and, if he relies on a parol contract, the burden is on him to establish a contract not required by the statute to be in writing. *Jonas v. Field*, 83 Ala. 445, 3 South. 893. Now, if this was an attempt on the part of Lord to answer for the debt, default, or miscarriage of Bettie Mixon, the contract must be in writing, expressing the consideration, and be signed by Lord; and there was no evidence that it was in writing, much less that it was signed by Lord. On the other hand, if it could be contended (which theory we do not think this evidence would support, though some of it may tend slightly to do so) that the contract was made with Lord and the credit given him alone—the lands being rented to Mixon and the goods sold and delivered to her on the credit given entirely and exclusively to Lord—of course, it would be a contract not within the statute, but in that event Bettie Mixon would not be liable at all, and consequently it would be a variance, and would not support a judgment against either of the defendants. While there may be some moral or immoral obligation upon the defendant Lord to pay this debt for Bettie Mixon, there was not sufficient evidence to impose a legal obligation upon him to pay the plaintiff.

The court was clearly and unquestionably in error in allowing all the evidence in this case relative to the existence of immoral relations between these two defendants. It neither proved nor tended to prove any issue involved in the case, and the attempt to prove this by the defendants themselves was not only a violation of the rules of law and prac-

tice, but a clear violation of the constitutional rights of these defendants. If they were persons of bad character, plaintiff could prove this for the purpose of impeaching them, but it conclusively appears that the evidence was offered for no such purpose. The only effect of the evidence at the time and in the manner it was offered would be to prejudice the jury against the rights of these parties. The court upon the request of the defendant Lord should have given the general affirmative charge in his case.

It is unnecessary to pass upon any other assignments of error.

Justices ANDERSON and DENSON do not concur in the opinion that the general affirmative charge should have been given, but do agree to the reversal on account of the admission of some of the evidence allowed over defendants' objections and exceptions.

For the errors pointed out, the case must be reversed and remanded.

Reversed and remanded.

SIMPSON, ANDERSON, DENSON, and SAYRE, JJ., concur.

(124 La.)

No. 17,802.

JEANERETTE LUMBER & SHINGLE CO., Limited, et al. v. POLICE JURY OF PARISH OF ST. MARTIN et al. In re JEANERETTE LUMBER & SHINGLE CO., Limited, et al.

(Supreme Court of Louisiana. Aug. 25, 1909.)

1. APPEAL AND ERROR (§ 73\*)—INJUNCTION—DISSOLUTION.

The injunction was dissolved on bond. There was no right to an appeal, as the injury was not irreparable and sufficient bond was given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 402, 404, 677; Dec. Dig. § 73.\*]

2. APPEAL AND ERROR (§ 73\*)—INJUNCTION—DISSOLUTION.

As relators need not institute another suit to vindicate their rights, there is no right of appeal. The status quo is unchanged by the election held by the property taxpayers.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 402, 404, 677; Dec. Dig. § 73.\*]

(Syllabus by the Court.)

3. INJUNCTION (§ 184\*)—DISSOLUTION.

Complainants in injunction are not to be considered as having abandoned their claim to injunctive relief because of the dissolution of the injunction on bond, nor are their rights to such ultimate relief prejudiced by such order.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 184.\*]

4. INJUNCTION (§ 178\*)—DISSOLUTION.

Dissolution of a temporary injunction on bond is largely within the discretion of the court granting the injunction.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 178.\*]

Application by the Jeanerette Lumber & Shingle Company, Limited, and others, for writs of certiorari, mandamus, and prohibition against the Police Jury of the Parish of St. Martin and others to review an order dissolving an injunction on bond. Application denied. Petition dismissed.

Voorhies & Voorhies, for applicants. Martin & Martin, for respondents. Respondent Judge, pro se.

Statement of the Case.

BREAUX, C. J. The purpose of plaintiffs is to obtain a decree to compel the judge of the district court to grant them a suspensive appeal. They are owners of land and taxpayers in the Second ward of the parish of St. Martin.

It appears that the police jury for the parish of St. Martin passed an ordinance on the 7th day of July, 1909, submitting to the property taxpayers of the Second ward the question of levying a tax of 3½ mills per annum on the dollar for a period of 15 years, beginning with the year 1909, the amount from this tax to be expended in constructing a navigable canal to connect a bayou by the name of Portage with the Teche at St. Martinville.

On the 17th day of July, 1909, relators obtained an injunction against holding this election.

The complaint on which the injunction was based is that the ordinance was not preceded by the required qualified petition of one-fifth of the qualified voters of the ward.

Further, in the alternative, plaintiffs' contentions are: That the police jury did not have the authority to connect the two streams named by a canal. That the police jury was encroaching upon the authority belonging to the levee board and state board of engineers, or that which should be exercised by the United States government. That the police jury sought to act independently entirely of the state board of engineers, and did not call upon it to make an examination and survey of the level of the two streams to the end of ascertaining whether the plan was at all feasible. The amount of the debt to be incurred, it is said, is not stated, nor the rate of interest on the bonds, nor the maturity of the bonds.

The further contention is urged that the election was not conducted under the auspices of the proper officers, and other objections to the same effect.

Lastly, relators alleged in their petition for an injunction:

"That, if said election was allowed to be held, it would cause them great and irreparable injury, and that for these reasons they are entitled to the equitable writ of injunction to stay and prevent the holding of said election."



The judge of the district court on the application of the defendants in the injunction dissolved the injunction on the latter's bond in the amount of \$500.

Relators applied for a suspensive appeal from the order of the district court authorizing the defendants to bond the injunction.

The court refused to grant the order of appeal.

In answer to the writ nisi, which issued from this court, the respondent judge stated in support of his refusal to grant the appeal that the injunction was dissolved on bond under article 307 of the Code of Practice, that it was not alleged that the act prohibited was such as to cause irreparable injury, and that in reality his order dissolving the injunction did not cause irreparable injury.

He further stated that he was acting strictly within the discretionary power with which he is intrusted, and added that in any event, the injunction he had granted had been granted by him through an oversight; that he had not read the decision in the Dubuisson contested election case, No. 123, from the parish of St. Landry; that it was only after he had granted the injunction that the decision attracted his attention. From it he deduced that he had acted inadvertently in granting the injunction. For that reason, in addition to other grounds stated, he had arrived at the conclusion that the defendants in injunction had the right to have it dissolved on bond.

#### Discussion.

The issues are taken up for decision in the inverse order from that followed in the pleadings.

The last statement in defense by the respondent in answer to the writ nisi is that the petition for an appeal had been filed before plaintiffs' petition to the district court for an order of the court dissolving the injunction on bond.

As a mere matter of date, there is some foundation for this statement. If controlling, these dates would excite some little confusion. But there is an order of record dissolving the injunction decreeing the amount of the bond required to that end. After that date, regularly enough plaintiffs in injunction filed their petition for an appeal, which the judge refused to grant.

We shall be governed by the date of this order. The filing of petitions and other orders will not be considered of any importance in view of the date of the order refusing the appeal. Though the petition was filed in a day or two after the order had been signed, this filing is not, under the circumstances shown, fatal to the order.

We pass to the question of the irreparable injury alleged. The allegation of plaintiffs in injunction in that respect is not entirely conclusive, though it should be entitled to some weight. While this allegation is of the utmost importance to obtain an order of ap-

peal, it may be considered as not conclusive on an application for an appeal; i. e., the court is not bound by the allegation.

Repeated decisions dispose of this question. *Koehl v. Judge*, 45 La. Ann. 1488, 14 South. 352; *Crescent City Live Stock Landing & Slaughterhouse Co. v. Police Jury*, Parish of Jefferson, Right Bank, 32 La. Ann. 1192; *Crescent City Live Stock Landing & Slaughterhouse Co. v. Butchers' Union Slaughterhouse & Live Stock Landing Co.*, 33 La. Ann. 930; *Schmidt v. Foucher*, 37 La. Ann. 174; *State ex rel. Sterken v. Judge Civil District Court*, 37 La. Ann. 825.

The judge a quo was in error in the statement that irreparable injury was not alleged by plaintiff in injunction. It was alleged.

We have arrived at the conclusion that the dissolution of the injunction on bond will not cause irreparable injury.

Another suit will not be necessary. The case here is different from those cited in *Garland, C. P.*, note 3, subnote "b," p. 307. We are not of the opinion that the plaintiffs will be driven to another suit to assert their rights should they elect to assert them in this present case.

Not one of plaintiffs' allegations is affected by the order authorizing defendants to bond. Whatever cause of action was alleged remains. It is not in the least prejudiced.

We will state, further, that the plaintiffs in injunction are not to be considered as having abandoned their injunction because of the dissolving order on bond. Nor can it be considered that the court has diminished or prejudiced rights claimed, if any they have, by the order in question.

The defendants have not since acquired any rights against plaintiffs which cannot be as well disposed of now or hereafter in this suit as any time previous to the date of the order dissolving the injunction.

The case has not been decided on the merits, and nothing appertaining to the merits has been decided.

If permissible amendments may be offered to the end of trying all admissible issues on the merits, they cannot be considered in the light of an abandonment of the grounds alleged for an injunction.

In a somewhat similar case this court decided, that, despite the bonding, the merits remained to be tried. *New Orleans Waterworks v. Jos. Oser*, 36 La. Ann. 918.

It results that the election was held subject to all the rights of the parties to have it annulled.

In the *Dubuisson Case*, 123 La. 443, 40 South. 15, similar to the present case, on rehearing the court recognized the right of plaintiffs in injunction to prosecute their suit after the election.

The conclusion that there was no irreparable injury and no necessity of instituting another suit disposes of the application.

This case is special in one of its features. Relators' petition came into the possession

of the court on the eve of the election sought to be enjoined, too late to issue an effective restraining order even if the relators were entitled to such an order. The court necessarily permitted the question presented to the voters to go to an election.

Returning for a moment to the application for appeal:

The issues will in all probability be disposed of finally at an earlier date than if an appeal were granted.

Were the appeal granted and the case taken up on the merits, there would be points to be considered never passed upon by the lower court.

Constitutional grounds and other legal grounds would be presented the first time on appeal.

It has repeatedly been held that they by all means should, whenever possible be raised, argued and decided in the district court, and should not generally be presented for the first time on appeal.

The persons interested will now have the opportunity of presenting all their grounds to the district court, and, after final decision in that court, they may be brought up before this court.

As relates to the discretion of the district court to dissolve an injunction on bond, a question before us:

We have given it consideration. In the nature of things, large discretion in matter of bonding an injunction or refusing to bond is vested in the district court.

There is sometimes necessity for prompt action, and, while that necessity should not prompt the judge to go further than before stated, yet, unless it abundantly appears that he has gone further, that he has rendered by his decision irreparable damages possible, or has driven the person enjoining to the necessity of instituting another suit, his action in matter mentioned should not be disturbed. The writ is recalled and discharged. Relators' application denied. *State v. Judge*, 29 La. Ann. 360; 2 High on Injunction, p. 1148, § 1497.

To the relators is reserved the right to pursue their suit and maintain any right they have as before stated.

It is ordered, adjudged, and decreed that the writ nisi be recalled, the demand of relators refused, and the petition dismissed.

(124 La.)

No. 17,629.

#### STATE v. LAWRENCE.

(Supreme Court of Louisiana. June 14, 1909. Rehearing Denied Oct. 6, 1909.)

#### 1. CONSTITUTIONAL LAW (§ 221\*)—DRAWING OF JURY — EXCLUSION OF DISREPUTABLE NEGROES.

The fact that the jury commissioners select persons for service on juries with the aid of a city directory, from which are excluded

only the names of negro nomads, living about barrel houses, in disreputable parts of the city, affords a defendant in a criminal prosecution, whether white or colored, no legal ground of complaint.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 724; Dec. Dig. § 221; Cent. Dig. Civil Rights, § 5.]

#### 2. CRIMINAL LAW (§ 1091\*) — APPEAL — REVIEW OF EVIDENCE.

A bill of exception in a criminal case to the overruling of a motion for new trial, which deals entirely with the sufficiency of the evidence, presents nothing upon which this court can act.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1091.\*]

(Syllabus by the Court.)

Appeal from Criminal District Court, Parish of Orleans; Joshua G. Baker, Judge.

Susie Lawrence was convicted of murder, and appeals. Affirmed.

J. Q. Flynn, for appellant. Walter Gulon, Atty. Gen., St. Clair Adams, Dist. Atty., and A. D. Henriques, Jr., Asst. Dist. Atty., for the State.

#### On Motion to Dismiss Appeal.

MONROE, J. Defendant, having been prosecuted for murder, was found "guilty, without capital punishment," and on April 2, 1909, was sentenced to imprisonment at hard labor for life. On April 13th she applied for, and was granted, an appeal, and the transcript was lodged in this court on April 28th. On the following day, the state filed a motion to dismiss the appeal, on the ground that it was not taken in time. The state relies on the provision of Act No. 108, p. 155, of 1898, which reads:

"Section 1. \* \* \* That appeals to the Supreme Court, in criminal cases, \* \* \* shall be taken, by motion or in writing, in open court within three days after the sentence shall have been pronounced."

It is conceded that, if the three days thus referred to are to be regarded as judicial days, the appeal herein was taken in time; otherwise, that it was too late. The question thus presented was decided in the case of *State v. Vicknair*, 118 La. 969, 43 South. 635, where it was held, in effect, that the three days allowed by the statute are judicial days.

The motion to dismiss is, therefore, overruled.

#### On the Merits.

The case is presented on two bills of exceptions—the one, to the overruling of a motion to quash the indictment; the other to a similar disposition of a motion for new trial.

1. The motion to quash alleges that the grand jury which presented the indictment was illegally constituted, in "that, in the selection of the names to be placed in the wheel, from which were selected the members of the grand jury which presented this

indictment, the names of all colored persons, otherwise qualified to serve, were excluded from said jury wheel, and only the names of persons who were known to be white were placed in said wheel to serve as jurors; that the names were selected from a directory, from which the names of colored [sic] were carefully excluded, and from the list so made up the names of all colored persons were again excluded"—all of which, it is alleged, was in violation of the Constitution and laws of this state and of the fourteenth amendment to the Constitution of the United States.

Three witnesses were examined in support of this motion.

Charles W. Drown, who was a jury commissioner up to December 1, 1908, testified that the commissioners took the names of the persons who were to be called on to serve as jurors "mainly from the city directory; at times, from the registration books."

Aristide Hopkins, who was also a jury commissioner up to December 1, 1908, testified to the same effect.

Louis Abadie, secretary to the Soards Publishing Company, testified that the canvassers (presumably, for the city directory) are instructed to take everybody, colored and white, except those "old negroes" [who] "move around every two months, around barrel houses." He said: "We have thousands of colored people" (in the directory). After hearing the testimony so given, the trial judge overruled the motion, and counsel for defendant took his bill.

Neither the motion nor the bill show whether the defendant is white or colored; but, whatever may be her color, we fail to discover why she should complain, or in what manner she has been injured, by the action of the jury commissioners in selecting jurors with the aid of a city directory from which only negro nomads, living about barrel houses, in disreputable parts of the city, are excluded.

2. The motion for new trial deals entirely with the question of the sufficiency of the evidence, a matter with respect to which the court has no jurisdiction.

Judgment affirmed.

(124 La.)

No. 17,643.

**EDWARD THOMPSON CO. v. DURAND.**  
In re EDWARD THOMPSON CO.

(Supreme Court of Louisiana. June 14, 1909.  
Rehearing Denied Oct. 6, 1909.)

1. GARNISHMENT (§ 162\*)—PROPERTY SUBJECT.  
The garnishment proceeding was directed against whatever funds of the defendant debtor the garnishee had in his hands.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 162.\*]

2. GARNISHMENT (§ 162\*)—ANSWER—DEFENDANT NOT A PARTY.

The answer of the garnishee was that he had no funds for the defendant; that he had funds for a corporation of which the defendant is the asserted president.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 162.\*]

3. GARNISHMENT (§ 162\*) — ANSWER — EVIDENCE.

As the garnishee disclosed for whose account he held the funds, it was incumbent upon the judgment creditor to prove contradictorily that the defendant (judgment debtor) is the owner.

This was done.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 162.\*]

(Syllabus by the Court.)

Certiorari to Court of Appeal, Parish of Iberia.

Garnishment by the Edward Thompson Company against W. J. Durand. Judgment for defendant was affirmed by the Court of Appeal, and plaintiff applies for certiorari or writ of review. Rule nisi recalled, and petition dismissed.

Weeks & Weeks, for applicant. Burke & Burke and Ventress J. Smith, for garnishee.

BREAUX, C. J. This is a garnishment proceeding instituted in aid of the collection of a judgment.

The case is before us on a writ of review.

In matter of this writ of garnishment, interrogatories were filed calling upon the People's National Bank of New Iberia to answer if the defendant, Walter J. Durand, had cash to his credit in bank.

The answer of the cashier of the bank was that it had no cash to his credit; that there is cash to the credit of W. J. Durand, president of the Louisiana Auto Club, to wit, the sum of \$432.23, and also a note, which the bank holds as collateral security, for an amount of \$170.

To the end of traversing the answers of the garnishee, plaintiff filed a motion. The grounds of this motion were that the funds were W. J. Durand's, and that the company of which he asserted he is the president was a corporation in name only; that it had no existence.

The garnishee interposed an exception, and averred that the question which plaintiff sought to open in this case could not thus be brought before the court; that the bank held the money for account of W. J. Durand, President, and not for account of W. J. Durand.

Although the court maintained this exception on the point just stated, evidence was heard on the rule to traverse.

The cashier of the bank testified, in support of his answer before mentioned, that the defendant opened an account with it in the name of the Auto Club, W. J. Durand, President; that the president drew against the account in bank as president; that he, the

cashier, did not have authority to charge a check of defendant personally to the Louisiana Auto Club.

There were checks drawn by Durand personally. They were charged to the company. His attention was called to the fact that a few of these checks had been signed by him personally, and he was advised that a change had been made by adding "President" to his name.

A witness who sold electrical supplies to the defendant testified that the entry in his books was in the name of defendant individually. He did not recall whether the check he received from this defendant was signed by him individually or as president.

The deputy clerk of court testified that there was no charter of incorporation recorded and that he knew nothing of an incorporated Louisiana Auto Club.

Another witness, who had been employed by defendant as stenographer, testified that he obtained a judgment against the defendant personally, and recovered an amount due him for services rendered as stenographer. He stated that when he was employed defendant had mentioned something about "his people," referring, as we understand, to members of the incorporation in New York.

Another witness, an attaché of a newspaper, stated that he dealt with the defendant as president of the company.

We have not found in this testimony positive evidence of the mythical character of the corporation, nor is there evidence showing that there ever was such a corporation.

As against the garnishee, it must be made to appear, in order to recover a judgment, that he is indebted to the defendant.

The bank denies indebtedness to the defendant debtor.

We are not of the opinion, with the proof before us, that we should hold the garnishee's answer as untrue despite the sworn denial.

It may be that the corporation is a mythical corporation, and that a mere name was used by the depositor. None the less, the deposits have been made in the name of the company. Until it is proven that the name is fictitious, we do not think that the bank should be held liable as garnishee.

The cashier, as before stated, testified that the money was deposited by the company.

The plaintiff in garnishment contested the answer of the garnishee as not true. The onus was with him of proving indebtedness as charged. His claim is that W. J. Durand owned the amount. The cashier's answer was in the negative.

He might have avoided making the negative reply, but, by testifying as he did, he did not thereby assume the burden of proof. It still remained for the plaintiff to prove that the defendant is the debtor, and to prove all that is necessary in order to hold the garnishee.

The liability of the garnishee must clearly appear.

Until it is made evident that the amount is due by W. J. Durand, the liability does not clearly appear.

Moreover, the garnishee disclosed in whose name the money was deposited.

Plaintiff did not proceed against the asserted party. It was for plaintiff to make Durand a party individually, and to prove that he is not the president of the company of which he asserts he is.

The debtor was not placed under oath, as he might have been; nor does it appear, as we are informed, that the creditors went far enough to shift the onus of proof from them to the garnishee.

We will refer to decisions in other jurisdictions, not as controlling, but as announcing the rule regarding the necessity of making parties.

The trustee who receives money with notice that it belonged to another is not chargeable for the money so received. *Cram v. Shackleton*, 64 N. H. 44, 5 Atl. 715.

In another decision it was held, where the evidence upon the disclosure of a garnishee shows that the debt sought to be garnished was payable to a third person, and not to defendant in a principal action, the disclosure itself is sufficient to protect the garnishee, and it devolves upon plaintiff to bring in such party, if he desires to test the validity of the claim. *Mansfield v. Stevens*, 31 Minn. 40, 16 N. W. 455.

The right of a party not before the court cannot be legally disposed of. *Brunswick Gaslight Co. v. Flanagan*, 88 Me. 420, 34 Atl. 263.

For reasons assigned, the rule nisi is recalled, applicant's demand is denied, and its petition is dismissed, at its costs.

(124 La.)

No. 17,462.

LOUISIANA-TEXAS OIL & PIPE LINE CO.  
v. ATLANTA OIL & GAS CO.(Supreme Court of Louisiana. June 15, 1909.  
Rehearing Denied Oct. 6, 1909.)1. PLEDGES (§ 27\*)—LIABILITY OF PLEDGEE—  
RENTAL VALUE OF PROPERTY PLEDGED.

The pledgee of oil machinery, who has not used the same for his own benefit, cannot be charged with its rental value by the pledgor, who has failed to redeem it pursuant to contract.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 27.\*]

2. APPEAL AND ERROR (§ 842\*)—REVIEW—  
QUESTION OF FACT.

The question of damages to oil machinery while held in pledge is an issue of fact, on which the judgment below will not be disturbed, unless clearly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.\*]

3. CONTRACTS (§ 319\*)—PERFORMANCE—SUP-  
PLEMENTAL CONTRACT—DEFAULT.

When a contract to sink a well to a certain depth has been performed, and the driller has thereby earned the stipulated compensation, his failure to comply with a supplemental contract to sink the well deeper will not affect the right acquired under the previous contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1493-1507; Dec. Dig. § 319.\*]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; A. J. Murff, Judge.

Action by the Louisiana-Texas Oil & Pipe Line Company against the Atlanta Oil & Gas Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Alexander & Wilkinson, for appellant.  
Herndon & Herndon, for appellee.

LAND, J. Plaintiff sues to rescind three contracts made with the defendant during the year 1906 for the purpose of having its lands exploited for oil, and for damages for breach of contract, and for depreciation by misuse and abuse of a certain well-rig delivered to defendant for the purpose of drilling for oil pursuant to the agreement between the parties.

The defendant answered that it claimed nothing under the contract of date February 10, 1906, that it had fully complied with the contract of date May 24, 1906, and was ready and willing to perform the contract of date December 31, 1906. For further answer defendant reconvened, and prayed for judgment declaring it to be the owner of an undivided half interest in the two five-acre tracts of land described in the contract of date May 24, 1906, and for judgment for \$1,500, with interest and attorney fees, on the note of the plaintiff to the order of the defendant, and for judgment preserving all of its rights and privileges under the same

contract, and for general relief in the premises.

There was judgment in favor of the plaintiff, annulling the first and last contracts, and in favor of the defendant as the owner of an undivided half interest in one of the five-acre tracts, and condemning the plaintiff to pay the amount of the note, with interest and attorney fees. The claims of the defendant as to the other tract and the oil well rig are not mentioned in the judgment.

Defendant has appealed, and the plaintiff has joined in the appeal, and for answer has prayed that the judgment below be reversed, and for judgment in favor of the plaintiff as prayed for in the petition.

On February 10, 1906, the parties entered into a written contract by which the plaintiff conveyed to defendant an undivided one-half interest in two certain five-acre tracts of land, and in consideration of said transfer the defendant agreed and obligated itself to continue the boring of a certain well, "Old No. 2," then being bored on the above-described lands, to a depth of 2,500 feet unless oil in paying quantities should be found at a lesser depth; the defendant being made the exclusive judge of such contingency. The parties agreed on certain stipulations in the event the well developed into an oil producer in paying quantities. The contract recited that the drilling machinery then at well No. 2 was pledged to J. B. Reynolds for a debt of the plaintiff, and that the plaintiff was to secure a lease of said machinery from J. B. Reynolds to the defendant.

Some work was done under this contract, but it was abrogated by mutual consent; and on May 24, 1906, the parties entered into another agreement, by which the defendant agreed to sink a new well on one of the five-acre tracts near old well No. 2 to the depth of 1,900 feet at its own expense, furnishing everything needful except the well rig, which was to be furnished by the plaintiff. It was stipulated that, when said well is completed, each of the parties was to own one-half interest in the well, share and share alike, and that the parties were to own jointly the two five-acre tracts of land, and the well rig, including what might be added to the same by the defendant. It was further stipulated that any six-inch piping that might be bought by the defendant should not be owned jointly, but should remain the property of the defendant unless an oil well is brought in (which is a gusher), in which event the said piping was to be owned jointly by the parties. It was further agreed that the \$1,500 advanced by the defendant to the plaintiff was to be paid back before any part of the well rig was delivered to the plaintiff.

It was further agreed that, if a paying well could be brought in at a lesser depth than 1,900 feet (and is not a gusher), the de-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fendant should finish the well and apply the net proceeds of such well to the sinking of another well on said five acres of land upon which well No. 2 is situated to a depth of 1,900 feet, which, when completed, was to be the joint property of the contracting parties. It was further agreed that, if said well was sunk on any land other than said five acres, then said land was to be owned jointly by the parties to the contract.

On the same date plaintiff executed its promissory note for \$1,500 to defendant, or order, payable 90 days after date, bearing 8 per cent. interest from date, and stipulating 10 per cent. attorney fees in the event the note should be placed in the hands of an attorney for collection, and also another instrument of writing, evidencing a pledge and delivery of the well rig to secure the prompt payment of said note.

The consideration of the note was money loaned and used in paying the debt due J. B. Reynolds and redeeming the well rig, which was delivered to the defendant. The contract of May 24, 1906, was performed on the part of the defendant by drilling a new well to a depth of 1,900 feet. The note was not paid at its maturity by the plaintiff company.

On December 31, 1906, the parties entered into a supplemental contract, which was not to affect or change the second contract, but was to be a part of the same. In the first paragraph of this supplemental agreement the parties recognized the necessity of sinking the well deeper than 1,900 feet and of incurring greater expenses than were at first anticipated if oil in paying quantity was to be struck. It was agreed that, if the defendant should succeed in bringing in a good producing oil well, the plaintiff would make to defendant certain "donations" (so called), consisting of one-third interest in a pipe line to be constructed out of the first revenues derived from the said well. It was further stipulated that the next revenues received from such well should be used in drilling another well on lands of another oil corporation, etc.

The defendant sunk the well covered by the second contract to a depth of 2,262 feet without striking oil, and then suspended further operations, after expending about \$13,000 in the enterprise.

We agree with the trial judge that the contract of May 24, 1906, was fully performed by the defendant by sinking the well to the depth of 1,900 feet, and that the defendant thereby became the joint owner with plaintiff of the two five-acre tracts of land and the well rig described in the contract. The trial judge seems, by oversight, to have omitted including one of the tracts and the

well rig in his decree in favor of the defendant. The contention of plaintiff that the compensation of the defendant under said contract was conditioned on the striking of oil is without merit. Defendant was bound by the terms of the agreement to sink the well to a depth of 1,900 feet, and nothing more. The contract of December 31, 1906, by stipulating an additional consideration for the sinking of the well beyond the depth of 1,900 feet, confirms the conclusion that the prior contract had been performed and the specified consideration earned by defendant. In a resolution adopted October 3, 1907, the board of directors of plaintiff corporation confined its claim to one-half interest in the machinery and one-half interest in the land in question.

As to the damages claimed for the use and abuse of the well rig, it is to be noted, first, that the defendant is the joint owner of the same; and, second, that defendant holds plaintiff's interest therein in pledge to secure the payment of the note for \$1,500. Defendant, having a legal right to retain possession of the well rig, cannot be charged with hire. Plaintiff's remedy was to pay the note and retake possession.

We agree with the trial judge that the evidence as a whole does not show that the well rig has depreciated in value through the neglect of the defendant. The well rig was a second-hand affair when delivered to the defendant, and some parts were defective and some were missing. Defendant has spent a considerable sum in repairs and replacing portions of the machinery, and seems to have exercised the usual care bestowed on well rigs operating in oil fields.

We think plaintiff, having succeeded in annulling the last contract, is entitled to costs on the main demand, and should be condemned to pay the costs of the reconventional demand.

It is therefore ordered that the judgment below be amended, by recognizing the defendant as joint owner with the plaintiff of the 5 acres of land out of the S. A. Wadkins 160-acre tract, as described in a deed recorded in the office of the recorder of Caddo parish, La., in Book 41 of Conveyances, page 27, and in the contract of May 24, 1906, and also by recognizing that the defendant is joint owner with the plaintiff of the well rig and additions thereto described in the said contract of May 24, 1906, and by decreeing that the defendant pay the costs below of the main demand, and that the plaintiff pay the costs below of the reconventional demand; and it is further ordered that, as thus amended, the judgment appealed from be affirmed, and that the costs of appeal be paid one-half by each party.

(124 La.)

No. 17,185.

**GURLEY v. CITY OF NEW ORLEANS.**

(Supreme Court of Louisiana. June 14, 1909.)

**1. MUNICIPAL CORPORATIONS (§§ 292, 294, 330\*)—STREET PAVEMENT—CHARTER REQUIREMENTS—COMPLIANCE WITH.**

Charter of New Orleans (Acts 1896, p. 46, No. 45), as amended by Acts 1902, p. 430, No. 215, providing that, where the cost of pavement is to fall in part on property owners, it can be ordered only when petitioned for, and that such owners shall have the right to prescribe what kind of pavement shall be used, and that the petition must be published during four weeks and the work done by contract awarded to the lowest bidder after advertisement, must be strictly observed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 768, 787, 854, 855; Dec. Dig. §§ 292, 294, 330.\*]

**2. MUNICIPAL CORPORATIONS (§ 294\*)—STREET PAVEMENT—PUBLICATION OF PETITION.**

A street pavement petition asking that the pavement be "with rock asphalt, pitch asphalt, or bitulithic" was so published, but placed, however, under an official caption which stated, both in its headlines and body, that the paving was to be with asphalt, so that any one who assumed that the caption correctly stated the nature of the petition and read it only would have been misled into the belief that the paving was to be with asphalt, and not notified of the intention to make it of bitulithic. *Held*, that the publication of the petition under such a misleading caption was not a compliance with the law requiring the petition to be published.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 787; Dec. Dig. § 294.\*]

**3. MUNICIPAL CORPORATIONS (§ 319\*)—STREET PAVEMENT—ESTOPPEL OF PROPERTY OWNER TO OBJECT.**

An abutting owner who petitioned that pavement be with rock asphalt, pitch asphalt, or bitulithic is estopped to restrain the city from contracting for bitulithic on the theory that as it is a patented pavement, and requires the use of materials protected by trade-marks, there could be no competition in bidding on the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 833; Dec. Dig. § 319.\*]

**4. ABATEMENT AND REVIVAL (§ 84\*)—WAIVER OF QUESTION OF ABATEMENT.**

The question whether a suit has or has not abated is waived by filing an exception of no cause of action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 507-510; Dec. Dig. § 84.\*]

**5. ABATEMENT AND REVIVAL (§ 52\*)—DEATH OF PLAINTIFF—PERSONAL SUIT.**

A suit by an abutting owner to enjoin a city from entering into a paving contract is not purely personal so as to abate with his death, but being to protect the property, and it having passed to his legal representatives, they have precisely the same right to maintain the suit.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 248-254; Dec. Dig. § 52.\*]

**6. EXECUTORS AND ADMINISTRATORS (§ 438\*)—ACTIONS—RIGHT TO MAINTAIN.**

Until the heirs have come forward and accepted the succession and taken charge of it, they could not undertake to represent it, and

have not alone the quality to stand in judgment in a suit as an abutting owner and taxpayer to restrain the city from entering into a paving contract, but the testamentary executor is the proper person to represent the succession.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1772; Dec. Dig. § 438.\*]

**7. ABATEMENT AND REVIVAL (§ 45\*)—GROUNDS OF ABATEMENT.**

Pending an appeal in a suit to restrain a city from entering into a paving contract, the succession of plaintiff, who died before answer filed, was closed, and the property turned over to his heirs, and his executor, who had been made a party to the suit, discharged. *Held*, that the contention by the heirs, who made themselves parties to the suit and objected that it abated by the executor's discharge, was not sustainable.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 233, 234; Dec. Dig. § 45.\*]

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Hewes T. Gurley against the City of New Orleans for an injunction. Judgment for defendant, and plaintiff appeals. Judgment set aside, and injunction made peremptory.

Denegre & Blair, for appellant. H. G. Dupre, Acting City Atty., for appellee. J. C. Henriques, amicus curiæ.

**PROVOSTY, J.** Plaintiff, in his double capacity of property owner on St. Charles street, in this city, and taxpayer in this city, has enjoined the mayor from entering into a certain contract with the Southern Bitulithic Company for the paving of that street. The grounds of the injunction are, first, that the petition of property owners asking for the paving was not published as required by law; second, that the ordinance providing for the letting of said contract provides for a different kind of pavement from that specified in the petition of property owners as published; and, third, that said ordinance provides for the letting of said contract in a manner violative of the law which requires such contracts to be let to the lowest bidder after advertisement, in that the pavement in question is a patented pavement, and requires the use of materials protected by trade-marks, and hence there can be no competition in the bidding on said contract.

In New Orleans, when the cost of the pavement is not to be borne exclusively by the city, but is to fall in part on the property owners along the street to be paved, the paving can be ordered only when petitioned for by one-fourth of the property owners, and the property owners have the right to prescribe what kind of pavement shall be used; and this petition must be published during four weeks, and the work must be done by contract awarded to the lowest bidder after advertisement. All this is prescribed by the city charter (Acts 1896, p. 46, No.

45), as amended by No. 215, p. 430, Acts 1902, and the settled jurisprudence of this court is that all these formalities must be strictly observed. *Barber Asphalt Co. v. Watt*, 51 La. Ann. 1345, 26 South. 70.

In the present instance, the deceased was one of the signers of the petition of property owners. The petition asked that the paving be "with rock asphalt, pitch asphalt, or bitulithic," and it was published as written. But in the publication it appeared under an official caption which explained its nature, and called upon the property owners along the street to come forward and make known their objection to the proposed paving, if any they had; and this caption stated that the paving was to be with asphalt. It so stated both in its title or head lines and in its body. So that any one who assumed that this caption correctly stated the nature of the petition and contented himself with reading only it would have been misled into the belief that the proposed paving was to be with asphalt, and would not have been notified of the intention to make it of bitulithic.

The case was disposed of in the lower court on an exception of no cause of action, which was sustained.

We think that the publishing of the petition under such a misleading caption was not a compliance with the law requiring the petition to be published. The object of the publication is to give notice of the kind of pavement proposed to be used, and the property owners along this street would have had the perfect right to assume that the nature of the petition was correctly stated in the caption, and not have read the petition itself. Especially that this caption was an official document duly signed by the clerk of the city council.

The petition, therefore, shows a cause of action in so far as based on want of publication; but it does not show a cause of action in so far as based on the patented character of bitulithic. The deceased could not have been allowed to enjoin the city from a course of action which it had adopted on his own petition. He prayed that the pavement be "With rock asphalt, pitch asphalt, or bitulithic," and the city adopted bitulithic. He and his legal representatives are estopped in the premises.

In this court the defendant has raised questions which were not passed on by the lower court. These we now proceed to consider.

The plaintiff died before answer filed, and his dative testamentary executor was made a party to the suit. Defendant contends that by the death of plaintiff the suit abated, because under article 21, Code Prac., a suit abates "where either party dies before answer filed"; and, secondly, because the action is personal, and, under the maxim, "*Actio personalis moritur cum persona*," dies with the plaintiff.

An exception of no cause of action does not deny that there is a demand or suit in court which the defendant is bound to answer. On the contrary, the defendant by joining issue on the question of whether or not the petition shows a cause of action, in other words, by joining issue on the legal rights of the plaintiff as exhibited in the petition, practically admits that the suit is in court—that is to say, admits that the suit has not abated. Therefore the question of whether the suit has or not abated is one which is waived by the filing of an exception of no cause of action.

The contention that this suit was purely personal to the deceased is, we take it, not made seriously. The object of this suit being to protect the property, and the property having passed to the legal representatives of the deceased, these legal representatives clearly have precisely the same right to maintain the suit that the deceased had.

Next, defendant contends that the testamentary executor had no quality to stand in judgment in this suit; that the legal heirs alone had such quality. But plainly the proper person to represent the succession in any suit in which it may be interested is the officer appointed by law to have charge and care of it. The heirs could not undertake to represent it until they had come forward and accepted it and taken charge of it. As observed in plaintiff's brief:

"The books are full of suits brought by administrators and executors for the protection of the property in their charge." *Woodward v. Thomas*, 38 La. Ann. 238.

Since the case has been in this court the succession of the deceased has been closed, and the property turned over to his heirs, and the executor discharged. The heirs have been made themselves parties to the suit, and objection is now made that the suit abated by the discharge of the executor. This contention can hardly be serious.

The judgment appealed from is set aside, and the injunction herein is made peremptory, at defendant's cost.



**FLORIDA HOME INS. CO. v. BOZEMAN.**

(Supreme Court of Florida, Division B. June 11, 1909. Headnote Filed Oct. 11, 1909.)

**ELECTION OF REMEDIES (§ 3\*)—WHEAT CONSTITUTES.**

Where an insurance company, as defendant to a bill in equity filed against it for reformation and correction of an alleged mistake in a policy of fire insurance issued by it, interposes a plea to such bill, alleging that the complainant had already instituted his suit at law upon such policy, claiming recovery thereon in the form that the same was written, and that such suit at law was still pending, and that complainant had thereby elected to stand upon said contract as written, and was thereby forever precluded and estopped from maintaining a suit for reformation of such policy, such plea is properly overruled, when it appears to the chancellor at the hearing thereof that the alleged suit at law by the complainant was not upon the policy as the same was written, but that such policy was declared upon in such suit at law in the form that such bill for reformation sought to make it bear. In such a case there is no inconsistency between the two remedies; the suit in equity for reformation being ancillary to and in aid of the suit at law upon the policy sought to be reformed.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 3; Dec. Dig. § 3.\*]  
(Syllabus by the Court.)

Appeal from Circuit Court, Calhoun County; John W. Malone, Judge.

Bill by J. J. Bozeman against the Florida Home Insurance Company. Decree for complainant. Defendant appeals. Affirmed.

Liddon & Carter, for appellant. Calhoun & Campbell, for appellee.

**TAYLOR, J.** The appellee, Bozeman, as complainant below, filed his bill in equity in the circuit court of Calhoun county against the appellant, as defendant below, alleging an existent mistake in a policy of fire insurance issued to him by the defendant company whereby \$600 of the amount assured by such policy was therein by inadvertence and mistake placed upon store fixtures and furniture, including one iron safe, when in fact it was intended by the insurer and the insured that said \$600 should be placed upon and should cover the complainant's two-story shingle-roof building situated on the west side of Pear street, on block 5 of lot 9 in the town of Blountstown, in said county of Calhoun, and said bill prayed a reformation of said insurance policy, so as to correct such mistake, and for general relief. The defendant demurred to this bill for want of equity. This demurrer was overruled, whereupon the defendant filed a plea to the bill, alleging that prior to the filing of said bill the complainant had instituted his suit at law in the circuit court of Calhoun county against defendant for recovery upon said policy as the same was

written, and that said suit at law was still pending and progressing, and has progressed to the extent that a demurrer to the declaration has been filed, argued, and overruled, and defendant has filed a plea denying liability of defendant upon such policy, and that by the institution of such suit at law complainant has elected to stand upon said contract as written, and is forever precluded, estopped, and barred from maintaining this suit for reformation of such policy. At the hearing on this plea the declaration in such suit at law was exhibited to sustain the defendant's plea, and such declaration shows upon its face that the policy as written was not declared on therein; but the cause of action declared on therein is the policy of insurance as the same is by the bill herein sought to be corrected and reformed. At the hearing on such plea the same was overruled, and from this order the defendant company has taken this appeal, and assigns such order to be error.

There was no error here. The complainant did not in his suit at law declare upon the policy as the same was written, but declared upon it in the form that in his bill herein he claims it should have been written, and in the form that he seeks by his bill herein to make it bear.

In the case of *Lansing v. Commercial Union Assurance Co.*, 4 Neb. (Unof.) 140, 93 N. W. 756, it was held in effect that there was no inconsistency between a pending action at law upon a contract and an ancillary suit in equity brought to correct or reform the contract sued on in the suit at law for mistake therein. 15 Cyc. 259. It would be best for the complainant in his bill to set forth his pending suit at law on the policy, and to pray therein that the prosecution of such suit at law be stayed until such reformation, as was done in the *Lansing Case*, supra.

In the case of *American Process Co. v. Florida White Pressed Brick Co.* (Fla.) 47 South. 942, it is held that: "Whether coexistent remedies are inconsistent is to be determined by a consideration of the relation of the parties with reference to the right sought to be enforced as asserted in the pleadings."

We do not think that there is any inconsistency between the two suits under discussion, but, on the contrary, that they are perfectly consistent with each other; the equity suit for reformation of the contract sued upon in the suit at law being ancillary to and in aid of the latter.

The order appealed from in said cause is hereby affirmed, at the cost of the appellant.

**HOCKER and PARKHILL, JJ., concur.**

**WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.**

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**PENSACOLA BANK & TRUST CO. v. NATIONAL BANK OF ST. PETERSBURG.**

(Supreme Court of Florida. June 25, 1909.)

Headnote Filed Oct. 11, 1909.)

**APPEAL AND ERROR (§§ 66, 133\*)—DECISIONS REVIEWABLE—NECESSITY OF FINAL JUDGMENT.**

Under the provisions of section 1691, Gen. St. 1906, writs of error lie only from final judgments; and where there is no final judgment in a cause brought to the appellate court for review by writ of error, such cause will be dismissed by the court *ex proprio motu*.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 329, 897; Dec. Dig. §§ 66, 133.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Action by the National Bank of St. Petersburg against the Pensacola Bank & Trust Company. Judgment for plaintiff, and defendant brings error. Dismissed.

Blount & Blount & Carter, for plaintiff in error. P. O. Knight and C. C. Whitaker, for defendant in error.

**PER CURIAM.** This cause being taken up in its regular order for final disposition, the court finds in the record the following entry for a judgment in the cause immediately following the verdict of the jury finding for the defendant:

"Whereupon it is ordered that judgment is rendered for the defendant, and that the defendant do have and recover of and from the plaintiff its costs in this behalf expended, to be taxed by the clerk, now assessed at one hundred and sixty-four <sup>29</sup>/<sub>100</sub> dollars."

Section 1691, Gen. St. 1906, provides that writs of error shall lie only from final judgments.

The quoted entry in this cause is not such a final judgment as will support a writ of error. No issue between the parties in the cause is adjudicated or finally disposed of thereby. It does not adjudge that the plaintiff take nothing by his plaint, nor does it adjudge that the defendant be discharged, or go hence without day. At best, it is an order for the entry of a judgment in favor of the defendant, and an adjudication in his favor for costs. *Hall v. Patterson*, 45 Fla. 353, 33 South. 982; *Mitchell v. St. Peters-*

*burg & G. Ry. Co.* (Fla.) 47 South. 794; *Dal- lam v. Sanchez* (Fla.) 47 South. 871, and cases cited.

There being no final judgment in the cause, the writ of error must be, and is hereby, dismissed, at the cost of the plaintiff in error. All concur.

**LOUISVILLE & N. R. CO. v. BERRY.**

(Supreme Court of Florida, Division B. June 9, 1909. Headnote Filed Oct. 11, 1909.)

**APPEAL AND ERROR (§ 66\*)—DISMISSAL—FINAL JUDGMENT—NECESSITY.**

Under the provisions of section 1691 of the General Statutes of 1906, writs of error lie only from final judgments and from orders granting new trials; and when a transcript of record, carried by writ of error to the appellate court for review, fails to show a final judgment in the cause, such writ of error will be dismissed by the court *ex proprio motu*.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 329; Dec. Dig. § 66.\*]

(Syllabus by the Court.)

Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Action by W. J. Berry against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Dismissed.

Blount & Blount & Carter, for plaintiff in error. Avery & Avery, for defendant in error.

**TAYLOR, J.** In this cause the record brought here on writ of error exhibits a verdict of a jury in favor of Berry, the plaintiff below, against the plaintiff in error, who was defendant below; but the record fails to show that any final judgment was ever rendered on this verdict by the court below.

Section 1691 of the General Statutes of 1906 provides that: "Writs of error shall lie only from final judgments, except as specified in section 1695." The last-named section provides for writs of error to review orders granting new trials. The writ of error herein must therefore be, and is hereby, dismissed at the cost of the plaintiff in error.

**HOCKER and PARKHILL, JJ., concur.**

**WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.**

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**BOTHAMLY et ux. v. QUEAL.**

(Supreme Court of Florida, Division A. June 29, 1909. Headnotes Filed Oct. 11, 1909.)

**1. APPEAL AND ERROR (§ 1009\*)—REVIEW—FINDING OF CHANCELLOR.**

The finding of a chancellor that an agent committed a fraud upon his principal will not be disturbed, when supported by the evidence, especially when the defense in evidence differs from that pleaded by the agent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

**2. JUDGMENT (§ 286\*)—ENTRY—MISPRISION OF CLERK.**

The act of the clerk in entering judgment for costs pro forma against husband and wife, when directed specifically by the court to enter the judgment against the husband alone, is a self-correcting misprision.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 563; Dec. Dig. § 286.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Volusia County; Minor S. Jones, Judge.

Bill by J. H. Queal against William Bothamly and wife. Decree for plaintiff, and defendants appeal. Affirmed.

Thomas E. Wilson, for appellants. Massey & Warlow, for appellee.

**COCKRELL, J.** This is a bill by Queal against Bothamly and wife, setting up the exclusive employment of Bothamly to locate cypress lands for the complainant, the purchase during the employment by Bothamly in the name of his wife of certain cypress lands from the state, and praying that the wife be declared to hold the title to these lands in trust for Queal. The separate answers of Bothamly and wife aver in effect that the lands were purchased with the wife's money and were located by her through another agent while Bothamly was under his employment locating lands for Queal in another part of the state. Testimony was taken, and there was decree for the complainant.

The evidence having disclosed that Bothamly personally conducted the negotiations for the purchase of the lands from the state, sending his own check in payment, and directing first that the deeds be made to one William Laws and then changing to Mrs. Bothamly, and that her alleged agent was employed by Queal through Bothamly, the defense shifted and contradicts the answer; it being then claimed that the location occurred several weeks prior to the inception of the employment.

No attempt is made to explain the discrepancy between the defense as pleaded and its abandonment and the change of front as presented in the evidence, and we are impressed with the thought that it was caused only by the exigencies of the case. The good faith required of agents towards their principals, the length of time between the supposed location and the attempt to get the state's deed for lands known by Bothamly to be readily salable for many times the purchase price, his concealment and absence of candor in failing to disclose the owner's name when the lands were finally shown to Queal, the paying for the property with his own money and having the deed made out to his wife, even though there be evidence that he was in her debt, and other suspicious circumstances in the record, forbid our upsetting the finding of the chancellor upon the facts.

The act of the clerk in entering judgment for costs pro forma jointly against husband and wife, when directed specifically by the court to enter the judgment against the husband alone, is a mere misprision, correcting itself, and will not cause reversal.

The decree is affirmed.

**WHITFIELD, C. J., and SHACKLEFORD, J.,** concur.

**TAYLOR, HOCKER, and PARKHILL, JJ.,** concur in the opinion.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**ETZLER v. BROWN et al.**

(Supreme Court of Florida. Division A. June 29, 1909. Headnotes Filed Oct. 11, 1909.)

**1. MANDAMUS (§ 76\*)—GROUNDS—EXPULSION OF COUNCIL MEMBER.**

Mandamus is the proper proceeding to test the validity of the action of a city council in expelling from office a member of the council. In such an action the court will consider the entire proceeding of the council, including the issues in effect made and the testimony taken before the council as shown by the alternative writ. If the proceedings were illegal or fatally defective, or if the testimony wholly fails to support the charges made, the court will order the officer restored.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 158-160; Dec. Dig. § 76.\*]

**2. MUNICIPAL CORPORATIONS (§ 159\*)—EXPULSION OF OFFICERS—OPPORTUNITY TO BE HEARD—REVIEW BY COURTS.**

Where no particular procedure is prescribed by which a city council may exercise its power to expel an officer of the city, such proceedings should be had as will give the person charged an opportunity to be heard in defense of any charges made against him for which he may be expelled. If the charges made warrant expulsion, and there is legal evidence in support of the charges, and the person has had reasonable opportunity to defend, action taken by the requisite vote of the council in expelling a member of the council will not be disturbed by mandamus proceedings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 353, 356; Dec. Dig. § 159.\*]

**3. OFFICERS (§ 66\*)—MALCONDUCT—SELLING INFLUENCE OR VOTE.**

One intrusted with official power, who violates his public obligation and betrays his official trust by selling his official influence or vote in a body of which he is a member, is guilty of malconduct in office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 96; Dec. Dig. § 66.\*]

**4. OFFICERS (§ 66\*)—"MALCONDUCT IN OFFICE."**

Malconduct in office, like misconduct in office, includes such acts as amount to a breach of the good faith and right action that are impliedly required of all officers (citing Words and Phrases, vol. 5, pp. 4296, 4332).

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 96; Dec. Dig. § 66.\*]

**5. MUNICIPAL CORPORATIONS (§ 159\*)—EXPULSION OF COUNCIL MEMBER—PROCEEDINGS—VALIDITY.**

In expelling a member of its body a city council does not convict of a crime, and it is not essential that the strict rules of criminal procedure be observed. Where no injury appears to have been done an expelled officer, it is not necessarily illegal for the council, while in executive session considering the action to be taken, to receive and read reports of a detective used in the case, when the action taken was publicly done and duly recorded.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 350-356; Dec. Dig. § 159.\*]

**6. MUNICIPAL CORPORATIONS (§ 159\*)—CITY COUNCIL MEMBER—"DISORDERLY BEHAVIOR"—"MALCONDUCT IN OFFICE."**

A charge that, in effect, alleges that a member of a city council agreed for a consideration to aid in securing a valuable contract with the city through a constituted board of the city, and to secure an increase in the appropriation

for the purposes of the contract to unduly increase the profits, sufficiently sets forth conduct amounting to "disorderly behavior and malconduct in office" for which such officer may be expelled under the statute; and, where there is evidence to sustain the charge and no illegality appears in the proceedings of expulsion, the courts will not interfere by mandamus.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 159.\*]

(Syllabus by the Court.)

Error to Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Mandamus by J. E. Etzler against W. Lesley Brown and others, constituting the City Council of Tampa. Judgment for defendants, and relator brings error. Affirmed.

Wall & McKay, for plaintiff in error. W. R. Rowland and C. C. Whitaker, for defendants in error.

**WHITFIELD, C. J.** The plaintiff in error obtained from the circuit court for Hillsborough county an alternative writ of mandamus commanding the city council of the city of Tampa to restore relator to his office as councilman of the city of Tampa from which he had been expelled by the council, or to show cause for not doing so. A motion to quash the alternative writ was granted, and the proceeding dismissed. The relator took writ of error, and urges that he was illegally expelled from his office, and should be restored.

Briefly stated, the alternative writ, in effect, alleges: That the relator was duly elected, qualified, and acting as councilman, his term not expiring till June, 1910. That certain charges of alleged malconduct in office were made to the council against him. That the council unanimously adopted a resolution suspending relator "until after the hearing and investigation by this council of the charges now pending against him," and providing "for a hearing in a body of the said charges now pending against councilman James E. Etzler, with all the testimony bearing upon the same." That another resolution setting forth designated specifications of the charges against relator was adopted by the council and served on the relator. That after striking a plea in abatement, and also denying motions to strike designated portions of the resolution adopted by the council and to quash certain of the specifications of malpractice in office, the council took testimony as set out in the alternative writ. That the controversy was by agreement submitted without argument. "That thereupon the council retired in executive session to consider what action they should take, and while in executive session, without knowledge of the said petitioner or his attorney, the council received the daily reports made by the detective North mentioned in the said proceedings, and that some of the

members of the council read at least a portion of said reports, and that afterwards, to wit, on the same evening, the council returned in open session and reported their findings in the form of a resolution introduced by T. B. Smith, which said resolution is as follows, to wit:

"Whereas, certain charges have been preferred against J. E. Etzler, a member of the city council of Tampa, on the 9th day of October, 1908;

"And whereas said J. E. Etzler has been given a hearing upon said charges;

"And whereas upon said hearing testimony has been submitted both for and against said charges;

"And whereas, the city council of Tampa having found that said charges have been proven to be true, and it being the opinion of two-thirds of the members of the city council that said charges constitute malconduct in office on the part of the said J. E. Etzler, city councilman of the city of Tampa:

"Therefore, be it resolved that the said J. E. Etzler as aforesaid be and he is hereby expelled from and as a member of the city council of Tampa."

"And that thereupon council for the petitioner demanded that the roll be called upon said resolution, whereupon Councilman Friend moved that said resolution be adopted, and the same having received a second, it was put to a vote, and said resolution was adopted by a vote of eight yeas and two nays.

"That the expulsion of the said J. E. Etzler from the said city council was unlawful, illegal, and in violation of law, and that the said respondents in pursuance of said illegal and unlawful expulsion are now withholding from him his said office of councilman from the Fourth Ward of the said city of Tampa, with its privileges, duties, and emoluments."

Mandamus is the proper proceeding to test the validity of the action of a city council in expelling from office a member of the council. In such an action the court will consider the entire proceeding of the council, including the issues in effect made and the testimony taken before the council as shown by the alternative writ. If the proceedings were illegal or fatally defective, or if the testimony wholly fails to support the charges made, the court will order the officer restored. See *State ex rel. Donnelly v. Teasdale*, 21 Fla. 652; *Scott v. State ex rel. Grothe*, 43 Fla. 396, 31 South. 244.

Section 1012 of the General Statutes of 1906 provides that "two-thirds of the council may expel a member of the same or other officer of the city or town for disorderly behavior or malconduct in office."

No particular procedure is prescribed by which the council may exercise its power to expel an officer of the city, but such proceedings should be had as will give the

person charged an opportunity to be heard in defense of any matters alleged against him for which he may be expelled. If the matters alleged warrant expulsion, and there is legal evidence in support of the charges, and the person has had reasonable opportunity to defend, action taken by the requisite vote of the council in expelling a member of the council will not be disturbed by mandamus proceedings.

The court will determine whether the charges made and considered would if proven amount to "disorderly behavior or malconduct in office."

"One who is intrusted with official power violates his public obligation, betrays his official trust, and loses the public confidence by selling his official influence or vote in a body of which he is a member is guilty of disorderly conduct" in office. *State ex rel. Tyrrell v. Common Council of Jersey City*, 25 N. J. Law, 536; *State ex rel. Donnelly v. Teasdale*, 21 Fla. 632.

Malconduct in office, like misconduct in office, includes such acts as amount to a breach of the good faith and right action that are tacitly required of all officers. See 5 Words & Phrases, 4296, 4532.

The charge here is, in effect, that the relator agreed for a consideration to aid in securing a valuable contract with the city of Tampa through a constituted board of the city, and to secure an increase in the appropriation for the purposes of the contract to unduly increase the profits. There is evidence to sustain the charge, and it is clear that such conduct was both "disorderly behavior and malconduct in office" within the meaning of the statute under which the expulsion was had.

In refusing to rescind or to strike out a resolution or parts of a resolution, and in striking a plea in abatement relating to the charge and the proceedings to be had thereon, no provision or principle of law was violated by the council, and no injury to the relator appears.

Even if while in executive session, considering what action to be taken, the council received the daily reports of a detective used in the case, and some of the members read at least a portion of said reports, such a course is not per se illegal or even reprehensible, and it does not appear that the result was thereby affected or the relator injured. The action taken by the council was publicly done and so recorded.

The council was not trying the relator for the purpose of convicting him of a crime, and the strict rules of criminal procedure were not essential where no substantial rights of the relator were denied to him.

The mere fact that an ordinance of the city provides that members of the city council shall not be directly or indirectly interested in any contract with the city, and that they may be suspended from office for that cause, does not render that the only

cause for which an expulsion may be had under the statute for "disorderly behavior or malconduct in office."

The adoption by a city council of different resolutions upon a subject for which a member of the council may be expelled is not twice placing of the person charged in jeopardy. Nor is a provision in a resolution that, if the charges are proven, the relator is guilty of disorderly behavior and malconduct in office, and should be expelled, a prejudgment of the charge referred to.

No illegality appears in the proceedings, and, as the charge made warranted expulsion and is supported by competent evidence, the finding of the council upon the evidence should not be disturbed on this proceeding. No fundamental principle of law affecting the rights of the relator appears to have been violated in the action of the council expelling him from his office as a councilman, and the order of the court dismissing the mandamus proceeding is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### STATE ex rel. NICHOLS v. BULLOCK, Judge.

(Supreme Court of Florida. June 29, 1909.  
Headnote Filed Oct. 11, 1909.)

#### CRIMINAL LAW (§§ 1138, 1139\*) — APPEAL — CONVICTION BEFORE COUNTY COURT—TRIAL DE NOVO.

Under the Florida Constitution (article 5, § 11) and laws circuit courts have only appellate jurisdiction in civil and criminal cases appealed from the courts of county judges, and in such cases circuit courts cannot exercise any original jurisdiction, such as permitting new or amended affidavits or charges to be there filed for the first time, or by trying the case anew before the judge or a jury, but in such cases the circuit courts act appellatively only, and review and pass upon the case as tried in the county judge's court upon the transcript of record brought up by the appeal, and simply reverse or affirm as error may or may not appear from such record. The appeal in such a case from the county judge's court to the circuit court operates simply as a common-law writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2999, 3000; Dec. Dig. §§ 1138, 1139.\*]

(Syllabus by the Court.)

In Banc. Application by the State, on the relation of Alexander S. Nichols, for writ of prohibition against W. S. Bullock, Judge. Writ granted.

Davant & Davant, for relator. E. W. Davis, for respondent.

TAYLOR, J. The relator, Alexander S. Nichols, was charged in the county judge's court of Hernando county by a very crude affidavit sworn to entirely upon unsworn hearsay and not upon any personal knowledge of the affiant with the misdemeanor of enticing away the laborers of another. Motion was made before the county judge to quash this affidavit for insufficiency, vagueness, and indefiniteness, and because its charges were based entirely upon unsworn hearsay, and not upon any personal knowledge of the affiant making it. The county judge overruled this motion, and put the relator to trial upon which he was convicted of the charge and sentenced. From this judgment of conviction he took his appeal to the circuit court of said county of Hernando. Upon such appeal the relator filed in the circuit court a complete certified transcript of the entire proceedings and judgment in the county judge's court, including his motion, to quash the affidavit containing the charge against him and the county judge's order denying such motion to quash, and the relator's exception to such ruling. When the case came on for hearing in the circuit court, the relator renewed his motion before the circuit judge to quash the affidavit upon which he was tried before the county judge. This motion the circuit judge granted, but permitted the state attorney to file a new affidavit then and there sworn to for the first time charging the same offense attempted to be charged before the county judge, but more fully, definitely, and effectually setting forth the offense, and upon this new affidavit made and filed for the first time in the circuit court the cause is now pending for trial in the circuit court. Upon this state of facts the relator has made his application here for the writ of prohibition against the respondent circuit judge, alleging that it is the intention of the said circuit judge to try him, the relator, de novo in the circuit court upon such new or amended affidavit there filed, and that he will so try him de novo upon such new or amended affidavit unless prohibited from so doing. The respondent circuit judge now moves to quash what he terms the alternative writ, meaning the rule issued here to show cause, if any, why the writ of prohibition should not be granted, upon the following grounds:

(1) Because it does not appear in and by the suggestion upon which said alternative writ was granted that the trial court was without jurisdiction.

(2) Because it does not appear in and by said suggestion that the trial court exceeded its jurisdiction in attempting to try the case of the State of Florida versus Alexander S. Nichols.

We think that the application or suggestion filed here for the writ of prohibition

sets up a good and sufficient cause for the relief sought.

By section 11 of article 5 of our Constitution our circuit courts are vested only with appellate jurisdiction in all civil and criminal cases arising before the county judge and before justices of the peace in counties where there is no county court. By section 22 of said article 5 of our Constitution, as amended in 1895, it is provided that appeals from justice of the peace courts in criminal cases may be tried de novo under such regulations as the Legislature may prescribe, but this last provision is there expressly confined to appeals from courts of justices of the peace, and does not authorize a trial de novo in the circuit court in a criminal case arising before the county judge and appealed from his court to the circuit court. Section 4056, Gen. St. 1906, enacted to carry out the provisions of said section 22, art. 5, Const., also expressly confines its provisions for trials de novo in the circuit courts to appeals in criminal cases from courts of justices of the peace. So far, then, as appeals in civil or criminal cases are concerned from county judge's courts to the circuit courts, the jurisdiction of the latter is appellate only, and in such cases the circuit courts cannot exercise any original jurisdiction, such as permitting new or amended affidavits or charges to be there for the first time filed, or by trying the case anew before the circuit judge or before a jury, but in such cases the circuit courts act appellatively only, and review and pass upon the case as tried in the county judge's court upon the transcript of record brought up by the appeal, and simply reverse or affirm as error may or may not appear from such record. The appeal in such a case from the county judge's court to the circuit court operates simply as a common-law writ of error. *State ex rel. Wallace v. Baker*, 19 Fla. 19; *State ex rel. Selph v. Vann*, Id. 29; *State ex rel. Chestnut v. King*, 20 Fla. 309.

When the circuit judge found upon the motion made before him to quash the affidavit upon which the relator was tried and convicted before the county judge that the county judge had erred in not granting the same motion when made before him, he should then and there simply have reversed and remanded the cause to the county judge's court with directions to quash the said affidavit, but when he went further, and permitted a new and amended charge against the relator to be made and filed in his court, and retained the case on the docket of his court as a pending cause for future trial de novo, it was the exercise of original jurisdiction with which the circuit courts are not clothed in such cases.

The motion of the respondent to quash the application or suggestion of the relator for

the writ of prohibition must therefore be, and is hereby, denied, and the peremptory writ of prohibition as applied for is hereby granted and ordered, at the cost of the state. All concur.

### CHARLES v. STATE.

(Supreme Court of Florida, Division B. June 29, 1909. Headnotes Filed Oct. 11, 1909.)

#### 1. CRIMINAL LAW (§ 1129\*)—REVIEW—ASSIGNMENTS OF ERROR GOOD IN PART.

Where a single general assignment of error is made to embrace refusals to give two or more instructions that assert distinct propositions of law, an appellate court will go no further into the consideration of such an assignment after ascertaining that any one of the several instructions thus aggregated was correctly refused. Such an assignment of error must prevail as an entirety or fail in toto.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2958; Dec. Dig. § 1129.\*]

#### 2. CRIMINAL LAW (§ 372\*)—EVIDENCE—SIMILAR ACTS.

In the trial of a defendant on the charge of aiding and abetting another in defrauding a bank, evidence tending to establish other and a continued series of fraudulent transactions of a similar character between the same parties is admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 833; Dec. Dig. § 372.\*]

#### 3. CRIMINAL LAW (§ 657\*)—PUNISHMENT—SUSPENSION PENDING TRIAL.

It is improper for trial courts as a penalty for contempt of court by counsel pending a trial to deprive a defendant on trial for crime of the services of such counsel pending such trial by suspending such counsel. The proper practice in such a case is to defer the application of a penalty upon the offending counsel until after the close of the trial, and then to punish the contempt by fine or imprisonment, or by both such fine and imprisonment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1534; Dec. Dig. § 657.\*]

#### 4. CRIMINAL LAW (§§ 680, 921\*)—RECEPTION OF EVIDENCE—DISCRETION OF COURT—NEW TRIAL.

The order and method for the submission of testimony to a jury is within the sound discretion of the presiding judge, and a new trial will not be granted because further evidence was permitted to be introduced after both sides had closed their evidence, and after the arguments of counsel had commenced, unless it be shown that the defendant was prejudiced thereby in some other way than by its mere irregularity.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1609, 2207; Dec. Dig. §§ 680, 921.\*]

(Syllabus by the Court.)

Error to Criminal Court of Record, Escambia County; E. D. Beggs, Judge.

M. B. Charles was convicted of aiding and abetting another in defrauding a bank, and he brings error. Affirmed.

Jones & Pasco, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error was charged by information filed in the criminal

court of record of Escambia county with the crime of being present with one George C. Scudamore, aiding, inciting, abetting, and assisting the latter as cashier of the Pensacola Bank & Trust Company, a corporation, in drawing without authority and with intent to defraud a certain bill of exchange for \$2,000 in the name of said Pensacola Bank & Trust Company as drawer on the Title Guarantee & Trust Company of New York as drawee, and payable to the order of said M. B. Charles. At the trial there was a severance, the plaintiff in error was convicted and sentenced, and brings the case here for review by writ of error. The refusal of the defendant's motion for new trial constitutes the second assignment of error. All the grounds of this motion that are insisted on here are comprised in separate assignments of error that will be discussed in their order as presented, except the grounds of said motion questioning the sufficiency of the evidence to sustain the verdict, and this feature of the motion will be considered later on.

The defendant requested the court to give five several instructions, designated as 1, 2, 5, 11, and 12, all of which were refused, and these several refusals are grouped together and constitute the third assignment of error.

It is settled law here that, where a single general assignment of error is made to embrace refusals to give more than one instruction asserting distinct propositions of law, an appellate court will go no further into the consideration of such an assignment after ascertaining that the trial court, correctly refused any one of the several instructions thus aggregated in the single assignment of error. In other words, such an assignment must prevail as an entirety or fail as an entirety. *McCoggle v. State*, 41 Fla. 525, 26 South. 734; *Shiver v. State*, 41 Fla. 630, 27 South. 36; *Easterlin v. State*, 43 Fla. 565, 31 South. 350, and cases cited. The first of these requested instructions peremptorily required the jury to acquit the defendant on the proofs. Even if error could properly be predicated on the refusal of the court to give such a charge in a criminal case, there was no error in its refusal here on the facts in proof, and under the rule above announced the third assignment fails.

The fourth assignment of error questions the propriety of the admission of a conversation between one Jackson, who was teller of the bank attempted to be defrauded, and the principal, George C. Scudamore, while the defendant Charles was not present. The witness testified that in checking up the exchanges drawn by the bank he noticed the check in question, No. 767, to be missing, and, on inquiring about it, G. C. Scudamore told him it had been spoiled, and to so mark it on the register, which he did.

There was no reversible error in the admission of this evidence. The legitimate

evidence in the case showed beyond a reasonable doubt a conspiracy between Scudamore and the defendant clearly to defraud the Pensacola Bank & Trust Company out of the amount of the check in question, and under the circumstances the testimony of the witness as to what Scudamore said about the check being spoiled, although at the time the conspiracy may have terminated, was practically harmless, even if it was improperly admitted.

W. M. Erney, a state witness, was permitted over the defendant's objection to compare the signature of the defendant on a hotel register that the witness saw him make with the purported signature of the defendant on the back of the check in issue, and to give his opinion that the two signatures were the same, and that they were very similar. This ruling constitutes the sixth and eighth assignments of error. There was no error in the admission of this evidence. It was nothing more than a proper comparison of writings before the court, and the opinion of the witness that the two signatures were made by the same hand.

The thirteenth assignment of error challenges the propriety of the admission of certain testimony by a state witness, one George F. Wentworth, in reference to a conversation between him and the defendant in reference to another check for \$4,600 drawn by Scudamore in the name of said bank as drawer and payable to the Central Bank & Trust Company of New Orleans and delivered by Scudamore to the defendant without consideration. There was no error in the admission of this testimony. It tended to establish other and a continued series of shady transactions between Scudamore and the defendant by which the bank of which Scudamore was cashier was being fleeced out of considerable sums without consideration or value received.

What is said above as to the thirteenth assignment of error applies as well to the sixteenth, seventeenth, and eighteenth assignments of error, which must likewise fail.

The defendant's counsel endeavored to prove by the defendant as a witness certain declarations asserted to have been made to him by one W. J. Rice, a nonresident of Florida, with reference to the \$4,600 check above mentioned, but objection thereto was sustained by the court, and this ruling constitutes the nineteenth assignment of error. There was no error here. The proffered proof was purely hearsay. During the examination of the defendant as a witness on his own behalf the county solicitor objected to a question propounded, and after some argument of the objection withdrew the same, but the judge, notwithstanding the withdrawal of such objection, excluded the evidence, whereupon defendant's counsel stated, "We except to the court interposing objections on behalf of the state"; and thereupon the judge said: "Do you mean,



Mr. Jones, that I am making objections on behalf of the state?" To which Mr. Jones replied: "That's the way it seems to me, your honor." Thereupon, at 1 o'clock p. m. on March 20th, the judge adjudged the said attorney, C. M. Jones, to be in contempt, and denied him the right to proceed any further as counsel in the case; but on the convening of court at 9 o'clock the next morning the judge rescinded said order and permitted Mr. Jones to proceed as counsel in the case on behalf of the defendant. This temporary suspension of counsel is assigned as the twentieth error. We think that, if the reply of counsel to the court could properly have been adjudged a contempt of the court, the proper course would have been to defer the application of punishment therefor until after the close of the trial, and then to have administered punishment in the shape of a fine or imprisonment or both, but to then and there suspend counsel from further participation in the trial of his client, the defendant, was beyond the power of the court, and might have vitally affected the defendant, who had no part in the supposed trespass upon the dignity of the court, but in the instant case we cannot see that the incident could at all injuriously have affected the defendant. During the few hours that the court kept the objectionable order in force the suspended attorney continued present in court freely assisting his law partner and associate counsel for the defense with consultations and suggestions, and again himself, after a few hours, took active part in the further trial and argument of the cause. A wrong perpetrated upon counsel during the trial of a cause, in order to avail one of the parties to such cause before an appellate court for reversal, must have injuriously affected such party or his case. We cannot discover, under the circumstances here presented, how the court's action could have injuriously affected the defendant or his case, and must, therefore, adjudge this assignment to be unavailable.

After both sides had closed the introduction of evidence, and after some of the arguments had been made to the jury, the court permitted the state attorney to introduce several witnesses strictly in rebuttal of one item of the defendant's proofs. This ruling is made the basis for the twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh assignments of error. There was no error here. It is settled here that the order and method for the submission of testimony to a jury is within the sound discretion of the presiding judge, and that a new trial will not be granted because the judge permitted further testimony to be introduced after the evidence had been closed on both sides and argument of counsel had commenced, unless it be shown that the prisoner was

prejudiced thereby in some other way than by its mere irregularity. *Jordan v. State*, 22 Fla. 528; *McCoggle v. State*, 41 Fla. 525, 26 South. 734; *Brown v. State*, 40 Fla. 459, 25 South. 63; *Davis v. State*, 44 Fla. 32, 32 South. 822; *Anthony v. State*, 44 Fla. 1, 32 South. 818. We do not see that there was any abuse of this discretion in the present instance that could have injuriously affected the defendant.

The only remaining question, all other assignments of error having been abandoned by nonpresentation here, is that the verdict of conviction is not supported by the evidence. We think that the evidence for the state amply sustains the verdict found, and, finding no reversible error, the judgment of the court below in said cause is hereby affirmed, at the cost of the plaintiff in error.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

#### EDWARDS et al. v. CITY OF OCALA.

(Supreme Court of Florida, Division A. June 29, 1909. Rehearing Denied Oct. 12, 1909.)

##### 1. MUNICIPAL CORPORATIONS (§ 277\*)—STREET IMPROVEMENTS—LIABILITY OF COUNTY.

The statutes of this state do not authorize a city to improve at the expense of the county the streets abutting on county property used for governmental purposes, unless there is a valid contract on the part of the county to pay for the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 732; Dec. Dig. § 277.\*]

##### 2. MUNICIPAL CORPORATIONS (§ 407\*)—CONSTITUTIONAL REQUIREMENT OF UNIFORMITY—SPECIAL ASSESSMENTS.

The constitutional provision requiring "a uniform and equal rate of taxation" does not relate to special assessments by municipalities for street improvements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1003, 1004; Dec. Dig. § 407.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 426\*)—STREET IMPROVEMENTS—LIABILITY OF COUNTY.

Under the system of county and municipal government existing in this state, statutory authority given to a city to impose and enforce special assessments for local street improvements will be held not to extend to a county courthouse square located in the city and used for governmental purposes, unless an intent to include such property clearly appears from the statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1035-1037; Dec. Dig. § 426.\*]

##### 4. MUNICIPAL CORPORATIONS (§ 426\*)—STREET IMPROVEMENTS—LIABILITY OF COUNTY.

The authority given by statute to the city of Ocala "to regulate, require, and provide for the construction and repair of streets and for the grading and paving of the same, and \* \* \* may order and have such work done, and the amount expended or to be paid therefor, shall

be a lien on the lot or lots fronting or abutting on such street as may be increased in value by such improvement, \* \* \* provided that the owners of property on each side of the street \* \* \* shall only be liable for one-third of the actual cost, \* \* \* and the same may be enforced by suit at law or in equity, or the said amount may be recovered against the said owner or owners by suit before any court of competent jurisdiction," does not contemplate that the city shall acquire a lien on county property used for governmental purposes for the improvement of streets abutting on such property; nor does it contemplate that an action may be brought against the county or the county commissioners for the cost of such improvements, in the absence of some contract obligation on the part of the county upon which a recovery may be had.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1035-1037; Dec. Dig. § 426.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 277\*) — IMPROVEMENT OF COUNTY PROPERTY—AUTHORITY.

Under the statutory authority given to the county commissioners "to make such orders concerning the care of and the improvement of the corporate property of the county as may be deemed expedient," the county commissioners alone may authorize improvements of county property to be made at the expense of the county.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 732; Dec. Dig. § 277.\*]

(Syllabus by the Court.)

Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action by the City of Ocala against John L. Edwards and others, as Commissioners of Marion County. Judgment for plaintiff, and defendants bring error. Reversed.

Wm. Hocker, for plaintiffs in error. H. M. Hampton and C. L. Slstrunk, for defendant in error.

**WHITFIELD, C. J.** The city of Ocala obtained a judgment against the members of the board of county commissioners as such for special assessments levied by the city for paving streets abutting on the county courthouse square in the city; such square being the property of the county used for governmental purposes. The validity of this judgment is questioned on writ of error.

The statutes of this state do not authorize the city to improve the streets abutting on county property at the expense of the county in the absence of a valid contract on the part of the county to pay for the improvement. County commissioners are not authorized to expend county funds except for the purposes and in the manner expressly provided by law.

The constitutional provision requiring "a uniform and equal rate of taxation" does not relate to special assessments by municipalities for street improvements. There is no express provision in the Constitution as to special assessments for local improvements. Under the organic provision that "the Legislature shall have power to establish and to

abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time," a municipality may by law be given power to require a county to make proper improvement of streets upon which county property fronts within the municipality where such improvement serves a county purpose. Such requirements must be legal, and be enforced according to law. *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 101 N. W. 141, 67 L. R. A. 408, 106 Am. St. Rep. 311; 3 Am. & Eng. Ann. Cas. 7, and notes; *Arnold v. City of Knoxville*, 115 Tenn. 195, 90 S. W. 469, 3 L. R. A. (N. S.) 837; 5 Am. & Eng. Ann. Cas. 881.

In some jurisdictions it is held that, when a statute gives to a city authority to impose and enforce special assessments, it does not extend to property of the county located within the city and used for governmental purposes, unless the statute expressly so provides. In other jurisdictions it is held that such property is included in the general terms of a statute unless a contrary intent expressly appears. See *Edwards & Walsh Const. Co. v. Jasper County*, 117 Iowa, 365, 90 N. W. 1006, 94 Am. St. Rep. 301; *Elliott on Roads and Streets*, § 350; 25 Am. & Eng. Ency. Law (2d Ed.) 1186; *City of Clinton v. Henry County*, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415; 33 Am. St. Rep. 400.

Under our system of county and municipal government, statutory authority given to a city to impose and enforce special assessments for local street improvements will be held not to extend to a county courthouse square located in the city and used for governmental purposes, unless an intent to include such property clearly appears from the statute.

The city of Ocala is by statute authorized "to regulate, require, and provide for the construction and repair of streets and for the grading and paving of the same, and \* \* \* may order and have such work done, and the amount expended or to be paid therefor, shall be a lien on the lot or lots fronting or abutting on such street as may be increased in value by any such improvement, \* \* \* provided that the owners of property on each side of the street \* \* \* shall only be liable for one-third of the actual cost \* \* \* and the same may be enforced by suit at law or in equity, or the said amount may be recovered against the said owner or owners by suit before any court of competent jurisdiction." This statute does not contemplate that the city shall acquire a lien on county property used for governmental purposes for street improvements abutting on such property; nor does it contemplate that an action may be brought against the county or the county commissioners for the cost of the improvements in the absence of some contract obligation on the part of the county.

upon which a recovery may be had. The county commissioners are not the owners of the property of the county, and cannot expend county funds except as authorized by law. The city can impose no tax, burden, or obligation upon the county that is not expressly authorized by law. By statute the county commissioners are expressly authorized "to make such orders concerning the care of and the improvement of the corporate property of the county as may be deemed expedient." This authority is given only to the county commissioners, and, in the absence of a valid statute permitting it, no such authority can be directly or indirectly exercised by the city. It does not appear that the county commissioners authorized the improvements, and the law does not expressly or by implication impose upon the county any legal obligation to pay for improvements of the streets upon which such county property abuts, where the improvements have not been in some way authorized by the county commissioners.

The judgment is reversed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### HILLSBOROUGH COUNTY COM'RS v. JACKSON, Sheriff.

(Supreme Court of Florida. Division A. June 29, 1909. Headnotes Filed Oct. 11, 1909.)

##### 1. STATUTES (§ 231\*)—CONSTRUCTION—COMPILATION OF STATUTES—REPUGNANCY.

The commissioners who compiled the General Statutes under the act of 1903 (Acts 1903, p. 260, c. 5287) were authorized "to revise, simplify, arrange and consolidate all the public statutes of the state of Florida, which are general and permanent in their nature, and which shall be in force in this state at the time such commissioners shall make their final report." Under this authority, if repugnant provisions of prior statutes are compiled and adopted in the General Statutes, it must be presumed that the repugnancy was overlooked, and that it was the intention of the compilers and of the Legislature to bring forward the latest expression of the legislative will.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. § 231.\*]

##### 2. STATUTES (§ 231\*)—CONSTRUCTION—COMPILATION OF STATUTES—REPUGNANCY.

Where there are two conflicting sections of a general compilation or code of statute laws, that section should prevail which is derived from a source that can be considered as the last expression of the lawmaking power in enacting separate statutes upon the same subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. § 231.\*]

##### 3. STATUTES (§ 231\*)—CONSTRUCTION OF COMPILATION—REPUGNANT PROVISIONS.

Sections 976 and 4108 of the General Statutes of 1906 of the state of Florida are conflicting, and, as section 976 was the latest

expression of the Legislature in enacting separate laws upon the same subject, such section 976 must prevail, even though section 4108 appears in the General Statutes subsequent in place and numerical order.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. § 231.\*]

(Syllabus by the Court.)

Error to Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Mandamus by the Commissioners of Hillsborough County against R. A. Jackson, sheriff. Judgment for defendant, and plaintiffs bring error. Affirmed.

H. C. Gordon, Victor Knight, and D. A. De Vane, for plaintiffs in error. F. M. Simonon and C. C. Whitaker, for defendant in error.

WHITFIELD, C. J. An alternative writ of mandamus was issued from the circuit court for Hillsborough county commanding the sheriff to allow C. F. Woolweaver to enter the jail of the county and feed the prisoners according to a contract made under section 4108 of the General Statutes of 1906, and existing between the said C. F. Woolweaver and the county of Hillsborough for feeding the prisoners, or to show cause for not doing so. A demurrer to the alternative writ was sustained, and the proceeding dismissed. On writ of error, it is urged that the court erred in sustaining the demurrer and dismissing the writ.

The question to be determined is whether the following provisions of sections 976 and 4108 of the General Statutes are so conflicting that one must give way to the other, and if so which shall prevail:

"Sec. 4108. (3031). Fees for keeping and providing for prisoners.—The fees of jailers shall be: For keeping and providing for prisoners, not more than thirty cents per day for each prisoner confined, but the county commissioners in counties having more than an average of ten prisoners may, if they shall deem it advisable, advertise for proposals for feeding prisoners and may contract for the feeding of the same to the lowest responsible bidder; for ironing and taking off irons from prisoners, fifty cents, except when prisoners are ironed or unironed in going to or returning from work performed or to be performed by direction of the county commissioners no charge shall be made; for medicines and medical service and attendance to prisoners, and amount of compensation allowed physicians' attendance on prisoners in jail such amount as may be allowed by the county commissioners: Provided, such prisoners shall be acquitted and discharged, or shall be insolvent and unable to pay the same."

"Sec. 976. Fees for feeding prisoners.—The sheriff shall make out and present to the board of county commissioners, at any

regular meeting thereof, his bill for fees for feeding prisoners and the period for which the charge is made, which fees shall be as follows: For feeding ten prisoners or less, forty cents per day each; and for feeding all over ten prisoners thirty cents per day each; and it shall be the duty of said board to properly audit the same, and order a warrant drawn against the fine and forfeiture fund of the county for the sum found to be due."

"Section 4108 was originally enacted in 1881. Section 976 was originally enacted in 1897. The commissioners who compiled the General Statutes under the act of 1903 (Acts 1903, p. 260, c. 5267) were authorized "to revise, simplify, arrange, and consolidate all the public statutes of the state of Florida, which are general and permanent in their nature, and which shall be in force in this state at the time such commissioners shall make their final report."

Under this authority, if repugnant provisions of prior statutes are compiled and adopted in the General Statutes, it must be presumed that the repugnancy was overlooked, and that it was the intention of the compilers and of the Legislature to bring forward the latest expression of the legislative will where irreconcilable inconsistency or repugnancy appears in different sections of the General Statutes, without reference to whether the latest statute appears first or last in the General Statutes. *Steele v. State*,

61 Ala. 213; *Mobile Savings Bank v. Patty* (D. C.) 16 Fed. 751; *Haritwen v. The Louis Olsen* (D. C.) 52 Fed. 652; *Olsen v. Haritwen*, 57 Fed. 845, 6 C. C. A. 608.

Where there are two conflicting sections of a general compilation or code of statute laws, that section should prevail which is derived from a source that can be considered as the last expression of the lawmaking power in enacting separate statutes upon the same subject. See *Lamar v. Allen*, 108 Ga. 158, 63 S. E. 958; 26 Am. & Eng. Ency. Law (2d Ed.) 735; *Lewis' Suth. Stat. Con.* (2d Ed.) § 281. See, also, *Hall v. State*, 39 Fla. 637, 23 South. 119; *State v. Mulhern*, 74 Ohio St. 363, 78 N. E. 507; 6 Am. & Eng. Ann. Cas. 856.

The two sections above quoted are conflicting, and as section 976 was the latest expression of the Legislature in enacting separate laws upon the subject, it must prevail, even though section 4108 appears in the General Statutes subsequent in place and numerical order. There is consequently no authority for making the contract, and the order dismissing the alternative writ is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

**STATE ex rel. RAILROAD COM'RS v. FLORIDA EAST COAST RY. CO.**

(Supreme Court of Florida. June 29, 1909.  
Headnotes Filed and Rehearing  
Denied Oct. 12, 1909.)

**1. CARRIERS (§ 10\*)—ORDERS OF RAILROAD COMMISSIONERS—DUTY TO OBEY.**

The valid administrative orders of the railroad commissioners should be obeyed, and those who are subject to such orders violate them at their peril.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 10.\*]

**2. CARRIERS (§ 18\*)—ORDERS OF RAILROAD COMMISSIONERS—APPLICATION FOR RELIEF.**

In seeking relief from orders or rules of the railroad commissioners thought to be unduly burdensome or otherwise illegal, railroad companies should apply to the railroad commissioners for changes or modifications of such orders or rules.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.\*]

**3. CARRIERS (§ 18\*)—ORDERS OF RAILROAD COMMISSIONERS—ARBITRARINESS.**

While the conduct of a railroad company in violating an order made by the railroad commissioners, without applying to the commissioners for a change or modification of the order, is emphatically disapproved by this court, yet if, under changed conditions, the order disobeyed would operate arbitrarily, and be detrimental to the public welfare, and violate constitutional rights of the carrier, the order will not be enforced.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.\*]

**4. RAILROADS (§ 5\*)—REGULATION.**

The initial discretion as to the means and manner of operating a railroad is in those charged with its management. It should be exercised in accordance with law, in good faith, and in the interest of the general welfare. Such discretion is subject to lawful governmental supervision and regulation, to prevent abuses, unjust discriminations, and other illegal actions or results.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 5.\*]

**5. CARRIERS (§ 18\*)—ORDERS OF RAILROAD COMMISSIONERS—REVIEW.**

Rules and regulations adopted by the railroad commissioners for the lawful supervision and regulation of the service rendered by railroad companies are administrative in their nature, are presumed to be reasonable and just, and are subject to judicial review by appropriate proceedings.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.\*]

**6. CARRIERS (§ 15\*)—REGULATION—FACILITIES FOR MAKING CONNECTIONS BETWEEN DIFFERENT LINES.**

The special and general statutory authority given the railroad commissioners to make and enforce reasonable and just regulations to require railroads to provide all necessary facilities and proper schedules to serve the uses, comfort, and convenience of the public, and to operate the roads for the public good, includes authority to make and enforce reasonable rules and regulations to require the furnishing of facilities for making connections between different roads for the use and convenience of the public.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 15.\*]

**7. CARRIERS (§ 40\*)—DUTY TO FURNISH ADEQUATE FACILITIES.**

The duty of a railroad company to furnish reasonably adequate facilities is commensurate with the powers and privileges conferred upon the corporation and the just requirement of the public to be served by it. In determining the obligation of the corporation in the discharge of its duties to the public, the corporate business as a whole, the character of the service required, the need of its performance, and the various rights of the public and of the carrier should be considered.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 40.\*]

**8. CARRIERS (§ 18\*)—ORDERS OF RAILROAD COMMISSIONERS—REASONABLENESS.**

All reasonable and just rules and regulations made by the railroad commissioners within the authority conferred upon them by law should be enforced to carry out the expressed purpose of the law in the interest of the general welfare; but unreasonable regulations are not within the authority conferred by law upon the railroad commissioners, and when regulations appear from the pleadings or the evidence in a case to be unreasonable and violative of constitutional provisions for the protection of private property rights, such unreasonable regulations will not be enforced by the courts.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.\*]

**9. CARRIERS (§ 18\*)—ORDERS OF RAILROAD COMMISSIONERS—ENFORCEMENT.**

Where it is in effect admitted by demurrer that the enforcement of an order of the railroad commissioners will be injurious to the public welfare and will violate constitutional rights of the carrier, the order will not be enforced, even though the carrier failed to apply to the railroad commissioners for relief from the order before disregarding it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.\*]

(Syllabus by the Court.)

In Banc. Original application for mandamus by the State, on relation of the Railroad Commissioners, against the Florida East Coast Railway Company. Demurrer to return overruled.

L. C. Massey, for relators. Alex. St. Clair-Abrams, for respondent.

WHITFIELD, C. J. In a former opinion overruling a demurrer to the alternative writ herein it was held that the railroad commissioners had authority under the statutes of this state to make just and reasonable regulations of the schedules of railroads with reference to connections between different railroads, so as to afford reasonable convenience and comfort to the public affected by the service, and that all such regulations, when made, are by the statute declared to be prima facie reasonable and just. *State v. Florida East Coast Railway Co.*, 57 Fla. —, 49 South. 43.

The respondent operates a railroad running north and south on the east coast of Florida, connecting at Jacksonville with several lines extending into other states and at its southern terminus with steamboats for points further south. The Atlantic Coast

Line Railroad Company operates a line of railroad from the southwestern coast of Florida through the state and to points in other states to the north. The two systems are connected at points on the peninsula of the state by branch roads operated by the respondent. The order made by the railroad commission affects the schedules on the respondent's main line, as well as on its branches that connect with the Atlantic Coast Line road. The branch roads serve the local communities through which they run, as well as the business between the two different roads; and the rights of such local communities should be considered in connection with the rights of others of the public and of the respondent company in determining the reasonableness of schedules that necessarily affect them all.

A return to the alternative writ has been filed, and the relators have demurred to it. By this demurrer the relators admit the averments of the return, which in effect are that the respondent, in good faith and for the prompt dispatch and convenience of the great majority of its passengers, changed the schedule, as it believed it had the right to do, from the one ordered by the commissioners; that the schedule prescribed by the railroad commissioners was changed to properly serve business from its connecting lines at its terminals; that a change in circumstances affecting the bulk of its patrons necessitated the change made; that to operate the schedule as required by the railroad commissioners would delay and inconvenience daily from 2,000 passengers to over 2,500 passengers, for the benefit and convenience of an average of from 2 to 7 through passengers at one connection and from 13 to 22 through passengers at the other connection; that the schedule now in operation is to enable respondent to make connections for the great mass of its passengers on its entire system; that the passenger trains carry as express fruit and vegetables that require rapid transit and certain connection at its Jacksonville terminal with trains going north and west beyond the state; that in effect the schedule and connections ordered by the railroad commissioners would seriously inconvenience the greater portion of respondent's passengers and entail undue expense and risk; that to make the schedule required would necessitate more rapid speed than can safely be made while preserving necessary and proper service at respondent's terminal points for the great volume of its business; that the service afforded to the passengers at the two connecting points is ample, and to make the change ordered would inconvenience the many to serve only a few; that special trains would be unreasonably expensive and burdensome, because of conditions and for reasons stated; that for years past there has been a deficit between the earnings and expenditures of the respondent on its entire road; that owing to increased prices

the deficit is steadily increasing, as shown by a statement given; that the cost of the extensions of its road by respondents is not considered in stating the deficits and burdens as set out in the return; that the enforcement of the schedule ordered by the railroad commissioners would be an unreasonable burden on the respondent in particulars stated in the return, without any compensating advantage to the great mass of its patrons, but, on the contrary, would be a serious detriment and loss to respondent and to the great body of its passengers and rapid freight under conditions and in the particulars stated in the return.

The return of the respondent also avers in effect that every economy is practiced in the purchase of property and in the employment of labor used in rendering the public service; that the obligations of the company bear only 5 per cent. interest; that the management and operation of the road are efficient, and all proper means are used to render an adequate service at the least cost, in order that the public may be properly served for the lowest charge.

It is urged by the relators that, as the railroad company has violated the order of the railroad commission in changing its schedule without application to or permission from the commission, the company cannot here assert a right to disregard the order of the commission, but must first present its case to the commission for its action thereon.

While the order violated is administrative, and not judicial, the railroad commissioners are entitled to have their valid orders obeyed, and the courts should recognize the obligation of railroad companies to accord proper respect to orders of the commission.

The initial discretion as to the means and manner of operating a railroad is in those charged with the management, who should be skilled, experienced, competent, faithful, well-informed, and alert to secure safe and adequate service, and to avoid accidents, risks, losses, and injuries that would result from incompetent, unskillful, or unfaithful management. Such discretion should be exercised in accordance with law, in good faith, and in the interest of the public welfare, and is subject to lawful governmental supervision and regulation to prevent abuses, unjust discriminations, and other illegal actions or results. Rules and regulations adopted by the commissioners within their authority are presumed to be reasonable and just, and are subject to review as administrative matters, not by appeal or writ of error to correct mere errors or irregularities, but in mandamus and other appropriate proceedings to test the legality of the rules and regulations, when it is sought to enforce or to enjoin such rules and regulations. It is the duty of railroad corporations to obey the lawful orders, rules, and regulations promulgated by competent state authority, and they violate such orders at their peril. In

seeking relief from orders or rules thought to be unduly burdensome or otherwise illegal, the corporation should apply to the railroad commissioners for changes or modifications before resorting to the courts; and valid orders or rules of the commission should not be disregarded with impunity or without valid excuse.

While the conduct of the respondent in disregarding the commission is emphatically disapproved, yet if, under the changed conditions alleged, the order of the commission will operate arbitrarily, as would seem to be indicated by the averments of the return, that are admitted by the relators through the demurrer, it would be unjust to respondent and to the great body of its patrons to enforce the order of the commission. The order, viewed in the light of the facts admitted, is apparently not a reasonable and just regulation; but it appears to be an arbitrary and unlawful order that, if enforced, will operate to the detriment of most of the respondent's patrons, and to deprive the respondent of its property without due process of law, and to deny the respondent the equal protection of the laws.

The special and general statutory authority given the railroad commissioners to make and enforce reasonable and just regulations to require railroads to provide all necessary facilities and proper schedules to serve the uses, comfort, and convenience of the public, and to operate the roads for the public good within the statutory authority, includes authority to make and enforce reasonable rules and regulations to require the furnishing of facilities for making connections between different roads for the use and convenience of the public.

Where a railroad, though wholly within a state, must, in order to properly serve the greater portion of its patrons, so schedule its through trains, carrying passengers, mail, and perishable freight, as to make prompt and regular connections at its terminal points with other lines of transportation extending into densely populated sections, in determining the reasonableness of a governmental relation affecting the schedules to be observed by such through trains, consideration should be given to the character and volume of the business requiring the terminal connections, the connections at the terminal points reasonably required to serve the through business, the volume of business demanding intermediate connections, the burdens and risks to be cast upon the carrier and the general public in making the intermediate connections, the benefits to be derived by the public and the carrier from the side connections, as well as other matters affecting the substantial rights of the local and general public and the carriers.

If the through trains, in view of the volume and character of respondent's through business or other considerations, cannot reasonably be required to make the desired in-

termediate connections, the railroad may be required to run special trains to serve the public at intermediate points or in local or lateral communities, where the business warrants it and no unjust burden is thereby put upon the carrier with reference to its entire business.

The duty of a railroad company to furnish reasonably adequate facilities is commensurate with the powers and privileges conferred upon the corporation and the just requirement of the public to be served by it. In determining the obligation of the corporation in the discharge of its duties to the public, the corporate business as a whole, the character of the service required, the need of its performance, and the various rights of the public and of the carrier should be considered.

All reasonable and just rules and regulations made by the railroad commissioners within the authority conferred upon them by law should be enforced to carry out the expressed purposes of the law in the interest of the general welfare; but unreasonable regulations are not within the authority conferred by law upon the railroad commissioners, and when regulations appear from the pleadings or the evidence in a case to be unreasonable and violative of constitutional provisions for the protection of private property rights, such unreasonable regulations will not be enforced by the courts.

Whether exercised and performed directly or through the medium of administrative officers, the power and duty of the Legislature are to supervise and regulate within legal bounds the rendering of service of a public nature, and not to arbitrarily control and manage the business or property of those engaged in rendering the public service. Property of individuals or corporations used in rendering a public service is private property. Its use is subject to lawful and reasonable regulation in the interest of the public welfare, to the end that there be no abuses or unjust discriminations or excessive charges in rendering the public service. Those engaged in a public service may properly exercise lawful and reasonable discretion in the physical control and management of property used in performing the service and in the conduct of the business, and so long as the discretion is exercised in accordance with law, in good faith, and with proper regard for the public welfare it should not be interfered with, though such discretion is at all times subject to governmental supervision and regulation within legal limitations, to prevent its being exercised so as to result in abuses or unjust discriminations or other illegalities in rendering the public service. Lawful regulation in the interest of the public welfare, not arbitrary control, is the extent of the governmental authority. While the authority to regulate extends to all the means used in rendering the service, such authority should be confined to lawful regu-

lation; and arbitrary control or management should not be attempted or permitted under the guise of regulation and supervision.

The defense presented by the return of the respondent is not that the enforcement of the order of the railroad commissioners will cause a particular loss or burden to respondent, that will only prevent it from realizing a profit, or will reduce its profits upon its business as an entirety; but it is in effect averred in the return and admitted by the demurrer that the enforcement of the order will greatly inconvenience many patrons to serve only a few, will seriously affect injuriously the greater part of respondent's service to the general public, will require respondent to assume undue risks or unreasonable burdens, which risks will operate to the disadvantage of the great mass of respondent's patrons, for the benefit of only a few, and will cause unreasonable loss and risks to respondent beyond its duty to the public, by increasing the annual loss sustained in the operation of the road as an entirety, and consequently that the order is unreasonable and unlawful.

The enforcement of an unreasonable and unlawful regulation is in effect a taking of property without due process of law and a denial of the equal protection of the laws.

In rendering the public service, the respondent and its property rights are subject to reasonable and lawful supervision and regulation and to the burden incident thereto; but the respondent and its property are not subject to unjust or unreasonable orders or regulations, the enforcement of which will not be for the general welfare, but will violate the constitutional provisions designed for the protection of all property rights, whether used in the public service or not.

The demurrer to the return is overruled, with leave to present issues of fact within two weeks. All concur.

#### FLORIDA EAST COAST RY. CO. v. LASSITER.

(Supreme Court of Florida. June 25, 1909.  
Headnotes Filed Oct. 11, 1909.)

#### 1. CONSTITUTIONAL LAW (§§ 245, 301\*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—INJURY TO RAILROAD EMPLOYEES—LIABILITY OF MASTER.

Section 3150, Gen. St. 1906, that imposes liability upon railroad companies for injury to their employes, who are free from fault, through the negligence of coemployes, does not deny to such companies due process of law, or the equal protection of the law, and is not violative of the fourteenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 702, 848-850, 857; Dec. Dig. §§ 245, 301.\*]

#### 2. PRINCIPAL AND AGENT (§ 22\*)—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.

Agency cannot be established by the declaration of the supposed agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.\*]

#### 3. TRIAL (§ 349\*)—APPEAL AND ERROR (§ 974\*)—SPECIAL VERDICT—RIGHT TO REQUIRE REVIEW—DISCRETION OF LOWER COURT—RECOMMENDATION OF SPECIAL VERDICT.

In the absence in Florida of a statute on the subject of special verdicts, our trial courts are not justified in directing the jury to find a special verdict, though they may, in their discretion, in a proper case recommend one; but the jury has the right to decline finding any other than a general verdict. The appellate court will not review or reverse such trial courts for their refusal to exercise their discretion in such cases.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 823; Dec. Dig. § 349.\* Appeal and Error, Cent. Dig. §§ 3853, 3859; Dec. Dig. § 974.\*]

#### 4. DAMAGES (§ 216\*)—INSTRUCTIONS.

In cases where a plaintiff's prospective losses in the future during his life expectancy from the diminished earning capacity consequent upon his injuries is made a ground of recovery, the jury should be instructed that, in estimating such prospective future damages resulting from the diminished earning capacity, they should reduce such damages to their present value, and that such present value thereof only should be included in their verdict.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.\*]

Cockrell and Hocker, JJ., dissenting.

(Syllabus by the Court.)

In Banc. Error to Circuit Court, St. Lucie County; Minor S. Jones, Judge.

Action by Charles O. Lassiter against the Florida East Coast Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Geo. M. Robbins, for plaintiff in error.  
Beggs & Palmer, for defendant in error.

TAYLOR, J. The defendant in error, as plaintiff below, sued the plaintiff in error, as defendant below, in the circuit court of St. Lucie county in an action for damages for personal injuries; the trial resulting in a verdict and judgment for the plaintiff below, for review of which the defendant below brings the case here by writ of error.

The plaintiff, at the time of the injury sued upon, was an employe of the defendant railway company, and brought his suit under the provisions of section 3150 of the General Statutes of 1906, which reads as follows:

"If any person is injured by a railroad company by the running of the locomotives or cars, or other machinery of such company, he being at the time of such injury an employe of the company, and the damage was caused by negligence of another employe, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery."



ery. No contract which restricts such liability shall be legal or binding."

The defendant demurred to the plaintiff's declaration on the ground that this statute denies the defendant equal protection of the law, in that it attempts to create a new tort as to only one class of carriers, and is obnoxious to the fourteenth amendment of the Constitution of the United States. This demurrer was overruled, and such ruling is assigned as error.

The contention in support of this assignment is that the new rule of liability of the master to his servant, who is without fault, for the negligence of a fellow servant, imposed by this statute, is an unjust discrimination against railroad carriers, in confining such rule to them, and in not extending it to all classes of carriers alike; that there is no just basis for such a classification of carriers. These contentions are untenable.

In the ably considered case of *Kiley v. Chicago, M. & St. P. Ry. Co.* (decided by the Supreme Court of Wisconsin in January, 1909) 119 N. W. 309, in which the same contentions were made that are here urged, it was tersely and properly held that: "The necessity and propriety of classification for legislative purposes are to be determined by the Legislature, and cannot be disturbed when exercised within the rule declaring that classification must be based on substantial distinctions and germane to the purpose. The business of operating railroads differs from other business in its nature, in its relation to the public, and in the particular dangers incurred by its employes and the public, and calls for special regulation to meet the conditions peculiar to it, and such as are wholly inapplicable to any other business, and that such a statute is not invalid as denying to railroad companies the equal protection of the law, nor does it deny to them due process of law." The court did not err in overruling this demurrer. See note to *V. C. G. M. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313.

The third assignment of error complains of the court's sustaining a challenge for cause made by the plaintiff to a talesman tendered as a juror. Inasmuch as there will have to be another trial of the cause, and as it is unlikely that the same occurrence will again transpire at another trial, it becomes unnecessary to pass upon this assignment.

At the trial it was shown that after the injury to the plaintiff he was attended by a physician, one Dr. Lloyd, and that owing to the unskillfulness of this physician the plaintiff's injury was very much aggravated, and in an attempt by the plaintiff to prove that he was the railroad's physician, and that the railroad was responsible for his unskilled treatment, the plaintiff testified that Dr. Lloyd told him he was the company's physician. The defendant moved the court to strike this testimony; but such motion was

denied, and this ruling is assigned as error. This was error. Agency cannot be established by the declarations of the supposed agent himself. *Lakeside Press & Photo Engraving Co. v. Campbell*, 39 Fla. 523, 22 South. 878; *Elliott on Evidence*, § 252, and citations. As the same facts were subsequently shown by competent evidence without objection, this error may be regarded as harmless.

The second count in the plaintiff's declaration sought recovery of damages from the defendant railway company because of the maltreatment by the physician whom it was alleged was put in charge of the plaintiff's case by the defendant; the defendant knowing at the time of said physician's want of skill in his profession. At the close of the plaintiff's testimony the defendant moved the court to instruct the jury not to consider any evidence put in by the plaintiff to support said second count of his declaration, because the plaintiff had wholly failed to prove that the defendant had any knowledge of the want of skill in his profession by said physician when it employed him, and also at the same time moved the court, on the same ground, to require the plaintiff to elect upon which count of his declaration he would proceed. Both of these motions were denied by the court, and these rulings constitute the fifth and sixth assignments of error.

There was no error in either of these rulings. At the time said motions were made only the plaintiff's testimony was before the jury, and he had the right at that stage of the case to an opportunity to make good the second count of his declaration, if he could, from the defendant's witnesses. Not having done so, however, at the close of all the evidence, the court properly instructed the jury that the plaintiff had failed to make out his case under the second count of his declaration, and that he could not recover anything under said second count.

The seventh assignment of error is predicated upon an argument of plaintiff's counsel to the jury that was objected to by the defendant, and the court moved to instruct the jury not to consider such argument, but which motion was denied by the court. The argument in question tended to make capital for the plaintiff out of the matter of the second count in the declaration, which, as before seen, was out of the case for lack of proof to sustain it. Such argument was, therefore, improper, and the jury should have been instructed, as requested, to disregard it.

At the close of the evidence the defendant's counsel requested the court to instruct the jury that it was within their discretion to return either a general or special verdict, which request was refused by the judge. The judge also remarked in the hearing of the jury that he did not consider the case one in which a special verdict would be proper. This refusal to instruct as request-

ed and the accompanying remark of the judge constitute the eighth and ninth assignments of error.

We have no statute in Florida on the subject of special verdicts, but at the common law it seemed to be a matter wholly within the discretion of the jury as to whether they would return a general or special verdict. See 2 Andrews, *American Law*, 1491; Clementson on *Special Verdicts*, pp. 5, 6. In the same work, at page 179, it is said that, in states where no specific statutory provision on the subject exists, special verdicts may be found as at common law. The court is not justified in directing the jury to find a special verdict, though it may, in its discretion, in a proper case recommend one. A jury has the right to decline finding any other than a general verdict. In the case of *Baltimore & Ohio R. R. Co. v. School District, 3 Penny. (Pa.) 518*, it is held that "a court may, in its discretion, recommend a special verdict, but it is a discretion the appellate court will not review and reverse for their refusal to exercise it." Following this authority, we will not undertake to review or reverse the action of the circuit judge in refusing to exercise his discretion in suggesting to the jury their right to return a special verdict. Nor can we discover how the defendant could have been injured by the remark of the judge in the hearing of the jury to the effect that he did not think the case was one where a special verdict was proper.

The tenth assignment of error is based upon the insufficiency of the evidence to support the verdict, and will be considered hereafter in dealing with the motion for new trial.

The eleventh assignment of error is based upon the refusal of the court to instruct the jury to return a verdict for the defendant, on the ground that the facts not controverted showed contributory negligence on the part of the plaintiff, which in an appreciable degree contributed to his injury. The writer of this opinion thinks that under the facts in proof this charge should have been given, for the following reasons and on the following authorities: The undisputed facts in proof make out the following case: The plaintiff was an employé of the defendant company in the capacity of switchman in the railway yards of the defendant at Ft. Pierce, which was a division point for freight trains, and where there is a coal chute for supplying the engines with coal, which coal chute is loaded from cars placed on a track that runs between the chute and the pit; the coal being first dumped from the cars into the pit, and from there hoisted up into the chute. On the 16th day of February, 1906, an engineer in charge of an engine and the plaintiff, on being instructed to place a car of coal at the pit to be unloaded, backed into what they called the "cripple track" and picked up a car of coal. The plaintiff rode

out of the cripple track on the north end of the car, and got off at a switch and threw it, and then stepped back some few feet towards a crossing to see that it was clear, and, seeing that it was clear, signaled to the engineer in charge of the engine to back, which he did slowly. Then the plaintiff stepped towards the car as it came slowly back, and mounted it by putting his foot in the stirrup and catching hold of the lower end of the grab iron, and after he had hung there for a distance of 25 or 30 feet, on straightening himself up to a more comfortable position, the grab iron gave way, letting him fall to the ground, when one of the car wheels passed over his foot, crushing it to an extent that necessitated amputation of the foot.

While the plaintiff testified that it was necessary for him to mount this car and ride on it back to the coal pit to see where to place it, yet his own evidence shows that from the point where he mounted the car back to the coal pit where it was to be placed in position for unloading was only 151 feet, and that the cars were being moved no faster than he could walk, and that he would have had to dismount just before reaching the coal pit in order to more effectually signal to the engineer in placing the car at the pit, and that between the point where he mounted the car and the coal pit the track curved, so that if he had undertaken to signal the engineer from his position on the car he would have been compelled to lean out from the car as far as he could in order for the engineer to see him or his signals. On the other hand, the uncontradicted evidence of the defense is that there was no necessity for his mounting this car, but that, on the contrary, his proper place was on the ground for the more efficient signaling to the engineer, and the plaintiff's own evidence shows that he could have walked back from the point where he mounted the car to the coal pit, where he would have had to dismount again, a distance of only 151 feet, as quickly, at the rate the cars were being propelled, as the cars would have arrived there. So that his mounting this car at the time and place that he did was wholly uncalled for by the demands of duty or necessity, was contrary to the efficient performance of his duty on that occasion, and undertaken by him solely for his own pleasure or convenience, and at his own risk. The boarding of a train in motion is necessarily attended with more or less danger under any circumstances, and employées of railroads, as well as the public generally, owe it to their own safety to abstain from attempting it, unless the demands of duty make it necessary. This court, following the construction put by the Georgia court upon their statute, from which ours in such cases has been adopted, has repeatedly held that an employé of a railroad company cannot recover damages from such company for injuries sustained by him on account of the negligence or

carelessness of another employé, unless wholly without fault himself. *Duval, Receiver, v. Hunt*, 34 Fla. 85, 15 South. 876. In *Atlantic Coast Line R. Co. v. Ryland*, 50 Fla. 190, 40 South. 24, it is held that under our statute, authorizing recovery by an employé of a railroad company of damages for injury received by the running of its locomotives, cars, or other machinery through the negligence of a coemployé or fellow servant, the injured employé, in order to recover, must himself be entirely free from fault or negligence. He must do nothing to contribute to his injury, and must neglect to do nothing to prevent the consequence of the negligence of the other servants. Any negligence of the plaintiff in such a case, however slight, that contributes in an appreciable degree to the cause of the injury, defeats a recovery.

In the case of *Cunningham v. Chicago, M. & St. P. R. Co.* (C. C.) 17 Fed. 882, it is said that: "If a man voluntarily and unnecessarily puts himself into a dangerous position, where there are other positions that he may take, in connection with the discharge of his duty, that are safe, he cannot recover damages for that injury to which he has contributed by his own negligence." To the same effect is the ruling in *Day v. Louisiana West. Ry. Co.*, 121 La. 180, 46 South. 203. In *Dowell v. Vicksburg & Meridian R. R. Co.*, 61 Miss. 519, it was held that a servant of a railroad company cannot recover in a suit against the company for injuries received while recklessly attempting to board a moving train, although it is shown that the train was improperly equipped and that some of its appliances were defective. That under these circumstances the fact that the plaintiff was in the habit of boarding moving trains, or that he had been seen to do so on previous occasions with impunity, will not avail him.

In the case of *Southern Ry. Co. v. Harbin*, 110 Ga. 808, 38 S. E. 218, the Supreme Court of Georgia approvingly quotes the following ruling from the case of *M. & O. R. R. v. George*, 94 Ala. 200, 10 South. 145: "If there are two apparent ways of discharging the required service, one more dangerous than the other, the employé is bound to select the latter, and is guilty of such negligence as will bar an action for damages if he selects the former and is thereby injured."

In the case of *Southern Kansas R. Co. v. Robbins*, 43 Kan. 145, 23 Pac. 113, it is held that evidence of the practice and usage of others in climbing the ladder of a box car when a train is in motion is not admissible to prove due care on the part of a party injured at the time of the accident.

In the case of *Quirouet v. Alabama G. S. R. Co.*, 111 Ga. 315, 36 S. E. 599, it was held that where an employé has his choice of two ways in which to perform a duty, the one safe, though inconvenient, and the other dangerous, he is bound to select the

safe method; and if, instead of so doing, he elects to pursue the dangerous way, and is, in consequence, injured, he is guilty of such negligence as will bar an action for damages against the master.

In the instant case the undisputed facts in proof show that the plaintiff here was in safety on the ground; that his duties required him to proceed a distance of only 151 feet to a point at the coal pit to signal the engineer as to the placing there of a car load of coal; that he could have walked this short distance with perfect safety to himself, and arrived there in ample time to give his signals, but that, instead of choosing the safe walk, he, wholly without necessity, selected the dangerous feat of boarding a moving coal car in order to ride thereon the short distance that he had to go. Under these circumstances the writer thinks he was guilty of such contributory negligence as will bar any recovery of damages against his employer. The majority of the court, however, are of a different opinion, and think that the boarding of the train by the plaintiff under the circumstances was not negligence in law *per se*, but that it was a question of fact for the jury to decide as to the necessity for him to so board it, and as to whether his mounting it under the circumstances stated was negligence on his part that contributed to his injury; and, so thinking, the majority of the court are of the opinion that the requested peremptory charge was properly refused. See *Florida Cent. & P. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148; *Florida Cent. & P. R. Co. v. Mooney*, 45 Fla. 280, 33 South. 1010, 110 Am. St. Rep. 73; *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887. See, also, note in 97 Am. St. Rep. 985.

The twelfth assignment of error is expressly abandoned here.

The thirteenth assignment of error is based upon the court's refusal to give the following instruction requested by the defendant: "If you believe from the evidence that one or more of the defendant's car inspectors inspected the car in question shortly before the accident, and found the safety appliances, including the hand hold in good order, and that if there was any defect in the hand hold at the time of the inspection it was such as to deceive human judgment, your verdict must be for the defendant, because the defendant cannot be held liable if it appears that it had the car inspected shortly before plaintiff used it, and that the inspector or inspectors used ordinary and reasonable care and diligence in making the examination and failed to discover the defect, if it then existed, which caused the injury to the plaintiff."

The writer hereof is of opinion that there was evidence in the case which justified the giving of this charge, and we think it states the law correctly, and the subject-matter thereof was not covered by any instruction

given to the jury. The majority of the court concludes that the refusal to give this charge was not error.

The fourteenth and fifteenth assignments of error are predicated upon the giving of the first and second charges requested by the plaintiff. No useful purpose will be subserved by a reproduction of these questioned charges here. It is sufficient to say that they state the law correctly and there was no error in giving them to the jury.

The sixteenth assignment of error is predicated upon the giving of the following charge at the request of the plaintiff: "A servant in the performance of his duties, is bound to exercise ordinary care for his own safety, or that degree of care which prudent persons usually exercise under similar circumstances, and if he is injured by failure to exercise such care his master is not liable. He must take ordinary care to learn the dangers, which are likely to beset him in the service. He must not go blindly to his work where there is danger. But this doctrine must be taken in connection with the qualification that mere knowledge of a defect or method will not always be sufficient to charge the servant with an assumption of the risk. Such knowledge must convey to a mind like his the danger that may or is likely to result to him in his employment from the defect or negligent act; for it is one thing to be aware of defects in the instrumentality or plans furnished by the master for the performance of his service, and another thing to know or appreciate the risks resulting or which may follow from such defects. The question is, taking his experience or inexperience into consideration, did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risk and not merely the defects existed."

This charge seems to have been taken from the second headnote in the case of *Flowers v. Louisville & N. R. Co.*, 55 Fla. 603, 46 South. 718. It states the law correctly when applied to a case like the one in which the utterance was made. In that case the court was dealing with a case of inexperience in the use of a certain machine, where, although the inexperienced servant may have known of defects in the machine, he might at the same time not have known of or appreciated the danger likely to result from the existence of such defects. But in the instant case there is no such question. We apprehend that, had it been shown in the present case that the plaintiff knew, at the time he mounted the car in question by seizing hold of the grab iron, that such grab iron was not properly fastened to the car, he would clearly have been chargeable with such contributory negligence as would defeat his recovery; and in such case he would not have been heard to say, "Yes; I knew it was loose, and not fastened to the car; but I

did not appreciate the fact that an unfastened grab iron would not hold me up." The charge as applied to the facts of this case is a misfit, is calculated to have misled the jury, and it was error to give it.

The seventeenth assignment of error is not argued here, and is therefore abandoned.

The following charge was given to the jury and was duly excepted to: "If you find from the evidence that the plaintiff is entitled to recover, then you will be required to determine the amount of the damages he has sustained, if any; and in estimating the damages you will take into consideration the plaintiff's bodily pain and suffering, if any, occasioned by the injury complained of, sickness resulting from the injury, if any, his age, his health and condition before the injury complained of, and the effect on his health, and in case you find that the plaintiff has been to any extent permanently injured or disabled, his loss of time, if any, the money he was making in his business or by his labor, and the effect, if any, of the injury in the future upon the plaintiff in attending to his affairs generally in pursuing his business or calling, and allow him such damages as in your opinion, from all the facts and circumstances in evidence, will be a fair and just compensation for the injury he has sustained."

In view of the feature in this charge to the effect that the jury could, in estimating the plaintiff's damages, base such damages upon the diminution of his earning capacity during his entire expectancy of life, and inasmuch as this feature of the plaintiff's injury was the chief basis for the assessment of damages in the case, this charge was faulty in not instructing the jury that, in estimating his prospective losses in the future during his life expectancy from his diminished earning capacity, such future damages should be reduced to their present value, and the present value thereof only should be included in their verdict. See *Jacksonville Elec. Co. v. Bowden*, 54 Fla. 461, 45 South. 755, 15 L. R. A. (N. S.) 451; *Atlantic & W. P. R. Co. v. Newton*, 85 Ga. 517, 11 S. E. 776; *Richmond & D. R. Co. v. Allison*, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43; *Fulsome v. Town of Concord*, 46 Vt. 135; 2 *Sedgwick on Damages*, § 485; *Duval, Receiver, v. Hunt*, 34 Fla. 85, 15 South. 876.

For the errors found, the judgment of the circuit court in said cause is hereby reversed, at the cost of the defendant in error, and a new trial awarded.

WHITFIELD, C. J., and SHACKLEFORD and PARKHILL, JJ., concur.

COCKRELL and HOCKER, JJ., are of the opinion that upon the whole record no substantial error appears.

(124 La.)

No. 17,927.

FULLER BROS. v. DUKE. S. S. GULLATT & BROS. v. DUKE et al. (MATHEWS, Intervener). In re MATHEWS.

(Supreme Court of Louisiana. Oct. 20, 1909.)

COURTS (§ 224\*)—REVIEW—JURISDICTION OF SUPREME COURT.

To warrant an application to the Supreme Court for a writ of certiorari, or review, to review a judgment of the Court of Appeal, the case must present exceptional features, or otherwise the determination of the Court of Appeal will, in view of the Constitution, be deemed final.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 608-618; Dec. Dig. § 224.\*]

Consolidated actions between Fuller Bros. and J. P. Duke, and between S. S. Gullatt & Bros. against J. P. Duke and others, in which Charles Mathews intervenes. From the judgment of the Court of Appeal, the Intervener applies for certiorari or writ of review. Refused.

J. B. Holstead, for applicant.

NICHOLLS, J. There is nothing special in this case to take it out of the class of cases which the Constitution contemplated should, on determination of the issues therein in the Court of Appeal, become closed and final, even if there might be error as between the parties in the litigation therein. We have endeavored to save much unnecessary expense to litigants and to avoid great and very burdensome labor being thrown upon this court through attempts to convert it into an ordinary court of appeal. We repeat, what we have often said before, that to warrant an application for a writ of review the case sought to be reviewed should present exceptional features.

The present application is refused.

(124 La.)

No. 17,787.

DAVENPORT v. T. B. ALLEN & CO.

In re T. B. ALLEN & CO.

(Supreme Court of Louisiana. Oct. 13, 1909.)

APPEAL AND ERROR (§ 1094\*)—DECISIONS REVIEWABLE—FINDINGS OF FACT—FINDINGS OF COURT OF APPEAL.

Under the Constitution, decisions of the Courts of Appeal are final, in the absence of special circumstances requiring the Supreme Court to review their decisions, and it will not review a decision of a Court of Appeal on questions of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4322; Dec. Dig. § 1094.\*]

Certiorari to Court of Appeal, Parish of Sabine.

Action by J. N. Davenport against T. B. Allen & Co. Judgment for plaintiff was affirmed by the Court of Appeal, and defend-

ant applies for certiorari or writ of review. Application denied.

J. H. Boone, for applicant.

NICHOLLS, J. This case was twice examined by the Court of Appeal. The original decision was sustained, in a written opinion, after the attention of the court had been specially called to the errors alleged to have been committed by it in an elaborate application for a rehearing.

The decision was based upon facts. We find nothing in the case calling upon this court to exert its authority under the power of review conferred upon it by the Constitution.

If the case were ordered up, and error were found, and the judgment of the Court of Appeal was reversed, our decision would relieve the defendant from the effect of that error; but its effect would extend no further. It would furnish no light to control or govern other cases. The convention necessarily contemplated the possibility of error in cases falling within the appellate jurisdiction of the Courts of Appeal. It contemplated that their conclusion should be final, nevertheless, unless special consideration should move this court exceptionally to determine otherwise. Counsel for parties seeking to obtain writs of review from the decisions of the Courts of Appeal must be prepared to have their applications refused where they present for the consideration of this court nothing more than alleged error to the prejudice of their particular clients, arising from differences of opinion, which might reasonably be expected to arise in regard to matters of fact, in tribunals to which they would be regularly submitted under the Constitution for judicial action. Such is the condition of things in the present case.

For reasons assigned, it is hereby ordered that the application herein be refused.

(124 La.)

No. 17,746.

STATE v. SANDOLOSKI.

In re SANDOLOSKI.

(Supreme Court of Louisiana. Oct. 9, 1909.)

MANDAMUS (§ 61\*)—CRIMINAL PROSECUTIONS.

Accused in a nonappealable criminal case is not entitled, merely because of the nonappealable character of the case, to test before judgment the correctness of the trial judge's rulings upon interlocutory points; and hence one, against whom an information was filed, charging the soliciting and receiving of orders for the sale of intoxicating liquors at retail in a parish where such retailing was prohibited, could not, before trial, apply to the Supreme Court for mandamus to compel the lower court to order a bill of particulars previously denied.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 122-126; Dec. Dig. § 61.\*]

Certiorari to Court of Appeals, Parish of Caddo.

H. J. Sandoloski was charged with illegally soliciting orders for liquors, and, his motion for a bill of particulars having been denied, he applies for a writ of certiorari and a rule to show cause why mandamus should not issue compelling the granting of a bill of particulars. Application refused.

Alexander & Wilkinson, for relator. Walter Gulon, Atty. Gen., and J. M. Foster, Dist. Atty., for the State.

#### Statement of the Case.

NICHOLLS, J. Relator prays that this court issue a writ of certiorari to A. J. Murff, judge of the district court in and for the parish of Caddo, commanding him to send to this court the proceedings in the cause of State of Louisiana v. H. J. Sandoloski, to the end that their validity may be inquired into—

"and further prays that a rule issue to said judge to show cause why a mandamus should not issue, ordering and commanding him to grant defendant an order for a bill of particulars of the charge against him, showing whether it is claimed that the liquors which he sought to sell were in broken packages of less than five gallons, and whether the orders sought were from persons for consumption or from dealers for resale."

The application was based upon allegations that the district attorney in and for the parish of Caddo had filed in the district court for that parish, before the said judge, a bill of information charging relator with—

"having on a date named sought, solicited, and received orders for the sale of intoxicating liquors at retail in the parish of Caddo, where the retailing of liquors was prohibited."

That on the 26th of May, 1909, relator filed in said court a motion for a bill of particulars of the crime charged against him, particularly as to—

"whether it was claimed that said liquors were attempted to be sold in broken packages of less than five gallons," and "whether it was claimed that said orders were sought or solicited from persons for consumption or from dealers for resale."

That the district attorney made answer to said motion for particulars:

"(1) That the quantity or how sold was immaterial; (2) that the orders sought in this case were from persons or firms in Caddo parish.

"In the eyes of the law there were no retail liquor dealers in the parish; hence there could be no retail liquor dealers in the parish; hence there could be no sale for resale."

That on June 5th the said motion for a bill of particulars was argued by counsel and taken under advisement by the judge. That the judge finally declined to order the district attorney to furnish relator any further particulars, and particularly refused to force him to answer by stating the quantity of liquors attempted to be sold, and whether the same were in the original and unbroken packages, to which ruling relator has taken a bill of exceptions.

That relator was entitled to a bill of par-

ticulars stating the facts called for, and it was the ministerial duty of the judge to order said bills of particulars stating the facts called for, and it was a gross abuse of discretion to have refused doing so when the charge against him was couched in such general and uncertain grounds. Relator avers that as the agent of the Houston Ice & Brewing Company he solicited orders from dealers for resale in five gallons and more and in the original and unbroken packages of near beer, a nonintoxicating and a non-spirituuous liquor, in the parish of Caddo, and that it was the purpose of the district attorney to secure his conviction for soliciting such order of such near beer, and that under the law he was without any right of appeal.

Upon reading this petition the district judge was ordered to send forward the proceedings in the said case, and to show cause why a writ of mandamus should not issue, commanding him to grant an order for a bill of particulars of the charge against him, showing whether it was claimed against him that the liquors which he sought to sell were in broken packages of less than five gallons and whether the orders sought were from persons for consumption or from dealers for resale.

The proceedings in the cause have been forwarded to this court.

The district judge for answer to the rule served on him says:

"That defendant was indicted for soliciting and receiving orders for sale of spirituuous and intoxicating liquors at retail in the parish of Caddo.

"That before going to trial defendant filed a motion asking for a bill of particulars, and the district attorney filed an answer to same.

"That counsel for defendant in open court waived his application, except as to Nos. 3 and 4 in his motion.

"No. 3 demands of the district attorney 'whether it is claimed that liquor was attempted to be sold in broken packages of less than five gallons.'

"No. 4 demands of the district attorney 'whether said orders were sought or solicited from persons for consumption or from dealers for resale.'

"In answer to No. 3, the district attorney answered that, inasmuch as defendant was charged with soliciting the sale of liquor at retail, it was immaterial as to what amount was sold.

"We thought this fully answered the demand. The bill having charged that he solicited at retail, we saw no necessity to say whether it was a pint, quart or a drink, as the statutes fully define what is wholesale and retail.

"Having charged that he solicited by retail sufficiently notified the defendant, and in our opinion was sufficient.

"In answer to No. 4, as to whether the soliciting was from persons for consumption or for resale, we think it makes no material difference, since it was solicited by retail.

"For these reasons we held that the bill of indictment charging him to be soliciting at retail was sufficient, especially after the answer of district attorney was filed, and so held. (See reasons in bills of exceptions. All other objections were waived by defendant, and we passed on exceptions No. 3 and 4.)

"We therefore ask that the writs be denied."

## Opinion.

We are of the opinion that the writ of mandamus prayed for should not be granted. The district judge has not refused to perform any duty imposed upon him by the law. At the instance of the relator, he ordered a rule to issue calling upon the district attorney to show cause why he (relator) should not be granted a bill of particulars. The rule was tried regularly, and decided by the judge adversely to the demand of the relator. The latter filed a bill of exceptions thereto, evidently to guard his rights under some contemplated future proceedings. The ruling may be right or wrong. Be that as it may, we do not think the present the proper time, or the method adopted to test the question the proper one. Relator has not yet been brought to trial; non constat that he will be convicted. Defendant in a nonappealable criminal case is not entitled, because of that fact, to test at once before judgment the correctness of the ruling of the trial judge upon interlocutory points, arising successively in this case as relator is attempting to do in this matter. If this case were one appealable to this court, relator would have no right to present relief; and the nonappealability of a case furnishes no reason for differentiating that particular class of cases from that of a more serious character. It was not contemplated by the Constitution that nonappealable cases should occupy a condition so peculiarly favorable to defendants. It is to the interest of the state that criminal cases should be brought to a speedy termination, and, if the course herein adopted by relator be recognized as a proper one, that object would be defeated.

Relator's application for relief is premature. It must be presently rejected for that reason.

Relator's application is therefore refused, without prejudice to any proceedings for relief to which he may be entitled in the future.

(124 La.)

No. 17,785.

CORBITT et al. v. HANSON et al.

In re LAW.

(Supreme Court of Louisiana. Aug. 7, 1909.  
Rehearing Denied Oct. 18, 1909.)

**1. APPEAL AND ERROR (§ 1206\*)—REMAND—ENFORCEMENT OF JUDGMENT—EFFECT OF DEVOLUTIVE APPEAL.**

In an action between C., L., and J., a fund was deposited in court, and judgment went for L. for the whole sum, and C. appealed, but J. did not. On the appeal the judgment was affirmed as to J. and reversed as to C., and one-half the fund was given to L. and the other to C. The original judgment, from which J. did not appeal, became final within the legal delay, and thereafter J. prosecuted a devolutive appeal from the original judgment. The trial judge, be-

cause of the pending appeal, refused to give L. his half of the fund, and L. brought mandamus. *Held* that, as the devolutive appeal could not affect the judgment appealed from, it could not affect L.'s rights to the fund as decreed by the amended judgment of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1206.\*]

**2. APPEAL AND ERROR (§ 1206\*)—REMAND—ENFORCEMENT OF JUDGMENT—PROCEEDING BY RULE.**

A contention that L. should proceed by rule against J. and the depository, which refused to pay L. unless the judgment made an order therefor, was without merit, because L. had already a final judgment against J. for the fund, and the bank, in paying, would be protected by the order of court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1206.\*]

Action by D. E. Corbitt and others against Rasmus Hanson, O. B. Law, and others. Judgment rendered for defendants was affirmed in part, and in other respects set aside and rendered for plaintiffs. Defendant Law applies for mandamus to enforce the judgment in his favor. Mandamus granted.

A. A. Gunby, for relator. Respondent Judge, pro se.

LAND, J. Relator has invoked the writ of mandamus to compel the judge of the Sixth judicial district court and the clerk of said court to comply with the final judgment of the Supreme Court rendered in the suit of D. E. Corbitt et al. v. Rasmus Hanson et al. (No. 17,436) 49 South. 995, and reading as follows:

"The judgment is affirmed, in so far as it rejects the demand of Morris Jouvenat, with costs, and discharges the defendants, E. T. Lamkin, R. Hanson, trustee, and the Monroe Lumber Company. In all other respects it is set aside. And it is now ordered, adjudged, and decreed that the sum of \$0,168.67 deposited in the registry of the court below be paid, one-half to the plaintiff D. E. Corbitt, and the remainder to the defendant O. B. Law, and that the said defendant Law pay the costs incurred by the said plaintiff Corbitt in the district court, and also costs of appeal. And with this amendment the applications for rehearing are refused."

It is alleged by relator, and is not denied by the respondent judge, that on the 9th of July, 1909, the respondent judge and clerk executed the decree of the Supreme Court in favor of Corbitt by giving him a check on the bank for one-half of the amount deposited in the registry of the court to the credit of the said suit. It is further alleged, and not denied, that the clerk of the district court was willing to sign an order in favor of the relator for the remaining half of said fund, but would not do so without the consent of the judge, who refused to sign an order in favor of the relator, and the bank refused to pay any part of said money without the order of the judge.

It appears that, after the judgment of the Supreme Court became final, Jouvenat took

a devolutive appeal from the original judgment rendered in the district court, returnable to the Supreme Court on the 4th day of September, A. D. 1909.

Our learned Brother below represents that the money was deposited subject to a final decree in the suit, and seems to apprehend that he might incur some personal liability by executing the judgment of the Supreme Court pending the belated appeal taken by Jouvenat.

The judgment of the district court awarded the whole fund to Law, and Jouvenat did not prosecute his appeal from the judgment in favor of Law, and could not avail himself of the appeal of Corbitt. Hence, as between Law and Jouvenat, the judgment became final and executory within the legal delay. The Supreme Court could not disturb the judgment as between Law and Jouvenat, and so declared. The practical result of the decree of the Supreme Court was to reverse as to Corbitt and to leave the judgment in full force and effect as to Jouvenat. Law has an unquestionable right to execute his judgment against Jouvenat, and the devolutive appeal taken by the latter cannot stay such execution. The fund is in the registry of the court, an executory decree has been rendered in favor of Law, and it is the mandatory duty of the judge and the clerk to pay out the fund as ordered by this court in the final judgment rendered in the case. It is too late to question our decree as to form or substance. Whether Jouvenat can maintain his appeal from the original judgment need not now be considered, because at most the appeal is devolutive, and presents no obstacle to the execution of the judgment below as amended by the Supreme Court.

The suggestion of the respondent judge that Law should proceed by rule against Jouvenat and the bank is without merit, because Law has already a final judgment against Jouvenat for the fund, and the bank, in paying, will be protected by the order of the court.

It is therefore ordered that peremptory writs of mandamus issue as prayed for by relator, and that the respondents pay the costs of this proceeding.

(124 La.)

No. 17,493.

**HOLLAND'S HEIRS v. SOUTHERN STATES LAND & TIMBER CO.**

(Supreme Court of Louisiana. June 19, 1909.  
Rehearing Denied Oct. 18, 1909.)

**1. TAXATION (§ 805\*)—TAX DEED—SETTING ASIDE.**

After the lapse of three years from the adoption of the Constitution of 1898, the party in possession under a duly recorded tax deed in the usual form cannot be disturbed, except for one of the two causes specified in article 233 of

the Constitution of 1898—that of dual assessment and that of antecedent payment of taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.\*]

**2. TAXATION (§ 805\*)—TAX SALE—CURATIVE ACT.**

A tax sale made under an actual assessment, however irregular or illegal, comes within the curative scope of article 233 of the Constitution of 1898.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.\*]

(Syllabus by the Court.)

Appeal from Ninth Judicial District Court, Parish of East Carroll; F. X. Ransdell, Judge.

Action by the heirs of J. C. Holland against the Southern States Land & Timber Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Davis & Browne, for appellants. Snyder & Gilfoil and Saunders, Dufour & Dufour, for appellee.

LAND, J. This suit was filed in January, 1908, by the heirs of Jackson C. Holland, who died in 1868, to annul two tax adjudications of certain lands to the state of Louisiana, one of date November 4, 1873, and the other of date May 10, 1896, and to recover said property as owners.

The defendant is alleged to be in possession of said lands as owners, through mesne conveyances extending back to said Jackson B. Holland, and to claim title through said purported tax sales and tax deeds.

The petition alleges that said land is and always has been woodland and unoccupied, except that a considerable portion of the same was deadened in 1860 by said Holland, and is now worth the sum of \$20,000.

The petition avers in general terms that both of said tax sales were illegal, invalid, and absolutely void for want of valid assessments, advertisements, and notices, and that the purported tax deeds were not translatives of property, and were not made in compliance with the requirements of the revenue acts under which said sales were attempted to be made.

The tax sale of 1873 is specially assailed on the following grounds:

(1) That said Holland was always a non-resident of the state of Louisiana, and no curator ad hoc was appointed to represent him, as required by the statute.

(2) That said property was sold for the delinquent taxes of the years 1865, 1866, 1870, and 1871, when the lien and privilege for taxes, and the taxes themselves for the years 1865 and 1866, had been prescribed long prior to the date of said tax sale.

(3) That the state taxes for said years did not amount to the sum of \$422.88, but, as the record show, to only \$375.

(4) That said property was sold, as shown

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



by the deed, to pay the delinquent taxes for said years amounting to \$421.88 and to pay damages amounting to \$357.81, when there was no law in existence authorizing the imposition of any damages, interest, or penalties.

(5) That under Act No. 47, p. 98, of 1873, under which said tax sale purports to have been made, the tax collector could sell only to pay the delinquent taxes and lawful costs.

The tax sale of 1896 is assailed on the following grounds:

(1) That the property was sold for the taxes of 1892, 1893, 1894, and 1895, on an assessment made February 12, 1896, on which day purported supplemental tax rolls for said years were filed, when the law prohibited the collection of back taxes for more than three years.

(2) That the tax and tax lien for 1892 had prescribed long before the filing of the supplemental tax roll.

(3) That said property was sold for taxes and interest amounting to \$693.33, in which amount was included \$53.79 of interest and penalties on levee taxes not warranted by law.

(4) That in the total amount were included levee taxes, both ad valorem and acreage, without warrant of law.

(5) That under article 210 of the Constitution of 1879 no valid tax sale could be made for more taxes or interest than were due.

(6) That the attempted sale and assessment of said property in 1896 under instructions of the commissioners of the levee district was a recognition of the title of plaintiff's ancestor, and estopped the taxing authorities and the defendant to claim title under said sale of 1873.

Plaintiffs alleged a willingness to repay the taxes that may have been properly paid on said lands, and prayed for judgment decreeing said tax sales to be null and void, and recognizing them as the lawful owners of the property.

Defendant pleaded the prescription of 5, 10, and 30 years, and the prescription of 3 years under article 233 of the Constitution of 1898.

Defendant further pleaded estoppel against plaintiffs, alleging that their ancestor purchased the property on a credit in 1860, never paid a dollar of the purchase price, never had any actual possession of the property, never paid any taxes thereon, and that he and his heirs for 48 years asserted no claims of ownership to the lands in controversy.

The case was tried on the plea of prescription, and, from a judgment in favor of the defendant, the plaintiff has appealed.

J. C. Holland purchased the lands in dispute entirely on a credit from Louis Selby in November, 1860. The mortgage securing the payment of the price was never can-

celed on the records, in whole or in part, and was reinscribed in 1870. It is not pretended that J. C. Holland, or heirs, have ever paid any taxes on the property. It is admitted that J. C. Holland caused the timber on a part of the lands to be deadened. Holland was an officer in the Confederate army. He died in 1866, and there has never been any administration of his estate.

In 1873 the lands in dispute were adjudicated to the state of Louisiana for taxes due by J. C. Holland on assessment rolls for 1865, 1866, 1870, and 1871, subject to redemption by the owners or any creditor at any time within six months.

In June, 1889, these lands were deeded by the State Auditor to the board of commissioners of the Fifth Louisiana levee district.

On May 16, 1896, the same lands were adjudicated to the state of Louisiana for taxes of 1892, 1893, and 1894, and for taxes of 1895, on assessment against "unknown owner; J. C. Holland, last known owner." This adjudication was made under Act No. 85, p. 111, of 1888, and the deed recites that all the requirements of the statute as to notices, advertisements, etc., were strictly observed.

In November, 1897, the lands so adjudicated were again deeded by the State Auditor to the board of commissioners of the Fifth Louisiana levee district, which in 1900 sold the same to the North Louisiana Land Company. Defendant acquired title in March, 1903, from the assigns of the said purchaser from the levee district. It is admitted that from 1901 to 1908, inclusive, the property has been regularly assessed to the holders of the title derived from the levee board, and all taxes so assessed have been paid by them. It is further admitted that the defendant purchased in good faith, believing that the title was good.

It appears that in July, 1895, the said board of commissioners, being advised that its title to said lands based on the tax adjudication of 1873 was defective, passed a resolution requesting the assessor to place the same on rolls for back taxes for 1892, 1893, and 1894, and for current taxes. Supplemental rolls for each of said years were made out and were actually filed by the clerk of the district court on February 10, 1896. The tax deed of May 16, 1896, recites that said assessment rolls were on file in the office of the tax collector.

The legal presumption is that these rolls were made out by the assessor of the parish pursuant to the request of the board of commissioners and that they were timely deposited in the proper offices. The circumstance that the assessor's name does not appear on the first page, and that the rolls were not indorsed as filed in the clerk's office until February 10, 1896, may have been irregularities, but certainly were not abso-

lute nullities, incurable by prescription. There were tax assessments, and the rolls were filed in the proper offices more than three months before the tax sale.

In *Terry v. Heisen*, 115 La. 1070, 40 South. 461, this court held that the constitutional prescription of three years validated a tax sale based on an assessment to a person without color of title, and made without notice to the owner. *Inter alia*, the court said:

"So long, therefore, as the property is actually assessed, whether in the name of one person or another, or in no name, there is an intelligible basis for the levy, and for the sale to enforce the payment of the tax; and if the law, to which alone he can look for his remedy, provides that the owner must bring the action to annul said sale within three years, or else that such action will be barred, he must comply with the condition imposed or suffer the consequences imposed."

In *Lavedan v. Choppin*, 119 La. 1056, 44 South. 886, the tax title was assailed on the ground that the property was not assessed for the year 1886, nor advertised in the time and manner required by law; but this court held that these grounds were barred by the constitutional prescription of three years, affirming *Terry v. Heisen*, *supra*.

The ground that the taxes of 1892 were prescribed when the supplemental roll was filed we do not think is well taken.

Under section 34, Act No. 98, p. 145, of 1886, the prescription of three years runs for the filing of the tax roll. Whether this section was repealed by Act No. 85, p. 111, of 1888, under which the tax sale in question was made, need not be determined in this case.

The allegation that more than three years' back taxes were assessed against the property, in violation of section 11, Act No. 85, p. 116, of 1888, is bottomed on the bare fact that the supplemental rolls were filed by the clerk of the court of date February 10, 1896. The filing of the tax rolls marks the completion of the work of assessment and review, and usually is done several months after the listing of the property by the assessor. Hence in the instant case the mere date of the filing does not prove the date of the assessment of the lands in question, or of the deposit of rolls in the proper offices. Under section 32, Act No. 85, p. 124, of 1888, the failure of the recorder to mark the tax rolls "filed" does not prejudice the rights of the state. The presumption of law is that the assessor in listing the property did not violate section 11, Act No. 85, p. 116, of 1888, but made his assessment in 1895 (as he was requested to do by the board of commissioners) for three years' back taxes and the current taxes for 1895.

The tax sale was made on the same day as other tax sales for delinquent taxes for the year 1895 and previous years, and on the tax rolls on file in the office of the tax collector.

The presumption is that such rolls were made out and deposited in the year 1895.

At the tax sale, in default of a bidder, the property was adjudicated to the state of Louisiana, subject to redemption for one year, pursuant to section 53, Act No. 85, p. 130, of 1888.

Plaintiffs allege that the property was sold in part for levee taxes and for interest or penalties on levee taxes without warrant of law.

The property was sold for state tax, levee tax, acreage tax, and parish tax, with 10 per cent. interest on each, and for costs.

Article 210 of the Constitution of 1879 provided for the collection of "levee district" taxes in the same manner as state, parochial, and municipal taxes; and article 218 declared that:

"All the articles and provisions of this Constitution regulating and relating to the collection of state taxes and tax sales shall also apply to and regulate the collection of parish, district and municipal taxes."

Act No. 44, p. 56, of 1886, creating the Fifth Louisiana levee district, empowered the board of commissioners to levy a five-mill district tax and a tax of five mills on each and every acre of land within the district, to be assessed and extended on the tax rolls and collected in the same manner as state taxes. This legislative mandate was sufficient warrant for the extension of the levee taxes on the supplemental rolls in question. If levee taxes are to be collected in the same manner as state taxes, the same coercive measures in the way of penalties must be employed. The acreage tax is a creature of the Legislature, and there is nothing in the organic law that inhibits the Legislature from attaching a penalty for its nonpayment. In fact, its collection would otherwise be difficult, if not impracticable. It has been the uniform practice in this state to collect levee taxes of all kinds in the same manner as state and parish taxes. The penalty was 2 per cent. per month for five months, including the month of May, in which the sale was made.

In *Woodfolk's Heirs v. Witkowski*, 120 La. 490, 45 South. 401, similar in its facts to the case at bar, it was alleged as ground for nullity of the tax sale that the price was "composed of pretended damages not authorized by any law, \* \* \* and of illegal, excessive taxes, costs, and charges." The court in conclusion said:

"Plaintiffs urge that the property was seized and sold, not only for the taxes due on the property, but for damages and penalties. The deed states that it was sold for the delinquent taxes. After it was sold the price was applied, as far as it went, to the payment of tax penalties. If there was any misapplication of the price, that fact did not affect the sale. Plaintiffs' remedy on that score was not to set aside the sale. As matters are disclosed in the record, we do not think that defendant was required to support his title by invoking prescription. Had that plea been necessary for the

purposes of this case, we think it would have been properly invoked and sustained."

There was an actual assessment of the property for taxation, and taxes were due thereon to the state, parish, and levee board. There was an actual tax sale of the property, evidenced by formal tax deed of adjudication to the state of Louisiana. The defects complained of are dehors the deed.

Article 210 of the Constitution of 1879 provided that:

"All deeds of sale made, or that may be made, by collectors of taxes, shall be received by courts in evidence as prima facie valid sale."

Article 233 of the Constitution of 1898 contains the same provision, and declares that:

"No sale of property for taxes shall be set aside for any cause, except on proof of dual assessment, or of payment of the taxes for which the property was sold prior to the date of the sale, unless the proceeding to annul is instituted \* \* \* within three years from the adoption of this Constitution as to sales already made."

By the very terms of article 233, a deed of sale by a tax collector in substantial compliance with the requirements of the statute cannot, after the lapse of three years, be set aside for any cause, except on proof of dual assessment, or of the payment of the taxes for which the property was sold. This prohibition bars inquiry as to all other causes of nullity. In *Canter v. Heirs of Williams*, 107 La. 77, 31 South. 627, this court said:

"After the lapse of three years from the adoption of the Constitution, the party in possession under his tax title, duly recorded, cannot be disturbed, except for the two causes mentioned in article 233—that of dual assessment and that of antecedent payment of taxes."

This court has never departed from this doctrine, based as it is on the plain words of the Constitution.

In *Harris v. Deblieux*, 115 La. 147, 38 South. 946, and in *Doullut v. Smith*, 117 La. 506, 41 South. 913, a part of the taxes had been paid, and in *Booksh v. Company*, 115 La. 351, 39 South. 9, the taxes had been paid under a duplicate assessment.

Judgment affirmed.

(124 La.)

No. 17,001.

STATE v. COGNEVICH.

In re COGNEVICH.

(Supreme Court of Louisiana. June 11, 1909.  
On the State's Application for Rehearing,  
Oct. 18, 1909.)

# 1. STATUTES (§ 135\*)—AMENDING REPEALED STATUTE—EFFECT.

A statute purporting to amend a repealed statute is void.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 202, 203; Dec. Dig. § 135.\*]

# 2. WEIGHTS AND MEASURES (§ 2\*)—STATUTES—REPEAL—AMENDMENT.

Acts 1894, p. 38, No. 35, defining dry measure, and providing that for the sale of oysters baskets shall be used which shall contain half of the standard barrel, etc., is, so far as it relates to oysters, repealed by Acts 1902, p. 274, No. 153, which covers the same ground so far as it relates to oysters and which contains a clause repealing all laws on the same subject; but in other respects it remains a valid statute, and may be amended.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 2; Dec. Dig. § 2.\*]

# 3. STATUTES (§ 64\*)—VALIDITY—INVALIDITY IN PART—EFFECT.

A statute may be valid in part and invalid in part, and the invalid part may be disregarded, where the two parts are not so intimately connected as to raise the presumption that the Legislature would not have enacted the one without the other.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 53; Dec. Dig. § 64.\*]

# 4. STATUTES (§ 64\*)—AMENDMENT OF REPEALED STATUTE—VALIDITY.

Acts 1908, p. 184, No. 92, entitled "An act to amend Act No. 35 of 1894, entitled 'An act to amend and re-enact section 3925 of the Revised Statutes of Louisiana, and to repeal Act No. 98 of 1888, \* \* \* by making provision for a standard measure for oysters arriving in sacks,'" defines a dry measure, and fixes a standard measure for the buying and selling of oysters, by providing that, for the sale of oysters, baskets shall be used which shall contain a half of the standard barrel. Acts 1894, p. 38, No. 35, had been repealed so far as it related to the sale of oysters in baskets containing a half of the standard barrel, and the proviso added by the act of 1908 as to oysters in sacks was intended as an amendment. *Held*, that the entire act of 1908 is invalid, since it cannot be assumed that the provision as to the sale of oysters in sacks would have been adopted, if it had been known that the provision in the act of 1894 as to oysters in baskets had been repealed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 53-66; Dec. Dig. § 64.\*]

Breaux, C. J., dissenting.

Etienne B. Cognevich was convicted of crime, and he applies for writs of certiorari and prohibition to review the judgment of the criminal district court affirming the conviction. Judgment set aside, and relator released.

James Wilkinson and John Dymond, Jr., for relator. Walter Gulon, Atty. Gen., and E. H. McCaleb (R. G. Pleasant and Geo. Montgomery, of counsel), for respondent.

PROVOSTY, J. The relator was charged by affidavit before the Second city criminal court with having, in violation of Act 92, p. 134, of 1908, brought oysters into the city of New Orleans in sacks containing less than a half standard barrel, and with having sold said sacks in said city in their same condition of deficiency. Relator filed a demurrer to the affidavit, and then a motion to quash. These pleas were overruled, and relator was convicted; and on appeal to the criminal district court, division A, the judgment was affirmed. The case is before this court on writ of review.

Said Act 92 of 1908 reads as follows:

"An act

"To amend Act No. 35 of 1894 entitled 'An act to amend and re-enact section 3925 of the Revised Statutes of Louisiana, and to repeal Act No. 98 of 1888 entitled "An act to amend and re-enact section 3925 of the Revised Statutes of the State of Louisiana," approved July 12, 1888,' by making provision for a standard measure for oysters arriving in sacks at the different ports and cities in the state of Louisiana of more than 50,000 inhabitants, and for the inspection of such oysters and the fees for such inspection.

"Section 1. Be it enacted by the General Assembly of the state of Louisiana, that section 3925 of the Revised Statutes be and the same is hereby amended and re-enacted so as to read as follows:

"There shall be in this state a dry measure to be known under the name of barrel which shall, except for the purchase and sale of oysters contain three and one-quarter bushels according to the American standard, and shall be divided into half and quarter barrels. But for the sale of oysters baskets shall be used which shall contain one-half of the standard barrel, which standard barrel contains three and one-quarter bushels according to this section, said basket to be stamped according to law, provided that all oysters arriving in sacks at any port or city in the state of Louisiana of more than fifty thousand inhabitants, from any other port, city or place within or without the state of Louisiana shall be inspected by the inspector of weights and measures for the respective districts or parishes where said oysters arrive if there be any such inspector at said port or city, and in the parish of Orleans by the inspector of the district where said oysters are unloaded, and each sack must contain one-half of the standard barrel mentioned in this section, and after inspection, if found correct, shall be stamped by such inspector, for which inspection and the stamping the inspector making the inspection shall be entitled to charge and collect from the buyers of said oysters a fee of one-quarter of one cent per sack, payable immediately after such inspection and stamping, and the inspector shall issue a certificate of inspection which shall be 'prima facie' evidence of such inspection and of the correct measurements of the oysters arriving in sacks in accordance with the provisions of this act.

"Sec. 2. Be it further enacted, etc., that any buyer or seller importer or exporter of oysters in sacks or any other person guilty of violating any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punishable by fine not exceeding twenty-five dollars or imprisonment not exceeding thirty days or both at the discretion of the court having jurisdiction.

"Sec. 3. Be it further enacted, etc., that the respective inspectors of weights and measures throughout the state now or hereafter appointed or elected in accordance with law shall have the power to appoint or employ one or more assistants at their own cost and expense, such assistants to be vested with the same powers and subject to the same obligations as the inspectors themselves, provided said inspectors shall be responsible for the acts of their assistants in the performance of their public duties.

"Sec. 4. Be it further enacted, etc., that Act No. 98 of 1888, entitled 'An act to amend and re-enact section 3925 of the Revised Statutes of the state of Louisiana,' approved July 12, 1888, and all laws or parts of laws in conflict or inconsistent herewith, be and the same are hereby repealed."

The relator assails the validity of this act in point both of form and of substance.

It is null, he says, in that it purports to amend a statute which had been repealed, and was therefore nonexistent, and, as such, insusceptible of amendment; and it is unconstitutional in point of form, he says, in that, first, it creates a crime without having expressed in its title the purpose of so doing; second, it has several objects; third, it seeks to amend Act 35, p. 38, of 1894 by mere reference to its title; fourth, it is a special and local law, and yet no notice of the intention to apply for its passage was published. The act, he says, is unconstitutional in point of substance, in that, first, it fixes a standard of measures different from that which has been fixed by Congress; and, second, it deprives him of his right to the equal protection of the laws and of his right to liberty and the pursuit of happiness.

The prosecution does not deny that a statute purporting to amend a repealed statute—that is to say, which undertakes to do an impossible thing, to amend something that does not exist—is null, but denies that Act 35 of 1894, which this statute purports to amend, was ever repealed.

There can be no serious question but that, in so far as Act 35 of 1894 has reference to oysters, it was repealed by Act 153, p. 274, of 1902. Exactly and precisely the same ground that is covered by it, in so far as having reference to oysters, is covered by section 17 of said Act 153 of 1902; and the latter act contains a repealing clause which repeals all laws on the same subject-matter. In so far, however, as not having reference to oysters, Act 35 was not repealed, but remained a perfectly valid statute and could be amended.

The title of our Act 92 expresses the intention of amending it "by making provision for a standard measure for oysters arriving in sacks." It does not express the intention of amending it in any other particular. It does not express the intention of amending it by making provision for a standard measure for the buying and selling of oysters. Those provisions, therefore, in the body of the act, which relate to a standard measure for the buying and selling of oysters, do not respond to anything expressed in the title of the act, and are, for that reason, null and void, and as if not written.

This, however, does not necessarily entail the nullity of the provision for a standard measure for oysters arriving in sacks. The rule is that a statute may be valid in part and invalid in part, and that the invalid part may be disregarded altogether, and the other part constitute a valid statute, if the two parts are not so intimately connected as to raise a presumption that the Legislature would not have enacted the one without the other. 26 A. & E. E. 505.

In the present instance the part which corresponds with the title and which it is claimed is valid was intended to be an amendment to the invalid part. It figures in

the act as a proviso to it. The Legislature lost sight of the fact that Act 35 of 1894 had been repealed, in so far as having reference to oysters, and sought to amend it in that respect—sought to amend the repealed part of said act. The amendment was not intended to be an independent piece of legislation, but merely supplementary, or ancillary, to that supposedly already existing. By this supposedly existing legislation, oysters, when bought and sold, were required to be measured in baskets, and the idea was to amend this by adding that oysters arriving in sacks might be sold in the sacks, but that the sacks should have to contain the same measure as the baskets. Such, upon careful reading, will be found to have been the idea, however inartistically expressed. Now, it is not probable that the Legislature would have enacted this supplementary legislation, if it had not mistakenly supposed that the legislation intended to be supplemented was in existence. The end sought to be subserved by this legislation, as a whole, was to protect the buyers of oysters against fraud and deception. This end would in no wise be subserved by maintaining the so-called valid part of the statute without the invalid part, because, in the absence of any law prescribing a standard measure for the buying and selling of oysters, this so-called valid part would operate, not as a law bearing upon the buying and selling of oysters, but exclusively upon the importation of oysters. It would require the sacks to contain a certain measure when imported, but would leave them free to contain any other measure when bought and sold. It would deal with the oysters as imports, and not as commodities upon the market. In other words, the statute would be made to operate in a way entirely different from the one which the Legislature had in view. Our conclusion is that Act 92 of 1908 is null in its entirety.

There was at the time of the adoption of this Act 92 of 1908, and there is to-day, no law establishing a standard measure for the buying and selling of oysters. Act 153 of 1902, which repealed Act 35 of 1894, in so far as having reference to oysters, was itself expressly repealed by Act 52, p. 113, of 1904, and the latter act made no provision for a standard measure for the buying and selling of oysters. We might mention here that Act 63, p. 88, of 1902, re-enacting Act 35 of 1894, was repealed, in so far as having reference to oysters, by Act 153 of 1902, in the same way precisely, and for the same reason, as was Act 35 of 1894. Act 153 was a later law than Act 63, and it repealed all laws on the same subject-matter.

It is therefore ordered, adjudged, and decreed that the judgments appealed from be set aside, and that the relator be released without day, or, if under bond, that his bond be canceled.

BREAUX, C. J. (dissenting). The object expressed in the title was the adoption of a standard measure for oysters.

The other expressions in the title are subordinate and incidental to the object. They are related to the object. They relate mainly to the inspection and to the fees of inspection.

They relate, also, to the repeal of prior acts named.

The title indicates a specific purpose irrespective of prior acts which it purports to amend. The reference to the amendment of a prior act, which was not amendable, is the merest *brutum fulmen*. The words of the title are:

"By making provision for a standard measure for oysters arriving in sacks."

That is, the provision made in the act in question would have the effect of amending Act 35 of 1894, if it had not been repealed, and it repeals Act 98, p. 157, of 1888.

The first-cited act above was not an existing act.

Reference to it leaves intact the independent provision for standard measure for oysters, mentioned in the title.

The fact that incidentally the lawmaking power refers to a repealed act does not militate against that part of the title which is complete in itself and independent of all idea of repeal.

Passing from the title to the act:

Eliminating from the first section of Act 92 of 1908 the reference to the asserted amendment, which was not an amendment, the act remains expressive of the legislative intent. The reference amounts to nothing. It has no effect, and should not be given an effect only to destroy a statute.

An act may be legal in part and illegal in part.

We have noted that the illegal and void part in this instance is entirely separate and distinct from the purpose of the act.

The act is not in all respects broader than its title.

There is enough in the title to justify the main provisions of the statutes.

In other words, it is broad enough to include the main purpose of the act, which is "provision for a standard measure of oysters arriving in sacks," and incidentally extended so that they shall not be sold in deficient measure.

The standard measure referred to includes the necessity of complying with the statute regarding the standard measure which must be observed in bringing the oysters in the port for sale.

The majority opinion has not decided the point raised by defendant that the act creates a crime without having expressed in its title the purpose of so doing, except to the extent that it is inferable by the conclusion reached.

That point has been considered and decid-

ed some time adversely to the defendant's contention, in which the court held:

"The penalties denounced and the other provisions of the act are to be regarded as the means."

As in this case the penalty in the body of the act rendered effective the terms of the statute. See *State v. Ackerman*, 51 La. Ann. 1223, 28 South. 80.

The act was rendered effective by fixing a penalty for its violation; otherwise, it would have been a useless statute.

The appellate court of Kentucky, in a well-considered opinion (in Kentucky there is a law similar to ours; that is, that the object shall be expressed in the title) held that:

"It should receive a reasonable construction, looking to the evil intended to be removed, and should be applied to such acts of the Legislature alone as are obviously within its spirit. None of the provisions of a statute should be regarded as void under said section, where they all relate directly or indirectly to the same subject, having a natural connection and not foreign to the subject expressed in its title." *Phillips v. Bridge Co.*, 2 Metc. (Ky.) 219.

The construction should be reasonable, and not too technical. *Johnson v. Higgins*, 3 Metc. (Ky.) 566.

A number of decisions are referred to in the Century Digest (under title "Statute") to the same effect.

I dissent.

On the State's Application for a Rehearing.

PROVOSTY, J. We deem it unnecessary to add anything to what is said in the opinion with regard to whether or not the valid and invalid parts of the statute in question, are, or are not, so intimately connected as to be severable.

To the contention that the title of the act would be sufficient if it read simply, "An Act to amend Act 35 of 1894," we answer that no one could doubt it after the decisions of this Court in *State v. Brown*, 41 La. Ann. 771, 6 South. 638, and other cases; but that the title does not read in that way. It reads: "To amend" &c. "by" &c.,—specifying the particular amendment proposed to be made. This announcement of the intention to make a particular specified amendment disclaims impliedly the intention of making any other. If we suppose that a statute regulating the police of cattle is desired to be amended by requiring cows to be branded, the title of the amending act would answer, if reading simply: "An act to amend" the statute in question; but not if reading: "An Act to amend" the statute in question "by adding a provision for the branding of sheep." By the latter title an intention to add a provision for the branding of cows would not only not be expressed, but would be impliedly disclaimed.

Rehearing refused.

# SOUTHERN RY. CO. IN MISSISSIPPI v. FREE et al. (No. 13,834.)

(Supreme Court of Mississippi. Oct. 18, 1909.)

NEGLIGENCE (§ 11\*)—WILLFUL AND WANTON NEGLIGENCE — FAILURE TO USE ORDINARY CARE.

Where, in an action for wrongful death of plaintiffs' ancestor, the court sustained a demurrer to the count charging ordinary negligence, leaving only a count charging gross, willful, and wanton negligence, an instruction that failure to use ordinary care, was willful and wanton negligence, was error.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 13; Dec. Dig. § 11.\*]

Appeal from Circuit Court, Clay County; J. T. Dunn, Judge.

Action by Juanita Free and others against the Southern Railway Company in Mississippi to recover for the wrongful death of their ancestor, Monroe Free, who was run over and killed by defendant's train while on the track. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Plaintiffs' amended declaration contained two counts, which concluded as follows:

(1) "Plaintiffs therefore charge that the servants of the defendant in charge of said train, by which said Monroe Free was so killed, were guilty of gross, willful, and wanton negligence in the running of said train which did the killing, at the time of said killing, and that such gross, willful, and wanton negligence of said servants was the direct cause of the injury which resulted in his death."

(2) "Plaintiffs therefore charge that the servants of the defendant in charge of said train, by which said Monroe Free was so killed, were guilty of negligence in the running of said train which did the killing, at the time of the killing, and that such negligence of said servants was the direct cause of the injury which resulted in his death."

There was a demurrer to the amended declaration, which was overruled as to the first count and sustained as to the second. So the trial was had upon the first count, to which two pleas were filed; the first being a plea of the general issue, and the second plea charging that deceased contributed to the injuries that caused his death by gross and reckless negligence and failed to exercise reasonable caution while walking on the tracks of the defendant.

The case was tried, and resulted in a verdict of \$1,000 for the plaintiffs. On appeal, the granting of instruction No. 1, which charges the jury that "it was the duty of said servants to use ordinary care to see said Monroe Free, and to use ordinary care to prevent his injuries by the running of said train, and if the jury further believes from the evidence that said servants did not use such ordinary care to discover said Free, and to protect him from injury, they are

guilty of willful and wanton negligence," was assigned as error.

Catchings & Catchings, for appellant. Critz, Kimbrough & Critz, for appellees.

SMITH, J. After sustaining a demurrer to the second count of appellee's amended declaration, thereby holding that the appellant would be liable for the death of Monroe Free only in the event his death was caused by the willful or wanton negligence of appellant, the correctness of which ruling is not now before us, the court very singularly charged the jury that, if appellant's employes failed to use ordinary care on the occasion in question, such failure would constitute willful and wanton negligence. A failure to use ordinary care and willful and wanton negligence are very different things, and are not equivalents of each other.

For the error in this instruction, the judgment of the court below is reversed, and the cause remanded.

#### ILLINOIS CENT. R. CO. v. DUNNIGAN. (No. 13,957.)

(Supreme Court of Mississippi. Oct. 18, 1909.)  
CARRIERS (§ 249\*)—CARRIAGE OF PASSENGERS—FARES—MINISTERS OF THE GOSPEL.

Permitting a minister of the gospel, or any person, to travel at a rate lower than that given to the general public, by a carrier, is a mere gratuity, which the carrier can withhold at its pleasure, and even a custom to allow a lower rate imposes upon it no obligation to give such permission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 999; Dec. Dig. § 249.\*]

Appeal from Circuit Court, Panola County; W. A. Roane, Judge.

Action by Sam Dunnigan against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Mayes & Longstreet, for appellant. Shands & Montgomery, for appellee.

SMITH, J. It being the custom of appellant to give ministers of the gospel a permit to travel over its lines at the reduced rate of two cents per mile, appellee, being a minister of the gospel of the Colored Methodist Episcopal Church of America, applied to appellant for such a permit, which appellant refused to give him, assigning no reason therefor. Thereupon this suit was instituted by appellee to recover damages for such refusal; the declaration alleging that the same was a willful, wanton, oppressive, and unlawful discrimination against him. From a judgment awarding damages to appellee, this appeal is taken.

The declaration is challenged on the ground that it shows no cause of action. The only duty which appellant owed to appellee was

to furnish him with transportation over its lines at the same rate and under the same conditions that it furnished same to the general public. Permitting a minister of the gospel, or any person, to travel at a rate lower than that given the general public is a mere gratuity, which appellant can withhold at its pleasure, and even a custom so to do imposed upon it no obligation to give such permission.

The declaration, therefore, states no cause of action, and the judgment of the court below is reversed, and the cause dismissed.

#### SORIA v. HARRISON COUNTY.

(No. 13,988.)

(Supreme Court of Mississippi. Oct. 25, 1909.)

1. DEEDS (§ 155\*)—CONDITION SUBSEQUENT—CREATION—REVERSION.

To create a condition subsequent, the breach of which will cause the land conveyed to revert, it must clearly appear that such was the grantor's intention.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

2. DEEDS (§ 90\*)—CONSTRUCTION—PARTICULAR WORDS.

Words in a deed are to be taken most strongly against him who uses them.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 235; Dec. Dig. § 90.\*]

3. DEEDS (§ 155\*)—CONDITION SUBSEQUENT—REVERSION—SUFFICIENCY OF LANGUAGE.

The provisions of a deed that "the lands hereinafter described shall be kept by the said board of police for the use of a courthouse and jail, for the benefit of said county," and "to have and to hold the same \* \* \* for the use of said county as aforesaid," do not create a condition subsequent, so as to cause the land to revert on the county removing the courthouse and jail and exposing the property for sale.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Suit by Harrison County against Margaret Soria to quiet title to land. From a decree for complainant, defendant appeals. Affirmed.

V. A. Griffith, for appellant. W. G. Evans and T. M. Evans, for appellee.

SMITH, J. In 1845 appellee, being in possession of the land in controversy and having built thereon a courthouse and jail, obtained from W. H. Tegarden the following deed to his interest therein: "This indenture, made and entered into this 31st day of March, A. D. 1845, between William H. Tegarden, of the first part, and the board of police of Harrison county, state of Mississippi, of the second part, witnesseth: That the said Tegarden, for and in consideration of the sum of one dollar in hand paid by the said board of police, and in further consideration that the land hereinafter described shall be kept by said board of police for the use of a courthouse and jail for the benefit

of said county, hath bargained and sold, and by these presents does hereby grant, bargain, sell, and convey, to the said board of police, in trust as aforesaid, all his right, title, and interest in and to the north half of square two hundred and thirty-two (232), in Mississippi, to have and to hold the same to the said board of police, and their successors in office, for the use of said county as aforesaid, for and from me, my heirs, and all persons claiming through, by, or under me. In testimony whereof, the said Tegarden hath hereunto set his hand and seal the day and date first above written. W. H. Tegarden. [Seal.] Appellee continued to use and occupy this land, maintaining thereon a courthouse and jail, until the year 1903, when it removed its courthouse and jail therefrom, ceased to use the land for any county purpose, and offered same for sale. This sale was prevented by appellant asserting title by reversion under the deed from W. H. Tegarden to a four-fifths undivided interest therein. Thereupon appellee filed its bill of complaint in the court below, praying that it be decreed to be the owner of the land and that appellant be enjoined from asserting any claim thereto. Appellant filed an answer and cross-bill, alleging in effect that the deed from Tegarden conveyed the land to appellee upon condition that it be used for a courthouse and jail, and that upon its ceasing to be so used the title would revert to the said Tegarden. She further alleged that she was the owner of this reversion, alleged to be an undivided four-fifths interest, under a deed to the land in controversy, executed and delivered to her by Tegarden in 1876, and prayed for a partition. From a decree dismissing the cross-bill, decreeing that appellee was the owner of the land, and enjoining appellant from asserting any claim thereto, this appeal is taken.

This deed does not contain any language such as is usually employed to create a condition subsequent, the breach of which would cause the land to revert to the grantor, such as an express provision to that effect, or apt technical words, such as "provided," "so long as," "until," etc. In order that a condition subsequent may be created, the breach of which will cause the land conveyed to revert to the grantor, it must clearly appear that such was the grantor's intention. Thornton v. Natchez, 88 Miss. 1, 41 South. 498. The words in this deed, "that the land hereinafter described shall be kept by said board of police for the use of a courthouse and jail for the benefit of said county," and the words "to have and to hold the same \* \* \* for the use of said county as aforesaid," are quite as consistent with an intent to repose a trust and confidence as they are with an intent to impose a condition which would compel the county, on pain of for-

feiture, to maintain on the land for all time a courthouse and jail. Since, under the maxim "*Verba fortius accipiuntur contra proferentem*," we must construe the words of this deed most strongly against the grantor, it follows that no condition subsequent, the breach of which would cause a reversion, was thereby created.

The foregoing views are supported by many authorities, among which is First M. E. Church v. Old Columbia Public Grant Company, 103 Pa. 608, approved by the Supreme Court of the United States in Stuart v. Easton, 170 U. S. 401, 18 Sup. Ct. 657, 42 L. Ed. 1084, wherein the court said: "Whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it. Laberee v. Carleton, 53 Me. 211. It was said by Mr. Chief Justice Bigelow in Packard v. Ames, 16 Gray (Mass.) 327: 'We know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate, unless coupled with a clause for the payment of money or the doing of some act by the grantee, on which the grant is clearly made to depend.' To make the estate conditional the words must clearly show such intent. Cook v. Trimble, 9 Watts (Pa.) 15. Turning to the writing executed by Wright, we see that he absolutely and unconditionally covenanted to convey the premises in fee simple, clear of all incumbrances, to the vendees, their heirs or assigns, whenever requested by them. No restraint was imposed on an alienation of the land. No construction of a reservoir, nor any work on the ground, was required to precede the right to demand a deed. No clause provided for a forfeiture or termination of the estate in case the land ceased to be used as a reservoir. No right of re-entry was reserved by the grantor on any contingency. No technical word to create a condition was used. No other words were used equivalent thereto, or proper to create a condition. The authorities show that the recital of the consideration and a statement of the purpose for which the land is to be used are wholly insufficient to create a conditional estate."

Affirmed.

QUACKENBOSS et al. v. INSURANCE CO. OF NORTH AMERICA, OF PHILADELPHIA. (No. 13,906.)

(Supreme Court of Mississippi. Oct. 23, 1900.)

1. INSURANCE (§ 402\*)—MARINE INSURANCE—CONTRACT—"EXTERNAL VIOLENCE."

The "external violence" intended by a marine policy, exempting the insurer from liability for loss occasioned by the bursting of the boiler,



ers, unless caused by unavoidable external violence, is violence external to the vessel, and not merely external to the boilers.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1105; Dec. Dig. § 402.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2619-2620.]

## 2. INSURANCE (§ 658\*)—MARINE INSURANCE—ACTION—EVIDENCE—ADMISSIBILITY.

Where, in an action on a marine policy exempting insurer from liability for loss by the bursting of the boilers, unless caused by external violence, there was no evidence on which an expert could base his opinion that a boiler explosion was due to violence external to the vessel, the opinion of the expert as to the cause of the explosion was immaterial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1689; Dec. Dig. § 658.\*]

Appeal from Circuit Court, Warren County; John N. Bush, Judge.

Action by Ida L. Quackenboss, administratrix, and others, against the Insurance Company of North America, of Philadelphia. From a judgment for defendant, plaintiffs appeal. Affirmed.

Smith, Hirsh & Landau and Pat Henry, for appellants. McLaurin, Armistead & Brien and Stephens, Lincoln & Stephens, for appellee.

SMITH, J. Appellants obtained from appellee a policy of marine insurance for \$8,000 upon the steamer W. T. Scovell for a term of one year, commencing on the 29th day of August, 1906, at noon, and terminating on the 29th day of August, 1907, at noon. This policy provided that: "The perils which this company assume under this policy are the unavoidable dangers of rivers, of fires, and of jettisons, that shall cause loss or damage to said vessel or any part thereof, excepting \* \* \* any loss or damage arising from or occasioned by the bursting of boilers, the collapsing of flues, or the derangement or breaking of engines or machinery, or from consequences of any character resulting from either of the foregoing exceptions, unless the same be caused by unavoidable external violence." During the time for which said policy was to be in force, and while the said boat was lying at the landing, her boilers exploded, wrecked the boat, and caused it to sink and become a total loss. Appellee having denied liability on the policy, this suit was instituted in the court below to recover on same. From a judgment in favor of appellee, this appeal is taken.

There was no evidence that the explosion was other than the ordinary explosion of a boiler, caused by the pressure of the steam within, except that the engineer of the boat, examining one of the sheets of the boiler which had been blown upon the bank, discovered an inward indentation thereon. In order to prove that the explosion was caused by unavoidable external violence, this engineer, who qualified as an expert and was be-

ing examined as a witness for appellant, was asked by appellant this question: "The boiler in good condition, as you stated, and a sufficient quantity of water therein, and that fusible plug in good condition, taking this indentation in the bottom of the boiler into consideration, what, in your opinion, produced that trouble?" Which question was objected to by appellee, the objection sustained, and this ruling of the court is assigned for error. We are therefore called upon to pass upon the correctness of the action of the court below in thus refusing to allow the witness to testify as an expert to what violence, in his opinion, caused the explosion of the boiler.

The correct answer to this proposition is necessarily involved in the prior determination of the question whether the terms of the policy cover only violence external to the boat—the thing insured. It has been decided in the case of *Citizens' Insurance Company v. Glasgow*, 9 Mo. 411, that only violence external to the boat is covered by the terms of this policy, and we think that is the correct view. This being so, and the evidence in this case clearly showing that the explosion was not due to violence external to the boat, it becomes immaterial whether the witness had testified that in his opinion the explosion was due to violence external to the boat, since there were no facts in evidence on which he could have based such an opinion.

The action of the court below was therefore correct, and the judgment is affirmed.

## KEYSTONE LUMBER YARD v. YAZOO & M. V. R. CO. et al. (No. 14,163.)

(Supreme Court of Mississippi. Oct. 25, 1909.)

### 1. DISCOVERY (§ 3\*)—IN EQUITY—REMEDY AT LAW.

The chancery court has jurisdiction of a bill for discovery, though plaintiff may have legal means of obtaining proof.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.\*]

### 2. EQUITY (§ 39\*)—JURISDICTION—COMPLETE RELIEF.

Where the chancery court has taken jurisdiction for the auxiliary purpose of discovery, it may grant full relief in the case, under the power conferred by Const. 1890, § 180, providing that, where the court heretofore exercised jurisdiction auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted, or the legal title established by the suit at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.\*]

### 3. EQUITY (§ 39\*)—JURISDICTION—COMPLETE RELIEF.

Reciprocal demurrage charges, if penalties at all, are statutory penalties, and not penalties created by contract; and hence, where the chancery court has taken jurisdiction for the auxiliary purpose of discovery, sought in a bill to compel the carrier to pay such charges, it

will grant full relief by a decree for the amount proved.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 39.\*]

Appeal from Chancery Court, Yazoo County; G. G. Lyell, Chancellor.

Bill by the Keystone Lumber Yard against the Yazoo & Mississippi Valley Railroad Company and others. From a decree dismissing the bill, plaintiff appeals. Reversed.

See, also, 47 South. 803.

Brown & Norquist, for appellant. Mayes & Longstreet, for appellees.

WHITFIELD, C. J. The bill filed in this case was for discovery, and for a decree for the amount of reciprocal demurrage charges; in other words, for full relief. A demurrer was interposed on the ground that to compel the defendants to discover would subject them to the payment of penalties, and that it was an attempt to enforce a penal action in a chancery court. Relief by way of discovery was grounded upon this allegation in the bill: "That complainant is informed and believes, and therefore charges, that each of said cars was unreasonably detained by reason of being switched while in transit to some track between points of origination and destination, but of this the complainant has not the means of proof at his command, but which proof is wholly within the knowledge of the defendant." The bill covers a period from September 21, 1907, to May 10, 1909, inclusive, in which it is charged that a very large number of shipments had been delayed. The chancellor sustained the demurrer, but on the ground alone that penalties could not be recovered in the chancery court, as shown by his decree, and dismissed the bill.

The first proposition urged in support of this decree is that the plaintiff's remedy was at law; that he could have had the witnesses summoned and all the documentary evidence secured by subpoenas duces tecum; and that the chancery court had no jurisdiction of this bill for discovery. This contention cannot be maintained. In *Millsaps v. Pfeiffer*, 44 Miss., at page 807, the court said: "It is more than probable that the court below acted under the belief that, inasmuch as the defendants, under the statute of November 25, 1861, could have taken the testimony of the complainants in the original bill, there was no necessity for a cross-bill. Even conceding this to be true, it did not justify the court in sustaining the demurrer and dismissing the cross-bill. This act does not oust the court of chancery of its original jurisdiction of cross-bills, when filed for discovery only. It furnishes a cumulative mode of obtaining the testimony of the complainants in the original bill, and does not take from that court the right to entertain such bills, even when they call for discovery alone, and much

less when they call for both discovery and relief, as in the present case. The defendants, therefore, had their election, either to take the testimony of the plaintiffs in the original bill under the statute, or to obtain discovery from them by cross-bill." This was a square holding that, even if the bill were for discovery alone, the fact that the plaintiff might have examined the witnesses and secured documentary evidence at law did not oust the chancery court of its original jurisdiction to entertain the bill for discovery. And this was the law prior to the Constitution of 1890.

But section 160 of that instrument has "lifted the jurisdiction in equity in this class of cases far above the region of doubt," as said in *Woods v. Riley*, 72 Miss., at pages 76 and 77 (18 South. 384). In the last clause of that section it is provided: "In all cases where said court heretofore exercised jurisdiction auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted or the legal title established by the suit at law." And the court said: "Clearly the relief sought by the complainant in this cause is such as falls within the auxiliary or ancillary jurisdiction of equity, and which, under the former practice in equity, was generally withheld until the right at law had been established, but which, under the modern practice, was frequently afforded. The Constitution not only destroys the obstacle which had formerly existed to the exercise of this auxiliary relief, but, as to the cases falling within paragraph 'f' of section 159, section 160 confers jurisdiction upon courts of equity to try legal as well as equitable titles. If a court of law first acquires jurisdiction, equity may, without awaiting exhaustion of the legal remedy, afford auxiliary aid. If the court of equity first acquires jurisdiction, it may proceed to final and complete relief, though the titles and rights involved are of a legal, as distinguished from an equitable, character." These two opinions settle beyond controversy the question that the chancery court has jurisdiction to entertain a bill for discovery, although the plaintiff may have a legal means of obtaining proof. And they settle the further proposition that now, under section 160 and the Constitution of 1890, wherever the chancery court has entertained jurisdiction for the auxiliary purpose of discovery, it may go on and administer complete relief in the case.

The second proposition contended for in support of the decree is that equity has no jurisdiction to enforce penalties, and this was the ground on which the chancellor proceeded. Whether or not reciprocal demurrage charges are penalties in any proper legal sense admits of grave doubt; but that we do not now decide. It is certain that, if they are, they are penalties imposed by authority

of law, and not penalties arising out of contract; and hence the court, having taken jurisdiction for the purpose of discovery, had the power to proceed and administer complete relief by decreeing for the amount of the reciprocal demurrage charges. If the evidence should sustain the allegations of the bill in that regard. In *Lafayette County v. Hall*, 70 Miss. 678, 13 South. 39, this court said, on that proposition: "Equally untenable is the position, assumed by counsel for appellees, that equity will refuse its aid in the enforcement of penalties. The unsoundness of this view lies in the failure to mark the distinction between statutory penalties and penalties created by contract between private persons. The latter courts of equity refuse to enforce, but the former, the expression of the will of the lawmaking power, the courts of equity will not undertake to disregard and nullify by refusing their aid in proper cases. 1 Pom. Eq. Juris. § 458; Story, Eq. Juris. § 1326; *State v. McBride*, 76 Ala. 51; *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780. Having acquired jurisdiction, the court below should have given full relief, by following the law and enforcing the penalty. Legal remedies are constantly being worked out in courts of equity in causes where jurisdiction is acquired on some recognized ground of equitable interference."

It follows, for these reasons, that the decree of the chancellor is reversed, the demurrer overruled, and the cause remanded for answer, to be filed within 30 days from the filing of the mandate in the court below.

BAKER et al. v. RICHARDSON. (No. 13,912.)  
(Supreme Court of Mississippi. Oct. 25, 1909.)

1. LIFE ESTATES (§ 4\*)—TERMINATION.

Where a deed conveyed a life estate, with remainder to the grantor's heirs, and all intermediate titles to the land asserted by any party to the action were taken in subservency to such deed, no outstanding title, on termination of the life estate, could be set up to defeat the claim of the heirs, whether the party attempting to set up his title asserted it as owner, or merely attempted to show that it was owned by another.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. § 4.\*]

2. TENANCY IN COMMON (§ 34\*)—RIGHTS OF TENANTS INTER SE.

The same policy of the law which prevents one tenant in common from buying up and successfully asserting as his own an outstanding title against his co-tenant appertains when a co-tenant seeks to defeat another co-tenant in any right which he may undertake to assert by showing the true title in another.

[Ed. Note.—For other cases, see Tenancy in Common, Dec. Dig. § 34.\*]

Appeal from Chancery Court, Bolivar County; M. E. Denton, Chancellor.

Action by E. G. Baker and others against

W. P. Richardson. From the decree, plaintiffs appeal. Reversed and remanded.

Sillers & Owen, E. N. Thomas, and Alexander & Alexander, for appellants. Campbell & Cashin, for appellee.

MAYES, J. By an instrument bearing date October 17, 1859, signed, acknowledged, and delivered on the 18th day of October, 1859, recorded in Adams county on the 31st day of October, 1860, and in Bolivar county on the 6th day of December of the same year, Amos Alexander, the common source of title, made what we have no hesitation in declaring to be a deed, conveying to his daughter, Eliza Jane Gray, a certain tract of land therein described "for and during her natural life, and then to her children, if any, and in default of children or child then to his lawful heirs forever." The language of this deed is so plain in its declaration that only a life estate was conveyed thereby that none but the willfully blind could have been deceived by it. In default of any child or children being born to Mrs. Gray, the grantor in the deed declared that it should be the property of his lawful heirs at the death of Mrs. Gray; and since she had no children, and the complainants are the lawful heirs of the grantor, and Mrs. Gray died in 1906, the declared purpose of the deed should be carried out, and the lawful heirs of the grantor should have this property, unless there has been some intervening cause diverting the title from the parties to whom it was originally deeded and thwarting the intent of Amos Alexander when he made the deed. All moral right is with the complainants in this bill, and they should and shall prevail, unless some rule of law compels a decision otherwise.

It is manifest from the record that all intermediate titles to this land, now claimed and asserted by any party to this record, were taken in subservency to the deed made by Amos Alexander to Mrs. Gray. This being the case, no outstanding title can be set up to defeat the just claim of the complainants as owners of the land, whether the party attempting to set up such outstanding title asserts it as owner, or merely attempts to show that it exists and is owned by another. In the case of *Cooper v. Fox*, 67 Miss. 237, 7 South. 342, where a petition was filed for partition, this court did say that, if the petitioners failed to show that they had title by reason of the fact that there was an outstanding valid title held by another, such want of title would be fatal to their suit; but the decision of the court was based on facts which showed that the parties setting up the outstanding title never claimed the land in subservency to the common source, but in hostility to same at the very time that possession was taken by the adverse claim-

ants. The same policy of the law which prevents one tenant in common from buying up and successfully asserting as his own an outstanding title against his co-tenant appertains when a co-tenant seeks to defeat another co-tenant in any right which he may undertake to assert, by showing the true title in another.

The decree of the chancellor is reversed and remanded.

**YOUNG v. MASONIC BENEFIT ASS'N.**  
(No. 13,910.)

(Supreme Court of Mississippi. Oct. 25, 1909.)  
Appeal from Circuit Court, Bolivar County; Sydney Smith, Judge.

Action between Virginia R. Young and the Masonic Benefit Association. From the judgment, Young appeals. Affirmed.

See, also, 47 South. 379.

Sillers & Owen, for appellant. Geo. B. Power and L. J. Winston, for appellee.

**PER CURIAM.** Affirmed.

**YAZOO & M. V. R. CO. v. BAKER.**  
(No. 13,962.)

(Supreme Court of Mississippi. Oct. 18, 1909.)  
Appeal from Circuit Court, Tallahatchie County; Sam C. Cook, Judge.

Action by S. J. Baker against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mayes & Longstreet, for appellant. Harris & Willing, for appellee.

**PER CURIAM.** Affirmed.

**HOXTON v. CUNNINGHAM.** (No. 14,155.)  
(Supreme Court of Mississippi. Oct. 18, 1909.)

Appeal from Chancery Court, Holmes County; James F. McCool, Chancellor.

Action between Ella May Hoxton and J. B. Cunningham. From the judgment, Ella May Hoxton appeals. Affirmed.

Tackett & Elmore and Coleman & McClurg, for appellant. Boothe & Pepper, for appellee.

**PER CURIAM.** Affirmed.

**TYSON v. SUMRALL BANK.** (No. 13,958.)  
(Supreme Court of Mississippi. Oct. 25, 1909.)

Appeal from Circuit Court, Lamar County; W. H. Cook, Judge.

Action by Essie May Tyson, by her next friend, E. N. Tyson, against the Sumrall Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

J. T. Garraway, Scott & Parker, and C. G. Mayson, for appellant. Sullivan & Tally, for appellee.

**PER CURIAM.** Affirmed.

**DINKINS v. SEALS.** (No. 13,541.)

(Supreme Court of Mississippi. Oct. 25, 1909.)

Appeal from Chancery Court, Leake County; J. F. McCool, Chancellor.

Action between Lynn H. Dinkins, as trustee, and S. S. Seals. From the judgment, Dinkins appeals. Affirmed.

W. R. Harper, for appellant. McMillon & Howard, for appellee.

**PER CURIAM.** Affirmed.

**DINKINS v. JOHNSON.** (No. 13,531.)

(Supreme Court of Mississippi. Oct. 25, 1909.)

Appeal from Chancery Court, Leake County; J. F. McCool, Chancellor.

Action between Lynn H. Dinkins and C. M. Johnson. From the judgment, Dinkins appeals. Affirmed.

W. R. Harper, for appellant. McMillon & Howard, for appellee.

**PER CURIAM.** Affirmed.

**ELDER v. DUNCAN.** (No. 13,877.)

(Supreme Court of Mississippi. Oct. 18, 1909.)

Appeal from Chancery Court, Tate County; I. T. Blount, Chancellor.

Action between A. D. Elder and A. W. Duncan. From the judgment, Elder appeals. Affirmed.

J. W. Lauderdale, for appellant. F. C. Holmes, for appellee.

**PER CURIAM.** Affirmed.

**BROWN v. YAZOO & M. V. R. CO.**  
(No. 14,016.)

(Supreme Court of Mississippi. Oct. 18, 1909.)

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

Action between H. B. Brown and the Yazoo & Mississippi Valley Railroad Company. From the judgment, Brown appeals. Affirmed.

Ernest E. Brown, for appellant. Mayes & Longstreet, for appellee.

**PER CURIAM.** Affirmed.

**PEARL RIVER LUMBER CO. v. BURKS.**  
(No. 14,052.)

(Supreme Court of Mississippi. Oct. 18, 1909.)

Appeal from Circuit Court, Lawrence County; R. L. Bullard, Judge.

Action between the Pearl River Lumber Company and Will Burks. From the judgment, the Lumber Company appeals. Affirmed.

T. Brady, Jr., for appellant. G. Wood Magee, for appellee.

**PER CURIAM.** Affirmed.

(124 La.)  
No. 17,469.

# NAVAILLES v. DIELMANN.

(Supreme Court of Louisiana, June 23, 1909.  
Rehearing Denied Oct. 18, 1909.)

## 1. MUNICIPAL CORPORATIONS (§ 705\*) — STREETS—INJURIES TO PEDESTRIANS—COLLI- SIONS—NEGLIGENCE.

Where a beginner in the management of an automobile concentrated his attention on a curve which he was executing, and not on what was ahead of him, and did not see a pedestrian until he was right on her, and he then failed to stop, as he could have done, within a foot or two, but ran his machine some eight feet after he had knocked the pedestrian down, the juridical cause of the accident was his inattention to what was ahead of him in the street, combined with his lack of skill in the management of the machine, authorizing a recovery.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.\*]

## 2. MUNICIPAL CORPORATIONS (§ 705\*)— STREETS—INJURIES TO PEDESTRIANS—COLLI- SIONS—NEGLIGENCE.

Where a pedestrian, struck by an automobile, had time to run from a point 3 feet from the east gutter of a street about 29 feet wide to a point beyond the middle of the street, and beyond the automobile, which was on the west side of the street, a competent operator had ample time in which to stop, and the cause of the accident to the pedestrian was the fault of the operator in venturing on the streets without knowing how to make an emergency stop.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.\*]

## 3. MUNICIPAL CORPORATIONS (§ 705\*) — STREETS—INJURIES TO PEDESTRIAN—VOLUN- TARY ACTS—ACTS RESULTING FROM TERROR.

The act of a pedestrian in running in front of an automobile as a result of terror, caused by discovering the automobile near him, is not voluntary, and it is not negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.\*]

## 4. MUNICIPAL CORPORATIONS (§ 705\*) — STREETS—INJURIES TO PEDESTRIAN—COLLI- SIONS—NEGLIGENCE.

Where a pedestrian, because of terror, ran in front of an automobile, and the operator saw the danger to the pedestrian in time to avoid the accident by stopping, but he failed to do so, and ran over the pedestrian, the operator was liable under the last chance doctrine.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.\*]

## 5. MUNICIPAL CORPORATIONS (§ 706\*) — STREETS — COLLISIONS — PETITION—SUFFI- CIENCY.

The petition in an action for injuries to pedestrian, struck by an automobile, which shows the condition of the street where the collision occurred and the surrounding circumstances, and which alleges that the operator of the automobile was running it in a careless and reckless manner, and neglected to stop it, is sufficiently specific.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.\*]

## 6. APPEAL AND ERROR (§ 1004\*)—REVIEW— VERDICT—APPROVAL BY COURT—EXCESSIVE DAMAGES.

A woman 60 years old was knocked down by an automobile and dragged. Her thigh bone was fractured in two places. She suffered excruciatingly for months. The injury would cause her to hobble with a stick, instead of walk, for the rest of her life. She was put

to large expenses. *Held*, that a verdict of \$3,250, approved by the trial judge, would not be disturbed as excessive.

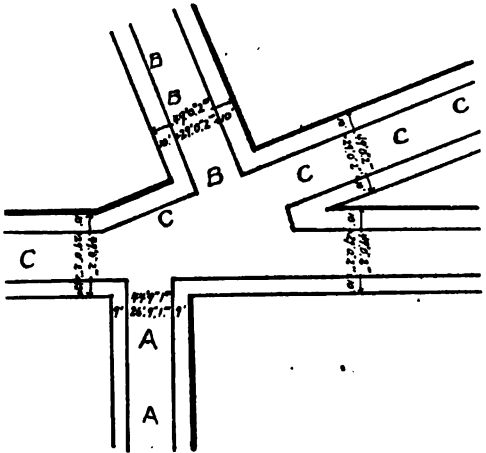
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Miss Fehle Navailles against William H. Dielmann. From a judgment for plaintiff, defendant appeals. Affirmed.

Robert Legler and Walter Gleason, for appellant. Carroll, Henderson & Carroll, for appellee.

PROVOSTY, J. Plaintiff, an old lady of 60, was run over by an automobile owned and driven by defendant, and she sues in damages. The following is a diagram of the locality:



The streets are asphalted. Street A is 26 feet 9 inches wide; the others are 29 feet wide. From this must be subtracted the width of the gutters. For convenience, we have changed the names of the streets, and in mentioning directions will assume that the diagram has been drawn as maps are; that is, the top north, the bottom south, etc. The accident occurred in broad daylight, when plaintiff and the automobile were the sole occupants of the street.

We attribute it to the peculiar combination of the streets at the place where it occurred. This peculiarity could be fully realized only if an automobile, drawn to scale, were made to follow on the diagram the same course as defendant did; that is, out of street A, then to the right, and east, through the open space, then to the left and northwest into street B.

For doing this the automobile has to make what is called "the reverse curve"—first to the right, towards the east, and then to the left, towards the northwest. An autoist testified that he travels this course every day, and that this corner is a most dangerous

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one. He was not allowed to give the reason of the danger; but it results, we imagine, from the difficulty of executing this "reverse curve" within the contracted space. The evidence does not show along what line defendant traveled in effecting these curves. The diagram is not faithful, in that it makes the streets appear wider than they really are by the entire width of the gutters, thereby making the curves appear easier.

Plaintiff was on foot, going east across street B along the line of the north sidewalk of street C. She had almost got across—was within about three feet of the iron plate over the gutter on the east side of street B—when her attention was for the first time attracted to the automobile, she says, by the screams of the persons in it. Defendant and those who were with him deny that there were any screams, but say the horn was being tooted. It will be observed that the automobile was approaching her from behind. Defendant would make it appear that the machine was not pointing towards her at the moment she turned her head and saw it, but had already completed the turn to his right, towards the east, and had also completed the turn to his left, towards the northwest, and was pointing northwest at an angle which would have cleared her by 10 feet had she simply stood still where she was, but that, instead of doing this, or continuing her way, she turned back, and ran across the path of his machine. As a matter of fact the old lady ran back, and had reached a point nearer to the west than to the east gutter of street B, when she was run over. We are satisfied that the explanation of this sudden turning and running back is that when she looked back the machine had just come out of street A, and was in the act of turning towards the east, and was therefore pointing straight for the path ahead of her; so that she imagined (very foolishly, no doubt) that, if she kept on, she would be run over. Constant practice in steering clear of pedestrians and vehicles coming towards us, or making towards our path at an angle and at a rate that will bring on a collision if we do not change our course, has so trained the eye of every grown person—especially of those living in cities, where the avoidance of collisions is more constantly practiced—that we are all of us—old ladies and all—pretty good judges of what line is being followed by a body moving towards us, or so as to intercept, or converge with, our own line of progress. The old lady turned because she saw that the machine was pointing for the path ahead of her, and she instinctively recoiled from this danger, not realizing that she could easily avoid it by simply taking a step or two forward, or, rather, fright bereaving her of all notion of her surroundings. And that is what she says. All she knows is that, on seeing the

automobile coming upon her, she became frightened and ran. Defendant's statement, that he had completed the reverse curve and was actually pointing northwest when the old lady first became aware of his presence and turned and began to run back, does not accord with the fact that the old lady's hearing was good and that the street was silent, save for the horn of the machine and the other noises which the evidence shows it makes. Indubitably, this automobile startled the old lady the moment it emerged from street A, with its tooting and other noises, just back of her right shoulder.

Defendant was a beginner in the management of an automobile. We are satisfied his whole attention was concentrated on "the reverse curve" which he was executing—perhaps for the first time in his life in so contracted a space—and not on what was ahead of him, and that he never saw the old lady until he was right upon her, and then lost his head. For making this difficult corner he had slowed up. At the rate he was moving, and with the pavement dry as it was, he should have stopped within a foot or two. Instead of this, he ran some eight feet after having knocked the old lady down, and, even then, succeeded in stopping his machine only by running it to the curb. He says that for thus running to the curb he restored the power without having stopped at all. But the instinctive movement of the driver of a vehicle that has a human being under its wheels is to stop in as short order as possible.

According to the foregoing, the juridical cause of the accident was defendant's inattention to what was ahead of him, in combination with his lack of skill in the management of his machine. But defendant is no better off if his own statement is accepted—that he was attentive all the time to what was ahead of him, and saw the old lady rush towards the path of his machine and nearly get by, so that what struck her was the fender on the left, or west, side of the machine, and that he turned his machine to the right, or east, in the hope of avoiding her, that is to say, of letting her get by in safety, and that he was then west of the median line of the street, and that his machine was going as slowly as he could make it go.

The situation, then, is that, if the old lady had time to run from a point three feet from the east gutter of the street to a point beyond the middle of the street, and even beyond the machine, which was on the west side of the street, defendant had ample time in which to stop his machine; for his own statement, and that of others, is that an automobile going thus slowly may be stopped within a foot or two. The juridical cause of the accident, then, becomes the fault of defendant in venturing upon the streets in an automobile without knowing how to make an emergency stop.

The act of the old lady not having been voluntary, but simply the result of terror, does not constitute negligence on her part. In that connection the case is covered by the last chance doctrine, and is precisely analogous with that which this court had to deal with in *Ross v. Sibley*, 116 La. 789, 41 South. 93, of which the syllabus reads:

"While plaintiff was negligent in attempting to cross the defendant's track at a sharp curve, without stopping to look and listen at the proper time and place, the company will be liable when the evidence shows that the engineer saw the danger in time to avoid the accident by sounding the whistle or applying the brakes."

In the instant case defendant saw the danger in time to avoid the accident by stopping his machine.

"When an automobile, being driven 20 or 25 miles an hour, came meeting plaintiff, who, when the automobile was 50 feet away and coming directly towards him, pulled the horse he was driving to the left, instead of to the right, it was held that in such circumstances negligence could not be imputed to plaintiff as matter of law, because he was confronted with a sudden danger, and his failure to exercise what might seem to others the best judgment was not necessarily negligence." *McFern v. Gardner*, 121 Mo. App. 1, 13, 97 S. W. 972, 975.

"If an automobile comes upon a boy under circumstances calculated to produce fright or terror, and such fright causes an error in judgment, by which he runs in front of the automobile, he is not guilty of contributory negligence." *Thies v. Thomas* (Sup.) 77 N. Y. Supp. 276.

Defendant's negligence does not consist in his having caused the old lady's fright, for, if she had received her injuries from having, in her fright, precipitated herself into the gutter, defendant would not have been responsible; but it consists in not having stopped his machine when he had a chance to do it.

"It is incumbent upon a person driving an automobile along a highway to take notice that motor cars are, as yet, usually strange objects to horses, and are likely to startle the animals when driven up in front of them at a rapid rate."

"Where the driver of an automobile sees, or by the exercise of reasonable caution could see, that the horses drawing an approaching carriage are unmistakably frightened, and are forcibly crowded off the road, ordinary care

requires him to slow up, stop his machine, or do whatever is reasonably required to relieve the persons in the carriage from their perilous station."

"When it becomes evident to the driver of an automobile that his machine is frightening the horses hitched to an approaching carriage, and that his further progress will increase the peril of the persons in the carriage, it is his duty to stop, or at least check up, irrespective of whether the occupants of the carriage are guilty of negligence." *McIntyre v. Orner*, 168 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359, 8 Am. & Eng. Ann. Cas. 1087.

The case of *Seman v. Mott*, 127 App. Div. 18, 110 N. Y. Supp. 1040, cited by defendant's learned counsel, is not analogous. In that case the plaintiff, a pedestrian, walked into the side of the car, which, because of the pedestrians upon the street, was barely moving. Said the court:

"He was not bound to bring his car to a standstill. He had a right to go on. There is no proof and no inference possible that \* \* \* he had reason to believe that, if he proceeded, the plaintiff would continue so as to come into contact with the wheel or side of the car."

How totally inapplicable this reasoning is to our case needs no pointing out.

We do not agree with defendant that the allegations of the petition were not sufficiently specific in setting forth what particular acts and conduct on his part was complained of as constituting negligence or fault. The petition, after having set forth the facts as stated in this opinion, went on to allege, among other things, that defendant—

"was driving or running said automobile in a careless and reckless manner, and that he failed and neglected to stop said automobile."

This, we think, was sufficiently specific.

Passing to the question of damages, we find it difficult to do justice between the parties. The old lady was knocked down, run over, and dragged, had her thigh bone fractured in two places, suffered excruciatingly for months, and will now hobble with a stick, instead of walk, for the rest of her life, and was put to large expenses. At the same time, is defendant's mere imprudence to be punished to the point of ruin? The jury allowed \$3,250, and the trial judge approved the verdict.

Judgment affirmed.

(124 La.)

No. 17,445.

BYRD et al. v. PIERCE et al.

(Supreme Court of Louisiana. June 23, 1909.

Rehearing Denied Oct. 18, 1909.)

## 1. DESCENT AND DISTRIBUTION (§ 69\*)—SIMULATED ACTS OF SALE.

Where, as consideration for acts of sale from a man to certain of his heirs, the grantees assumed a mortgage for \$2,000 against the grantor, paid the heirs of his wife sums due them, under a compromise in a suit by them against the grantor to obtain shares of the community property, paid the costs of suit, attorney's fees, a large amount of debts due from the grantor, and assumed the obligation, with which they complied, of supporting him during his life, the acts of sale were not simulations.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 208-212; Dec. Dig. § 69.\*]

## 2. DESCENT AND DISTRIBUTION (§ 90\*)—CONVEYANCES IN FRAUD OF HEIRS—EVIDENCE.

Acts 1884, p. 12, No. 5, amending Rev. Civ. Code, art. 2239, providing that counter letters can have no effect against creditors or bona fide purchasers, but are valid as to all others, by adding the provision that forced heirs shall have the same right to annul by parol evidence the simulated contracts of those from whom they inherit, and shall not be restricted to the legitimate, relates to the character of evidence which forced heirs may offer to support a charge of simulation, but does not change the burden upon them regarding presumptions and proof, and does not affect Rev. Civ. Code, art. 2444, providing that the sales of immovable property, made by parents to their children, may be attacked by the forced heirs as containing a donation in disguise, if the latter can prove that no price has been paid, or that the price was below one-fourth of the real value at the time of the sale.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 351; Dec. Dig. § 90; \*Fraudulent Conveyances, Cent. Dig. § 528.]

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; M. W. Ott, Judge ad hoc.

Action by Rosa Byrd and others against Luzene P. Pierce and another, in which Olivia Pierce and another intervened. Judgment for defendants, and plaintiffs appeal. Affirmed.

Miller & McDougall and Gayer & Talley, for appellants. P. B. Carter and Ellis & White, for appellees.

NICHOLLS, J. The plaintiffs describe themselves as being the forced heirs of James Pierce, deceased. They allege: That James Pierce died on or about the 21st day of August, 1903, leaving as heirs petitioners and Olivia Pierce, wife of David Richardson, Burnette Pierce, wife of J. Leon Pounds, Ellen Wood, wife of Delos Wood, and Luzene Pierce, residents of Washington parish, La.

That prior to his death said James Pierce was the owner of the lands hereinafter described and of other lands in St. Tammany and Washington parishes, and of a large amount of movable property situated in said parishes. That said Luzene P. Pierce, son

of said James Pierce, applied to the district court for St. Tammany parish, for administration upon the succession of said James Pierce, and was by said court appointed administrator of said succession.

That said Luzene P. Pierce procured to be made an inventory of the estate of said James Pierce, showing that the only property belonging to said succession was a few dollars in money, a few head of hogs, and one or two promissory notes, amounting in all to about the sum of \$250; the said Luzene P. Pierce well knowing that all the lands and property hereinafter described belonged to the said succession of said James Pierce and should have been included in the inventory thereof. And petitioners allege that before his death said James Pierce colluded and conspired with the said Luzene P. Pierce and with J. Leon Pounds, husband of said Burnette Pierce, to deprive petitioners of their rights and interest in his property and succession, and to that end and for that purpose said James Pierce made and executed to said Luzene P. Pierce and to said J. Leon Pounds simulated and fraudulent conveyances of his real estate and other property as hereinafter set forth.

That on the 21st day of February, 1903, said James Pierce executed a pretended act of sale and conveyance to said J. Leon Pounds and Luzene P. Pierce, purporting to convey to them the following lands in St. Tammany parish, La., to wit:

(1) The S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 27 and the W.  $\frac{1}{2}$  and the S. E.  $\frac{1}{4}$  and lots 1 and 2, of section 34, in township 4 S., range 13 E., and the John Mizell headright, No. 43, and the S. W.  $\frac{1}{4}$  of section 27, being partly in St. Tammany parish and partly in Washington parish, and the Jesse Lee headright, No. 48, less 170.28 acres previously sold; all being in township 4 S., range 13 E., St. Helena meridian.

(2) Jesse Lee headright, No. 40, and 100 acres, being the north end, of section 1, one undivided half of 400 acres of land off the east side of Mahlen Holden headright, No. 56; one undivided half of 130.70 acres off the south end of Cornelius Cooper headright, No. 38, in township 5 S., range 13 E., containing in all 2,222.10 acres.

Also 200 head of stock cattle branded "77," marked upper square in one ear and under square in other, ranging in the vicinity of Red Bluff, on Pearl river, St. Tammany parish, La. The said sale including all the improvements on said lands. That it is stated in said deed that the same was made for a consideration of \$6,000 cash in hand paid, as by said pretended act of sale recorded in St. Tammany parish, La., in Conveyance Book 39, page 327, will more fully appear.

That on the same day said James Pierce made and executed a pretended act of sale to said J. Leon Pounds and Luzene P. Pierce,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



by which he pretended to convey to them for a pretended consideration of \$2,000 the following described lands in Washington parish, La., to wit:

(1) Burril Perry headright, No. 49, in township 4 S., range 13 E., containing 401.50 acres.

(2) East  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  and the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 15; S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 14; or the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of fractional section No. 23; S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  and the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 14; and the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and lot 3 of section 27, in township 4 S., range 13 E., containing 834 acres, as by said pretended act of sale recorded in the conveyance office of Washington parish, La., in Conveyance Book 8, page 507, will more fully appear.

That on the 30th day of July, 1904, said James Pierce made and executed a pretended act of sale to said J. Leon Pounds and Luzene P. Pierce for an alleged consideration of \$300, purporting to convey to them 200 acres of land, situated in the southwest corner of the Francis Passon headright, No. 45, township 3 S., range 10 E., as by said pretended act of sale, recorded in Conveyance Book No. 9, page 588, of the conveyance records of Washington parish, will more fully appear.

That on the 19th day of July, 1905, said James Pierce made and executed to said Luzene P. Pierce a pretended act of sale, for an alleged consideration of \$320 cash, purporting to convey the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 7 and the N.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$ , section 18, township 5 S., range 14 E., containing 160 acres of land, as by pretended act of sale recorded in St. Tammany parish, La., in Conveyance Book 41, page 508, will more fully appear.

That the said James Pierce at other times pretended to convey and sell to said Luzene P. Pierce and J. Leon Pounds other real estate in said parish of Washington and St. Tammany, the descriptions whereof petitioners are not now able to give, and a large amount of movable property situated in said parishes, a more particular description whereof will be given on the trial of this case.

And petitioners allege that all of said sales and transfers were mere pretenses and simulations made by the said James Pierce and said Luzene P. Pierce and J. Leon Pounds for the purpose of attempting to place the property of said James Pierce beyond the reach of petitioners, and to prevent petitioners as his heirs from inheriting or acquiring such property, or any of it, after his death, and for the purpose of attempting to donate and give his property to his son, said Luzene P. Pierce, and to his daughter, Burnette Pierce, wife of J. Leon Pounds. And petitioners allege that the property so attempted

to be conveyed and disposed of by said James Pierce was worth far more than the considerations expressed in the said alleged deeds as having been paid for the same, and that the considerations alleged in said pretended deeds as having been paid for such property were not paid by the said Luzene P. Pierce and J. Leon Pounds, and were not received by said James Pierce, but that the said alleged deeds were without consideration, and were mere simulations.

And petitioners allege that, if said pretended deeds were not mere simulations, they were fraudulent and collusive, and were made and entered into by said James Pierce and said Luzene P. Pierce and said Leon J. Pounds for the purpose above set forth, and to deprive petitioners of their rights and interest in the property of said James Pierce and in his succession.

That said James Pierce at the time of his death was the owner of a steam sawmill situated in Washington parish, of the value of at least \$3,000, which said Luzene Pierce and J. Leon Pounds have taken possession of and converted to their own use.

That said Luzene P. Pierce and J. Leon Pounds refused to recognize petitioners as having any ownership of or any interest in the lands and property above described and mentioned, and claim that they are the sole owners thereof.

That since the execution of said pretended deeds, and since the death of said James Pierce, the said Luzene P. Pierce and J. Leon Pounds have cut and taken from the lands above mentioned timber to the amount and of the value of upwards of \$10,000, and have converted the same to their own use, and have refused to account to petitioner for the same, or any part thereof.

That petitioners Rosa Byrd, Laura Williams, and Magnolia Stewart, as forced heirs of said James Pierce, are the owners each of one-eighth interest in the property of the succession of said James Pierce, and your petitioners the children of said Cintella Pierce, deceased, are the owners together of a one-eighth interest therein; and petitioners are entitled to have said simulated and fraudulent sales, transfers, and donations above mentioned set aside and declared to be null and void, and petitioners recognized as entitled to their legal share and interest therein.

In view of the premises, petitioners pray for the citation of the said Luzene P. Pierce and J. Leon Pounds, and, after due proceedings, for judgment annulling and setting aside as simulated and fraudulent the pretended conveyances and transfers above set forth, and such other pretended conveyances and transfers of the same character as petitioners may produce proof of on the trial of this action, and recognizing petitioners as owners in the proportions above set forth of all such property, and of all the property belonging

to the succession of said James Pierce, deceased, and for judgment against said Luzene P. Pierce and J. Leon Pounds for one-half of the value of the timber cut and taken by them off the lands of said James Pierce, and petitioners pray for all further necessary orders and decrees in the premises, and for general relief, and for costs.

Defendants excepted that there was a misjoinder and a cumulation of action. They prayed that all proceedings be stayed until the plaintiffs elect which of the defendants they should continue these proceedings against and which they should continue to prosecute, dismissing as to the others.

Under reservation of the exceptions filed by them, defendants answered, first pleading a general denial. They admitted that they are the holders of the following described property, to wit: The S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  in section 27, and W.  $\frac{1}{2}$  and S. E.  $\frac{1}{4}$  and lots 1 and 2 in section 34, John Mizell headright, No. 43, S. W.  $\frac{1}{4}$  of section 27, being partly in St. Tammany parish and partly in Washington parish. The Jesse Lee headright, No. 48, less 170.28 acres previously sold, all being in township 4 S., range 13 E., St. Tammany parish, La. Jesse Lee headright, No. 49, and 100 acres off the north end of section 1; one undivided half of 400 acres of land off the east side of the Mahlen Holden headright, No. 54; one undivided half of Mahlen Holden headright, No. 56; one undivided half of 130.70 acres of land, being off the south end of Cornelius Cooper headright, No. 56; one undivided half of 130.70 acres of land, being off the south end of Cornelius Cooper headright, No. 38—all being in township 5 S., range 13 E., together with all the buildings and improvements on said lands, and containing in all 2,222.10 acres, in St. Tammany parish, La.

Also 200 head of stock cattle, branded "77," and marked with upper square in one ear and under square in the other ear, ranging in the vicinity of Red Bluff, on Pearl river, in St. Tammany parish, in Book 39, pages 327, 329.

A certain piece or parcel of land situated in the parish of Washington, state of Louisiana, being the Burril Perry headright, No. 49, containing 401.51 acres, and the E.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section 15, and S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of section 14, and lot No. 4 or N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  fractional section 23, and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 14, and N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  and lot 3 of section 27, all in township 4 S., range 13 E., in Washington parish, La., containing 834 acres, together with all the buildings and improvements thereon.

That defendants acquired the above-described property from James Pierce on the 21st day of February, 1903, said deed being recorded in conveyance records of Washington parish on August 11, 1904, in Book 8,

page 507, and that defendants acquired the following described property from James Pierce on the 30th day of July, 1904, said deed being recorded in conveyance records of Washington parish on August 11, 1904, in Conveyance Book 8, folio 507, being 200 acres of land situated in Washington parish, La., said land being in the southwest corner of Francis Passon's headright, No. 45, township 3 S., range 10 E.

All of said property was acquired from James Pierce by defendants in good faith and for a good and valid consideration; said consideration consisting of the payment of cash money to James Pierce, the assumption and settlement of obligations due and owing by James Pierce at his request, and in settlement of the interest of Luzene P. Pierce in the succession of his mother, Ailsey Morris, which was purchased by James Pierce, and the agreement to support and care for James Pierce during the last years of his life, which your defendant did, and for other good and valid considerations, all of which will more fully appear on the trial of this cause. Defendant, further answering, says that the following described property, situated in St. Tammany parish, La., to wit: The W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 7, and N.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of section 18, township 5 S., range 14 E., containing 160 acres, was transferred to this defendant Luzene P. Pierce by his father, James Pierce, as a donation, and was without any consideration; that your defendant and his father, James Pierce, believed that they had a perfect right to do so, and your defendant did not know anything to the contrary until said property was attacked, and rather than raise any question in regard to the matter defendant Luzene P. Pierce transferred said property back to the estate of James Pierce on the 28th day of May, 1906, and the said property is now being administered in the succession of James Pierce, No. 591 of the docket of the Twenty-Sixth judicial district court of Louisiana, St. Tammany parish, and the costs of this proceeding to and including the time of said transfer of the said land made back to the succession of James Pierce have been paid, and the plaintiffs herein were notified through their attorney of said transfer. And defendants further aver that this suit is not brought in good faith, but is brought for the sole purpose of harassing and annoying defendants.

In view of the premises defendants pray that plaintiffs' demand be rejected, and their suit dismissed, and for costs and general relief.

Olivia Pierce, wife of David Richardson, and Ellen Wood, wife of Delos Wood, filed a petition of intervention and opposition in the suit. They alleged that a suit entitled "Rosa Byrd, Wife of Leon Byrd, et al. v. Luzene P. Pierce et al.," No. 939 of the docket of the Twenty-Sixth judicial district court, has been brought in the district court of the

Twenty-Sixth judicial district for the parish of Washington to recover certain property, which is more fully described in plaintiff's petition, from Luzene P. Pierce and J. Leon Pounds, which property was transferred to them by petitioners' deceased father during the years 1903, 1904, and 1905, on the ground that said transfer was simulated and fraudulent, without consideration, and was made for the purpose of defrauding the forced heirs of James Pierce out of said property. Petitioners desired to join the defendants in this action and to oppose the application of the plaintiffs, as they believe that said suit was instigated through malice, prejudice, and greed; that they know of their own knowledge that said transfers made by their deceased father were made in good faith and for a valuable consideration, and they do not believe that said transfers should be set aside.

In view of the premises, petitioners pray that they have leave to file this intervention and third opposition, that a certified copy be served on the plaintiffs and defendants, and that after due legal proceedings had there be judgment dismissing and rejecting the plaintiffs' demand, and for costs and general relief.

The district court rendered judgment in favor of the defendants and against the plaintiffs, rejecting the demands of the plaintiffs, and decreeing the defendants Luzene P. Pierce and J. Leon Pounds to be the owners of the following described property in St. Tammany and Washington parishes, viz.:

The S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  section 27, and the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  and lots 1 and 2 of section 34, in township 4 S., of range 13 E.; the John Mizell headright, No. 43, and the S. W.  $\frac{1}{4}$  of section 27, being partly in St. Tammany parish and partly in Washington parish, and the Jesse Lee headright, No. 49, less 170.28 acres, all being in township 4 S. of range 13 E., St. Helena meridian; Jesse Lee headright, No. 49, and 100 acres off the north end of section 1, one undivided half of 400 acres of land off the east side of Mahlen Holden headright, No. 56, one undivided half of 130.70 acres of land, being off the south end of Cornelius Cooper headright, No. 38, all being in township 5 S. of range 13 E.—together with all the buildings and improvements on said land, and containing in all 2,222.10 acres in St. Tammany parish.

Also the Burril Perry headright, No. 49, containing 401.50 acres, and the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  and the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 15, and the S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  in section 14, and lot No. 4, or N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , of fractional section 23, and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 14, and N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  and lot 3 section 27,

all in township 4 S. of range 13 E., in Washington parish, containing 384 acres, together with all the improvements and buildings thereon. Also 200 head of stock cattle branded "77," and marked with upper square in one ear and under square in the other, being the property described in plaintiffs' petition. It is further ordered that the plaintiffs in this case pay all cost.

The judge assigned the following reasons for his judgment:

"This is an action en declaration de simulation, in which plaintiffs seek to set aside the sale of certain lands, described in their petition, by James Pierce to Luzene P. Pierce and J. Leon Pounds. The prayer of their petition is that 'after due proceedings there be judgment annulling and setting aside as simulated and fraudulent and pretended conveyances and transfers above set forth, and such other pretended conveyances and transfers of same character as petitioners may produce proof on the trial of this action, and recognizing petitioners as the owners in the proportion above set forth, all of which property and all of the property belonging to the succession of said James Pierce, deceased, and for judgment of said James Pierce, deceased, and for judgment against said Luzene P. Pierce and J. Leon Pounds for one-half the value of the timber cut and taken by them off the land of said James Pierce.' They further pray for all necessary orders and general relief. They allege: That they are the forced heirs of James Pierce, who died on August 21, 1905, and that prior to his death said James Pierce was the owner of certain lands, described in their petition, in St. Tammany and Washington parishes, also a large amount of movable property, and that before his death the said James Pierce colluded and conspired with defendants Luzene P. Pierce and J. Leon Pounds, the husband of Burnette Pierce, to deprive petitioners of their rights and interest in his property and succession, and to that end and for that purpose he made and executed to said Luzene P. Pierce and J. Leon Pounds simulated and fraudulent conveyances of his real estate and other property, all of which is fully set forth in their petition. That all of said sales and transfers were mere pretenses and simulations, and made for the purpose of attempting to put the said property beyond the reach of petitioners, and to prevent them from inheriting or acquiring said property after his death, and for the purpose of attempting to donate and give his property to his son, Luzene P. Pierce, and his daughter, Burnette Pierce, wife of said J. Leon Pounds.

"That the property so attempted to be conveyed and disposed of was worth far more than the consideration expressed in said alleged deeds as having been paid for same. That said consideration so expressed in said deeds was not paid by said Luzene P. Pierce and J. Leon Pounds, and was not received by said James Pierce, but that the said alleged deeds were without consideration and were mere simulations. Petitioners alleged that, if said deeds were not mere simulations, they were fraudulent and collusive, and were made and entered into by said James Pierce and said Luzene P. Pierce and said J. Leon Pounds for the purpose of depriving petitioners of their rights and interest in the property of said James Pierce and in his succession. The evidence taken on the trial of this case discloses the fact that James Pierce was at one time a large property owner in Washington and St. Tammany parishes, which belonged to the community which existed between him and his wife, Ailsey Pierce, who died about May 7, 1899. The same petitioners were plaintiffs in a former suit, entitled 'Rosa Byrd

et al. v. James Pierce et al., No. — of the docket of the Twenty-Sixth judicial district court for St. Tammany parish, La. In this suit three plaintiffs seek to be recognized as heirs of said Ailsey Pierce, and, as such, owners in division of all the lands belonging to such community. The record in this suit is offered in evidence by the plaintiffs. This litigation was never carried to judgment, it having been compromised by James Pierce agreeing to pay the plaintiffs \$500 each and other costs, all of which will be noted in its proper place; and I might say at this juncture that there were nine heirs of Ailsey Pierce, deceased, who, it seems from the testimony adduced, were to receive the same settlement. There is no serious question of law involved in the issues presented in this case. This is an action brought by a portion of the forced heirs of James Pierce, deceased, under the provisions of Act No. 5, p. 12, of 1884, now incorporated in the Revised Civil Code in article 2239, but turns, I might say, exclusively on questions of fact. Fortunately for the court, there is very little conflicting testimony, although on some important points it leaves the fact somewhat obscure. This is noticeable in reference to the consideration actually paid by defendants to James Pierce, and, as inadequacy or want of consideration is one of the strongest badges of fraud or simulation, it becomes important what this consideration was. The best evidence of this fact is the original memorandum or agreement between James Pierce and defendants, marked 'D 4,' referred to in the testimony of Judge T. M. Burns.

"This agreement shows a consideration tantamount to cash of \$5,000, \$4,000 of which was the assumption of certain obligations due by James Pierce and \$1,000 representing their interest in the estate of Mrs. Ailsey Pierce. This consideration of \$3,000 was the obligation on the part of defendants to take care of said James Pierce during the balance of his life. We will now turn to the evidence of other considerations, which was given without objection. It is in evidence that defendants assume an indebtedness due by James Pierce to H. J. Smith of \$1,900. (See testimony of H. J. Smith, p. 108.) True, we cannot add the whole amount of this indebtedness as an addition to the consideration actually paid, for the reason that the evidence shows that only one-third of this was, strictly speaking, due by James Pierce, as the evidence shows that it was a debt of the firm of Pierce & Pounds, of which he was a member with a one-third interest. There were also various other small amounts too numerous to mention (see testimony of B. Labat, taken before the clerk of court for St. Tammany parish; also testimony of both defendants), making the amount of cash actually paid, or for the payment of which defendants were liable, approximately \$6,500.

"We will now consider the value of the property which defendants purchased from James Pierce. There is a mass of testimony in the record by a number of witnesses for both plaintiffs and defendants to prove the value of this property. In reference to the mill property, the evidence shows that it had very little value at the time of this sale. The highest estimate of the one-third interest of James Pierce that could be placed on this property under the testimony would be approximately \$200. The same thing is true of the one-sixth interest of James Pierce in the Poole Bluff Turpentine Company. This firm seems to have been in a bad way financially at that time. Warren Thomas, one of the members of this firm, testified that he bought the one-fourth interest of L. O. Mitchell in the firm for \$250 and considered it more than it was worth. (See testimony of Warren Thomas, p. 100.) I conclude, therefore, that \$500 would be a liberal estimate on the value of James Pierce's one-sixth interest in Poole Bluff Turpentine Company and one-third interest in the Pierce &

Pounds mill. Add to this an estimate of \$2,000 as the cash value of 200 head of stock cattle, and it is the opinion of the court that we have a fair estimate of the value of the property, exclusive of the land, transferred by James Pierce to the defendants.

"We will next consider the question of the value of the land. The various witnesses placed the value of these lands at anywhere from \$1.25 to \$7 per acre; the basis of all testimony in this respect being the price brought by similar lands at that time. Hence it is difficult to arrive at a just valuation or what would be considered a just valuation, of the land involved in this suit at that time. One thing stands out clear, and that is that there was not much valuation placed on land at that time. A. C. Williams, witness for plaintiff, testified that he attempted to sell 250 acres of land in 1904 for \$1,000. (See testimony, pages 27 and 28.) Marshall Richardson, another witness for plaintiff, testified that he bought 180 acres for \$500, and that the land had improvements on it which he considered worth \$400. He further testified that he owned a tract of land of 430 acres that he tried to sell for \$500. (See testimony, pages 42-44.) On the other hand, it is in evidence that lands of about the same class were sold for \$7 per acre (see testimony of D. F. Sheridan, p. 149); and a number of other sales from \$2.50 to \$5 per acre. After a careful consideration of all the testimony on this point, the irresistible conclusion is that no better answer can be found on the question of the value of these lands than that given by R. E. Keaton, who, in answer to this question, replied in part: 'It depended on what a man wanted for it. If he wanted a little place for a farm, it was different in the price according to the tract. It was from \$2 to \$2.50 per acre. Pine and swamp and cut-over lands, of course, were all considered.' (See testimony, pages 66, 67.) The mortgage granted by James Pierce to Anthony Vizard marked 'Defendants' Exhibit D-4,' was given to secure a loan of \$2,000, and as security for this amount he gave a mortgage on more than 3,000 acres of land. This is important only in so far as it goes to show what was considered to be a reasonable valuation on these lands at the time of the transaction complained of in plaintiffs' petition.

"As before stated, the cash actually paid by these defendants, or its equivalent, was approximately \$6,500. Deducting from this \$2,500, being the value of one-third interest of said James Pierce in the Pierce & Pounds mill and his one-sixth interest in the Poole Bluff Turpentine Company and 200 head of stock cattle, there is a residue of \$4,000. These figures mean that a consideration of \$1.25 per acre was paid for the land described in plaintiffs' petition. The testimony shows conclusively that this was paid in actual cash, or its equivalent; and, considering the value of lands at that time, it would take evidence of the strongest character to overcome the presumption that these sales were made in good faith and at what was at that time considered a reasonably fair price for lands of this class. There was considerable evidence introduced attempting to show that James Pierce made these transfers complained of with the intent to defraud plaintiffs and deprive them of their rights to share equally in the division of his property after his death. On the trial of the case great latitude was allowed by the court for the introduction of evidence tending to show this fact; but the evidence adduced on the trial of this case to show this fact would have to be supported by the strongest corroborative evidence of fraud or simulation to carry conviction to the mind of the court. True, it was shown that James Pierce was very much angered with plaintiffs on account of their former suit that they had filed against him for the recovery of

their interest in their mother's estate; but those who have observed the foibles of human nature know that it would have been strange indeed if he had not become angered. The father was getting old and infirm, and unable longer to look after his affairs, and these plaintiffs, who were his children, and to whom he had a right to look for support, aid, and affection in his declining years, involved him in litigation, forcing what one witness (Judge T. M. Burns) terms a bad compromise, and brought about the very condition about which plaintiffs so bitterly complained. In the case of *Slocumb v. Real Estate Bank of Arkansas*, 2 Rob. 92, it is stated in the syllabus of the case that proof of questions calculated to create a doubt as to the fairness of a sale is not enough to set it aside. The evidence is conclusive that James Pierce had no money at the time this suit was filed to pay these plaintiffs, and he had to borrow the money to pay them according to the terms of the compromise that they had made. He was old and unable to attend to his ordinary affairs. Defendants assumed the obligation that he had incurred to pay these plaintiffs, besides other obligations which were pressing, a consideration, as stated before, which was in the mind of the court reasonable and fair in the light of conditions as they existed at the time, and the evidence showing intention to defraud on the part of defendants and James Pierce is of such a flimsy character that, without discrediting a single witness of plaintiffs, the court does not feel that it would be justified in attaching any serious weight to it for these reasons. It is therefore ordered, adjudged, and decreed that plaintiffs' demands be rejected, and they pay all cost of this suit, and that there be judgment accordingly."

After an application for a new bond upon the ground that the judgment rendered was "contrary to the law and the evidence" had been overruled, plaintiffs appealed. The appellees have pleaded in this court the prescription of one year in bar of plaintiffs' claim and charge of fraud. The case was tried before M. W. Ott as judge ad hoc, in place of the district judge, recused.

The issues between the parties submitted to this court for decision are disclosed in the pleadings and judgment which have been set out. In the brief filed on behalf of the plaintiffs, counsel say:

"Without entering into a discussion of the evidence, which will serve no good purpose, as we know the court will examine the evidence for itself, we submit that, taken together, it shows a conspiracy and design by James Pierce and the defendants to so dispose of Pierce's property that those of the heirs who had angered him by objection to his spoliation of the property receive nothing from his estate."

An examination does not cause us to reach that conclusion. The acts under which the defendants claim title were undoubtedly not simulated. The defendants assumed and paid the mortgage debt held by Vizard for \$2,000. They paid the heirs of James Pierce's wife the respective amounts due them under the compromise entered into in the suit which plaintiffs brought against their father. They paid the costs of suit and the attorney's fees. They paid a large amount of debts due by them to third parties, and they assumed the obligation, with which they complied, of sup-

porting him during his life. Under such a condition of things, the claim that the acts were "simulations" must fall to the ground.

Plaintiffs urge that, if not simulated, the acts were passed under and in furtherance of a conspiracy between Pierce, his son, L. F. Pierce, and his son-in-law, Pounds, to so dispose of his estate that the plaintiffs should take nothing from his estate. The father was evidently angered by the suit brought against him; but, whatever his feelings in respect thereto were, we do not think that they formed the motive for his passing the acts. We think that the father's feelings played little part in that matter, and that he was forced into passing the acts by the situation of his affairs, resulting from that suit and his personal condition at that time. He was then an old man, not fitted for active work. He was without money, and debts were pressing upon him which he himself was unable to meet. There was every probability that they would be enforced, and, if enforced, his property would be sacrificed. He had no alternative but to take the course he did. His volition had little to do with his action. We do not think the consideration of the sales was such as to enable plaintiffs to set them aside. Present values in the parish of Washington and St. Tammany furnish no standard of comparison for prices of land at the time the sales were made. The construction of a railroad through these parishes and the construction of sawmills have brought about almost a phenomenal change in respect to values of land there. The lands in question were what is known as "cut-over" lands, lying to a considerable extent in the swamps, for which there was very little demand, while the cattle which were sold were on the range, subject to range delivery. The alternative claim of the plaintiffs is that the court should hold the acts to be "disguised donations" to the defendants. They maintain that the evidence raises a strong "presumption" to that effect.

Article 2444 of the Revised Civil Code provides that:

"The sales of immovable property made by parents to their children may be attacked by the forced heirs as containing a donation in disguise if the latter can prove that no price has been paid or that the price was below one-fourth of the real value of the immovables sold at the time of the sale."

That article is still in force. The passage of Act No. 5, p. 12, of 1884, amending article 2239 of the Code, does not affect it. That statute bears upon the character of the evidence which forced heirs are entitled to bring to bear in support of a charge of simulation, but does not change the obligation in respect to the burden which they bear regarding presumptions and proof.

The plaintiffs have not brought this case within the range of a presumption against the acts complained of. *Laycock v. Byrd*, 13

La. Ann. 173; *Brown v. Brown*, 30 La. Ann. 966; *Moore v. Wartelle*, 39 La. Ann. 1067, 3 South. 384, and authorities therein cited; *Landry v. Landry*, 40 La. Ann. 229, 3 South. 728.

We are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

(124 La.)

No. 17,632.

STATE ex rel. GUION, Atty. Gen., v. BOARD  
OF LEVEE COM'RS OF ORLEANS  
LEVEE DIST.

(Supreme Court of Louisiana. June 22, 1909.  
Rehearing Denied Oct. 18, 1909.)

LEVEES (§ 32\*)—LEVEE BOARDS—DEPOSIT OF  
MONEYS.

Proceeds from the sale of bonds under Act No. 25, p. 24, of 1908, by the Board of Levee Commissioners of the Orleans Levee District, are not required by Rev. St. § 2769, to be deposited in the state treasury, but may be deposited with a bank selected by the board under Act No. 25, p. 25, of 1907, providing that all funds of a public board, commission, or body shall be deposited with its fiscal agent, selected as therein prescribed.

[Ed. Note.—For other cases, see *Levees*, Cent. Dig. § 19; Dec. Dig. § 32.\*]

Appeal from Civil District Court, Parish of Orleans; W. B. Sommerville, Judge.

Mandamus, by the State, on relation of Walter Guion, Attorney General, against the Board of Levee Commissioners of the Orleans Levee District. Judgment for relator, and defendants appeal. Reversed and rendered.

McCloskey & Benedict, for appellant Board of Com'rs of Orleans Levee Dist. Howe, Fenner, Spencer & Cocke, for appellant Interstate Trust & Banking Co. Walter Guion, Atty. Gen. (R. G. Pleasant, of counsel), for appellee.

NICHOLLS, J. In the petition of the state of Louisiana, plaintiff, on the relation of Walter Guion, Attorney General, it is alleged that:

The "Board of Levee Commissioners of the Orleans Levee District" is a body politic, with corporate powers created under the terms of Act No. 93, p. 95, of the General Assembly of the State of Louisiana for the year 1890, and charged with the construction, repair, control, and maintenance of all levees in the Orleans levee district; said district comprising the whole of the parish of Orleans. That the domicile of said board is in the city of New Orleans, where, by the terms of said creative act, it is made suable by service of process upon its president. That said board is a public board created to discharge a governmental function, and as to all of its functions is simply an instrumentality of the state government.

That by reason of the terms of Act No.

93, p. 95, of 1890, aforesaid, the act creating said board, as well as by reason of the provisions of other acts of the General Assembly of the state of Louisiana, and particularly of Acts Nos. 14 and 116, pp. 15, 171, of 1898, and of article 239 of the Constitution of 1898 of the State of Louisiana, and by further reason of the fact that said board is a public board, organized and created solely for the purpose of discharging as an instrumentality of the state government, a purely governmental function, the state of Louisiana is and has been constituted the fiscal agent of said board, and the State Treasurer the proper and sole lawful depository of all funds dedicated to the work to perform which said board was created, whether said funds result from taxation, or from the issue and sale of bonds authorized by law, or otherwise, and that said board has no legal right to fail or refuse to deposit all of said funds from the State Treasurer or to withdraw said funds from the State Treasurer except for the purpose of meeting, and in amounts sufficient to meet, its current expenses and liabilities in the prosecution of the work with which it is charged by the law of its creation. That by the terms of Act No. 25 of the General Assembly of the State of Louisiana for the year 1908 the said board was authorized to make and issue, under the terms and conditions in said act provided, bonds in an amount not exceeding \$3,000,000. That said board was by the terms of said act further authorized to exchange for the then outstanding bonds of said board, on a basis of par and accrued interest, so many of said new bonds as might be required for such purpose, and the balance of said new bonds said board was authorized to sell at not less than par and accrued interest; the proceeds of said sale to be expended by said board for the retirement by payment of certificates issued for property previously appropriated for levee purposes, for enlarging and strengthening the levee system in said Orleans levee district.

That, acting under the authority of, and pursuant to, said act No. 25, p. 24, of 1908, said board has issued its bonds to the amount of \$3,000,000. That of said amount it has delivered to the State Treasurer bonds to the amount of \$244,000 for the purpose of retiring its outstanding bonds for a like amount issued under and by virtue of the authority of previous acts of the General Assembly of the State of Louisiana, and that it has sold the remainder of said bonds to the amount of \$2,756,000. That of this last-named amount its bonds to the amount of \$2,000,000 have been delivered and the proceeds of the sale thereof received by the said board, and that the balance of the said bonds will be delivered, and the proceeds of the sale thereof received, by said board on or about the 1st day of May, 1909.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

That, during the month of February, 1909, said board advertised for bids from banks in the city of New Orleans to become the fiscal agent of said board for the year beginning March 1, 1909, in accordance with the terms of Act No. 23, p. 25, of the Extra Session of the General Assembly of the State of Louisiana for the year 1907, and having accepted the bid of the Interstate Trust & Banking Company of the said city of New Orleans, to pay interest at the rate of  $3\frac{1}{16}$  per cent. per annum upon the daily balances of said board, did subsequently, on the 6th day of March, 1909, by act before E. P. Cousin, notary public, make and enter into a contract with the said Interstate Trust & Banking Company and the Fidelity & Deposit Company of Maryland, whereby in consideration of the obligations assumed by the said Interstate Trust & Banking Company to accept the fiscal agency of the said board, and to pay to said board interest on its daily balance at the rate of  $3\frac{1}{16}$  per cent. per annum, and of the agreement of said Fidelity & Deposit Company of Maryland to bind and obligate itself unto the said board, in the sum of \$100,000 as surety for said Interstate Trust & Banking Company, for the safe-keeping and return of such deposits as might be made with the said Interstate Trust & Banking Company by said board, and for the payment of the interest thereon, as hereinabove set forth, said board did constitute and appoint said Interstate Trust & Banking Company its fiscal agent for the year following March 1, 1909, and agreed that, as such fiscal agent, said Interstate Trust & Banking Company should be entitled to the deposit of all of the funds of the said board during said term.

That thereafter said board deposited with the Interstate Trust & Banking Company, in accordance with the terms of said contract, the balance then remaining of the proceeds of the bonds sold as hereinabove recited, and, of the proceeds of said sale of bonds, the said board now has on deposit with the said Interstate Trust & Banking Company the sum of \$261,023.36.

That, except in so far as may concern funds withdrawn from the state treasury in pursuance of law to meet current expenses and liabilities, the contract aforesaid, between the said board and the said Interstate Trust & Banking Company, is null, void, and of no effect; that it was and is the duty of said board to pay into the state treasury the proceeds of the sale of the bonds authorized as aforesaid by Act No. 25 of 1908, the said proceeds to be thereafter withdrawn from said State Treasurer by said board in accordance with law as and when same may be needed for the purpose for which said board is authorized to expend the same. That the said board has neglected and refused, and still neglects and refuses, to pay the said proceeds into the state treasury, notwithstanding demand has been legally

made upon it to do so by the proper authorities, and it is necessary and proper that the court should issue to said board, through its president, a writ of mandamus commanding and directing that the fund representing the proceeds of the sale of the said bonds be forthwith paid over to the State Treasurer and into the state treasury, to be there held to the credit of said board in accordance with law and particularly in accordance with Act No. 93 of 1890 and the provisions of Acts Nos. 14 and 116 of the General Assembly of the State of Louisiana, approved June 17, 1898, and July 13, 1898, respectively, and of article 239 of the Constitution of the State of Louisiana.

Wherefore, the premises and the annexed affidavit considered, relator prays that an alternative writ of mandamus may issue herein directed to the Board of Levee Commissioners of the Orleans Levee District commanding said Board of Levee Commissioners of the Orleans Levee District to immediately transfer and pay into the State Treasury the proceeds of the sale of the bonds issued and sold by said board under the terms of Act No. 25 of 1898, as well as all other moneys belonging to said board, or to show cause to the contrary on such a day and at such an hour as may be named by the court, and upon such hearing relator prays that said alternative writ may be made peremptory, and for costs, and for general relief.

On reading this petition the court ordered an alternative writ of mandamus to issue as prayed for.

The board of commissioners excepted that the petition filed disclosed no cause of action. Under reservation of its exception, defendant answered pleading first a general denial. It admitted that it was a body politic created with corporate powers by Act No. 93 of the General Assembly of the State of Louisiana for the year 1890, and that it was charged with the construction, repair, control, and maintenance of all levees within the New Orleans levee district.

Further averring, it specially averred: That under and by virtue of Act No. 25 of the General Assembly of the State of Louisiana for the year 1908 respondent was authorized to make and issue under the terms thereof bonds in an amount not to exceed \$3,000,000; to exchange for then outstanding bonds of respondent so many of said new bonds as might be required for such purpose; and to sell at not less than par and accrued interest the balance thereof for the purposes set forth in said act.

That acting under and by virtue of said Act No. 25 of 1908 respondent had sold bonds to the amount of \$2,736,000. That part of the proceeds thereof has been turned over and delivered into the physical possession of respondent for expenditures as provided by the terms of said act, and the balance of

the proceeds of sale thereof were to be turned over and delivered to respondent on or about the 1st of May, 1909, to be by it expended for like purposes.

That the General Assembly of the State of Louisiana at its extra session held in the year 1907, passed Act No. 23 of the Acts of the General Assembly of said year, and that thereunder it was made the imperative duty of every public board created by special or general act of the General Assembly of this state to deposit all public funds "belonging to" or "received by it," except such only as "then held in the custody or possession of the State Treasurer," with a fiscal agent paying interest on deposits. That thereunder it was made the duty of all such public bodies to advertise for bids from such bank or banks as might be within the territorial jurisdiction of such public boards inviting bids as to the quantum of interest such banks would pay upon the daily balances of the deposits so to be made and upon the giving of satisfactory security as provided under the terms of said act. That it was a public board created by Act No. 93 of the General Assembly of the State of Louisiana for the year 1890, and that as such it was amenable to the provisions of Act No. 23 of the Extra Session of 1907. That in consonance therewith, and agreeably thereto, it duly advertised for the reception of bids for interest on the deposits to be derived from the sale of the bonds authorized to be by it issued under the terms and provisions of Act No. 25 of the General Assembly of 1908, a copy of which advertisement it annexed and made part of its answer.

That after due and legal proceedings, following in all respects the terms and provisions of said Act No. 23 of 1907, respondent adjudicated the deposits of the avails of said bonds to the Interstate Trust & Banking Company for and in consideration of their obligation to pay to respondent interest on the daily average of the balance carried at the rate of  $3\frac{1}{16}$  per cent. interest per annum. That accordingly it did, on the 6th day of March, 1909, by act before Edward P. Cousin, notary public, enter into a notarial contract evidencing said bid and adjudication with said Interstate Trust & Banking Company and the Fidelity & Deposit Company of Maryland, surety of said banking company, as would more fully and at large appear by reference to a certified copy of said act annexed and made part of its answer.

Respondent denied that the avails or proceeds of the sale of the bonds so issued under and by virtue of the provisions of Act No. 25 of 1908 ever went into the custody or possession of the State Treasurer of Louisiana, or that it was ever contemplated that it should go into his custody or possession. That the same Legislature of the year 1908 that authorized respondent to issue bonds

under provisions of Act 25 of that year, passed Act No. 232, p. 414, of the Sessions Acts of 1908 amending Act No. 23 of 1907, above referred to, to the extent only of making obligatory upon respondent as one of said public boards therein referred to, to make deposits of such funds not in the possession or under the control of the State Treasurer weekly in the fiscal agent or depositary selected by respondent under and by virtue of the terms of Act No. 23 of 1907, and thereby established contemporaneously exposition of said Act No. 23 of 1907, and wrote it into Act No. 25 of 1908, authorizing the aforesaid bond issue.

Respondent specially denied that there was anything in Act No. 93 of 1890 creating respondent, or any other law which provides that any funds arising from the sale of bonds should be deposited with the State Treasurer; but, on the contrary, it averred: That section 5 of Act No. 93 of 1890 specially and clearly provides that only the funds arising from the district levee tax of one mill authorized to be issued under and by virtue of said section shall be collected by the state tax collector of this parish in the same manner as state taxes were collected, and that said state tax collector was directed to collect and transmit the funds arising therefrom to the State Treasurer. That said section 5 was specific only as to the funds arising from said tax, and referred to no other funds, and that the application of Act No. 24 of 1907 alleged by relator to concern funds of respondent board sufficient in amount to only meet its current expenses and liabilities was justified neither by the phraseology of Act No. 93 of 1890, Act No. 23 of 1907, nor Act No. 25 of 1908.

That the purpose of Act No. 23 of 1907 was to provide an additional fund arising from the interest on deposit to be attributable to and appropriated directly by the various public boards therein referred to, in order that said interest so obtained might be expended in the prosecution of the public work enjoined upon respondent board as one of said boards referred to in said act. That it was contemplated that said funds, as stated in said act, "belonged to and were received by" respondent board and not to be held within the custody or possession of the State Treasurer, in order that respondent board might have the advantage of the interest so obtained which otherwise will be deposited at the capital of the state of Louisiana and be subjected to the control of the State Board of Liquidation. That the interest so earned would go to the general credit of the state of Louisiana, and thus be lost for availability to the purposes of respondent board. That this was not the intention of the Legislature in the passage of Act No. 23 of 1907 or Act No. 25 of 1908, and would in a large measure defeat the very purposes of the act.



That said Act No. 23 of 1907 repealed all other acts on the same subject-matter in conflict therewith and was the latest legislation upon the subject. That respondent in view thereof complied with its requirements in word and tenor, and its action thereunder was legal and binding and should be so decreed.

In view of the premises respondent prayed that the alternative writs of mandamus herein sued for be discharged, and that this honorable court do decree that the proceedings taken by respondent board under the provisions of Act No. 23 of 1907, and the notarial contract entered into between respondent and said Interstate Trust & Banking Company, on the 6th day of March, 1909, before Edward P. Cousin, notary public, be confirmed, ratified, and upheld, and that respondent be hence dismissed with its costs, and as in duty bound it ever prayed.

The Interstate Trust & Banking Company intervened in the case. In its petition of intervention it alleged: That it was a corporation organized under the laws of the state of Louisiana, regulating the organization of corporations for the purpose of conducting the business of banking, and is and has been for many years conducting a general banking business with its office and domicile in the city of New Orleans. That during the month of February, 1909, the defendant in this case, the Board of Levee Commissioners of the Orleans Levee District, a body politic with corporate powers created under the terms of Act No. 93 of the General Assembly of the State of Louisiana for the year 1890, and by said act charged with the construction, repair, control, and maintenance of all levees in the Orleans levee district, said district comprising the whole of the parish of Orleans, advertised for bids from banks in the city of New Orleans to become the fiscal agent of said board for the year succeeding March 1, 1909; said advertisement having been made in pursuance of and in accordance with Act No. 23 of the Extra Session of the State of Louisiana for the year 1907.

That the said advertisement invited proposals from the various banks of the city as to the rate of interest they would pay during the stipulated term upon the daily balances which might stand to the credit of the said board during said term, in consideration of receiving the deposit during the said term of all of the funds of which said defendant had the management and control, and stipulated that the successful bidder should execute a bond in favor of said defendant in accordance with the provisions of said act in the sum of \$100,000; the said defendant specially reserving the right to reject any and all bids. That in response to said advertisement intervener submitted a bid for said deposit, by the terms of which it offered and proposed to pay interest at the rate of

$3\frac{1}{16}$  per cent. per annum on the daily balances of said defendant and otherwise to comply with the terms and conditions of said advertisement.

That, intervener's said bid being the best submitted, the same was at a special meeting of said defendant board held on the 1st day of March, 1909, duly accepted, and intervener was on the same day notified in writing of said acceptance by said defendant acting through its president, Jules C. Keonig.

That intervener thereupon arranged with the Fidelity & Deposit Company of Maryland, a corporation duly authorized to conduct in this state the business of signing bonds as surety, in consideration of a premium of \$500, to be paid by intervener, to sign as surety for intervener the bond for \$100,000 in favor of the defendant required under the terms of the advertisement hereinabove referred to and Act No. 23 of the Extra Session of the General Assembly of the State of Louisiana for the year 1907.

That thereafter, to wit, on the 6th day of March, 1909, in confirmation of intervener's bid and its acceptance by the defendant as aforesaid, there was executed before Edward P. Cousin, notary, a formal contract by and between the said defendant intervener and the Fidelity & Deposit Company of Maryland, by the terms of which, in consideration of the obligation assumed by intervener to accept the fiscal agency of said defendant and to pay to said defendant interest on its daily balances at the rate of  $3\frac{1}{16}$  per cent. per annum, and of the agreement by said Fidelity & Deposit Company of Maryland to bind and obligate itself unto the said defendant in the sum of \$100,000 as surety of intervener for the safe-keeping and return of such deposits as might be made with intervener by said defendant, and for the payment of interest thereon as hereinabove set forth, said defendant did constitute and appoint intervener its fiscal agent for the year succeeding March 1, 1909, and did agree that as such fiscal agent intervener should be entitled to the deposit of all the funds of said defendant during said term.

That prior to the making of the said contract with intervener the defendant had been authorized by the terms of Act No. 23 of the General Assembly of the State of Louisiana for the year 1908 to make and issue under the terms and conditions in said act provided bonds in an amount not exceeding \$3,000,000. That said defendant was by the terms of said act further authorized to exchange for the then outstanding bonds of said defendant on a basis of par and accrued interest so many of said new bonds as might be required for such purpose, and the balance of said bonds said defendant was authorized to sell at not less than par and accrued interest, and the said

defendant was authorized to expend the proceeds of the sale of said bonds for the retirement by payment of certificates issued for property previously appropriated for levee purposes for the purchase of property necessary for such purpose and for enlarging and strengthening the levee system in said Orleans levee district.

That, acting under the authority of and pursuant to said Act No. 25 of 1908, said defendant had, at the time the contract with intervenor aforesaid was made, sold bonds to the amount of \$2,756,000. That of this amount \$2,000,000 had been delivered, and the proceeds of the sale thereof received by said defendant, and that the proceeds of the balance of said bonds will be received by said defendant on or about the 1st of May, 1909.

That in accordance with the terms and conditions of its contract of March 6th, aforesaid, with intervenor, said defendant immediately thereafter deposited with intervenor the balance of the proceeds of the sale of said bonds which then remained unexpended in defendant's possession and control, and of the deposit so made there then remained with intervenor on deposit in accordance with the terms of the said contract the sum of \$261,023.36, as alleged in the petition of relator herein.

Intervenor specially denied that it was the duty of the defendant, as alleged by relator in his petition, to deposit in the state treasury said fund, or any funds which may hereafter come into its possession as the proceeds of the sale of bonds not yet paid for, or that relator was entitled to the mandamus applied for, in this case, but averred, on the contrary, that it was the duty of defendant as to said fund and as to the fund which will hereafter be received by it as the proceeds of the sale of bonds not yet paid for to deposit the same with intervenor as its fiscal agent duly selected as aforesaid in accordance with the terms of Act No. 23 of the Extra Session of 1907.

Intervenor further averred that, if this honorable court should grant the relief prayed for by relator herein, it would constitute a violation and an impairment of intervenor's contract with the defendant made upon a valid consideration and under express sanction of law, to intervenor's great loss and injury.

In view of the premises, intervenor prayed for leave to file this petition of intervention, that the relator and the defendant be cited in accordance with law to answer same, and that after due proceedings there be judgment rendered in intervenor's favor and against the relator, rejecting relator's demand and dismissing his suit, with costs. Intervenor further prayed for all such general and equitable relief as it may be entitled to in the premises.

The plaintiffs answered the petition of intervention pleading first a general denial. Further answering, it admitted: That intervenor was a corporation fully organized under the laws of this state for the purpose of conducting the business of banking; that it had its office and domicile in the city of New Orleans; that during the month of February, 1909, defendant, the Board of Levee Commissioners of the Orleans Levee District, advertised for bids from banks in the city of New Orleans to become the fiscal agent of said Orleans levee board for the year succeeding the 1st of March, 1909; that said advertisement invited proposals from said various banks of the city of New Orleans as to the rate of interest to be paid by them during a stipulated term upon daily balances to the credit of said board in consideration of receiving the deposit during the said term of all of the funds belonging to said Orleans levee board and of which it had the management and control, and provided that the successful bidder should execute a bond in favor of defendant in the sum of \$100,000, with the reservation of the right to reject any and all bids, and that intervenor submitted a bid for said deposit and offered to pay interest thereon at the rate of  $3\frac{1}{16}$  per cent. per annum on the daily balances of defendant on deposit with intervenor; that intervenor's bid was accepted by the Orleans levee board, and thereupon intervenor arranged with the Fidelity & Deposit Company of Maryland as surety in a bond for the sum of \$100,000 in favor of defendant under the terms of the advertisement heretofore referred to; and that thereafter a contract was entered into between defendant intervenor and the said Fidelity & Deposit Company of Maryland, whereby, in consideration of the obligation assumed by intervenor to accept the fiscal agency of defendant and to pay to defendant interest on its daily balances at the rate of  $3\frac{1}{16}$  per cent. per annum and of the agreement on the part of the Fidelity & Deposit Company of Maryland to obligate itself, as above stated, in the sum of \$100,000 as surety of intervenor, for such deposits as might be made with intervenor by the defendant, as well as for the payment of interest thereon, defendant did appoint intervenor its fiscal agent for the year succeeding March 1, 1909, and did agree that intervenor as such fiscal agent should be entitled to the deposit of all funds belonging to the Orleans levee board during said term. But it denied that any of said acts and doings, whether on the part of defendant or of intervenor, or of the Fidelity & Deposit Company of Maryland, were made or done under any authority of law. It especially denied that the same were had or done in compliance with the provisions of Act No. 23 of the Extra Session of the General Assembly of the State of Louisiana for the year 1907. Further answering the petition of interven-

tion, it averred: That defendant, the Orleans levee board, had been authorized by Act No. 25 of the General Assembly of the State of Louisiana for the year 1908 to make and issue, under the terms and conditions of said act provided, bonds in an amount not exceeding \$3,000,000; that defendant was, by the terms of said act, also authorized to exchange for the then outstanding bonds of said defendant, on a basis of par and accrued interest, and to use the proceeds of the sale of said bonds for the retirement by payment of certificates issued for property previously appropriated for levee purposes, for the purchase of property necessary for such purpose, and for enlarging and strengthening the levee system in said Orleans levee district; that defendant has sold bonds to the amount of \$2,756,000, of which amount \$2,000,000 of bonds had already been delivered and the proceeds of the sale thereof received by defendant; and that the proceeds of the sale of the balance of said bonds would be received by defendant on or about the 1st of May, 1909. It admitted that defendant had deposited with intervenor the balance of the proceeds of the sale of bonds aforesaid which remained unexpended in defendant's possession and control, and that, of the deposit so made, there was then on deposit with intervenor the sum of \$261,023.36.

In view of the premises it prayed that the demand contained in the petition of intervention herein be rejected, and that said petition be dismissed at intervenor's cost.

The defendant answered the petition of intervenor. It admitted the allegations and facts therein contained, and reiterated the allegations it had made in its answer to the original petition in the case. It reiterated the prayer in that answer contained.

The district court rendered judgment making peremptory the alternative writ which had issued in the case, and rendered judgment in favor of the state of Louisiana and against the intervenor, the Interstate Trust & Banking Company, and the defendant, the Board of Levee Commissioners of the Orleans Levee District, commanding said Board of Levee Commissioners of the Orleans Levee District to immediately transfer and pay in to the state treasury the proceeds of the sale of the bonds issued and sold by said board under the terms of Act No. 25 of 1908, as well as all other moneys belonging to said board and for costs.

In the brief filed on behalf of the state, the Attorney General says:

"The only question submitted to this court is whether the proceeds arising from the sales of certain bonds issued by the defendant under Act No. 25 of 1908 should be deposited in the state treasury, or whether the same may be deposited with the Interstate Trust & Banking Company, a bank selected by the defendant for the deposit of those funds under the authority which it claims to have by virtue of the provision of Act No. 23 of the Extra Session of

the General Assembly of the state approved December 3, 1907."

The position of the state is that the levee district is a mere agency or instrumentality of the state, the Board of Commissioners thereof mere agents of the state, and all money collected by that board from whatever source under legislative authority is money of the state which should be deposited with the State Treasurer unless otherwise specially provided. *Fisher v. Steele, Auditor, & Burke, Treasurer*, 39 La. Ann. 447, 1 South. 882.

The defendant board was organized under Act No. 93 of 1890. No revenue was contemplated for said board except the proceeds of a one-mill tax which the law authorized and provided should be collected by the state tax collector and by that officer transmitted to the State Treasurer. The funds which pass from the state tax collectors into the state treasury are not involved in this litigation. It is conceded that these taxes are properly on deposit with the state fiscal agency. The state tax collector was directed to settle with the State Auditor and State Treasurer as a separate fund account to the credit of the Board of Commissioners of the Orleans Levee District.

There was no authority to be found in any act of the Legislature for the issuing of bonds by that district, until, by section 1 of Act No. 116 of 1898, it was authorized to issue bonds to the amount of \$5,000 payable in 15 years from the date of their issuance and bearing interest at a rate not exceeding 5 per cent. per annum from date to be represented by coupons attached to said bonds payable semiannually at the office of the State Treasurer.

The next act of the General Assembly which authorized the issuing of bonds by the board was Act No. 25 of 1908, which authorized the issuance of bonds to the amount of \$3,000,000, the interest thereon payable semiannually at the office of the State Treasurer.

The Extra Session of the General Assembly held in the year 1907 enacted Act No. 23, entitled:

"An act providing for the deposit of the public funds the interest to be paid thereon the security to be given therefor the realization upon such security in case of the failure of a depository and providing penalties for the violation of the act."

By its first section it was provided in the act:

"That all funds of the state of Louisiana and of all parishes and municipalities thereof and of all public boards, commissions and bodies created by or under the authority of the state or any parish or municipality thereof shall be deposited in the fiscal agency or agencies hereafter mentioned which deposits shall be made in the name of the state or of the parish, municipality, board, commissioners or body having by law the custody of the same."

By the second section it was provided that the fiscal agency or agencies with whom such funds shall be deposited shall be a bank or banks chartered under the laws of the state of Louisiana, or of the United States, and domiciled in the state offering the highest rate of interest consistent with the safety of such funds upon the daily balances of the deposits so to be made, and giving satisfactory security hereinafter mentioned. Such fiscal agency or agencies shall be selected as follows:

(1) As to funds belonging to or received on behalf of the state, whether by the State Treasurer or any sheriff or tax collector, the board of liquidation of the state debt shall biennially for 30 days, beginning on the first Monday of March, 1908, advertise in the official journal published in the cities of New Orleans, Baton Rouge, Shreveport, Alexandria, Monroe, Lake Charles, and New Iberia as to funds received by and in the hands of sheriffs and tax collectors. Said board shall advertise for a like period in the same manner in one newspaper published in the parish where such collective officer exercises his office, giving notice of the time and place of the letting out of the state's deposits, the amount of security required, and inviting banks to bid for the custody thereof; provided that as to the funds in the hands of the State Treasurer said advertisements shall be first made 30 days prior to the expiration of the present contract with the fiscal agencies of the state, and the first letting shall be for a period expiring April, 1910.

Should there be but one bank in any parish authorized hereunder to bid for the funds received or in the hands of any sheriff or tax collector, said board is authorized to invite bids also from banks in contiguous parishes when in their judgment deemed proper; otherwise bidders shall be limited to banks domiciled in said parish. As soon as possible after the expiration of the terms of advertisement herein fixed shall have expired, said board shall meet at the capitol and publicly open bids and make awards of said deposits as herein required.

(2) As to funds belonging to or received in behalf of any parish or municipality of this state, the police jury or the municipal council shall at the same time, in the same manner, and under the same regulations and penalties as are provided for the control of the board of liquidation of the state debt in reference to funds received by and in the hands of sheriffs or tax collectors, advertise and let such funds; provided that said advertisement shall be for a period of 15 days.

(3) As to funds belonging to or received by any public board, commission, or body created by any special or general act of the General Assembly of the state, not held in the custody or possession of the State Treasurer, such board, commission, or body shall advertise and let the deposit to the bank or

banks domiciled within the territorial jurisdiction of such board, commission, or body, or, in case such jurisdiction does not extend over an even parish, then to any bank in the parish in the same manner, at the same time, and under the same regulations and penalties as are prescribed herein for funds of parishes and municipalities.

By section 8 it is provided that in case it should become necessary for the state to obtain advantages of money, or for any of the other authorities to borrow money in cases permitted by law, the bank or banks awarded the contract as fiscal agent or agents shall advance the same at a rate of interest no greater than that allowed on the said deposit; provided the amount so advanced shall not exceed the amount on deposit to the credit of the state or such authority.

Section 9: Wherever by any existing law or laws the deposit of the funds of any municipality, board, commission, or body, with any bank or banks paying the highest rate of interest consistent with the safety of such funds, and giving security therefor, is provided for, such law or laws shall remain in full force and effect, and not be repealed or impaired thereby. Nor shall any existing contracts made in pursuance of any such law or laws be affected or impaired hereby. Except as in this section provided all laws or parts of laws in conflict herewith are hereby repealed. Section 10: This act shall take effect on and after the 1st day of March, 1908.

By Act No. 282, p. 414, of 1908, the first section of Act No. 23 of the Extra Session of 1907 was amended and re-enacted so as to read that:

"All funds of the state of Louisiana and of all parishes, municipalities thereof and all public boards, commissions and bodies created by or under the authority of the state or any municipality thereof shall be deposited weekly in the fiscal agency or agencies hereinafter mentioned. Such deposit shall be made in the name of the state or of the parish, municipality, board, commissions or body having by law the custody of the same."

On the trial of the case it was admitted by all parties that all of the allegations of fact made in the petition of the relator in the case, in the petition of intervention of the Interstate Trust & Banking Company, and in the answer filed by the Board of Commissioners of the Orleans Levee District, and the answers to the intervention, are true. It is urged on behalf of the state: That by section 2769 of the Revised Statutes all moneys of the state should be deposited with the State Treasurer, who is bound to receive and safely keep all the moneys of the state not expressly required by law to be received by some other person.

That levee boards have no other treasurer than the State Treasurer, and all of their obligations are paid directly by the state treasury, through the State Treasurer, through

the State Auditor, whose duty it is by section 176 of the Revised Statutes to audit, adjust, and settle all claims against the state payable out of the treasury. That the State Auditor by Act No. 117, p. 180, of 1888, was given additional compensation of \$2,400 for auditing and keeping the accounts of the various levee boards of the state through warrants drawn by him on the State Treasurer.

That the Orleans levee board is not entitled to select a fiscal agent under the provisions of Act No. 23 of the Extra Session of 1907:

(1) Because it has not the custody of their funds.

(2) Because such funds are received on behalf of the state by the State Treasurer.

(3) Because the public boards of the state are only entitled to make deposits with the fiscal agents of their own selection where the funds to be deposited are not held in the custody or possession of the State Treasurer.

The relator relies very much upon the fact that all the levee boards (about 15 in number) have issued bonds, and, with the exception of the Orleans levee board, the proceeds of the same have been paid over to the State Treasurer. The Attorney General says that about one-half of these 15 boards were in the act creating them directed to deposit all of their funds with the State Treasurer, and have done so, while the others, though not directed to deposit their funds with the treasurer, have none the less done so.

He admits that the act does not specially declare that the proceeds arising from the sales of the bonds authorized by the act shall be deposited with the State Treasurer, but contends that when it is thoroughly analyzed, and the duties therein imposed upon the State Treasurer are considered, and due weight given to the fact that by Act No. 93 of 1890 the State Treasurer is made the treasurer of the Orleans levee district for the purposes therein named, no other reasonable conclusion can be reached but that he is by virtue of his office as State Treasurer the treasurer and custodian of all the funds arising from whatever source belonging to the levee district.

The defendant, on the other hand, contends: That the Orleans levee district board has only been authorized by the Legislature twice to issue, first by Act No. 116 of 1893, when a \$500,000 issue was provided for, and, secondly, Act No. 23 of 1908. That so far as the proceeds of the first bond issue were concerned same were collected by the board, used and paid out by it, and no requisition for their custody was ever made by the State Treasurer or other executive officer during the 11 years that the Orleans levee bonds were outstanding.

That the difference in the character of the two funds, the proceeds of the taxes, on the one hand, and the proceeds derived from the sale of bonds, on the other, is marked and

was clearly recognized by the Legislature itself under the very terms of Act No. 23 of 1907. In the former case, a certain fund is derived from taxation, and the proceeds are collected by an independent state official, the state tax collector, who without the intervention of the board transmits the same to the state treasury. In no sense are those funds "belonging to" or "received by" the defendant board within the phraseology of Act No. 23 of 1907, while in the latter case the amount of funds are collected physically by and actually belong to "and are received by" the defendant board within the phraseology of Act No. 23 of 1907.

Nowhere in Act No. 116 of 1893 is any provision found directing either the deposit of the funds derived from the bonds with the State Treasurer, nor any method of withdrawal of the deposit that could be inferred from any other law. The same is also true of the terms of Act No. 25 of 1908, authorizing the recent issue. Act No. 23 of the Extra Session of 1907 was passed in pursuance of one of the special calls for the said Extra Session of 1907. Its purpose, broadly stated, was to provide additional revenue in the shape of interest on public funds appertaining to public agencies having the custody and control of such funds and for the benefit of the people within the territorial jurisdiction of such board and in aid of the objects and purposes with which such board was intrusted. The act was the indirect result of the cases of *Board of Liquidation of the City Debt v. Briede*, 117 La. 183, 41 South. 487, and its sequel *City of New Orleans v. Board of Liquidation* 118 La. 543, 43 South. 157, to which further reference is made below. It is conceded that all public funds that go into the state treasury are let out at interest by the state board of liquidation, but the interest so derived goes to the general credit of the state, and is lost to the public agency transmitting the funds. In the present case the difference in interest lost to the people of the city would be in excess of \$1,100 per month.

We do not attach any particular weight to the fact that prior to the act of 1907 the levee boards made use of the State Auditor and State Treasurer for the purpose of auditing, adjusting, and settling their affairs through those officers, nor to the fact that the funds under the control of the different boards for the purpose of carrying out the objects for which they were created should have been deposited by them in the state treasury.

There was no reason or motive for their acting otherwise. They were relieved of considerable trouble and labor by so doing, and there was nothing to influence them in following a different course. At the time this Act No. 23 of 1907 was enacted, a great change for the better had taken place in business and financial conditions in Louisi-

ana. The position of the banks with reference to the deposit therein made of public funds had completely changed.

The banks were no longer merely willing to accept the position of fiscal agencies. They sought to obtain the privilege of becoming such, and to the end of doing so offered to pay the depositors interest on the funds to be received. The interest to be received became an asset of no inconsiderable business importance to the depositing bodies in aid and for the advancement of the objects and purposes for which they were respectively created. That this last consideration was in the minds of the lawmakers and was the motive to a great degree for the enactment of the statute of 1907 is manifest from the direct reference to the matter of interest in the fourth and fifth sections of the act and the designation of the parties to whom should inure the benefit of that interest. The act evidences a general line of policy forward, touching the deposit of the funds of the state and the different political corporations there-

of. The General Assembly evidently intended that full scope should be given to its provisions, and that it should be the controlling statute on the subject for the future. We find no good ground for supposing that the General Assembly intended that the interest to be paid on the deposit of funds raised for and to be applied for the prosecution of public works in particular districts should be made to inure, not to the benefit, and in aid of, those works, but to the benefit of the state at large through its general fund.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and it is now adjudged and decreed that there be judgment in favor of the defendant, the Board of Levee Commissioners of the Orleans Levee District, and of the intervener, the Interstate Trust & Banking Company, and against the plaintiff and relator, the state of Louisiana, rejecting its demand herein, and dismissing its suit.

(124 La.)

No. 17,489.

**NEW ORLEANS, FT. J. & G. I. R. CO. v.  
NEW ORLEANS SOUTHERN RY. CO.**

(Supreme Court of Louisiana. March 29, 1909.  
On the Merits June 7, 1909. Rehearing Denied Oct. 18, 1909.)

**1. RETURN DAY OF APPEAL.**

The appeal was made returnable within 10 days from the date of the order of appeal as required by Act No. 159, p. 312, approved July 14, 1898.

**2. APPEAL AND ERROR (§ 344\*)—ACTION—APPEAL—TIME FOR TAKING.**

The judgment was signed appointing the receiver. The judgment making such an appointment should be signed, and, in consequence, the time for taking the appeal is not counted from the day that the judge a quo orally announces his appointment in open court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1889-1893, 1896; Dec. Dig. § 344.\*]

**3. OTHER ISSUES.**

There were other grounds urged, not connected with the application for the appointment of a receiver.

As to these, the appellant has in any event the right to be heard.

The demand for the appointment of a receiver does not preclude the applicant for the appointment from urging other grounds.

**4. APPEAL AND ERROR (§ 364\*)—RETURN DAY FOR APPEAL—FIXING BY COURT—MISTAKE.**

In any event, the date of the return day of the appeal was fixed by the judge of the district court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 364.\*]

**5. RAILROADS (§ 131\*) — LEASES — PARALLEL AND COMPETING ROADS.**

The object of the present suit is to have a lease which was entered into between the plaintiff company and the defendant annulled, avoided, and set aside on the ground that it was ultra vires of both companies, and was in contravention of the provisions of Act No. 74, p. 101, of 1902, on the ground that the two railroads "were parallel and competing roads." The district court rejected the demand of the plaintiff, and for reasons assigned that judgment is affirmed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 404; Dec. Dig. § 131.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by the New Orleans, Ft. Jackson & Grand Isle Railroad Company against the New Orleans Southern Railway Company. Judgment for defendant, and plaintiff appeals, and defendant moves to dismiss the appeal. Motion overruled. Judgment affirmed.

Farrar, Jonas, Kruttschnitt & Goldberg, for appellant. E. Howard McCaleb (John Thos. Smith, of counsel), for appellee. Gustave Lemle, for intervener.

On Motion to Dismiss Appeal.

**BREAUX, C. J.** The grounds are that the appeal having been taken from an order refusing to appoint a receiver and refusing to

grant an injunction, and the appeal not having been perfected in time, it should be dismissed.

Going into details, the contention is that the appeal was not made returnable to this court within 10 days from the date of the order of appeal as required by Act No. 159, p. 312, approved July 14, 1898.

Plaintiff's petition, which we have had to refer to on this motion to dismiss, substantially states that the lease described in the petition is null and void.

In consequence plaintiff asks that it be recognized as entitled to possession of the property and to recover of the defendant all the rents and revenues thereon from the date of the lease, that it be given an accounting, and that it be decreed the owner of the funds arising from the rents and revenues of the property now in the New Orleans National Bank or elsewhere deposited.

Plaintiff further prayed for a writ of injunction restraining defendant from using any of the incomes and profits from daily receipts or any of the funds for any other purpose.

Plaintiff asked for an order directing defendant to show cause why a receiver should not be appointed to take charge of the property and administer it. And in the event the court should hold a writ of sequestration, and not the appointment of a receiver, the remedy, petitioner asked on its giving bond in a sum fixed by the court for a writ of sequestration of all the property.

The petitioner further asked that it be adjudged that the receiver is designated as a judicial sequester appointed by the court.

A writ of injunction was issued, and an order nisi to the defendant to show cause why a receiver should not be appointed.

The defendant appeared and filed an exception and an answer asking that plaintiff's demand be rejected, and also that the writ of injunction be dissolved.

Judgment was rendered in favor of defendant discharging the rule for the appointment of a receiver, dissolving the injunction, and rejecting the demand and dismissing the suit, discontinuing the intervention, and decreeing that the reconventional demand against defendant be dismissed as in case of nonsuit, and reserving defendant's right to sue for damages.

The judgment was rendered in open court on January 19, 1909. It was signed on January 26, 1909.

The motion of appeal was made on January 29th, and the bond was filed on February 5th.

On the 29th day of January plaintiff obtained a suspensive appeal to this court.

The contention is that the suit was instituted and prosecuted under Act No. 159, p. 312, approved July 14, 1898, entitled "An act to authorize and regulate the appointment of

receivers for corporations under Art. 109 and Art. 233 of the Constitution."

The contention on the part of the defendant on this motion to dismiss the appeal is that the purpose was not to obtain the appointment of a receiver to take possession of and manage the property; that it was an appeal to the general equity powers of the court beyond the limits of the statute cited; and that, if the court should conclude that its powers should not extend to the appointment of a receiver, then asking that a writ of sequestration should issue.

We do not conceive that it is necessary to dwell upon this point, for it is next stated that the application to appoint a receiver in this case was abandoned on the trial of the merits because it appeared that in the interval between the application for the appointment of a receiver and the hearing on the merits defendant paid the January interest on plaintiff's claim.

In the brief of defendant in motion, we are informed that counsel stated in open court that, this having been done, the application for the appointment of a receiver was abandoned as the application had accomplished its purpose.

This really leaves no contest in so far as relates to the receivership. It is disposed of entirely. The dispute is limited to the question of the validity of the lease in question, and, if the lease is invalid, whether plaintiff is entitled to the conservative remedy of an injunction to prevent the defendant from spending the revenues of its property except for any other purposes than those pertaining to the management of the property itself and the payment of the bonded debts.

In order to decide the different points presented, we have taken up the question whether the appeal was taken in time under the act of 1898.

We have seen that the judgment was signed on January, the 26th. The motion for an appeal was made three days after, and the bond was filed as before stated within 10 days from the date judgment was signed.

Prior to that time there had been a judgment rendered, but not signed.

A judgment appointing a receiver should be signed, and, if it should not be signed, the motion for the appeal lies only after the judge has affixed his signature.

From that point of view the appeal was in time.

We will state, in addition, that it does not appear that the appeal was made returnable, as it was, at the instance of appellant. It appears of record as the order of the judge fixing the return day without suggestion from the appellant in that regard.

This court has passed recently upon that point, and decided that in matter of date we could not hold that the appellant was responsible if an oversight be committed un-

less it appeared that it was the act of the appellant.

There is nothing of the kind here. The court acted directly in fixing the return day.

We do not think the appeal should be dismissed.

For reasons assigned, the motion to dismiss is overruled.

#### On the Merits.

NICHOLLS, J. The plaintiff corporation appearing through its president, Charles D. Haines, in the petition herein filed, alleged: That, as appears by its charter, the main object and purpose of the corporation was:

"To construct, own, and operate a line of railroad through the parishes of Orleans and Plaquemines in this state; said railroad to begin in or near the city of New Orleans on the right descending bank on the Mississippi river, and to be built down on a line at, near, or contiguous to the Mississippi river, following such cutoffs as may be deemed necessary as far as the 'Jump' on said river or beyond it as may hereafter be determined."

That petitioner had constructed and had been operating for many years said road from the city of New Orleans, at a point in Algiers, through the parishes of Orleans, Jefferson, and Plaquemines as far down as Buras, in the parish of Plaquemines, a distance of about 60 miles, and had supplied said railroad with locomotives, cars, stations, and all the paraphernalia of a railroad carrying passengers and freight. That the New Orleans Southern Railway Company was a corporation organized under the laws of the state of Louisiana, domiciled in the city of New Orleans, as appeared by a copy of its charter annexed and made part of its petition.

That, as appeared by its said charter, the main object and purpose of said corporation was:

"To locate, construct, maintain, and operate a standard gauge railroad, with the necessary side tracks, switches, turn-outs, turntables, poles, and wires, and to erect, maintain, and operate the same and to use all and any appliances and contrivances necessary and suitable to operate the same; the route to start from a suitable point on the south side of the Mississippi river, in the parish of Jefferson, opposite the city of New Orleans, thence through the parish of Jefferson and the parish of Plaquemines to a point at or near Southwest, Grand South or South East Pass, with a branch from such line to Grand Isle," etc.

That, as appeared by a mere comparison of the routes of the main lines of the two railroads provided for by the charters of the two companies, the railroads of the two companies were parallel and competing lines of railroad. That it further appeared by the charters of the said two railroad companies that no power was therein contained either to lease their own respective lines or to lease the lines of other railroads, and



that, even if such power had been inserted in such charters, such provisions would have been contrary to the statutes of the state of Louisiana and void. That the only provisions in the laws of this state which permit the lease of one railroad by another were found in Act No. 74, p. 101, of 1902, which provided:

"That any railroad company in this state existing under the general or special laws of this or any other state or territory or of the United States may sell or lease its railroad property and franchises to any other railroad company duly organized and existing under the laws of this or any other state or territory, whenever the line or lines of said contracting companies shall or may form in the operation thereof by bridge, ferry, or otherwise, connecting or continuous line or lines of railroad, provided that the said railroads of the said companies thus contracting shall not be parallel and competing lines."

That the railroad of petitioner and the railroad contemplated by the charter of the New Orleans Southern Railway Company, which it was obligated under its charter "to locate, construct, maintain and operate," did not and could not form in the operation thereof by bridge, ferry, or otherwise connecting or continuous lines of railroad. On the contrary, the said lines of railroad were distinctly parallel and competing lines of road. That on the 24th day of March, 1908, by act before Charles T. Sonlat, notary public, a duly certified copy of which act was annexed and made part of its petition, a lease of all the railroad property and franchises of every kind and nature of petitioner was made for 75 years to the said New Orleans Southern Railway Company. That the said lease was absolutely null and void and of no effect or validity for the reasons above set forth, and was against the law and public policy of the state of Louisiana, and that petitioner had no power to make such lease to the defendant, and the defendant had no power to lease the railroad and franchises of petitioner. That on the said 24th day of March, 1908, the said New Orleans Southern Railway Company took possession of all the railroad property of petitioner, including its roadbed, locomotives, cars, stations, water tanks, side tracks, platforms, and all of its said tools, apparatus, and appurtenances, and all of its open accounts, books, and papers, and since that time had held possession of said property and had received and collected all of the tolls, income, and profits of said railroad and held possession of the same and refused to deliver the same to petitioner, although it well knew that the lease aforesaid was null and void.

That the said New Orleans Southern Railway Company had never had in its treasury a single dollar except the money derived from the income of petitioner's property. That of the \$10,000 of stock subscribed for in its charter to make it a going concern

not a cent had ever been called or paid in, and no subscriptions to its capital stock other than that set forth in its charter had ever been made. That said defendant company in the conduct of its affairs and business and in the operation of petitioner's railroad had used only the rents and revenues of petitioner's railroad aforesaid, and that said rents and revenues were and had been deposited to its credit in the New Orleans National Bank, a corporation of the United States, domiciled in the city of New Orleans.

That it had a bonded debt of \$410,000 of first mortgage bonds, bearing 5 per cent. per annum interest, on which semiannual interest of 2½ per cent. will be due and payable on January 1, 1909, and of \$102,500 second mortgage bonds, bearing 5 per cent. per annum interest, on which 2½ per cent. will be due and payable on January 1, 1909. That the payment of said bonded debt and of the interest thereon was assumed by the defendant company in the lease aforesaid. That said company had no means and no funds to pay said interest when it shall fall due, except the rents and revenues derived and to be derived from petitioner's property.

Petitioner charges: That it is the object, purpose, and scheme of said defendant company and its officers and particularly of its president, Arthur Kennedy, who completely controls, dominates, and manages the affairs of said company, to permit a default of said mortgages, and not to apply to the payment of the approaching January interest the income and revenue of petitioner's railroad, but to divert the earnings of said railroad, past and future, to his own purposes and to the purposes of the defendant company. That a default on the interest on said mortgages would cause petitioner an irreparable injury, because by the terms of said mortgages all the principal thereof would immediately become due and the whole of said debt would be precipitated on petitioner at once, without means to pay it, which would result in the foreclosure of said mortgages and the divestiture of petitioner's title to said property. That petitioner being out of the possession of its property and its revenues, and having no other means on which to raise money to pay said interest, was helpless to prevent this calamity, except through the intervention of the court.

That during the pendency of this suit the said defendant will, unless restrained by the injunction of this court, withdraw the funds arising from the income of petitioner's property from the New Orleans National Bank where they were then deposited, and will apply them to its own purposes, so that said funds will be irrevocably lost to petitioner, and that it will receive and dissipate for its own purposes the current daily receipts from the operation of petitioner's property, and that, as it was necessary to keep said railroad a going concern in the interest of the

public, petitioner had no objection to the application of such funds and such daily receipts from petitioner's property to the daily operating expenses of such railroad, meaning thereby the wages of employes, and the purchase of fuel and current necessary supplies, but not to salaries of the officers of said company, or to bills heretofore incurred by said defendant railroad company, nor has petitioner any objections to the use of said funds to pay the January, 1909, interest on its bonds.

That a writ of sequestration of the property of petitioner in the unlawful possession and control of the defendant would not give petitioner proper or adequate relief, for the reasons that said property was located in the parishes of Orleans, Jefferson, and Plaquemines, and this would require the issuance of writs to the sheriffs of the three parishes to seize said property as it was in their respective parishes. That it would be impossible to operate the said road as a going concern in the interest and for the convenience of the public under the administration of the sheriffs of three parishes, and that the only and proper remedy for the situation was the appointment of a receiver by this honorable court to take possession of, hold, administer, and operate said railroad of petitioner during the pendency of this suit.

The premises conceded, petitioner prayed: That the New Orleans, Southern Railway Company, through its proper officer, be cited, and that, after due proceedings had, there be judgment in petitioner's favor declaring the lease of petitioner's railroad and its franchises and property made before Chas. T. Soniat, notary public, on March 24, 1908, to be absolutely null and void ab initio, and declaring petitioner entitled to have possession of said property, and to be entitled to have and recover of the defendant all the rents and revenues of said property from the date of said lease, March 24, 1908, according to an accounting to be had on the trial of this cause, and to be the owner of all funds arising from the rents and revenues of said property now in the New Orleans National Bank or elsewhere deposited.

That on its giving bond in a sum to be fixed by the court a writ of injunction issue herein prohibiting, enjoining, and restraining the defendant, its officers, agents, and employes from using any of the income and profits or daily receipts arising from the operation of the railroad property of the New Orleans, Ft. Jackson & Grand Isle Railroad Company, or any of the funds now deposited in the New Orleans National Bank arising from the income of said railroad or any of the funds that may hereafter be deposited in said bank, arising from said income for any other purpose, during the pendency of this cause, except for the payment of the January interest upon the bonds of the plaintiff, and the payment of the daily current expenses of the

operation of said railroad, meaning thereby the current wages of employes and for the purchase of fuel for current use and necessary current supplies, and that on final hearing this injunction should be made perpetual.

That an order may be herein issued directing the defendant, the New Orleans Southern Railway Company, to show cause why a receiver should not be appointed in this cause to take possession of and hold the railroad of the plaintiff and all its appurtenances and all the income and profits thereof past and future, and to manage and operate the same during the pendency of this suit, and, on said hearing, that such receiver be appointed and given such power and authority as are usually given to receivers of railroads and as are appropriate in this case.

In the event that the court should hold that writs of sequestration and not the appointment of a receiver was the proper remedy, petitioner prayed that on its giving bond in a sum to be fixed by the court the court would order a judicial sequestration of said railroad and its appurtenances, and, accordingly, that a writ of sequestration be issued to the sheriff of the parishes of Orleans, Jefferson, and Plaquemines, directing them and each of them to sequester and hold in their possession until the further order of the court, all the property in their respective parishes appertaining to the railroad of the New Orleans, Ft. Jackson & Grand Isle Railroad Company, and all the money and income thereof, and particularly the funds deposited in the New Orleans National Bank, to the credit of the New Orleans Southern Railway Company, and any other funds of said defendant arising from the income and profits of the railroad of petitioner.

Petitioner prayed that it be adjudged and decreed that the said receiver was a judicial sequestrator appointed by this court, and that all the costs and expenses of said receivership, as well as all the costs of this cause, might be adjudged against the defendant.

The court ordered an injunction to issue, and that defendant show cause as prayed for.

On December 18, 1909, the defendant company excepted:

First. That said petition discloses no right or cause of action against this appearer.

Second. That there is a nonjoinder of parties herein. The bondholders of the New Orleans, Ft. Jackson & Grand Isle Railroad Company, being parties to the lease, are necessary parties to this suit.

Third. That plaintiff, averring that it entered into an illegal contract with defendant, cannot be aided by the court to enforce it, or set it aside, it appearing from the petition that both parties are in equal fault.

Fourth. That plaintiff, by its own showing having contracted with defendant as a corporation, is estopped from denying its cor-

porate existence and power to contract as such.

Fifth. That defendant specially pleads that plaintiff has failed and neglected to offer, restore, and deliver up the bonds deposited at its request to guarantee the performance of all the obligations contained in said lease herein complained of.

Sixth. That proper authority was not given by a quorum of the board of directors to file this suit.

Wherefore defendant prayed that these exceptions be sustained, that the writ of injunction herein issued be dissolved, and plaintiff's suit dismissed, at his costs.

In the event the said exceptions be overruled, and not otherwise, then for answer to plaintiff's petition defendant denies each and every allegation in said petition contained.

Defendant specially denies: That the contract of lease entered into by plaintiff with defendant was in violation of law, ultra vires, or illegal in any respect whatever. That the plaintiff, the New Orleans, Ft. Jackson & Grand Isle Railroad, was by its charter (article 1) specially authorized "to purchase, hold, own, lease, sell and mortgage or pledge, real estate or personal property." By article 9 "this corporation shall have power to consolidate with any other company organized under the laws of this state," etc.

That by article 1 of the charter of the New Orleans Southern Railroad Company the said company was authorized "to hold, lease, purchase, receive, mortgage, pledge and convey property, real, personal, and mixed, of any kind."

That by section 3 of Act No. 74, approved July 2, 1902, it is provided:

"That any railway company existing under the laws of this state \* \* \* may acquire by lease from any other railway corporation, existing and organized under the laws of this state, \* \* \* the whole or any part of which is in the state, with all the property, privileges, appurtenances, rights and franchises, stocks and bonds of said railway company or companies, \* \* \* whenever the railroad lines of said contracting companies, shall or may fork in the operation thereof connecting the continuous line or lines \* \* \* provided that the lines of said companies thus contracting shall not be parallel and competing."

That at the time of the execution of said lease of the railroad then and previously owned and operated by the plaintiff company the defendant was not then or before a parallel or competing line of road. That, inasmuch as the New Orleans Southern Railway Company does not own any line of road nor operate any competing line, the said defendant did not come within the proviso of section 3 of said act No. 74, approved July 2, 1902.

That the said New Orleans Southern Railway Company authorized by its charter to build a certain line of road had the right and power to lease or purchase another rail-

road already built on that line, instead of constructing the same itself, and there was no prohibition contained in the Constitution or laws of this state preventing it from so doing.

That the object of the prohibition contained in said proviso was clearly to prevent one independent corporation from acquiring the possession of a road of another company which was operating a competing line. It was to prevent the buying up by one railroad corporation of a competing line and the establishment thereby of a monopoly, but it did not apply or embrace a corporation authorized to build and construct a line of railroad, which had not at the time of the lease done so, or prevent it from buying another railroad already built on or over the contemplated route.

That said lease was made and entered into with the consent of the stockholders of plaintiff company, and also of defendant, after complying with all the requirements of their respective charters. That Arthur Kennedy, president of defendant company, on the demand of plaintiff, through its board of directors, deposited first mortgage bonds of Chicago, Northern Indiana & South Bend Railway Company with plaintiff to insure and guarantee the performance of all the obligations contained in said lease for the space and term of two years.

That said plaintiff could not retain such guaranty without first tendering back the 35 first mortgage bonds of — put up and deposited to guarantee the performance of all obligations contained in said lease.

That defendant had expended large amounts in operating said railroad so leased by it, as aforesaid, in the purchase of rails, cross-ties, new engines, and other equipments; a portion of the purchase price thereof being still due and payable. That defendant had improved the services and facilities for transportation, both of freight and passengers, over said road. And this defendant specially denied that its president, officers, and others desired or intended to permit a default on the mortgage bonds, and not to apply to the payment of the approaching January interest the income and revenue of its property, but, on the contrary, the president of plaintiff's company, in direct violation of the desires and wishes of its minority stockholders, without their consent, had attempted to destroy the credit, wreck and ruin the plaintiff company, and to cause a foreclosure of the first and second mortgages, amounting to \$512,500 without any necessity or reason therefor.

That the refunding of the past-due coupons in the bonds and the postponement of the payment thereof was a part of the agreement contained in the lease by the plaintiff to this defendant of its franchises, property, etc., and the bondholders assented thereto because of the stipulations contained in said lease; and, if the said lease was wrongfully canceled and

annulled at the instance of the plaintiff's president, that the original coupons which were funded into said bonds amounting to \$102,000 would be reinstated as an immediate obligation of said plaintiff company, and the bondholders authorized to foreclose at once on the whole of said indebtedness under the terms and conditions of said mortgages and the stipulations in said contract of lease.

That said lease could not be valid and binding in part and invalid and illegal in part. That if the obligations of said plaintiff company were ultra vires, illegal, or void, which was specially denied and said averment repudiated by defendant, then the agreement to merge said past-due coupons into bonds and to postpone the payment thereof would thus render the whole of said lease nugatory, which would entail great injury and damage upon the stockholders of said plaintiff company. That, besides the maturing interest on said bonds, the plaintiff owed a large amount of taxes, \$7,000, the payment of which must be provided for over and above all other obligations without delay.

That the writ of injunction herein issued was illegal and wrongful, and should be dissolved with 20 per cent. attorney's fees and say the sum of \$2,500 as damages. In view of the premises, defendant prayed that plaintiff's demand be rejected and dismissed, with costs, that the writ of injunction herein issued be dissolved, and the plaintiff and surety on his injunction bond be condemned in solido to pay this defendant all costs, and for general and equitable relief.

On December 18, 1908, Frank T. Howard filed with leave of court a petition of intervention in the case, in which he alleged: That he was the owner of \$500,000 of the \$512,500 outstanding mortgage bonds referred to in plaintiff's petition as the bonded debt of plaintiff, and that he is the owner of 1,325 shares of the par value of \$50 each of the capital stock of the plaintiff company, the total outstanding stock being 4,873.

That the plaintiff company was organized on the 15th day of December, 1888, by act passed before Henry Edward Gilmore, a notary public, in and for the parish of Plaquemines, state of Louisiana, and that the said company never at any time paid any dividends on the stock, the income from its property not being sufficient to pay the operating expenses, keeping the property in repair, and paying the interest on the mortgage debt, and as matter of fact on March 24, 1908, the date of the lease of property to the New Orleans Southern Railway Company, there were \$102,500 coupons annexed to mortgage bonds due and unpaid, \$100,000 of which were held by petitioner. That on November 26, 1907, Charles D. Haines purchased 2,660 shares of the New Orleans, Ft. Jackson & Grand Isle Railroad Company for the price and sum of \$8,000, paying \$2,000 cash, and the balance on December 11, 1907; the said \$6,000 bal-

ance being raised as petitioner has been informed by a loan from a bank in the city of New Orleans on the pledge of the stock purchased.

That on March 24, 1908, the plaintiff company by act passed before Charles T. Soniat, notary public in and for the parish of Orleans, leased to the defendant company for a term of 75 years from March 24, 1908, all of its property. Among other things which the lessee, the defendant herein obligated itself to do as a consideration for said lease were the following, viz.:

First. To pay the debts due by the lessor, plaintiff herein, and particularly the mortgage indebtedness amounting at the time to \$410,000 and \$102,500, past-due coupons. Second. To pay the principal and interest on the bonds at their respective maturities, and also to pay the following dividends on the stock, viz.: First year 3 per cent.; second year 4 per cent.; third year 5 per cent.; and fourth year 6 per cent.; and a like per cent. each succeeding year for the entire term of the lease. The payments of dividends on the stock were to be made semi-annually, the first payment 1½ per cent. on January 1, 1909, and Arthur Kennedy deposited \$35,000 bonds of the Chicago, South Bend & Northern Indiana Railroad Company first mortgage bonds as a guarantee that the lessee, defendant therein, would carry out the terms and conditions of the lease. In consideration of the benefits to accrue to petitioner from said lease as a stockholder and holder of the mortgage bonds and past-due coupons, as aforesaid, petitioner agreed to surrender the past-due coupons held by it, and take in payment mortgage bonds maturing in 1921, and petitioner now avers, if the lease between plaintiff and defendant is null and void, then there should be judgment in his favor restoring the situation as it existed before the said lease was entered into by declaring the \$102,500 past-due coupons which were canceled by the execution and delivery of the \$102,500 bonds secured by act of mortgage passed before Charles T. Soniat, notary public, on May 1, 1908, to be in full force and effect and on the mortgage securing the payment being reinstated on the public records, the bonds executed on May 1, 1908, as well as the mortgage given to secure the payment thereof given be decreed to be null and void.

That the lease entered into by and between the plaintiff and defendant was advantageous to the stockholders of the plaintiff company as it insured to them a payment of dividends on their stock which they had not received in the past, and, if the lease was declared to be null and void, then the \$35,000 first-mortgage bonds pledged as a guarantee of the lease would necessarily have to be returned to Arthur Kennedy to the great detriment of petitioner, a stockholder and bondholder as aforesaid.

That the said lease was not null and void, for the reason that the defendant at the

time it leased had no road constructed, and therefore, in leasing the plaintiff's property, it did not lease a competing road, and under the law of the state of Louisiana, as well as the charters of both plaintiff and defendant, the said lease was valid and binding, and the court should so hold.

That if the lease be null and void, which was denied, there was no necessity for the appointment of a receiver herein, as all parties were amply protected by the injunction which prohibited and enjoined plaintiff, its officers, agents, and employes from using any of its income and profits arising from the operation of the railroad property of plaintiff or any of the funds now deposited in the New Orleans National Bank arising from the income of said railroad company, or any of the funds that may hereafter be deposited in said bank arising from said income for any other purpose during the pendency of this suit except for the payment of the January interest on the bonds of plaintiff, and the payment of the daily current expenses of the operation of said railroad property meaning thereby the current wages of employes, and for the purchase of fuel for current use, and necessary current supplies. Said injunction, however, should be modified so as to permit the payment of the taxes and the payment of \$200 per month to F. Muller, bookkeeper, and \$250 per month to J. S. Landry, superintendent.

That the appointment of a receiver herein would very seriously impair the value of the mortgage bonds held by petitioner, as the income from the road was barely sufficient to pay and maintain the property and pay the interest on the mortgage debt, and to burden the property with the costs of a receivership would be to very greatly impair the value of his security without there being any necessity therefor. The road was being operated in an economical manner, and the court should not subject the property to the enormous costs of a receivership to gratify the desire of those who had very little if any, financial interest in the property; the property not being worth to-day more than the mortgage indebtedness.

In view of the premises, he prayed: That upon the trial there be judgment maintaining the validity of the lease entered into by and between plaintiff and defendant on March 24, 1907, as per act passed before Charles T. Soniat, notary public, and maintaining the injunction sued out after it had been notified so as to permit the payment of taxes, and the salaries of F. Muller, bookkeeper, and J. S. Landry, superintendent, out of the revenues of the property. In the event, however, it should be held that the lease was null and void, then that there be judgment decreeing that the \$102,500 past-due coupons and the mortgage given to secure the payment thereof canceled by delivery of \$102,500 bonds secured by act of

mortgage passed before Charles T. Soniat, notary public, May 1, 1908, be decreed to be in full force and effect, and that, upon the mortgage given to secure the past-due coupons being reinstated on the public record, the \$102,500 mortgage bonds, secured by act passed before Charles T. Soniat, notary public, May 1, 1908, given in payment for said past-due coupons, be decreed to be null and void. That the application of the plaintiff for the appointment of a receiver herein be decreed denied and for costs and for general relief. The plaintiff answered the intervention of Frank T. Howard pleading a general denial. In particular it denied that the intervenor as holder of only a part of the bonds aforesaid had the right to upset and destroy the mortgage of the plaintiff. It specially denied that the funding of the bonds of the plaintiff was any condition or part of the lease in this case. It prayed that the intervention be dismissed.

The defendant answered the same intervention. It pleaded a general denial, and prayed that the intervention be dismissed.

On January 18, 1909, on motion of counsel for intervenor the intervention was discontinued.

On January 26, 1909, the district court rendered judgment in favor of the defendant and against plaintiff discharging the rule for a receiver and dissolving the injunction which had issued. On the main demand it rejected plaintiff's demand, and dismissed its suit, and on motion of intervenor's counsel discontinued the intervention. It dismissed defendant's reconventional demand as of non-suit reserving defendant's right to sue for damages. Plaintiff has appealed.

We understand that the only question presently urged by the appellant and submitted for decision to this court is whether the lease entered into between the two corporations was invalid or not under the provisions of Act No. 74, of 1902, and incidently whether the plaintiff occupies such a position as entitled it to have recourse to an action for its annulment. The charge made against the defendant company or its president of a purpose to permit or bring about a default in the interest coupons due January 1, 1909, has been shown to have had no basis to rest upon. It has been shown that the appointment of a receiver would result in good to no one, but, on the contrary, in injury to all concerned. We do not think that the provisions of Act No. 74 find application under the circumstances of this case. Under the evidence the railroads of the two companies are not "parallel and competing lines." It appears very clearly, we think, that under no circumstances could or would two roads have been constructed or operated simultaneously. The business of the territory along the west side of the Mississippi river below New Orleans is utterly insufficient to support two roads. The operations

of plaintiff company acting singly and alone have been carried on ever since its organization with great difficulty. So much so that no second company would attempt for a moment to enter the field as a rival and as a competing road. The lease in question was not expected or intended to restrict railroad business to one line in a case where but for the lease two railroads would have gone in to active operation. No one reading the transcript in this case could possibly reach the conclusion that the annulment of the lease would carry with it as a result the construction by defendant of a "parallel and competing line of railroad" on the west side of the Mississippi river.

Should the lease be annulled, there would remain the line of the plaintiff company. There would be no other. The mischief to the public sought to be avoided by the act of 1902 does not arise in this case. Should a condition of things arise in the future affecting the public good it can be effectually met at that time by the action of the state. We are anything but favorably impressed by the course of the president of the plaintiff corporation in this matter. This suit is manifestly brought in furtherance of his individual benefit, although the public good is brought to the front in aid of the same. There are equitable considerations arising out of the present situation which we are not disposed to deal with as matters stand. Important rights of third parties not before the court are involved which have to be adjusted. We do not feel called on to take action in this matter under present conditions, even should plaintiff's position that its right of action is not barred by the course which it has taken be conceded, as to which we need express no opinion. We think that justice, good faith, and equity require that the parties should be left where they have placed themselves.

The judgment appealed from is correct, and it is hereby affirmed.

95 Miss 832

McKINNEY et al. v. ADAMS. (No. 13,861.) (Supreme Court of Mississippi. Oct. 18, 1909.)

1. JUDGMENT (§ 518\*)—"COLLATERAL ATTACK" DEFINED.

By "collateral attack" is meant any proceeding in which the integrity of a judgment is challenged, except in the action wherein the judgment is rendered, or by appeal, and except a suit to declare the judgment void ab initio (citing 2 Words and Phrases, pp. 1249, 1250).

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 962; Dec. Dig. § 518.\*]

2. JUDGMENT (§ 518\*)—COLLATERAL ATTACK—WHAT CONSTITUTES.

A bill by an attachment creditor to annul a judgment in a senior attachment by default, on the ground that the affidavit showing defendant's post office address or that plaintiff after diligent inquiry was unable to ascertain it, required by Ann. Code 1892, § 143, as the basis

of a judgment on service by publication, had not been made, is not a collateral, but a direct, attack, in which a recital in the judgment that defendant had been legally summoned by publication may be contradicted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 961; Dec. Dig. § 518.\*]

3. JUDGMENT (§ 452\*)—CONCLUSIVENESS—PERSONS ENTITLED TO ATTACK.

A purchaser at a sale under the judgment in an attachment suit acquires the title of the defendant in attachment, and has the same right to file a bill to annul a judgment in a senior attachment, on the ground that the affidavit showing defendant's address or that plaintiff after diligent inquiry was unable to ascertain it, required by Ann. Code 1892, § 143, as the basis of a judgment on service by publication, had not been made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 857; Dec. Dig. § 452.\*]

4. PLEADING (§ 312\*)—EXHIBITS—CONTROLLING FORCE.

The rule of pleading, under Ann. Code 1892, § 528, that, where there is a conflict between an allegation in the bill and a recital in an exhibit, the latter controls on demurrer, can be invoked only where the exhibit is made the basis of the relief sought.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 943; Dec. Dig. § 312.\*]

Appeal from Chancery Court, Sharkey County; J. S. Hicks, Chancellor.

Action by W. C. H. McKinney and others against A. J. Adams. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Catchings & Catchings, for appellants. McLaurin & Clements and Green & Green, for appellee.

WHITFIELD, C. J. The facts in this case are about as follows: On June 26, 1905, the appellants filed a bill of complaint in the chancery court of Sharkey county, Miss., against A. J. Adams, a citizen and resident of that county. The bill alleged: That on August 12, 1901, the appellant McKinney sued out an attachment writ in a justice court against J. A. Pfeifer as a nonresident, and that the writ was levied on all that part of the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 7, township 13, range 5, lying west of Conner Bayou, containing 30 acres, more or less, and on all that part of the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 18, same township and range, lying west of said bayou, containing 16 acres, more or less. That the attachment was regularly prosecuted to judgment, the proceedings all being regular, and that under a judgment by default rendered September 26, 1901, these lands were sold; the appellant McKinney becoming purchaser. That at McKinney's request the sheriff executed a deed to him and to A. L. Brown, conveying the lands to them as tenants in common. That the deed of conveyance to them was not recorded, but was accidentally destroyed by fire January 20, 1904. That the defendant, Adams, had knowledge of the sale, and that

his attorneys were present when it was made. That on June 28, 1904, they filed a petition in the said chancery court, praying for the restoration of the destroyed deed, and that on July 27, 1904, a decree was rendered accordingly. That Mrs. S. A. Adams, who was the wife of the appellee, A. J. Adams, on January 3, 1898, sued out an attachment against the said Pfeifer as a non-resident of the state of Mississippi, which was on the same day levied on said lands. That on July 26, 1898, Mrs. Adams obtained an order from the circuit court of Sharkey county for publication against Pfeifer as a nonresident. That no further step, was taken until 1902, when in May and June of that year publication was made returnable to the July term, 1902, of the circuit court. That from said last-mentioned date no further action was taken until March term, 1905, when judgment by default was entered for the sum claimed in the suit in favor of appellee, A. J. Adams, who prosecuted the suit as the administrator of S. A. Adams, his deceased wife, who had died in April, 1904; the said A. J. Adams having procured letters of administration upon her estate May 13, 1904. That under a writ of venditioni exponas the said lands were offered for sale at public outcry to satisfy said judgment, and that complainants were present and gave public notice to the sheriff and all others present that they were the owners of said lands under their purchase, and that the judgment under which the sheriff was offering the lands for sale was invalid and ineffective to pass title. That notwithstanding this the sheriff made sale of the lands and struck them off to appellee, A. J. Adams, for \$50, and made him a deed therefor. That the lands were sold March 4, 1901, for the taxes of 1900, and purchased by J. W. Lyles, and that complainants, after having purchased the lands under the judgment in favor of the appellee McKinney, redeemed the lands from this sale February 7, 1902, paying out for that purpose \$13.90, and that from that time to the filing of the bill complainants had regularly paid all annual taxes accruing thereon. That the said lands had greatly increased in value since they were purchased by complainants in December, 1901. That the facts stated show that the attachment suit instituted by Mrs. S. A. Adams had been abandoned long prior to her death in April, 1904. That the attempt of the appellee, A. J. Adams, to revive and prosecute the same to judgment was contrary to equity. That, even if there was no intentional deliberate abandonment by Mrs. Adams of her suit, her laches should prevent her or her heirs from acquiring any right to the detriment of complainants. Complainants made as an exhibit to their bill the entire record of the attachment suit of S. A. Adams, and of its revival, and all proceedings thereunder. That the judgment in the Adams suit was utterly

void, and that the sale thereunder passed no title to the appellee, Adams, for the reason that there was no affidavit made by plaintiff in said attachment suit, or by her agent or attorney, as required by section 143 of the Annotated Code of 1892, showing the post office of said Pfeifer, or that diligent inquiry had been made to ascertain it without success. That, aside from the question of laches, this failure to follow the statute rendered the whole judgment nugatory and void, and that the deed by the sheriff to appellee, Adams, should be canceled, and that the appellee should be enjoined from claiming the lands.

On July 24, 1905, A. J. Adams filed a demurrer, which was sustained. An amended bill was duly filed, which set out the matters in the original bill and alleged several matters in addition, not necessary to be stated in our view of the case. The amended bill averred, amongst other things, that Pfeifer, the defendant in the attachment, had no actual or constructive notice of the attachment suit of Adams, for the reason that the plaintiff, Adams, did not make and file the affidavit required by section 143, Ann. Code 1892, showing defendant's post office address, or that the plaintiff, after diligent inquiry, was unable to ascertain it; that the said Pfeifer was not represented by an attorney, or any one else; and that the court was without jurisdiction to render a judgment against him, which judgment was by default. A demurrer was filed to this amended bill, and it was sustained, and the complainant allowed to amend again by making A. J. Adams and his four children parties defendant; Mrs. S. A. Adams having died in 1904. A demurrer was again filed, and again sustained, and the bill dismissed. In the judgment in attachment in favor of Adams against Pfeifer, it was recited that "the defendant had been duly and legally summoned in this case by legal publication." The prayer of this bill was that this judgment should be declared nugatory and wholly void, on the ground that the plaintiff in the Adams attachment had not made the affidavit which was the basis of a judgment by default on publication, as required by section 143, Ann. Code 1892, and for the cancellation, consequently, of the deed made by the sheriff to the defendant, and that the defendant should be forever enjoined from claiming the lands under said judgment and deed. It will thus be seen that the chief relief prayed for in this bill was the annulment of the judgment by default in favor of Adams in the attachment suit on the grounds stated, from which, of course, the rest of the relief prayed for would follow. This bill was filed, not by Pfeifer, the defendant in the attachment, but by McKinney, the junior attaching creditor and purchaser under the judgment and attachment in favor of McKinney v. Pfeifer. It will thus be seen that the chief ground of

assault on this judgment is that the affidavit required by section 143, Ann. Code 1892, as the basis for a judgment on constructive service by publication, was not in truth and in fact made, and that the party had not, as that statute required, made it appear that such an affidavit had been made. It was distinctly held, in *Drysdale v. Biloxi Canning Co.*, 67 Miss. 539, 7 South. 541, that the failure to file this affidavit rendered the whole attachment proceeding absolutely null and void. That case was also the case of a judgment in attachment by default, without such affidavit having been made. It may be said, in short, that this case and that are on all fours, as to the facts, except in two particulars: First, that bill was filed by *Drysdale*, the defendant in the attachment, and this is filed by *McKinney*, a purchaser of the land attached, at the sale under the attachment, he being a junior attaching creditor and the purchaser of the title of defendant at the said sale; and, second, it does not appear in the statement of the case cited, that there was any recitation in the record that the defendant had been summoned by a publication duly and legally made as required by law.

The main ground of defense in this case is that the recitation in this judgment is conclusive against collateral attack, and that this bill is a collateral attack. It becomes very important, therefore, to determine whether this is a collateral or direct attack on the judgment. In *Words and Phrases*, vol. 2, at pages 1249 and 1250, "collateral attack" is thus defined: "By a 'collateral attack' is meant every proceeding in which the integrity of the judgment is challenged, except those made in the action wherein the judgment is rendered, or by appeals, and except suits brought to obtain decrees declaring judgment to be void ab initio. *Burke v. Interstate Savings & Loan Ass'n*, 25 Mont. 315, 64 Pac. 879, 881, 87 Am. St. Rep. 416. \* \* \* A collateral attack on a judgment is any proceeding to impeach a judgment which is not instituted for the express purpose of annulling, correcting, or modifying such judgment, or enjoining its execution. *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 364, 11 L. R. A. 155, 23 Am. St. Rep. 95; *Meinert v. Harder*, 39 Or. 609, 65 Pac. 1056, 1058; *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824, 826; *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027, 1029; *Harter v. Shull*, 17 Colo. App. 162, 67 Pac. 911, 912. Hence a proceeding to enjoin the enforcement of a judgment because of its invalidity or want of service of summons is not a collateral attack. *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824, 826. \* \* \* When the validity of a record attacked is directly put in issue by the pleadings of the party attacking it by proper averment, the attack is direct, and not collateral; but when there are no proper averments attacking the record, al-

though its validity is drawn in the issue of the case, the attack is collateral. *Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537, 553. A direct attack upon a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of the same, in a proceeding instituted for that purpose, such as a motion for a rehearing, an appeal, some form of writ of error, a bill of review, an injunction to restrain its execution, etc.; while a collateral attack is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes aforesaid, etc. \* \* \* The prayer of a complaint asked that a guardian's release of certain mortgages on property belonging to a ward should be set aside and the mortgage foreclosed, and for general relief. The allegations of the complaint attacked the probate proceedings and acts of the guardian and a sale of the property made by him as fraudulent, which was denied by defendant. The defendant contended that, as the suit was for the foreclosure of the mortgage, the validity of the probate proceedings and the acts of the guardian could not be questioned, as it would be a collateral attack thereon; but it was held that as the complaint attacked directly the probate proceedings and the guardian's deeds thereunder, and prayed for general relief in addition to the foreclosure of the mortgage, such attack was not a collateral attack. *Dormitzer v. German Savings & Loan Soc.*, 23 Wash. 132, 62 Pac. 862, 881." See, also, *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95, and notes.

Under this definition, which we think is correct, this bill is not a collateral, but a direct, attack on the judgment in this case, so far as the nature and character of the bill is concerned. But the cases in this court lay down the same doctrine precisely in the same character of case. In *Crawford v. Redus*, 54 Miss. 700, a final account was filed by the executor, *Redus*, and a judgment rendered against *Mrs. Crawford*, one of the heirs and legatees. In that judgment it was recited that "all persons interested in said estate have been, either by citation regularly served and returned or by publication regularly made and proved, notified to appear." At a subsequent term of the court, *Mrs. Crawford* presented a petition assailing this judgment as void, because no service or process, either actual or constructive, had ever been made on her; and this court held, reversing the court below, that this was a direct proceeding, in which the recital quoted was only prima facie true, and that the falsity of that recital could be shown by either the record or parol proof. The court observed that the effort to overthrow it by parol proof would be exceedingly difficult, but that that difficulty in no way affected "the right, by a direct proceeding, to show that in point of



fact a decree had been rendered without jurisdiction of the person."

In *Sivley v. Summers*, 57 Miss. 712, this *Redus* Case was assailed, and directly reaffirmed by the court in a masterly opinion by Justice Campbell. In this case a decree was rendered upon a petition by *Sivley*, who had been appointed administrator, declaring the estate insolvent and ordering it sold, etc.; there being no process for *Robert D. Osborn* and his wife, two of the defendants, as was apparent from the record. That decree was rendered November 18, 1872, reciting that due proof of publication and service of process had been made on all the parties. When the lands were sold, the widow's dower was set apart to her, and when she died, in 1876, the purchasers at the sale under the insolvent decree demanded possession of the lands, in which they had purchased the reversion of the heirs of *Summers*, the decedent, who was still in possession. These heirs refused to surrender, and filed, in 1877, their original bill in the chancery court against *Sivley* and *Drone*, the purchasers, to vacate the decree and the administrator's deed to *Drone*, who bought at the sale, and the deed from him to *Sivley*, upon the grounds, amongst others, that there was no service of process on *R. D. Osborn* and his wife. It will be observed that the prayer of this bill was exactly the prayer of the bill in this case. The court distinctly held that that bill constituted a direct attack, and that consequently the recital that service had been had was only *prima facie* true, and could be overthrown. The court said:

"The recitals in the decree for the sale of the land, as to service of process and proof of publication, are *prima facie* true. In this proceeding they are not conclusive. In a collateral proceeding these recitals would be conclusive, because, in such case, they could not be shown to be untrue, except by the record. Not being liable to attack in a collateral proceeding, their *prima facie* character would amount to conclusiveness; but in this proceeding the recitals of the decree may be contradicted, and, if shown to be untrue, the decree resting upon them for its validity should be opened. It is not to be tolerated that, because the record may show the concurrence of those facts essential to give the court jurisdiction of a party, he may not, in a proper proceeding in the same court and against the other parties, show its falsity. It is not to be assumed that a record is false, and yet it may be, and sometimes is, and, when shown to be so in a proper proceeding and between proper parties, the truth must prevail, though the record falls. If, in its fall, no one is harmed, except the one who procured a false record to be made, or those in his shoes with notice, no wrong is done, and right prevails. We acted on this doctrine in *Crawford v. Redus*, 54 Miss. 700, which is said by counsel to be at vari-

ance with all the previous decisions of this court on this subject. We do not agree with counsel as to former adjudications. As we understand them, they announce the correct doctrines, to which we steadfastly adhere, that every presumption is to be indulged in favor of the record of a court of general jurisdiction, and that it cannot be controverted in a collateral proceeding. Want of jurisdiction is as fatal to the proceedings of one court as to those of another. No court can render a valid judgment without jurisdiction. It is said that 'it is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not.' *Cooley*, Const. Lim. 406. It is a presumption founded on an assumption. But suppose, in a direct proceeding for that purpose, the fact is demonstrated that this assumption is not correct; what becomes of the presumption? We say that every presumption is to be indulged in favor of the jurisdiction of courts of record, and that their recitals are *prima facie* true, and they cannot be questioned in a collateral proceeding; but when directly questioned, in a proper proceeding for that purpose, the truth must prevail, whether the court be of the one grade or the other in the classification of courts. We adhere to *Crawford v. Redus*."

In *Duncan v. Gerdine*, 59 Miss. 550, a judgment had been rendered in favor of the testator of the appellees against *Duncan* in the circuit court. *Mrs. Duncan* filed a bill in the chancery court, assailing this judgment on the ground that it had no jurisdiction to render the judgment, because summons was never served upon her, and asking to enjoin the judgment. It will be observed that this bill is identical with the bill in this case, to wit, a bill seeking to annul and vacate the judgments at law, because of the want of proper service of process on one of the parties, and the court held that that was a direct attack, saying:

"First, is it permissible for *Mrs. Duncan* in this proceeding to attack the validity of the judgment against her, by showing that the return of the officer on the writ was false, and that in fact she never had been notified in any manner of the pendency of the suit? And, if this question be determined in her favor, second, has she introduced sufficient evidence to overturn the presumption which exists in favor of the truth of the return as made by the officer? We consider the first of these questions as already settled in this state by the former decisions in the cases of *Crawford v. Redus*, 54 Miss. 700, and *Sivley v. Summers*, 57 Miss. 712; but, if it be not, we have no hesitation or doubt in deciding it in the affirmative. The rule that a record is conclusive evidence of its own verity is not applicable in a direct proceeding instituted

for the purpose of showing its falsity as to a matter which, if false, shows that the court pronouncing it as a judgment had no jurisdiction of the person of the defendant, and, consequently, that what purports to be a record is in fact no record at all. No consideration of public policy requires that one guilty of no negligence should be concluded by *ex parte* proceedings, of which he had no notice, because of a declaration made by the court, at the instance of his adversary, that he had such notice. If in fact Mrs. Duncan was not served with the process of the court, by what rule of law or reason shall she be required to submit to have her property sold for the satisfaction of that which is only the pretense of a judgment? It is not sufficient to reply that the court which rendered the judgment has adjudicated the fact that she was served with the summons; for, if the summons was not served, the court had no power to adjudicate that or any other fact against her, and the whole fabric falls, unless she is forced, in the outset, to admit as true that which she avers to be false, and that, too, when upon its truth depends her liability to its burden, and upon its falsity her right to relief. We reiterate what was said in *Sivley v. Summers*, that, in direct proceedings instituted for the purpose of testing the validity of the judgment, 'the truth must prevail, though the record falls.' Relief may be sought through the interposition of the chancery court. *Freeman on Judgments*, § 495."

It is not possible for language to be more emphatic in the statement of the principle than the language of this court in the case of *Gerdine v. Duncan* and *Sivley v. Summers*. No room whatever is left for doubt that this court has held, expressly, that a bill of this character constitutes a direct, and not a collateral, attack. See, also, *Am. Ency. of Law*, vol. 117, p. 848; *Cyc.* vol. 23, p. 1062; *Sadler v. Prairie Lodge*, 59 Miss. 574, where the court said: "Jurisdiction of the person is as essential as jurisdiction over the subject-matter, and no court can by any recital deprive a party of the right to show, in a direct proceeding undertaken for the purpose, that he is about to be deprived of his property without having had an opportunity to be heard."

Learned counsel for appellee cite a number of cases as to the binding force of the recital in the judgment, but a careful examination of each of these cases shows that they are all cases of collateral attack. The cases of *Cocks v. Simmons*, 57 Miss. 183, *Cason v. Cason*, 31 Miss. 578, *Ames v. Williams*, 72 Miss. 760, 17 South. 762, and all the other cases on this point cited by the learned counsel for appellee, are cases of collateral attack. So far, therefore, as the nature of attack as disclosed by the character of the bill is concerned, this is manifestly a direct attack.

But learned counsel for appellee say that this is not a direct attack for another reason, to wit, that this bill was not filed by the defendant in the attachment, as was true in the case of *Drysdale v. Biloxi Canning Co.*, but, as they say, by a stranger. It must be remembered that the judgment in the case of *Adams v. Pfeifer* is not a personal judgment against Pfeifer, but a judgment condemning the land, which has been attached, to sale to satisfy the debt adjudged to be due by Pfeifer to Adams. The appellants purchased this land so condemned to be sold at an execution sale made under the judgment which McKinney had obtained against Pfeifer. By such purchase the appellants acquired all title to the land which Pfeifer himself had held, and must stand directly in his shoes as regards the title. We are clearly of the opinion that, under these circumstances the appellants, who acquired whatever title Pfeifer had to this land, thus condemned by this proceeding in rem, had the same right as to the filing of this bill that Pfeifer himself would have had. They are not strangers in any proper sense. Since, therefore, this is a direct attack, the recitation in the judgment was only *prima facie* true, and it was perfectly competent to show its falsity by testimony to be introduced. As well said in *Sivley v. Summers*, *supra*, on collateral attack as a rule it is only the record which is assailed which is introduced, and, since there can be nothing but the record introduced on such an attack, the recital in the record is conclusive; but, on direct attack, the falsity of the recital as to the service of process in the judgment may be shown by any competent testimony.

The last proposition of learned counsel for appellee on this point is that there is a direct conflict between this recital in the exhibit and the allegation in the bill, and that consequently, under the cases of *House v. Gumble*, 78 Miss. 259, 29 South. 71, *McNeill v. Lee*, 79 Miss. 455, 30 South. 821, and *Weir v. Jones*, 84 Miss. 610, 37 South. 128, on demurrer, the recital in the exhibit must prevail, and for that reason alone the demurrer was properly sustained. The opinion in *McNeill v. Lee*, *supra*, is far too broad. The very purpose of appellants' bill is to have declared null and void this judgment and the conveyances under it, upon the express ground that the court had no jurisdiction over the person of the defendant. The rule invoked as to exhibits controlling on demurrer, in case of a conflict in the recital as to the existence of a fact between the exhibit and the bill, meant nothing more than that such exhibit should so control, where a complainant bases the relief which he seeks upon the written exhibit annexed to the bill. In other words, an allegation in a bill describing a writing, and characterizing a writing as having a certain character or being a certain thing, would not control the court when,

looking at the writing itself, it shows it is not the kind of writing so described; or, when there is a fact stated in the bill, and a written exhibit annexed to the bill, which exhibit is the basis and foundation of the relief sought, states that fact to be otherwise, then, of course, the exhibit will control on demurrer under the statute. There is no contradiction between this bill and this recital in this exhibit, when properly considered. All that section 528, Ann. Code 1892, meant was that exhibits should be considered on demurrer as if copied in bill, contrary to the former practice. In the case of *House v. Gumble*, supra, for instance, the assessment roll was the basis of relief claimed in the bill, and that assessment roll showed the allegation and fact in the bill to be untrue. There was a clear case for the application of the rule, although, so far as the principle is concerned, it is true, as said by learned counsel for appellant, that in that case the rules should not have been referred to, since the case was on final hearing. It was a mistaken view in the case of *McNeill v. Lee*, supra, to apply this rule as appropriate there. In that case a bill was filed to vacate a sale made by a trustee, on the ground, as alleged, that no default had been made, and hence the trustee had no power to sell. The deed of conveyance by the trustee was made an exhibit to the bill, and it recited that default had occurred. The court incorrectly held in that case that the recital in the deed was enough to overthrow the allegation in the bill. This is conclusively shown to be erroneous by the reflection that if the bill had contained the allegation that there had been no default, and the trustee's deed had not been made an exhibit, the recitals contained in the trustee's deed would have been offered in evidence with the deed, and, of course, if the complainant could show in the evidence that the recital was false, the recital would fail, and the truth would prevail.

We say this much in explanation of the case of *McNeill v. Lee*, to show that the rule of pleading under the statute as it now exists is only to be made in those cases where the exhibit is made the very basis of the relief prayed for, and there then arises a contradiction between the recital in the exhibit and the allegations of the bill as to some essential fact. This is not the case here. No relief is prayed for bottomed on this recital. On the contrary, the bill assails the recitals set out in the exhibit as false in a direct proceeding as shown. For the reason, therefore, that this bill is a direct attack, praying the annulment of this judgment as void for want of jurisdiction because of the failure to file the affidavit required, and is a direct proceeding, therefore, to that end, though not made by the defendant, but made by one who was a purchaser of the land, the title to which is involved under a judgment against the defendant in attachment, it is

clear that the court erred in sustaining the demurrer.

The decree is reversed, demurrer overruled, and cause remanded for answer within 30 days from filing of mandate in court below.

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PAUL et al. v. STATE. (No. 14,055.)  
(Supreme Court of Mississippi. Nov. 2, 1909.)

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.  
William Paul and Emeline Miller were convicted of crime, and appeal. Affirmed.

Ernest E. Brown and Chas. F. Engle, for appellants. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

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MARSHALL v. STATE. (No. 13,805.)  
(Supreme Court of Mississippi. Nov. 2, 1909.)

Appeal from Circuit Court, Claiborne County; Jno. N. Bush, Judge.  
Clem Marshall was convicted of crime, and appeals. Affirmed.

J. McC. Martin, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

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CORRERO v. STATE. (No. 14,090.)  
(Supreme Court of Mississippi. Nov. 2, 1909.)

Appeal from Circuit Court, Washington County; J. M. Cashin, Judge.  
A. Correro was convicted of crime, and appeals. Affirmed.

Hugh C. Watson, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

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PATTERSON v. STATE. (No. 13,808.)  
(Supreme Court of Mississippi. Nov. 2, 1909.)

Appeal from Circuit Court, Claiborne County; J. N. Bush, Judge.  
Frank Patterson was convicted of crime, and appeals. Affirmed.

R. B. Anderson, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

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COTTON STATE LUMBER CO. et al. v. POOL. (No. 13,914.)  
(Supreme Court of Mississippi. Nov. 2, 1909.)

Appeal from Chancery Court, Lauderdale County; D. W. Heidelberg, Chancellor.  
Action between the Cotton State Lumber Company and others and Mrs. M. E. Pool. From the judgment, the Cotton State Lumber Company and others appealed. Affirmed.

G. Q. Hall, Hall & Jacobson, for appellants.  
F. V. Brahan, for appellee.

**PER CURIAM. Affirmed.**

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**SOUTHERN SCHOOL BOOK DEPOSITORY  
v. OFFICE SUPPLY & BOOK CO.**  
(No. 14,118.)

(Supreme Court of Mississippi. Nov. 2, 1909.)  
Appeal from Chancery Court, Hinds County;  
G. G. Lyell, Chancellor.

Action between the Southern School Book Depository and the Office Supply & Book Company. From the judgment, the Book Depository appeals. Affirmed.

F. M. West and J. B. Stirling, for appellant.  
Powell & Powell, for appellee.

**PER CURIAM. Affirmed.**

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**LATHAM v. STATE. (No. 14,091.)**

(Supreme Court of Mississippi. Nov. 2, 1909.)

Appeal from Circuit Court, Washington County; J. M. Cashin, Judge.

Dick Latham was convicted of crime, and appeals. Affirmed.

Bowen & Cannon and Shields & Boddie, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM. Affirmed.**

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**KEY v. STATE. (No. 13,967.)**

(Supreme Court of Mississippi. Nov. 2, 1909.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Hattie Key was convicted of crime, and appeals. Affirmed.

J. H. Mize, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM. Affirmed.**

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**SUTTON v. STATE. (No. 14,056.)**

(Supreme Court of Mississippi. Nov. 2, 1909.)

Appeal from Circuit Court, Jackson County; W. H. Hardy, Judge.

Lilly Sutton was convicted of crime, and appeals. Affirmed.

Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM. Affirmed.**

(124 La.)

No. 17,866.

## STATE v. MILLER et al.

In re ARTHUR et al.

(Supreme Court of Louisiana. Oct. 18, 1909.)

## 1. MANDAMUS (§ 16\*)—To TRIAL JUDGE—MANDAMUS INEFFECTUAL.

Mandamus will not issue, ordering a trial judge to file in his court his written charge to the jury in a criminal case, when it appears, from his return to the order nisi, that the charge has been filed, and he denies that he refused to file it.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. § 16.\*]

## 2. MANDAMUS (§ 16\*)—To TRIAL JUDGE.

Mandamus will not issue, ordering the trial judge to send to this court his memoranda, made for his own use during the trial of a criminal case, when, in making his return to the order nisi, without objection, he sends all such memoranda as he has preserved.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. § 16.\*]

## 3. CRIMINAL LAW (§ 1092\*)—SETTLING BILL OF EXCEPTIONS—MANDAMUS.

Mandamus will not issue, ordering the trial judge to correct statements said to be contained in bills of exception reserved in a criminal case, prior to the hearing on appeal and when the bills are not produced, and this court is not fully informed as to their contents and as to the statements complained of.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.\*]

(Syllabus by the Court.)

R. J. Miller and others were convicted of crime, and John Arthur and others apply for writ of mandamus to compel the trial judge to deliver to the clerk his written charge and certain memoranda on which bills of exception were reserved. Application dismissed.

J. E. Moore and Richardson & Richardson, for relators. Walter Guion, Atty. Gen., and W. C. Bamente, Dist. Atty., for respondent.

## Statement of the Case.

MONROE, J. (1) Relators complain that, being on trial in the district court for the parish of Claiborne (as we infer, for murder), and before the close of the trial, they requested the judge to reduce the charge to be delivered to the jury to writing; but that he delivered it from "tablets," referring first to one, then to another, in such a manner as to confuse the jury, and that he now refuses to file the same as part of the record.

(2) They complain that a certain witness for the state, having testified "to what she saw and heard," was asked, on cross-examination, "certain questions" as to her being a witness before the coroner's jury—stating "the time and place—calling the witness' attention, especially, to her statement before the coroner's jury"; that, "when it came defendants' time to" put in their evidence, they offered the testimony given on the trial before the coroner's jury. The state objected, on the ground that the "proper basis

had not been laid for the impeachment of the witness," and, "as the offering was only for the purpose of impeachment, it was inadmissible." The court, in giving his reasons, states, "No such bill of exception was reserved." That the judge made an entry on a sheet of paper on which he entered the bills as reserved, in which he gave the point, the objections, and his ruling. Those memoranda were made by him in "order that he would have a record of what occurred at the time." They—

"show that this record, or memoranda, is now, or should be, in the possession of the trial judge, and this memoranda will show that his honor is in error, that a bill of exception was reserved, and that the objections to the evidence offered were those stated in the bill. Relators allege that they are entitled to a correct statement of the reasons for denying them the benefit of this evidence and this evidence and its going to the jury; that said memoranda should be presented, in order that the appeal may be passed on based on questions of law as they occurred, and now [show] the errors of the trial judge, and that defendants are entitled to show such bill was reserved."

The bill to which the foregoing relates is described as bill No. 1.

(3) The petition then proceeds:

"There is also another bill of exception that is in the same condition as the other, bill No. 3. The judge is in error as to his reasons given therein. The memoranda referred to will show that the purpose and object of such evidence, as stated in said bill of exception, was stated therein by counsel preparing same. \* \* \* We submit that said memoranda should be filed, and further submit that relators should be allowed to show that the evidence of the witness Annie Shines was not admitted, as claimed in the reasons of the judge in the said bill No. 3."

The prayer of the petition is that the judge be ordered to deliver to the clerk of the district court his written charge, as given to the jury, and that he be further ordered to send to this court—

"the written memoranda on which he entered the points or questions on which the bills of exception were reserved during said trial, and that he be ordered to correct said bills of exception Nos. 1 and 3 in accordance with the facts herein above stated."

We find attached to the petition the affidavits of counsel representing relators, in substance, as follows:

J. E. Moore swears that:

"He was present \* \* \* when the question was asked Annie Shines (a witness for the state, who was then on cross-examination by defendant's counsel) which is set forth in defendants' bill of exception No. 3, and was present when the same was objected to and the answer excluded, as set forth in said bill of exception. Affiant further states that the testimony of the witness, Annie Shines, in response to that and similar questions, answers to which were excluded at the time, did not go to the jury subsequently; that, shortly after the question recited in the bill No. 3, and similar questions, were asked of this witness, and objected to and excluded, she was dismissed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from the stand, and did not go on the witness stand again during the trial, and at no time did she answer the question recited in bill No. 3 in presence of the jury. Affiant further states, with regard to bill No. 1, that he had consulted with Judge J. A. Richardson, with whom he was associated in the trial of the case, with regard to offering the testimony of Annie Shines, taken before the coroner's jury, for the purpose stated in the bill of exception, and it was agreed that it should be offered, and, if excluded, that a bill of exception should be retained thereto; that he was present when said testimony was offered by said Judge J. A. Richardson, who had the matter in charge of offering said testimony and retaining said bill, if excluded, but that defendants were at that time closing their case, and affiant's attention was somewhat withdrawn from the matter in hand, at the moment, by a consultation with one of the defendants, or other matters connected with the closing of the case, so that he does not distinctly remember hearing Judge Richardson formally retain the bill, but knows that this action had been agreed upon before, and believes and feels morally certain that such bill was retained."

John A. Richardson declares that he is one of the counsel for defendants on the trial in question, and that Judge Moore and he conducted the defense; that the allegations contained in the petition for mandamus are true—

"and, further, that the witness Annie Shines, who was the witness referred to in the bills of exception 1 and 2, upon dismissal from the witness stand, was not recalled during the trial, and therefore this evidence was not given by her afterwards [and] could not have been admitted, as the judge states in his reasons given in bill No. 3."

John S. Richardson swears that he was one of the counsel for defendants and—

"that, although he did not take an active part in the trial, he was present and paid particular attention to what occurred during the trial; that the witness Annie Shines did not return to the witness stand after the question recited in defendant's bill No. 3, and answer excluded, and that she did at no time give before the jury the evidence which was sought to be elicited by the question recited in the said bill."

It may here be noted that neither of the bills of exception referred to in the foregoing petition and affidavits are attached to the petition or otherwise presented to this court.

The respondent judge, for answer, says:

"That he has filed his written charge, in its original form, with the clerk of the district court; that he made memoranda in writing for his charge to the jury, instructing them as to the jurisdiction of the case, and informing them of the different verdicts they could render, which memoranda have been destroyed or misplaced, and are not now in his possession."

Further answering, he says:

"That he also made memoranda of the objections and rulings of the court at the time, as stated in bill of exception No. 3, but that said memoranda are mislaid or destroyed, and are, hence, out of his possession; \* \* \* respondent believing that no bill would be presented on that point after the evidence had gone to the jury. In fact, all the evidence complained of [sic] in the application for the writ of mandamus, and stated in bills of exception 1 and 3, really went to the jury, wheth-

er it was offered as impeachment or to assist the jury as to the attitude of the deceased, or who was the aggressor. The accused had as full and fair trial as this respondent was able to give him. \* \* \* Respondent attaches hereto all memoranda made by him during the trial of the case that are in his possession."

Further answering, he—

"denies the allegations of error appearing in the application for mandamus with reference to bills of exception 1 and 3, and avers that, at the time that Annie Shines was on the witness stand and asked certain questions, and was then finally asked 'if she was not sworn by the coroner to tell the truth, the whole truth, and nothing but the truth,' and subsequently the counsel for the defense called Mr. Malone, a member of the coroner's jury, to prove what questions were asked, and the district attorney objected, on the ground that it was 'hearsay.'"

The notes or memoranda hereto attached are intelligible to the respondent and were made for his use, at the time. The bill marked "No. 3" is referred to in memorandum marked "Malone," for identification.

And respondent specially denies all other allegations of plaintiff's application for writ of mandamus. Having done all that he understands—

"is required of him, \* \* \* respondent asks to be discharged, and the writ of mandamus denied. \* \* \*"

Included in the memoranda which accompany the return, we find two notes which apparently relate to the contemplated charge to the jury, and two others which read as follows:

#### "Question (Bill) (Malone).

"Witness was asked to state if the question was asked Annie Shines, to state all that she saw of the difficulty. Objected to by district attorney.

"Evidence of Annie Shines, taken down before coroner's jury, offered in evidence for the purpose of impeachment. The state objected for the reason that there has been no basis laid for the impeachment. The court sustained the objection, because the court considered that there had been no proper basis laid, because the attorneys for defense only asked the witness Annie Shines if she was not sworn by the coroner to tell the truth, the whole truth, and nothing but the truth, and the court [thought] that was not sufficient."

Respondent makes affidavit to the truth of the statements contained in the answer. The clerk of the district court certifies that the judge has filed with him—

"his charge, in writing, which was delivered to the jury in the case of the State of Louisiana vs. R. J. Miller et al. \* \* \*"

#### Opinion.

The petition alleges that "the court illegally and arbitrarily refuses to file his charge, that it may become a part of the record and go up as such"; but the judge denies that there was any such refusal, and the circumstances under which the demand was made (if there was any demand) do not appear. We imagine, therefore, that there must have been some misunderstanding in regard to the matter. At all events, the charge is

shown to have been filed, and no present action is required concerning it.

With regard to the memoranda made by the judge in the course of the trial, he was ordered to send it up to this court, "or show cause to the contrary." He has sent up all that he preserved, without objection, and nothing more can be asked in that respect.

The remaining prayer of the petition is that the respondent be ordered to correct "said bills Nos. 1 and 3, in accordance with the facts hereinabove stated" (in the petition). The bills referred to have not, however, been produced, and, taking the allegations of the relators, with the denials and allegations of the respondent, we are unable to determine what the bills contain. We should therefore be acting in the dark in ordering them to be corrected.

As the case stands, we are of opinion that no writ of mandamus should issue. If upon the hearing on the appeal it should appear that the defendants have been prejudiced in the matter of the bills of exception Nos. 1 and 3, the question of remedy will be considered, and in the meantime, and in order that they may enjoy whatever advantage they may be entitled to by reason of their present application, the same will be denied without prejudice.

It is therefore ordered, adjudged, and decreed that relators' application be denied, without prejudice, and this proceeding dismissed, at their cost.

(124 La.)

No. 17,838.

#### STATE v. BEHLER.

(Supreme Court of Louisiana. Oct. 18, 1909.)  
CRIMINAL LAW (§ 912½\*)—INDICTMENT AND INFORMATION (§ 161\*)—NEW TRIAL—GROUNDS.

A bill of information, under which a prosecution is conducted, may, with leave of the court, be amended during the trial, and, if the defendant makes no objection and pleads no surprise at the time, such objection and plea will not avail him, after conviction, as grounds for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2136; Dec. Dig. § 912½.\* Indictment and Information, Cent. Dig. §§ 516-523; Dec. Dig. § 161.\*]

(Syllabus by the Court.)

Appeal from Criminal District Court, Parish of Orleans; Frank D. Chrétien, Judge.

Tony Behler was convicted of crime, and appeals. Affirmed.

Loys Charbonnet and P. M. Gilmore, for appellant. Walter Gulon, Atty. Gen., St. Clair Adams, Dist. Atty., and Warren Doyle, Asst. Dist. Atty., for the State.

MONROE, J. Defendant was prosecuted, by bill of information, and convicted of incest, and presents his case to this court upon a bill of exception, reserved to the overrul-

ing of a motion for new trial; the ground relied on being that, it having been charged that the crime was committed on May 15, 1908, the prosecuting witness testified, on the trial, that it was committed on May 27, 1908, and the district attorney was permitted to amend the bill of information accordingly, and over the protest of the then counsel for defendant, who was taken by surprise, and that, had defendant been charged originally with the commission of the crime on May 27th, he would have been prepared to establish his innocence.

No bill was reserved when the amendment was allowed, and no surprise suggested. The objection, bill of exception, and plea of surprise came too late in the motion for new trial. Marr's Criminal Jurisprudence, §§ 249, 483, 489; State v. Terrebonne, 45 La. Ann. 25, 12 South. 315; State v. Robinson, 87 La. Ann. 678; State v. Green, 115 La. 1042, 40 South. 451; State v. Hauser, 112 La. 313, 36 South. 396; State v. Henderson, 118 La. 232, 36 South. 950; State v. Michel, 111 La. 438, 35 South. 629.

Judgment affirmed.

(124 La.)

No. 17,534.

#### ALPERN v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana. Oct. 18, 1909.)  
STREET RAILROADS (§ 114\*)—COLLISION—EVIDENCE.

After comparing the testimony offered by plaintiff in support of his claim for injury and damage resulting from the alleged negligence of defendant with the testimony offered on behalf of defendant, this court agrees with the jury, by which the case was tried in the district court, that defendant was not at fault in the matter of the accident from which the alleged injury and damage resulted.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by Samuel Alpern against the New Orleans Railway & Light Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Benjamin Rice Forman, for appellant. Dart & Kernan and Wm. Kernan Dart, for appellee.

MONROE, J. Plaintiff prosecutes this appeal from a verdict and judgment rejecting his claim for damages for personal injuries alleged to have been sustained through the fault of the defendant.

He alleges that he was driving a buggy down Camp street in the direction of Canal street, and that, near Gravier street, whilst he was endeavoring to turn out of the way, one of defendant's cars ran into the buggy,

from behind, inflicting injury upon his horse, buggy, and himself to the amount of \$15-125, for which he prays for judgment.

Plaintiff offered his own testimony, that of a man named Lynch, and that of a boy named Katz in support of his theory of the accident; and defendant offered the testimony of the conductor of the car in question, that of the motorman, and that of a passenger named Mallo, who was standing on the rear platform of the car. From the testimony of defendant's witnesses it would appear that plaintiff's buggy was clear of the car track, with the head of the horse pointed out Gravier street, near the lower side, in the direction of the river, and that, the front of the car having passed without any collision, the buggy was backed, or turned, in such a manner as to bring its left hind wheel in contact with the rear platform of the car, resulting in considerable injury to the buggy, and some injury to the horse and driver. The jury before which the case was tried, apparently, accepted the testimony of defendant's witnesses as giving the correct version of the matter, and, after comparing that testimony with the testimony offered on behalf of plaintiff's witnesses, we agree with the jury, and are of the opinion that defendant's employes were not at fault.

The judgment appealed from is therefore affirmed.

#### LOUISVILLE & N. R. CO. v. CALDWELL.

(Supreme Court of Florida, Division A. June 29, 1909. Rehearing Denied Oct. 12, 1909. Headnote Filed Nov. 11, 1909.)

#### MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—EVIDENCE.

Where the body of a brakeman is found between parallel tracks of a railroad, over which his own and another train had just passed, to authorize recovery of damages for his death, it must first be shown that he was free from fault, that the railroad company was negligent, or that he was killed by the other train; and, where the proof fails to disclose any of these, a judgment for his widow will be reversed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 894-908; Dec. Dig. § 265.\*]

(Syllabus by the Court.)

Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Action by Jennie Caldwell against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Blount & Blount & Carter, for plaintiff in error. Maxwell & Veeves, for defendant in error.

COCKRELL, J. Jennie Caldwell recovered judgment in the circuit court for Escambia county against the Louisville & Nashville

Railroad Company in the sum of \$2,000 for the negligent killing of her husband, Nathan Caldwell, an employe of said company. The declaration consists of two counts. In the first no reference is made to the employment, and it averred in general language the killing to have been occasioned by the careless and negligent running and operation of the engine and train of cars of the company; and in the second that Nathan, while employed as brakeman in the performance of his duties, stepped from the train upon the right of way, which was so improperly and negligently constructed and maintained as to render the footing insecure, and to throw him against the train, causing his death.

No point is made upon the pleading; the issues now being only those raised by the pleas of not guilty and contributory negligence.

The facts going to show how the accident happened are exceedingly meager. When last seen alive, Nathan was standing upon the footboard of the engine of the train upon which he was engaged, and a few minutes thereafter he was seen dead, lying in the space between the double track, with two bruises upon his head and his teeth knocked out, following close upon the passage of another train of the company over the parallel track. All the evidence shows that both trains were moving slowly, and we find nothing in the evidence, outside legal presumptions, from which to impute negligence against the company.

The law of the case seems to be admitted by both sides, based upon the opinion in Florida Cent. & P. R. Co. v. Mooney, 40 Fla. 17, 24 South. 148, to the effect that, if Nathan was killed by his own train, the burden was upon his widow to show either that he was himself free from fault or that there was negligence on the part of a co-employe; whereas, if the other train did the injury, the burden would be upon the company to show the plaintiff was at fault, or that its servants were not negligent, and it was upon this theory that the declaration was framed in the two counts.

As to the second count, we have nothing from which we can say either that Nathan was free from fault or that the company or its agents were negligent. We place little stress upon the testimony that he was on the running board of the engine, and not on the top of the box car, where he should have been, but are more impressed by the failure of the evidence to show that his duty called him to get off the train at that point, his manner of doing so, or any negligence in the condition of the right of way there, directly shown to have contributed to the injury. There is evidence that one might slip upon the right of way, if "he stepped in the slag or something," but that it was in the usual condition of roadbeds; but the difficulty in



this case is lack of evidence that Nathan fell or slipped while on the right of way.

The chief contention, however, is that he was killed by the other train. Again we have nothing but surmise. The statute shifts the burden of proof to a railroad company for damages to person, stock, or property, caused by the running of the locomotive or cars or other machinery of such company; but before the statutory presumption arises it should first be reasonably made to appear that the damage was in fact done by the running of the locomotive or cars, not necessarily by an eyewitness, but when indirect evidence is resorted to, it should be at least reasonably clear. Not only have we some uncertainty as to whether he was killed by the running of the train, but if we get beyond that point we are wholly unable to say which train killed him. His body was found midway between the two tracks, nine feet apart, slightly nearer the track of the other train. The engineer of the other train was promptly notified of the accident, made a thorough examination of his very dusty engine, discovering no evidences of any abrasion of dust, and testified to a thorough lookout at the time of the accident.

It may be that upon a subsequent trial new evidence may be adduced from which something more tangible may appear, but we cannot sustain the judgment upon the record now before us.

Judgment reversed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### HYER et al. v. YORK MFG. CO.

(Supreme Court of Florida, Division B. June 29, 1909. Headnote Filed Nov. 12, 1909.)

#### BILLS AND NOTES (§ 140\*)—RENEWAL NOTE—OPERATION AND EFFECT.

Where a contract was made for having ice machinery, etc., ready for shipment on or before the 1st of April, 1906, and said machinery was not shipped until the 31st of May, 1906, and said machinery was accepted by the purchasers without protest or objection, and part of the purchase money was paid and notes given for the balance, and afterwards another part of the purchase money was paid and renewal notes given, which were the basis of this suit, the mere fact that the machinery was not shipped on or before April 1, 1906, does not defeat a recovery by the plaintiffs against the purchasers of the ice machine on the renewal notes.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 140.\*]

(Syllabus by the Court.)

Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Action by the York Manufacturing Company against J. W. Hyer and W. C. Fritter.

Judgment for plaintiff, and defendants bring error. Affirmed.

Blount & Blount & Carter, for plaintiff in error. Jones & Pasco and Pattillo Campbell, for defendant in error.

HOCKER, J. On the 2d of March, 1906, the plaintiff, York Manufacturing Company, a corporation, filed the following declaration against the defendants Hyer and Fritter in the circuit court of Escambia county: "York Manufacturing Company, a corporation, by Pattillo Campbell, its attorney, sues J. W. Hyer and W. C. Fritter for money payable by the defendants to the plaintiff, for the said defendants, on the 20th day of May, 1907, by their promissory notes, now overdue promised to pay to the plaintiff \$600 three months after date and \$600 six months after date, with interest from date of said notes at 6 per cent. per annum until paid, with all cost of collection, including 10 per cent. attorney's fees, but did not pay the same. Wherefore the plaintiff sues and claims \$2,500 damages."

The first of said notes is as follows:

"\$600.00 Pensacola, Fla., May 20, 1907.

"Three months after date we or either of us promise to pay to the order of York Manufacturing Co., York, Pa., six hundred & no/100 dollars, at Pensacola, Fla., without defalcation, for value received, with interest from date at the rate of six per cent. per annum until paid, with all costs of collection, including ten per cent. attorney's fees. Waiving the right of all valuation, stay and exemption law.

"[Signed] J. W. Hyer,

"[Signed] W. C. Fritter,

"By J. C. Hicks, Atty. in Fact."

The second note is like the first, except that it is payable six months after date.

To this declaration the defendants filed the following plea: "The defendants, for plea to the plaintiff's declaration, say: That it is true that they made and executed the notes mentioned in the said declaration, and that the said notes are now overdue, and that they have not been paid; but they say that the consideration for which these notes were given was certain ice machinery manufactured by the plaintiff and sold to the defendants under a certain contract, one of the terms of which was as follows: 'The party of the first part [plaintiff] will have the machinery, apparatus, or plant ready for shipment on or before the 1st day of April, 1906, provided the purchasers shall have performed within the time limited herein all agreements by them to be kept and performed as part of the attached specifications.' That the defendants did well and truly perform within the time limited therein all the agreements by them to be kept and performed as part of the said attached specifications,

but that the said plaintiff did not have the said machinery, apparatus, or plant ready for shipment on or before the 1st day of April, 1906, but that the said machinery, apparatus, or plant was not ready for shipment, and was not shipped, until on or about the 31st day of May, 1906. That because of the failure on the part of the plaintiff to ship the said machinery, apparatus, or plant on or before the 1st day of April, 1906, as provided by the contract entered into by and between the plaintiff and the defendants, the said defendants were damaged in a large sum, to wit, two thousand (\$2,000.00) dollars, which sum the said plaintiffs are willing to set off against the claim of the said plaintiff."

The plaintiff filed the following replication to the plea:

"(1) That the defendants accepted without protest or objection the ice machinery mentioned in said plea, and paid \$600 on account of the purchase price thereof, and executed their notes for the balance; that six months after the acceptance of the machinery as aforesaid they voluntarily paid a portion of their said notes, and executed a new note for the balance, which said renewal is the note mentioned and sued on herein, and thereby waived the alleged delay in the delivery of the said machinery."

The defendants demurred to this replication on the following grounds:

"(1) That the facts set forth in the said replication, to wit, that the defendants accepted, without protest or objection, the ice plant mentioned, and paid \$600 upon the purchase price thereof, and executed their note for the balance, and that six months thereafter they voluntarily paid a portion of their said notes, and executed a new note for the balance, does not constitute a waiver of the defendants' right to a claim for damages for failure to ship the said ice machinery by the time mentioned in the contract of sale.

"(2) It sets forth no defense to the defendants' plea."

The circuit judge overruled this demurrer and allowed the defendants until the 16th of January, 1909, to plead further. On the 18th of January, 1909, the defendants refusing to plead further, the judge entered a default against them for their failure and refusal to plea, and ordered a judgment against them in favor of the plaintiff. The original notes sued on were produced and filed in evidence, and a judgment entered in favor of the plaintiff for \$1,451.56. The case is here on writ of error from this judgment.

The only error assigned is that the circuit judge erred in overruling defendants' demurrer to plaintiff's replication. The demurrer, of course, reaches back to any substantial defect in the plea, and it is urged here that the plea is faulty. Without going into the merits of the plea, we think the

facts stated in the replication show that the defense set up in the plea is unavailing. The defendants below had every opportunity, before the execution of the renewal note sued on, by the exercise of ordinary diligence, to discover whether they had any claim for damages on account of the failure to ship the machinery according to contract. Such a defense was waived by the execution of the renewal note. This question is settled by this court in the case of Padgett v. Lewis, 54 Fla. 177, 45 South. 29.

The judgment of the court below is affirmed.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COOKRELL, JJ., concur in the opinion.

#### RUSHTON v. STATE.

(Supreme Court of Florida, Division A. Oct. 12, 1909. Headnotes Filed Nov. 12, 1909.)

##### 1. STATUTES (§ 18\*)—MODE OF ENACTMENT.

The Legislature may initiate and finally pass a bill in one legislative day.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 18.\*]

##### 2. STATUTES (§ 23\*)—ENACTMENT—ERROR IN DATE OF MESSAGE TRANSMITTING BILL.

A wrong date in the message from one house to another transmitting a bill may be self-correcting and treated as a clerical misprision.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 23.\*]

##### 3. STATUTES (§ 8½\*)—PUBLICATION OF NOTICE OF LOCAL BILLS—AFFIRMATIVE SHOWING ON JOURNALS.

The journals need not affirmatively show that notice of local bills had been duly published.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. § 8½.\*]

##### 4. COURTS (§ 42\*)—CREATION—VALIDITY OF ACT.

Chapter 5771, p. 302, Laws 1907, in so far as it created the criminal court of record for Suwannee county, was duly enacted.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 42.\*]

##### 5. CRIMINAL LAW (§ 1028\*)—REVIEW—QUESTIONS NOT PRESENTED BELOW.

A convict cannot raise for the first time in the appellate court the validity of legislation affecting the practice of the court or compensation of its officers.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619-2653; Dec. Dig. § 1028.\*]

##### 6. RAPE (§ 16\*)—ASSAULT WITH INTENT TO RAPE—EVIDENCE.

A conviction of assault with intent to rape will not be sustained, upon proof that the assailant voluntarily desisted before consummation, without suggestion of outside interference and with no unusual resistance on the woman's part.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 15-19; Dec. Dig. § 16.\*]

(Syllabus by the Court.)

Error to Criminal Court of Record, Suwannee County; H. E. Carter, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Orum Rushton was convicted of an assault with intent to rape, and he brings error. Reversed.

J. B. Johnson, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

**COOKRELL, J.** Orum Rushton was convicted in the criminal court of record for Suwannee county of an assault with intent to commit rape, and sentenced to five years in the state prison.

Attack is made here upon the constitutionality of the act (chapter 5771, p. 302, Laws 1907) creating the trial court.

It is first claimed that there were fatal defects in the passage of the bill through the Legislature, but an examination of the journals fails to disclose any serious irregularity. It does appear that House Bill No. 378, now chapter 5771, was introduced in the House, and under waiver of the rules was read three times, and passed by a ye and nay vote, on May 2, 1907, and was at once certified to the Senate; that on the same day House Bill No. 378 was received by the Senate, and upon waiver of the rules was duly passed by that body and ordered certified to the House; and upon the next day it was received by the House and referred to the enrolling committee, evidently the joint committee on enrolled bills. There is a reference in the House Journal of May 2d of the bill to the enrolling committee, upon which stress is laid, and the message as printed from the House transmitting the bill to the Senate bears date May 1st. Neither point is material, but as to the former the reference evidently was to the House committee, not to the joint committee, and the latter is so clearly a misprision we have not taken the trouble to examine the original journal.

It is difficult to follow the argument against the act in detail. Suggestions are made to the requirement that bills be read on three separate days, but counsel must know that this provision in the Constitution of 1885 was amended in 1896 (Gen. St. 1906, p. 88). It is also insisted that the journal should show that notice of local legislation has been duly had. The Constitution does not specifically require the journals to show this, and the courts may not inquire into that question. *Stockton v. Powell*, 29 Fla. 1, 10 South. 683, 15 L. R. A. 42.

The act established the court, and the Constitution prescribed its jurisdiction. If the Legislature went too far in prescribing matters of practice and compensation for its officers, we are not now concerned and express no opinion. *Ex parte Pitts*, 35 Fla. 149, 17 South. 76. No objection was made to the jury, and the county solicitor is not here demanding his salary.

The sufficiency of the evidence gives us grave concern, and but emphasizes again the

need of legislation to punish more severely these indecent assaults that do not quite come up to the definition of assault with intent to commit rape.

The evidence of the prosecuting witness authorizes a finding that the plaintiff in error pulled her from her horse, placed his hand upon her thighs under her clothing, threatened her with violence, and importuned her to yield her person to him; but, upon her refusal, he assisted her back upon her horse, and let her go, without intimation of possible outside interference or unusual resistance on her part. This took place on a public road, with dwellings 150 and 250 yards distant.

In *Hunter v. State*, 29 Fla. 486, 10 South. 730, we held that in this crime the intent is the gravamen of the offense, and that the intent must be shown by the state to have so possessed the accused that his determination was to commit the rape, regardless of resistance and want of consent. See, also, *Clark v. State*, 56 Fla. 46, 47 South. 481.

Giving full credit to the testimony of the girl, we are convinced that the threats of the boy were but a bluff, and that he did not intend to complete the act, except with her consent.

The judgment is reversed.

**WHITFIELD, C. J., and SHACKLEFORD, J., concur.**

**TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.**

#### WALDO v. STATE.

(Supreme Court of Florida, Division A. Oct. 12, 1909. Headnote Filed Nov. 9, 1909.)

**CRIMINAL LAW (§ 1182\*)—REVIEW—AFFIRMANCE.**

Where no errors are made to appear in a criminal cause, and the appellate court is of the opinion that the evidence supports the verdict, the judgment of conviction will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.\*]

(Syllabus by the Court.)

Error to Criminal Court of Record, Hillsborough County; H. C. Gordon, Judge.

Savannah Waldo was convicted of grand larceny, and she brings error. Affirmed.

E. B. Drumright, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

**SHACKLEFORD, J.** An information was filed in the criminal court of record for Hillsborough county against Savannah Waldo, wherein she was charged with having committed the crime of grand larceny. A trial was had before a jury, which resulted in her conviction, and she was sentenced to confinement in the county jail at hard labor for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a period of six months. She seeks a reversal of this judgment by writ of error.

Four errors are assigned, but the second is expressly abandoned. The remaining three question the sufficiency of the evidence to sustain a conviction; the defendant admitting in her brief that "the single question presented is, Was there sufficient evidence adduced to convict the defendant of the crime?" The jury answered this question in the affirmative, as likewise did the trial judge in refusing to grant the motion for a new trial. After a careful consideration of all the evidence, we are of the same opinion. No useful purpose could be served by setting it forth. Nothing remains for us to do but to affirm the judgment. See *Chan-acey v. State*, 54 Fla. 20, 44 South. 1018, and authorities there cited.

Affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### HOLIFIELD v. CITY OF LAUREL.

(No. 14,034.)

(Supreme Court of Mississippi. Nov. 2, 1909.)

#### CRIMINAL LAW (§ 543\*)—EVIDENCE—TESTIMONY ON A FORMER TRIAL.

Testimony of a witness against defendant on a prosecution in a police court may not be used on the trial on appeal to the circuit court, though the witness has removed from the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. § 543.\*]

Appeal from Circuit Court, Jones County; R. L. Bullard, Judge.

Jesse Holifield appeals from a conviction in the circuit court, on appeal from a police court. Reversed and remanded.

The appellant was tried and convicted in the police court of the city of Laurel on the charge of the unlawful sale of intoxicating liquor. At said trial one Posey, a witness for the prosecution, testified as to a sale. On appeal to the circuit court, when the case was called for trial, this witness could not be found, and it was learned that he had taken up his residence in the state of Alabama. The prosecution then offered to prove by the police justice what the testimony of Posey had been at the former trial. The defendant objected, the court overruled the objection, and the police justice was allowed to testify for the state. From a conviction in the circuit court, appellant prosecutes an appeal, assigning as error admission of this testimony over his objection.

R. E. Halsell, for appellant. W. S. Welch and Geo. Butler, Asst. Atty. Gen., for appellee.

WHITFIELD, C. J. The testimony of the police justice of the city of Laurel, Mr. Gavin, is manifestly incompetent, under the decisions of *Owens v. State*, 63 Miss. 450, and *Dukes v. State*, 80 Miss. 353, 31 South. 744. The whole subject was exhaustively considered in the case of *Dukes v. State*, supra, and we feel ourselves bound, by the former decisions of this court, to hold as we have announced therein. We said, in the *Dukes Case*, at page 362 of 80 Miss., and page 745 of 31 South.: "It doubtless would be well for our Legislature to enact that such testimony should be received in all the categories mentioned in section 1195 of Dr. Bishop's New Criminal Procedure. Volume 1, § 1195." In that section Mr. Bishop said: "Of necessity, if a witness has died, or has become insane, though but temporarily, or by the opposite party is kept out of the way, or is too ill or infirm to come to the court (for it cannot adjourn to his house), or if from any cause for which the party is not responsible, such as residence beyond the process of the court, or the like, the witness' personal presence cannot be had (a rule as to which the decisions are somewhat indistinct and inharmonious), added to which, if there has been a prior proceeding, involving the same issue, between the same parties, conducted regularly in pursuance of law, and therein the defendant had the opportunity to cross-examine the witness against him—not otherwise—what was on such former hearing testified to by a witness whose presence cannot now be had may be shown against the defendant."

We once more repeat that the Legislature should change the rule of evidence on this subject, as indicated in that section, and we trust that the Legislature soon to meet will not fail so to do.

Reversed and remanded.

MAYES, J. (specially concurring). I concur in the result reached by the court and also the law declared in the opinion, but I dissent from that part of the opinion which suggests to the Legislature that there should be any change in the rule of evidence on the subject dealt with in the main body of the opinion. Indeed, I think it will be unwise for the Legislature to change this well-established rule or to extend the doctrine announced by the opinion further than the courts have already extended it.

#### BEASON v. STATE. (No. 14,132.)

(Supreme Court of Mississippi. Nov. 2, 1909.)

#### 1. INFANTS (§ 66\*)—CRIMES—CAPACITY TO COMMIT CRIME—CRIMINAL INTENT.

The criminal intent, which is an essential element of every crime, cannot be entertained by an infant until he has developed sufficient intelligence and moral perception to enable him

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to distinguish between right and wrong and to comprehend the consequences of his acts.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 172; Dec. Dig. § 66.\*]

**2. INFANTS (§ 66\*)—CRIMES—CAPACITY TO COMMIT CRIME—PRESUMPTIONS.**

While an infant under the age of 7 years is conclusively presumed to be incapable of entertaining a criminal intent, the presumption between the ages of 7 and 14 is only prima facie, and can be overcome by proof.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 172; Dec. Dig. § 66.\*]

**3. INFANTS (§ 66\*)—CRIMES—CAPACITY TO COMMIT—RAPE.**

The presumption that an infant under the age of 14 has not reached the age of puberty, and hence is incapable of committing rape, is prima facie only, and may be overcome by proof.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 172; Dec. Dig. § 66.\*]

**4. INFANTS (§ 66\*)—CRIMES—RAPE.**

In a trial of an infant under 14 years of age for rape, where there was no evidence of his mental capacity to entertain a criminal intent or of his physical ability to commit the crime, a peremptory instruction to acquit should have been given.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 172; Dec. Dig. § 66.\*]

Appeal from Circuit Court, Forrest County; W. H. Cook, Judge.

Jupiter Beason was convicted of rape, and appeals. Reversed and remanded.

Luther James and Jno. T. Haney, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

SMITH, J. Appellant, a boy under the age of 14 years, was convicted in the court below of the crime of rape. There was no evidence of his mental capacity to entertain a criminal intent, or of his physical ability to commit the crime of rape. At the close of the evidence, appellant requested, and was refused, an instruction charging the jury to find him not guilty. A criminal intent is an essential element of every crime. Such an intent cannot be entertained by an infant until it has developed sufficient intelligence and moral perception to enable it to distinguish between right and wrong and to comprehend the consequence of its act.

Under the age of 14, an infant is presumed not to have reached this state of development, and to be incapable of entertaining a criminal intent. But as in fact the age at which children reach this state of development varies, this presumption between the ages of 7 and 14 is only prima facie, and can be overcome by proof. Under the age of 7 this presumption is conclusive. *Westbrook v. Railroad Co.*, 66 Miss. 567, 6 South. 321, 14 Am. St. Rep. 587; 22 Cyc. 622; 16 A. & E. En. of Law (2d Ed.) 311. In the crime of rape, in addition to mental capacity to entertain a criminal intent, there is also involved the element of physical ability to commit it, and this physical ability cannot exist until the infant has arrived at the age of puberty.

In most jurisdictions, an infant under the age of 14 is conclusively presumed not to have arrived at the age of puberty, and hence incapable of committing rape. But the rule, and we think the safer rule, in some jurisdictions, is that this presumption is only prima facie one, and can be overcome by proof. 16 A. & E. En. of Law (2d Ed.) 315, and authorities there cited.

The learned judge who tried the case in the court below seems to have correctly announced the law in his instructions to the jury; but, as there were no facts in evidence by which these presumptions could have been overthrown, there was nothing to submit to the jury, and the peremptory instruction should have been given.

Reversed and remanded.

**BRAMLETT & SONS v. ADAMS, Revenue Agent. (No. 13,712.)**

(Supreme Court of Mississippi. Nov. 2, 1909.)

**STIPULATIONS (§ 6\*)—REDUCTION TO WRITING—NECESSITY.**

The court should require that all stipulations, made out of court, between the parties, should be reduced to writing, and oral stipulations should be disregarded.

[Ed. Note.—For other cases, see *Stipulations*, Cent. Dig. §§ 5-13; Dec. Dig. § 6.\*]

Appeal from Circuit Court, Lafayette County; W. A. Roane, Judge.

Action by Wirt Adams, Revenue Agent, against Bramlett & Sons. From a default judgment for plaintiff, defendants appeal. Reversed and remanded.

This was a suit by the state revenue agent against the appellants for the recovery of \$1,500, statutory penalty for the unlawful sale of intoxicating liquor, and was begun by an attachment in the circuit court. There were several criminal prosecutions pending in the court of the justice of the peace against the appellants, and there were some efforts made to compromise all of the cases, both civil and criminal, as the same attorneys represented both sides in all the cases. According to the theory of the appellee here, there was a verbal agreement that a judgment should be entered in the magistrate's court, imposing fines, without imprisonment, in all of the criminal cases, and that a judgment should then be entered in the instant case for the amount claimed, to wit, \$1,500, unless the revenue agent should agree to settle for less; that thereupon, in accordance with this agreement, these judgments were entered imposing fines in the criminal cases; that thereafter the revenue agent declined to accept any compromise, but demanded judgment for the full amount, \$1,500; that when the appellants filed, or attempted to file, a plea to the declaration, the time for filing same having expired, the appellee, by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

his attorney, filed a motion to strike said plea from the files and enter judgment, which was done. This agreement was not made in writing, and appellants contend that they did not file their plea in time, because they understood that the matter would be adjusted out of court, and that judgment for the full amount would not be demanded. They therefore asked leave of the court to file their plea *nunc pro tunc*. This plea had remained on file for about a year before this motion to strike it out was filed, but was unsigned. There was no evidence of any laches on the part of the defendant's counsel. The plea denies the guilt of the defendant, and was only imperfect because counsel had inadvertently omitted to sign it, which defect appellants' counsel offer to correct by amendment; but their motion to amend was overruled, and the plea stricken from the files, and judgment entered by default.

W. V. Sullivan and Falkner & Russell, for appellants. Alexander & Alexander, for appellee.

MAYES, J. We have no doubt but that the trial judge would have permitted the plea in question to be filed, had the question been presented to him, uninfluenced by the alleged oral agreement, as amendments are liberally allowed by statute. This being the case, we think the court should have disregarded any agreement not in writing, and allowed the filing of the plea as asked. The only safe rule for courts to be governed by is to require all agreements to be in writing.

This case is reversed and remanded.

#### STATE v. TATUM. (No. 14,094.)

(Supreme Court of Mississippi. Nov. 8, 1909.)

##### 1. FALSE PRETENSES (§ 33\*)—INDICTMENT—WRITTEN INSTRUMENT.

Where alleged false pretenses consist wholly or in part of the use of a written instrument, the writing need not be set out in the indictment in *hæc verba*, unless some question turns on the form of construction of the instrument, or some legal description of it is given, the accuracy of which may be material for the court to determine.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 45; Dec. Dig. § 33.\*]

##### 2. FALSE PRETENSES (§ 32\*)—INDICTMENT—VALUE OF PROPERTY.

An allegation that by certain false pretenses defendant obtained from prosecutor \$600 in money sufficiently alleged the value of the property obtained.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 42-44; Dec. Dig. § 32.\* Indictment and Information, Cent. Dig. § 280.]

##### 3. FALSE PRETENSES (§ 28\*)—INDICTMENT—PERSONS DEFRAUDED—PARTNERSHIP—NAMES OF PARTNERS.

Where a partnership was alleged to have been defrauded by defendant's false pretenses, the indictment must contain the Christian and

surname of the individuals composing the partnership, or a proper excuse for the omission. [Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 33; Dec. Dig. § 28.\*]

Appeal from Circuit Court, Newton County; J. B. Byrd, Judge.

M. J. Tatum was indicted for false pretenses. From an order sustaining a demurrer to, and quashing, the indictment, the State appeals. Affirmed.

Geo. Butler, Asst. Atty. Gen., for the State. G. C. Tann, for appellee.

SMITH, J. Appellee was indicted in the court below for obtaining money under false pretenses. This indictment was demurred to, and from a judgment sustaining the demurrer, and quashing the indictment, this appeal is taken by the state.

The allegations of the indictment necessary to be here considered are as follows: First, "did then and there falsely and feloniously pretend, by means of letters and otherwise, to the said Aycock Frank Alvis Company that the said M. J. Tatum had in his possession," etc.; and, second, "did \* \* \* obtain from the said Aycock Frank Alvis Company six hundred dollars in money," etc.; and, "intending to cheat and defraud Aycock Frank Alvis Company, a partnership composed of Aycock Frank Alvis, doing business in New Orleans, Louisiana," etc. The three grounds of demurrer necessary to be herein considered are: Because said indictment fails to allege or charge the value of the property alleged to have been obtained by the defendant; because the indictment fails to set forth the contents of the letters alleged to have been used for the purpose of procuring the money alleged in said indictment; because the indictment fails to give or set forth the proper names of the persons composing the firm of Aycock Frank Alvis Company.

The first two of these grounds are wholly untenable. "When the false pretense is in writing, or consists wholly or in part in the use of a written instrument, the writing need not be set out in *hæc verba*. It is sufficient, as in the case of a verbal pretense, to set out the purport of it, unless some question turns on the form or construction of the instrument, or some legal description of it is given in the indictment, the accuracy of which it may be material for the court to determine." 19 Cyc. 424, 425, and authorities there cited. The allegation that appellant obtained from the said Aycock Frank Alvis Company \$600 in money is a sufficient allegation of the value thereof. *Oliver v. State*, 37 Ala. 134; *People v. Millan*, 106 Cal. 320, 39 Pac. 605; 8 En. Pl. & Pr. 875.

The indictment, however, failed to allege the names of the individual persons composing the partnership. The name of the party defrauded must be set out, as a means of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

identifying the offense charged; and this allegation is as essential in false pretenses as it is in larceny. McClain on Crim. Law, vol. 1. § 707. Where the persons defrauded compose a partnership, the indictment must allege both the Christian and surname of the individuals composing the same, or a proper excuse given for not so doing. 2 Bishop, Criminal Pr. § 718.

The demurrer, therefore, was properly sustained.

Affirmed.

### EASLEY v. ALABAMA GREAT SOUTHERN RY. CO. (No. 13,929.)

(Supreme Court of Mississippi. Oct. 18, 1909. Suggestion of Error Overruled Nov. 2, 1909.)

#### 1. CARRIERS (§ 318\*)—INJURIES TO PASSENGERS — PRIMA FACIE CASE — BURDEN OF PROOF.

Where the evidence showed that a passenger was injured by the running of a locomotive of the carrier, the carrier did not meet the prima facie thereby made, under Code 1906, § 1985, providing that, in actions against railroads, proof of an injury inflicted by the running of locomotives shall be prima facie evidence of negligence, by evidence leaving it a matter of conjecture as to how the accident happened; but it must clearly show how the injury occurred, and show facts exonerating it from liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.\*]

#### 2. TRIAL (§ 252\*)—EVIDENCE—INSTRUCTIONS—APPLICABILITY.

Where, in an action for injuries to a passenger by the running of a locomotive, the testimony negated the fact that the passenger was either leaning out of the car window or holding his arm out of the same, an instruction that the passenger must show that he exercised ordinary care, and that if his injury was caused from his leaning out of the window, or holding his arm out of the same, so far as to be struck by an object a specified distance from the car, he was guilty of contributory negligence, was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. § 252.\*]

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action by Tom Easley against the Alabama Great Southern Railway Company for injuries received while a passenger. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

F. V. Brahan, for appellant. Bozeman & Fewell, for appellee.

MAYES, J. As the proof now appears in this case, it conclusively shows that the injury to plaintiff was inflicted in some way by the running of the locomotive. This being so, he was entitled to all the benefit of section 1985 of the Code of 1906, which provides that: "In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the

want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employes of railroad companies." In this view of this statute, under the facts as they now appear in the record, it is exceedingly doubtful whether or not a peremptory instruction should not have been given plaintiff on the question of liability; but, since this case is to be tried again, we leave this question undecided, as a new trial may develop new facts.

We are very much inclined to the view that the testimony offered to rebut the prima facie case made by the testimony of plaintiff under the statute leaves it a matter of conjecture as to how this accident happened. When this is the case, this court has said, in the case of Railroad Company v. Brooks, 85 Miss. 269, 88 South. 40, and in Railroad Company v. Landrum, 80 Miss. 399, 42 South. 675, in construing this statute, that "mere conjecture would not meet the burden of the statute, but that the testimony for the railroad must clearly show how the injury occurred, and, in showing this, show further such facts as exonerate the railroad company." We hardly think that the testimony of the defendant company met this standard of requirement. In this doubtful state of the case on the law, the court undoubtedly committed reversible error in giving an instruction to the jury which had no facts to support it.

By the first instruction the court told the jury that "it devolved upon plaintiff as a passenger to exercise ordinary care not to be injured, and if you believe from the evidence that his injury was caused from his leaning out of the car window, or holding his arm out of the car window, so far as to be struck by an object 12 inches from the coach, then he is guilty of contributory negligence, and cannot recover." The testimony nowhere shows that plaintiff was either leaning out of the window or holding his arm out of same. On the contrary, it negatives this. All instructions must have application to the case made, and not be mere arbitrary announcements of the law. Again, instructions cannot have inserted in them fictitious facts, and the jury told that, if they believe those unproven facts, they must find in favor of the party asking the instruction.

Reversed and remanded.

### FARMERS' LOAN & TRUST CO. v. RAINER. (No. 14,088.)

(Supreme Court of Mississippi. Nov. 8, 1909.)

#### SALES (§ 176\*)—PRICE—LIABILITY TO ASSIGN-EE.

Where a buyer, who knew that the goods delivered were not of the character and quality ordered, and who knew that his customers, who had bought part of the goods, had returned the same as worthless, failed to exercise his right

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to reject the goods, but executed an acceptance and notes for the price, he must pay the notes to an assignee in due course.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.\*]

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

Action by the Farmers' Loan & Trust Company against T. J. Rainer. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The appellee purchased a certain quantity of jewelry from the traveling salesman of the Equitable Manufacturing Company; the purchase being made by sample. The jewelry was delivered, and the appellee testified that immediately he discovered that it did not come up to the sample. He sold some of it, and it was returned to him as unsatisfactory. Afterwards he executed an acceptance and notes for the purchase price, which were in due course assigned to the Farmers' Loan & Trust Company. Payment being refused, suit was brought.

Holmes & Holmes, for appellant. Campbell & Campbell, for appellee.

SMITH, J. With full knowledge of the fact that the jewelry delivered him by the Equitable Manufacturing Company was not of the character and quality ordered by him, and after some of it, which had been sold to his customers, had been returned to him as worthless, appellee failed to exercise his right to reject the jewelry, but executed the acceptance sued on. The peremptory instruction, therefore, requested by appellant, should have been given.

Reversed and remanded.

#### ANGLIN v. STATE. (No. 14,168.)†

(Supreme Court of Mississippi. Nov. 8, 1900.)

#### 1. INTOXICATING LIQUORS (§ 147\*)—ILLEGAL SALE.

One may be convicted of an illegal sale of liquor, though the offer to purchase, the acceptance thereof, and the payment of the price be just without the state; the delivery of the liquor being within the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 162; Dec. Dig. § 147.\*]

#### 2. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REPETITION.

Refusal of an instruction covered by one given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

Appeal from Circuit Court, Amite County; M. H. Wilkinson, Judge.

Henry Anglin appeals from a conviction. Affirmed.

This is an appeal from conviction of the unlawful sale of intoxicants. The evidence

shows that the whisky was delivered in Amite county, Miss., by being left at a certain designated place agreed upon by the parties to the transaction, though the money was paid and the sale actually made across the line in the state of Louisiana. On the trial the defendant asked a peremptory instruction, on the ground that he was not guilty, because the sale had not been consummated in the state. This instruction was refused, as was also the third instruction, requested by the defendant, which is as follows: "(3) The court instructs the jury, for the defendant, that before you can convict the defendant you must believe beyond all reasonable doubt that the testimony of Jake Carter is true." The court granted the following instruction for the state, the granting of which and the refusal of the third instruction asked by the defendant are assigned as error on appeal: "(1) The court instructs the jury, for the state, that if you believe from the evidence in this case beyond a reasonable doubt that Henry Anglin sold Jake Carter whisky in Louisiana, and it was delivered in Amite county, state of Mississippi, then he is guilty, and you should so find."

R. S. Stewart, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

SMITH, J. The evidence in this case shows without conflict that the offer to purchase the whisky, the acceptance thereof, and the payment of the price occurred in the state of Louisiana, near the Mississippi line, and that the whisky was delivered across the line in the state of Mississippi. Appellant's request for a peremptory instruction, therefore, was properly refused. And while the instruction given the state may not be a strictly accurate announcement of the law, still, as applied to the facts of this case, it could not have misled the jury.

The third instruction requested by the appellant, charging the jury that they could not convict him unless they believed beyond a reasonable doubt that he sold the whisky, correctly announced the law; but its refusal worked no prejudice to him, for the reason that the jury was specifically told in the state's instruction that they must believe beyond a reasonable doubt that the defendant sold the whisky before they could convict him.

The matters complained of with reference to the admission and exclusion of testimony cannot be considered, under the rule announced in Richburger v. State, 90 Miss. 806, 44 South. 772. There was no error in the other matters complained of.

Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For opinion on suggestion of error, see 50 South. 728.



McFARLAND, Tax Collector, et al. v. GOINS.  
(No. 13,990.)

(Supreme Court of Mississippi. Nov. 2, 1909.)  
CONSTITUTIONAL LAW (§§ 206, 220\*)—CLASS  
LEGISLATION.

Laws 1908, p. 92, c. 102, authorizing a county to establish one agricultural high school for instruction of its white youth, and to support it by a tax on all taxable property therein, contravenes Const. U. S. Amend. 14, § 1; its object or necessary effect being to abridge the privileges or immunities of a certain class of citizens, or deny them the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 644, 723; Dec. Dig. §§ 206, 220.\*]

Appeal from Chancery Court, Jasper County; Sam Whitman, Jr., Chancellor.

"To be officially reported."

Suit by Robert Goins against W. J. McFarland, Tax Collector, and another. Judgment for plaintiff. Defendants appeal. Affirmed and remanded.

The appellee filed a bill in the chancery court to enjoin the appellants, who were the tax collector and treasurer, respectively, of Jasper county, from collecting a special tax levied to support and maintain an agricultural high school in said county, established under chapter 102 of the Laws of 1908, on the ground that the collection of such a tax and its application for such a purpose would be in violation of the Constitution of the United States, and that said act was unconstitutional. The defendants demurred, the court overruled the demurrer, and this appeal is prosecuted.

Thigpen & McFarland and Deavours & Shands, for appellants. Sharbrough & Corley and Mayes & Longstreet, for appellee.

MAYES, J. In 1908 the Legislature passed an act, entitled "An act to provide for the establishment of a county agricultural high school," etc. This act is chapter 102, p. 92. Laws 1908, and by section 1 it is provided "that it shall be lawful for the county school board of any county in the state to establish one agricultural high school in the county for the purpose of instructing the white youth of the county in high school branches, theoretical and practical agriculture, and in such other branches as the board hereinafter provided for may make a part of its curriculum." By section 2 of this act it is further provided that the board of supervisors of any county, where an agricultural high school has been established by the county school board, shall have the power, if necessary, to levy a tax on the taxable property at the time the annual tax levy is made for the support and maintenance of the said school, etc.

Section 1 of article 14 of the amendments to the Constitution of the United States

makes "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States and of the state wherein they reside," and further provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, \* \* \* nor deny to any person within its jurisdiction the equal protection of the laws." When the act in question is read in the light of the fourteenth amendment to the Constitution of the United States, its violation of same is too plain for argument. By section 1 of the act of 1908 provision is made for the establishment of an agricultural high school for the white youth only, and by section 2 of the same act this school is to be sustained by taxation on all "taxable property"—that is, by taxes raised on the property of both white and black for the use of the white citizen only. We are not to be understood as holding that a statute could be passed which provided that the revenue raised for the support of the school could be raised by taxation only on the property of the white citizen for the white school and not be in violation of this provision of the Constitution of the United States; but we cite the method of taxation to emphasize the inequality of the law.

If the fourteenth amendment of the Constitution of the United States means anything at all, it certainly means that all citizens of the United States shall stand equal before the law, and that no special privilege or benefits shall be given to one class of citizens to the exclusion of the other as a matter of statutory enactment. This does not mean that the Legislature of the state cannot pass laws the object of which is to prevent a social commingling of the races; nor does it mean that an act of a Legislature which in its administrative effect fails to work out an exact proportion of benefit to the two races is in conflict with this amendment to the United States Constitution; but a law is only void when its object or necessary effect is to abridge the privileges or immunities of a certain class of citizens, or deny them the equal protection of the laws. In the case of *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, and *West Chester & Phila. Ry. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744, it was held that a state statute which provided separate railway carriages for the white and colored races was not in violation of the fourteenth amendment of the federal Constitution; and in the case of *Berea College v. Kentucky*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81, the Supreme Court of the United States sustained a statute of Kentucky which provided for the separation of the races in the public schools.

Civil rights do not mean social rights,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the courts, both state and federal, recognizing this, and further realizing that no man-made law can force this condition of affairs, have steadily upheld all laws that merely had for their object this disassociation of the two races as promotive of the peace and welfare of all the citizens. See citations 175 U. S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262. But, while this is true, no decision of any federal or state tribunal has yet been called to our attention, nor do we think it will be so long as the fourteenth amendment is in existence, upholding a statute taxing the property of the two races for the benefit of the one.

Counsel for appellant cite the case of *Cummings v. Board of Education*, 175 U. S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262, as an authority sustaining the validity of the act in question; but this case is not at all in point. In the case just cited it was shown that the board of education charged with the administration of the school laws maintained a primary school for white and colored children, and in addition to this also maintained a high school for the white children, discontinuing the high school for the colored children for the reason that the available funds were needed for primary schools for a much larger number of colored children than attended the high school. In short, the administrative school board was making the best application of the funds on hand in order to bring about the greatest service, and the United States Supreme Court held that in so doing they were not denying the colored children the equal protection of the law, nor any privilege or immunity guaranteed by the fourteenth amendment. But in the case now before the court the very law itself creates the school for white children only, and imposes taxes on all taxable property for the purpose of raising revenue for the support of this school, and by its very terms excludes the idea that, whatever conditions may exist, any such colored school can be created. Section 533 of the Code of 1906 leaves no doubt as to the complainant's right to file this suit, and we think that the bill states a perfect case.

The chancellor having overruled the demurrer to complainant's bill, the case is affirmed and remanded.

#### WADLEY v. STATE. (No. 14,146.)

(Supreme Court of Mississippi. Nov. 8, 1909.)

#### 1. CRIMINAL LAW (§ 291\*)—PLEA OF FORMER CONVICTION—TIME TO FILE.

Where an indictment which left blank the date of the offense was returned after accused had been convicted of a similar offense, a plea of former conviction was properly filed, after the state's case showed an offense, prior to the

conviction, though the better practice requires the filing of the plea before the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 687; Dec. Dig. § 291.\*]

#### 2. CRIMINAL LAW (§ 292\*)—FORMER CONVICTION—PLEAS—SUFFICIENCY.

Under Code 1906, § 1702, providing that, on trial for violating the liquor laws, the state may give evidence of any one or more offenses of the same character committed before the date laid in the indictment, but in such case, after conviction or acquittal, accused shall not be liable for prosecution for any offenses of the same character before the date laid in the indictment, a plea of former conviction, alleging that accused had been convicted of unlawfully retailing liquor, filed on the trial of an indictment which left blank the date of a similar offense, is good as against a demurrer; for the question whether the state on the former trial availed itself of the privilege of the statute is a matter of proof, though there was a plea of guilty entered on the former trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 668-771; Dec. Dig. § 292.\*]

Appeal from Circuit Court, Panola County; W. A. Roane, Judge.

Louis Wadley was convicted of unlawfully retailing intoxicating liquors, and he appeals. Reversed and remanded.

Shands & Montgomery, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

MAYES, J. The appellant was indicted at the September term of the circuit court of Panola county for unlawful retailing. The indictment states no specific date on which it is claimed the offense was committed, but as to this merely charges that it was "on the ——— day of ———, 1908." Two distinct sales are testified to by two different witnesses; one of them testifying that the sale was made to him some time in June, 1908, and the other claiming that his purchase was in July of the same year. When this testimony was in, the defendant asked leave of the court to file a plea of former conviction of the same offense, and in support of this plea offered the record of the justice of the peace of the proper district, showing that appellant was charged, by affidavit of date August 7, 1908, with unlawful retailing, and convicted and sentenced on August 8th. It will be noticed that the conviction of appellant for unlawful retailing was subsequent to the date at which the witnesses claim they made the purchase from him. This plea was demurred to by the state, and the demurrer sustained, and plea stricken out, followed by a conviction of defendant under the indictment.

As the indictment did not allege the date on which the violation occurred, and as it was returned subsequent to the conviction of appellant in the justice court, it could hardly be expected that he would file the plea of former conviction until it developed in the state's testimony that the state intended to rest its prosecution on a sale occurring prior to the conviction before the justice. It may

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be better practice to file the plea of former conviction before the trial commences, if the defendant knows such facts as would justify the plea at that time; but in this case it took the state's testimony to develop the appropriateness of the plea. We know of no rule of pleading that makes it imperative for a plea of this nature to be filed before the trial is begun, and to so hold in this case would thwart justice. The plea was proper, and the court erred in sustaining the demurrer and striking out the plea. This is particularly true in this case, where the indictment lays the date in blank, only alleging that it was in 1908, and because of section 1762 of the Code of 1906, which provides: "On the trial of all prosecutions for the violation of law by the sale or giving away of liquors, bitters, or drinks, the state shall not be confined to the proof of a single violation, but may give evidence in any one or more offenses of the same character committed anterior to the day laid in the indictment or in the affidavit, and not barred by the statute of limitations; but in such case, after conviction or acquittal on the merits, the accused shall not again be liable to prosecution for any offense of the same character committed anterior to the day laid in the indictment or in the affidavit."

The state must take the benefits of this statute subject to its burdens. The offense proven by the state was prior to the conviction of appellant before the justice of the peace, and if it be true that in the prosecution before the justice of the peace on the 8th day of August, 1908, the state availed itself of this statute and let in evidence of more than one sale, then there can be no further prosecution of appellant for any offense of the same character occurring prior to the date laid in the affidavit in the justice's court, to wit, August 8, 1908; and whether the state did avail itself of this statute in the prior prosecution can only be determined by proof, showing whether or not the state confined itself to a single issue, to wit, the date laid in the affidavit, and this is true, although there was a plea of guilty entered on former trial. For all that is shown by this record, the state may have fully developed its case before this plea was entered.

Reversed and remanded.

#### DEAL v. STATE. (No. 13,806.)

(Supreme Court of Mississippi. Nov. 8, 1909.)  
FORGERY (§ 44\*)—FORGED INSTRUMENT—PRODUCTION—TRIAL.

Where the instrument alleged to be forged is in the hands of the state and available as evidence, its production in evidence is essential to a conviction.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117-121; Dec. Dig. § 44.\*]

Appeal from Circuit Court, Claiborne County; J. N. Bush, Judge.

Mike Deal was convicted of forgery, and he appeals. Reversed and remanded.

R. B. Anderson, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

MAYES, J. This is an indictment against appellant for forgery. He was tried, convicted, and sentenced to the penitentiary for two years, and appeals.

The indictment charged appellant with forging the name of one John Miller to a certain check drawn by one B. F. Luster and made payable to the said Miller, and in the indictment is set out an exact copy of the check. It is not alleged in the indictment that the check was lost or destroyed, or that same was in the possession of accused and could not be produced by the state; nor is there any notice served on accused to produce the check. In this attitude of affairs it appears that, though the state had in its possession the check at the time of the trial, it was never introduced in evidence by the state. At the conclusion of the trial the defense asked for a peremptory instruction to find for defendant, and same was refused by the court, and this is the error assigned here.

Since it plainly appears from the record that the check in question was in the hands of the state and available as evidence, it is our view that its production was essential, and the failure on the part of the state to offer it was fatal to the conviction.

Reversed and remanded.

#### JENKINS v. STATE. (No. 14,167.)

(Supreme Court of Mississippi. Nov. 8, 1909.)

LOTTERIES (§ 20\*)—RAFFLE.

Under Code 1906, § 1286, declaring a punishment for one who puts up or offers anything to be raffled, it is not enough that chances are sold in the state; but the property raffled must be put up or offered within the state.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. §§ 21, 22; Dec. Dig. § 20; \* Gaming, Cent. Dig. § 157.]

Appeal from Circuit Court, Amite County; W. H. Wilkinson, Judge.

L. S. Jenkins appeals from a conviction. Reversed and remanded.

This is an appeal from a conviction under section 1286 of the Code of 1906, which is as follows: "If any person, in order to raise money for himself or another, shall publicly or privately put up or in any way offer any prize or thing to be raffled or played for, he shall, on conviction, be fined not more than twenty dollars, or be imprisoned not more than one month in the county jail." It is shown by the testimony that chances were sold in this state; but it is not shown that the property, to wit, a horse and buggy, were

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ever offered to be raffled in Mississippi, and it is affirmatively shown that the drawing occurred in Louisiana.

Stewart, Jackson & Gordon, for appellant.  
Geo. Butler, Asst. Atty. Gen., for the State.

**MAYES, J.** The record does not show that the property raffled was ever put up or in any way offered within the state, and this is very frankly conceded to be the fact by the Assistant Attorney General. The section of the Code under which this indictment is found being section 1286, Code 1906, it was necessary to show that the property raffled was put up or offered within the state, or there was no proof of any crime. This was expressly decided in the case of *Kirk v. State*, 69 Miss. 215, 10 South. 577.

Reversed and remanded.

**BURNS v. YAZOO & M. V. R. CO.**  
(No. 13,920.)

(Supreme Court of Mississippi. Nov. 8, 1909.)

Appeal from Circuit Court, Warren County;  
John N. Bush, Judge.

Action by J. O. Burns against the Yazoo & Mississippi Valley Railroad Company. From the judgment, Burns appeals. Affirmed.

McKnight & McKnight, for appellant. Mayes & Longstreet and C. N. Burch, for appellee.

PER CURIAM. Affirmed.

**KENNEDY v. STATE.** (No. 14,075.)

(Supreme Court of Mississippi. Nov. 8, 1909.)

Appeal from Circuit Court, Simpson County;  
R. L. Bullard, Judge.

Jodie Kennedy was convicted of crime, and appeals. Affirmed.

Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**McLELLAN v. STATE.** (No. 13,971.)

(Supreme Court of Mississippi. Nov. 8, 1909.)

Appeal from Circuit Court, Holmes County;  
Sydney Smith, Judge.

Clopton McLellan was convicted of crime, and appeals. Affirmed.

Boothe & Pepper and W. J. Croom, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**GULLY v. PERMENTER.** (No. 14,171.)

(Supreme Court of Mississippi. Nov. 9, 1909.)

Appeal from Chancery Court, Noxubee County;  
J. F. McCool, Chancellor.

Action between Fannie E. Gully and W. F. Permenter. From the judgment, Gully appeals. Dismissed.

PER CURIAM. Appeal dismissed.

**ARKY et al. v. CAMERON et al.** (No. 14,131.)  
(Supreme Court of Mississippi. Nov. 2, 1909.)

Appeal from Chancery Court, Lauderdale County; Sam Whitman, Jr., Chancellor.

Bill by L. H. Arky and others against W. D. Cameron and others. From a decree dismissing the bill, complainants appeal. Affirmed.

The appellants filed a bill in chancery to enjoin the enforcement of a judgment at law. A demurrer was interposed, and a motion made to dissolve the temporary injunction. The demurrer and motion were both sustained, and the bill dismissed. See, also, 92 Miss. 632, 46 South. 54, 170.

G. Q. Hall, Hall & Jacobson, for appellants.  
C. C. Miller and C. B. Cameron, for appellees.

**MAYES, J.** This case falls within the principle announced in the case of *Gum Carbo Co. v. German Gazette*, 90 Miss. 177, 43 South. 82, and is affirmed.

**JONES v. STATE.** (No. 13,949.)

(Supreme Court of Mississippi. Oct. 25, 1909.)

Appeal from Circuit Court, Lafayette County;  
W. A. Roane, Judge.

Gene Jones was convicted of crime, and appeals. Dismissed.

PER CURIAM. Dismissed.

**McDOWELL v. STATE.** (No. 14,150.)

(Supreme Court of Mississippi. Nov. 8, 1909.)

Appeal from Circuit Court, Lincoln County;  
M. H. Wilkinson, Judge.

J. W. McDowell was convicted of crime, and appeals. Affirmed.

Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**MAGEE v. STATE.** (No. 14,227.)

(Supreme Court of Mississippi. Nov. 8, 1909.)

Appeal from Circuit Court, Panola County;  
W. A. Roane, Judge.

Louis Magee was convicted of crime, and appeals. Affirmed.

Lomax B. Lamb, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**MISSISSIPPI COTTON OIL CO. v. SMITH et al.** (No. 14,109.)

(Supreme Court of Mississippi. Nov. 9, 1909.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between the Mississippi Cotton Oil Company and Mrs. S. J. Smith and others. From the judgment, the company appeals. Affirmed.

See, also, 48 South. 735.

Green & Green, for appellant. G. Q. Hall, Hall & Jacobson, for appellees.

PER CURIAM. Affirmed.

## FORD v. STATE. (No. 14,071.)

(Supreme Court of Mississippi. Nov. 15, 1909.)

## 1. BREACH OF THE PEACE (§ 19\*)—SECURITY TO KEEP THE PEACE—NATURE OF REMEDY—JURISDICTION.

The proceeding under Code 1906, § 1548, providing that, whenever complaint is made to a justice of the peace that any person has threatened to commit an offense against the person or property of another, the justice may issue a warrant to arrest such person and may require him to give a peace bond, etc., while not in strictness either a civil or criminal proceeding, is more in the nature of a criminal proceeding, and the jurisdiction lies in any county or justice district where the party makes the threats, or in which occurs the hostile action leading to the apprehension that the party charged intends to commit an offense against the person or property of another.

[Ed. Note.—For other cases, see Breach of the Peace, Cent. Dig. § 13; Dec. Dig. § 19.\*]

## 2. BREACH OF THE PEACE (§ 20\*)—SECURITY TO KEEP THE PEACE—APPLICATION AND PROCEEDINGS THEREON.

The proceeding under such section being a preventive one, the court should solve any reasonable doubt in favor of the preservation of the peace and require the bond to be given; the amount thereof to be measured by the gravity of the situation and the condition of the parties.

[Ed. Note.—For other cases, see Breach of the Peace, Cent. Dig. § 14; Dec. Dig. § 20.\*]

## 3. BREACH OF THE PEACE (§ 21\*)—SECURITY TO KEEP THE PEACE—APPLICATION AND PROCEEDINGS THEREON—SUBMISSION TO JURY.

Such section does not intend that on an appeal to the circuit court, the issue should be tried by any person other than the judge, and the submission of the case to a jury is error.

[Ed. Note.—For other cases, see Breach of the Peace, Cent. Dig. § 15; Dec. Dig. § 21.\*]

## 4. CRIMINAL LAW (§ 1179\*)—APPEAL—HARMLESS ERROR.

Under Code 1906, § 1548, relating to peace bonds, the submission on appeal to the circuit court of the issue to a jury was harmless, where the facts fully warranted the court in requiring the bond, since in approving the verdict of the jury the judge himself necessarily passed on the facts, and the judgment would be treated as his judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. § 1179.\*]

Smith, J., dissenting.

Appeal from Circuit Court, Lee County; E. O. Sykes, Judge.

Lee Ford was placed under a peace bond, and appeals. Affirmed.

A. T. Stovall, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

MAYES, J. On the 11th day of January, 1909, a proceeding was instituted under section 1548, Code of 1906, by Wiley Jones against Lee Ford, the object of which was to require Lee Ford to give a bond to keep the peace. The affidavit is in the language of the statute. The proceeding was instituted before a justice of the peace of Lee county, in which county the affiant lived, and it is a conceded fact in the case that Lee Ford lived

in Chickasaw county. When the affidavit was made, a warrant was duly issued by a justice of the peace as required by law, and Lee Ford was subsequently arrested under said warrant. A hearing was had before the justice of the peace on the 20th day of January following, and the justice required Ford to give a bond to keep the peace, fixing his bond at the sum of \$200. An appeal was taken to the circuit court, and the cause was again heard. It fully appears in the testimony that the threats made by Ford were made at affiant's home in Lee county, and in the justice's district in which the affidavit is made. When the cause came on to be heard, the court impaneled a jury and submitted to them the cause, and, the jury finding defendant guilty as charged, the court placed him under a peace bond in the sum of \$200.

There are numerous questions presented in this case—the first being that the court was without jurisdiction to try it, because the affidavit was made in Lee county, whereas it appears that the appellant resided in Chickasaw county; and, second, it is urged that the court had no right to submit the case to be tried by a jury. It is argued by counsel for appellant that the proceeding under section 1548 is not a criminal, but a civil, proceeding, and for that reason jurisdiction only attached in the justice of the peace district in the county of the residence of the defendant. We do not think the contention of counsel as to this is sound. It cannot be said, in strictness, that this is either a civil or a criminal proceeding; but it is more in the nature of a criminal proceeding, and the jurisdiction lies in any county, or justice district, where the party makes the threats, or in which the hostile action occurs leading to the apprehension that the person charged with so doing intends to commit an offense against the person or property of another. It abundantly appears in this record that the threats were made in Lee county at a time when the appellant was there, that the danger to Lee Ford is threatened in that county, and the jurisdiction was unquestionably in Lee county under the facts of this case.

In the case of Howard v. State, 121 Ala. 21, 25 South. 1000, the Alabama court very aptly says, in construing a statute of the state of Alabama similar to the one here, that "the purpose of the statute is to prevent the commission of an offense against the person or property of another, and to this end a warrant may issue for the arrest of the person who has threatened or is about to commit an offense on the person or property of another; and, if there is just reason to fear the commission of such offense, the defendant must be required to give security to keep the peace. It is a preventive measure, which the magistrate is authorized to set in motion to re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

strain the defendant from the commission of an offense against the person or property of another, and not a proceeding to try the person charged with the commission of a criminal offense. To threaten an offense on the person or property of another is not an offense against the law for which a person may be punished. At most, as we have said, he may be restrained from so doing by proper proceedings, but not punished by fine and imprisonment." This proceeding being a preventive one, the court before whom this proceeding is instituted should require the peace bond to be given in all cases where the evidence leaves any reasonable doubt as to whether or not the party charged under this section will carry into effect his threat.

The rule which should govern courts in a proceeding of this sort is the opposite from that which should control where a party is being tried for a crime. When on trial under a criminal charge, all reasonable doubts are to be solved in favor of the accused; but when one is accused under this section, and the court has any reasonable doubt as to whether or not the threats have been made, or the danger to the person or property of another impending, that doubt should be solved in favor of the preservation of the peace, and the bond should be required to be given, the amount of the bond to be measured by the gravity of the situation and the condition of the parties. It was never intended, by section 1548, when an appeal was taken to the circuit court, that an issue should be tried by any person other than judge of the court. It was error for the court to submit the question involved in this case to a jury; but it was not such error as should cause a reversal of the case. The section under discussion clearly contemplates that the trial shall be by the judge; but, since the facts of this case fully warranted the court in requiring the bond, and in approving the verdict of the jury the judge necessarily passed on the facts himself, we look to the judgment, rather than the procedure which led up to it, and treat the act of the judge in submitting the matter to the jury, in this character of case, as mere surplusage, and treat the judgment as his judgment.

We think the case ought to be, and it is affirmed.

SMITH, J. (dissenting). If the statute contemplates, as my Brethren say, and I am inclined to think it does, that causes of this character shall be tried by the judge, without the assistance of a jury, then appellant has not had such a trial as the law contemplates. I cannot assent to the statement that in declining to set the verdict aside the judge necessarily passed on the facts himself. If there is sufficient evidence to support a verdict, the judge, on a motion for a new trial, has nothing to do with the question of the correctness

of this verdict; that being a matter wholly within the province of the jury. It may be that he himself would have reached a different conclusion on the facts, but would not be warranted in setting the verdict aside.

GAVIN et al. v. STATE. (No. 13,884.)  
(Supreme Court of Mississippi. Nov. 15, 1909.)

1. DISORDERLY HOUSE (§ 5\*)—PUNISHMENT OF KEEPER OF HOUSE.

Code 1906, § 5055, providing that every keeper of a house of prostitution shall be punished as a vagrant, does not exclude the right to prosecute such person for keeping a bawdy house; the latter offense, which is distinct from vagrancy, being an offense at common law, which still prevails in Mississippi, where not abrogated by statute.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 5, 9-13; Dec. Dig. § 5.\*]

2. VAGRANCY (§ 1\*)—DEFINITION.

The offense of vagrancy consists in general worthlessness; that is, in being idle, and, though able to work, refusing to do so, and living without labor, or on the charity of others.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7267-7268.]

Appeal from Circuit Court, Noxubee County; Jno. L. Buckley, Judge.

Bettie Gavin and another were convicted of keeping a bawdy house, and appeal. Affirmed.

J. E. Rives, for appellants. Geo. Butler, Asst. Atty. Gen., for the State.

MAYES, J. The only question in this case which we deem necessary to discuss is whether or not, under section 5055 of the Code of 1906, wherein it is provided that "every keeper of a house of prostitution shall be punished as a vagrant," excludes the right to prosecute such person for keeping a bawdy house.

It is urged by counsel for appellant that, since the adoption of the section above quoted, there can be no indictment of a person as a bawdy house keeper, but that in every such case such person must now be indicted only as a vagrant. We do not think this contention can be maintained. The common law still prevails in this state, where not abrogated by statute, and offenses which were such under the common law are still indictable and punishable, and keeping a bawdy house was an offense at common law, and not abrogated by our statute. One may be indicted for keeping a bawdy house, which is one offense against the laws of the state, and, again, may also be indicted as a vagrant, which is another substantive offense. The keeper of a bawdy house offends the law in allowing, permitting, and encouraging lewd, indecent, and immoral practices; and, when charged with being the keeper of a bawdy

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

house, this is the thing for which the party is punished. In vagrancy, the offense consists in general worthlessness; that is to say, in being idle, and, though able to work, refusing to do so, and living without labor, or on the charity of others. It is thus seen that these two offenses are as distinct as the night and day.

Affirmed.

#### RUNNELS v. STATE. (No. 14,005.)

(Supreme Court of Mississippi. Nov. 15, 1909.)

##### 1. CRIMINAL LAW (§ 789\*)—THEORY OF CASE—REASONABLE DOUBT—INSTRUCTIONS.

An instruction that if there arises from the evidence two reasonable theories, one favorable to the state, and the other to defendant, it is the jury's duty to accept the latter theory and acquit defendant, though the other theory is the more reasonable and supported by the stronger evidence, is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1906; Dec. Dig. § 789.\*]

##### 2. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Even though the instruction correctly announced the law, its refusal was not prejudicial to defendant; the court having charged the jury to give defendant the benefit of every reasonable doubt, and that they could not find him guilty unless proven so beyond all reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Thornton Runnels was convicted of crime, and appeals. Affirmed.

W. J. Croom and R. P. Thompson, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

SMITH, J. In the court below the defendant requested and was refused the following instruction: "The jury are instructed, for the defendant in this case, that if there arises from the evidence two reasonable theories, one favorable to the state and the other favorable to the defendant, it is their duty to accept the theory favorable to the defendant and acquit him, although the theory favorable to the state is the more reasonable and supported by the stronger evidence." Even if it should be held that this instruction correctly announced the law, its refusal could not constitute reversible error, for the reason that the court charged the jury over and over again, in several instructions, to give the defendant the benefit of every reasonable doubt, and that they could not find him guilty unless his guilt was proven beyond all reasonable doubt. The defendant was therefore given the full benefit of this principle of law. This instruction seems to have been approved, along with several others, in the case of *Thompson v. State*, 83 Miss. 287, 35 South. 689. That case was properly decided,

independent of what view the court may have taken of this particular instruction.

It rarely happens on the trial of a criminal case that two reasonable theories, one favorable to the state and the other favorable to the defendant, do not arise out of and to some extent find support in the evidence. If acted upon literally by juries, this instruction in most cases would amount to a peremptory instruction to find the defendant not guilty. The court below, therefore, not only committed no reversible error in refusing this instruction, but committed no error at all.

Affirmed.

#### CAMPBELL v. STATE. (No. 13,804.)

(Supreme Court of Mississippi. Nov. 2, 1909.)

##### CRIMINAL LAW (§ 615\*)—CONTINUANCE—SETTING ASIDE ORDER.

Where, in a trial for rape, the court, conceiving that prosecutrix was unable to attend the trial, continued the case, it was error to set aside the continuance on the petition of a large number of citizens; neither accused nor his attorney being present when the petition was presented and acted on.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1371; Dec. Dig. § 615.\*]

Appeal from Circuit Court, Claiborne County; Jno. N. Bush, Judge.

"Not to be officially reported."

D. C. Campbell was convicted of rape, and appeals. Reversed and remanded.

Appellant was indicted for rape. The court, being under the impression that the prosecutrix was unable to attend the trial, continued the case. Afterward, upon a petition signed by a large number of citizens, the court set aside the order of continuance; neither appellant nor his attorney being present when this petition was presented and acted on. Appellant thereupon made application for a continuance on the ground of the absence of a material witness in his behalf. This application was overruled. The case proceeded to trial, and appellant was convicted, and sentenced to the penitentiary for life.

R. B. Anderson, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. We care to say, in this case, only this: That, under the facts shown in this record, it was manifest error to have set aside the order granting a continuance.

Reversed and remanded.

#### DENNIS v. STATE. (No. 14,067.)

(Supreme Court of Mississippi. Nov. 15, 1909.)

##### JURY (§ 149\*)—MISTRIAL—INSANITY OF JUROR—EFFECT.

Where, pending a prosecution for homicide, and after several witnesses had been examined, one of the jurors became insane, it was the

court's duty to begin the trial de novo, reconstituting the jury as a whole, tendering to defendant the right to exercise all the peremptory challenges accorded him by law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 635; Dec. Dig. § 149.\*]

Appeal from Circuit Court, Madison County; W. H. Potter, Judge.

Louis Dennis was convicted of manslaughter, and he appeals. Reversed.

Williamson & Wells and W. J. Croom, for appellant. R. N. & H. B. Miller and Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. In the case at bar the trial had proceeded for three days, and the jury had not only been sworn in chief, but numerous witnesses had testified before the jury. In the selection of the jury the defendant had exercised 10 of the peremptory challenges allowed him by the statute. One of the jurors became insane during the progress of the trial. The defendant thereupon moved the court to declare a mistrial, discharge the jury, and give him a trial de novo, which motion was overruled. The court discharged the insane juror and proceeded to substitute another juror in his place. The remaining 11 jurors were never retendered to the defendant. Thereupon the defendant moved the court to allow him to exercise his right of challenge as to the 11 jurors remaining, which motion the court overruled. Thereupon the defendant moved the court to be allowed his 12 peremptory challenges in the selection of the one juror to be substituted for the insane juror, and this motion was overruled, and the defendant was compelled to proceed in the selection of the substituted juror, and was only permitted to exercise two peremptory challenges, which remained to him from the former trial. All of this was done over the objection of the defendant, not interposed in a general way, but specially, and special bills of exception were taken to the action of the court. This was fatal error. See *Thomp. & Mer. Juries*, 273, and citations; *Proffatt, Jur. Trials*, p. 487, c. 11; 1 *Thompson on Trials*, 90, and citations; 1 *Bish. New Crim. Law*, 1014; *Kinloche's Case*, *Fost. Crim. Law*, 16; *Weddenheimer's Case*, *Fost. Crim. Law*, 22; also *U. S. v. Haskell*, 4 *Wash. C. C.* 402, *Fed. Cas.* No. 15,321; *State v. Vaughan*, 23 *Nev.* 103, 43 *Pac.* 193; *Garner v. State*, 5 *Yerg. (Tenn.)* 160; *State v. Curtis*, 5 *Humph. (Tenn.)* 601; *Com. v. Knapp*, 10 *Pick. (Mass.)* 477, 20 *Am. Dec.* 534; *Jackson v. State*, 51 *Ga.* 402; *Sterling v. State*, 15 *Tex. App.* 249; *State v. Scruggs*, 115 *N. C.* 805, 20 *S. E.* 720; *Com. v. McCormick*, 130 *Mass.* 61, 39 *Am. Rep.* 423. In the *Jefferson Case*, 52 *Miss.* 767, this court gave as some of the reasons for refusing to disturb the judgment, that the objections taken were general. In the instant case it was special. The accused did not claim at the time a continuance of the trial. In this case the de-

fendant did make this claim. Jefferson did not claim the privilege of rechallenging the other 11 jurors. In this case the defendant did claim this privilege, and it was denied to him. All of these things which Jefferson did not do, whereby his case was affirmed, the defendant in this case did do.

The lower court further erred in the so-called new trial, which was claimed to have been given, in this: The same witnesses were not introduced, and the record in this case presents the curious anomaly of a conviction where 11 of the jurors heard the testimony of several witnesses, whose testimony was not heard at all by 1 member of the jury. In this state there is no statute on this subject, and the common law, of course, prevails. Under the common law there is no room for discussion. The court should have begun de novo, and the defendant should have had the whole jury, as reconstituted for the new trial, tendered to him, with the right to exercise all his challenges given him by the law. We approve the statement of the true doctrine on this subject in the opinion of the Supreme Court of Florida in *West v. State*, 42 *Fla.* 244, 23 *South.* 430, where that learned court say: "The common-law rule is that in a trial for felony, if a juror, the judge, or the prisoner, become incapacitated by illness or death, after the jury is impaneled and sworn in chief, the proper course to pursue is to declare a mistrial and begin de novo. In the case of a juror falling ill after being sworn in chief, there is no impropriety in utilizing the remaining 11 on the new trial; but they should be retendered to the prisoner and resworn, and the defendant has a right to his full complement of peremptory challenges, just as though there had been no prior impanelment of a jury in his cause, and he has the right to peremptorily challenge any of the 11 first chosen upon their retender to him. Some of the American courts hold that in such cases the discharge of 1 juror after being sworn, but before any evidence is introduced, does not necessitate the discharge of the remaining 11, nor the beginning of the trial de novo; but such holdings are planted upon special statutory enactments, and have no force as authority here, where there is no such statute and where the common law prevails."

We pass upon no other point in this case, except this one.

Reversed and remanded.

#### BACOT v. STATE. (No. 13,980.)

(Supreme Court of Mississippi. Nov. 15, 1909.)

1. CRIMINAL LAW (§ 452\*)—DEFENSES—INSANITY—EVIDENCE—REMOTENESS.

Where, in a prosecution for homicide, the sole defense was insanity, the opinion of a nonexpert offered by defendant, who testified

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



that he had known defendant for 50 years and had gone to school with him when they were boys, was not objectionable for remoteness.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1054; Dec. Dig. § 452.\*]

**2. CRIMINAL LAW (§ 782\*) — INSANITY — EVIDENCE—INSTRUCTIONS.**

Where insanity was pleaded as a defense to homicide, and a nonexpert testified to an opinion on circumstances detailed, an instruction that, in passing on the evidence of a nonexpert as to the sanity of a person, the jury should be governed by the circumstances related by the witness on which he based his opinion, and then judge whether defendant had sufficient mind to know right from wrong when he committed the crime, was erroneous, as directing the jury not to give any weight to the opinion of the witness based on the facts detailed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1851; Dec. Dig. § 782.\*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Charles Bacot was convicted of manslaughter, and he appeals. Reversed.

Price & Whitfield and Clem V. Ratcliff, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**WHITFIELD, C. J.** The only defense in this case was insanity; that is, the only defense worthy of consideration. There were only two errors which we think of serious import. A number of witnesses, who were laymen, testified to various facts, showing insanity on the part of defendant, and then gave it as their opinion that he was insane. This testimony reached all the way back to the childhood of defendant. As a matter of course, a witness testifying to the conduct of defendant, over a period from 20 to 30 or 40 years, could not possibly give anything except a portion of the facts and circumstances upon which his opinion would be based. In fact, many of such facts going to make up a basis for the opinion, in that long lapse of time, would become lost to memory. And yet, under these circumstances, the court gave the jury, for the state, this instruction: "No. 4. The court instructs the jury, for the state, that in passing upon the evidence given by a nonexpert as to his opinion of the sanity or insanity of a person, you must be governed by the facts and circumstances as related by the witness upon which he bases his opinion, and then judge whether or not the party charged with crime had mind enough to know right from wrong at the time he committed the crime."

Waiving minor objections to this instruction, the fundamental and fatal one is that the jury were directed that they must be governed by the facts and circumstances stated by these lay witnesses, and must form their own opinion from these facts and circumstances, and must not give any weight to the opinion of the lay witnesses, based upon facts which they stated. This is in the very teeth of *Wood v. State*, 58 Miss. 741, and *Reed v.*

*State*, 62 Miss. 405. In this last case the court said: "It is competent for a nonexpert witness, who has had opportunity to observe the conversation, conduct, or manner of the defendant, to state his opinion or belief of the sanity or insanity of the accused, in connection with the facts upon which it is based. Such a witness may give his opinion or belief from facts stated or known by him." There would be no reason whatever, if this were the correct doctrine, why a nonexpert should be allowed to give his opinion. It substitutes the opinion of the jury on the facts related by the nonexpert for the opinion of the nonexpert himself, and practically tells the jury to ignore the mere opinion of the nonexperts. The fact is that a nonexpert witness, who has known the subject of inquiry all his life and observed him under all sorts of varying conditions and circumstances, is often himself a better judge of the sanity or insanity of the subject of inquiry than the best expert in the world, who has not known the subject of inquiry at all. And so the opinion of such nonexpert may often itself be worth vastly more than the opinion of an expert witness who has never known the subject of inquiry. And this has been plainly declared to be the law in the case of *Wood v. State*, supra, wherein this court said: "How much weight is to be given to the opinion of a witness on the question of insanity depends, like the weight to be given to all other opinions, upon the intelligence of the witness and his opportunities of observation; and, while the testimony of a professional man with equal opportunities would ordinarily be more reliable than that of a nonprofessional, the testimony of an intelligent friend, who had known the subject of the inquiry for years, might be more weighty than that of the most experienced expert, who had seen him only since the condition of his intellect had become a matter of investigation. Craft and deceit might mislead the one into an error, which the lifetime acquaintance and observation of the other would readily detect."

It must be remembered that this was the sole defense presented by the defendant, supported by a large mass of testimony, and the instruction, therefore, is vital, and the error in it fundamental. The witness J. C. Williams, who testified that he had known the appellant for about 50 years and had gone to school with him when they were boys, was not permitted to state his opinion in the direct examination as to whether the appellant, from his knowledge of him and observation of him, was sane or insane, and the objection was made on the specific ground that the testimony was too remote. This was manifest error, and, taken in connection with the charge we have discussed, constitutes reversible error. In inquiries as to the insanity of a person, the largest reasonable latitude is allowed. This witness seems to have been

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the one who had known the appellant long-est and best, and been most intimately associated with him, and therefore best qualified to have expressed an opinion as to his sanity or insanity.

For the reasons indicated, these two assignments are well taken, and the judgment is reversed, and the cause remanded for a new trial.

### CITY OF GULFPORT v. MARTIN. (No. 14,026.)

(Supreme Court of Mississippi. Nov. 15, 1909.)

#### INTOXICATING LIQUORS (§ 198\*)—PROSECUTIONS—COMPLAINT—ALLEGATIONS—MANNER OF OBTAINING LIQUOR.

An affidavit, under Code 1906, § 1797, as amended by Laws 1908, p. 116, c. 114, § 1, charging defendant with having intoxicants in his possession for the purpose of selling or giving same away in violation of law, need only allege those facts which under the statute constitute the crime, so that it need not allege how liquors were obtained, whether C. O. D., or with bill of lading attached, etc.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 218; Dec. Dig. § 198.\*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Jack Martin was charged by affidavit, filed by the City of Gulfport, with unlawfully selling liquor. From an order sustaining a demurrer to the affidavit, the City appeals. Error.

This is an appeal from an order of the court sustaining a demurrer to the affidavit made against appellee, who was charged with "having in his possession intoxicating liquors with the intent and for the purpose of selling the same, or giving it away in violation of the law," and quashing the affidavit and discharging the defendant. The city appeals, to settle the question of law.

John L. Heiss, for appellant. J. H. Milze, for appellee.

MAYES, J. The affidavit in this case charges that the defendant "did unlawfully and willfully have in his possession intoxicating liquors with the intent and for the purpose of selling same in violation of law." It seems that by ordinance the city of Gulfport has adopted the state law on this subject.

Under Code 1906, § 1797, as amended by Laws 1908, p. 116, c. 114, § 1, it is provided that: "It shall be unlawful for any person in this state to have in his possession any intoxicating liquors with the intention or for the purpose of selling the same or giving it away in violation of law. Any one violating this section shall, upon conviction for such

offense, be punished by a fine not less than ten dollars nor more than one hundred dollars, or be imprisoned in the county jail not exceeding thirty days or by both such fine and imprisonment." In an affidavit or indictment, under this section, it is not necessary to allege more than the statute fixes as constituting the crime; that is, it is only necessary to allege that the party charged had "in his possession intoxicating liquors with the intent or purpose of selling same or giving it away in violation of law." And it can make no difference in what manner he obtained the liquors; that is to say, it is not an element of the offense that they were obtained C. O. D., or with bill of lading attached.

The holding of the court below that the allegation that the liquors were received C. O. D., or with bill of lading attached, was essential to charge an offense under this section, was error.

### FOURNIER v. STATE. (No. 13,968.)

(Supreme Court of Mississippi. Nov. 15, 1909.)

#### LARCENY (§ 38\*)—INDICTMENT.

An indictment charging accused with burglary, and alleging that the building was entered with intent to take, steal, and carry away certain property found therein, charges burglary, and not larceny, and will not support a conviction for the latter offense.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 98; Dec. Dig. § 38.\*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Henry Fournier was convicted of larceny, and appeals. Reversed, and appellant discharged.

J. H. Milze, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

SMITH, J. The indictment in this case charged appellant with the commission of the crime of burglary, and alleged that the building was entered "with the felonious and burglarious intent then and there" certain property "found therein to take, steal, and carry away." From a conviction thereunder of the crime of petit larceny, this appeal is taken.

While this indictment properly charged the crime of burglary, it contains no allegation charging the crime of larceny. The allegation is that the building was entered with intent to commit this crime, not that the crime in fact was committed. Appellant, therefore, by the verdict of the jury, was acquitted of the crime of burglary, the only crime charged in the indictment, and convicted of a crime not charged therein.

The judgment of the court below is reversed, and appellant discharged.

\*For other cases see same topic and section NUMBER in Dec. & An. Digs. 1907 to date, & Reporter Indexes

**EVANS v. CITY OF LAUREL.** (No. 14,033.)  
(Supreme Court of Mississippi. Nov. 15, 1909.)

Appeal from Circuit Court, Jones County; R. L. Bullard, Judge.

Dave Evans was convicted of unlawfully re-tailing liquor, in violation of an ordinance of the City of Laurel, and appeals. Affirmed.

R. E. Halsell, for appellant. W. S. Welch and Geo. Butler, for appellee.

**PER CURIAM.** Affirmed.

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**FINKLEA v. STATE.** (No. 13,885.)  
(Supreme Court of Mississippi. Nov. 15, 1909.)

Appeal from Circuit Court, Noxubee County; J. L. Buckley, Judge.

J. E. Finklea was convicted of burglary, and appeals. Affirmed.

See, also, 48 South. 1.

J. E. Rives, for appellant. H. H. Brooks, Jr., and Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM.** Affirmed.

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**BABB v. STATE.** (No. 13,946.)  
(Supreme Court of Mississippi. Nov. 15, 1909.)

Appeal from Circuit Court, Lafayette County; W. A. Roane, Judge.

Charles Babb was convicted of manslaughter, and appeals. Affirmed.

Kimbrough & Slough, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM.** Affirmed.

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**CARTER v. STATE.** (No. 14,007.)  
(Supreme Court of Mississippi. Nov. 15, 1909.)

Appeal from Circuit Court, Yalabusha County; Sam C. Cook, Judge.

Napoleon Carter was convicted of assault and battery with intent to kill, and appeals. Affirmed.

Creekmore & Stone and W. C. Blount, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM.** Affirmed.

**SALTER v. STATE.** (No. 14,061.)  
(Supreme Court of Mississippi. Nov. 15, 1909.)

Appeal from Circuit Court, Pearl River County; W. H. Cook, Judge.

F. M. Salter was convicted of manslaughter, and appeals. Affirmed.

Mounger & Mounger, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM.** Affirmed.

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**WARFIELD v. STATE.** (No. 14,028.)  
(Supreme Court of Mississippi. Nov. 15, 1909.)

Appeal from Circuit Court, Warren County; J. N. Bush, Judge.

Elmore Warfield was convicted of murder, with life imprisonment, and appeals. Affirmed.

R. L. C. Barrett, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM.** Affirmed.

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**DOW v. STATE.** (No. 14,074.)  
(Supreme Court of Mississippi. Nov. 15, 1909.)

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

Percy Dow was convicted of assault and battery, and appeals. Affirmed.

A. M. Edwards, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM.** Affirmed.

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**PORTER v. STATE.** (No. 13,964.)  
(Supreme Court of Mississippi. Nov. 15, 1909.)

Appeal from Circuit Court, Attala County; G. A. McLean, Judge.

Jim Porter was convicted of manslaughter, and appeals. Affirmed.

Dodd & Dodd and McWillie & Thompson, for appellant. J. A. Teat and Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM.** Affirmed.

**VIRGINIA-CAROLINA CHEMICAL CO. v. FISHER et al.**

(Supreme Court of Florida, Division B. June 29, 1909. Headnotes Filed Nov. 12, 1909.)

**1. BILLS AND NOTES (§ 475\*)—ACTIONS—PLEAS—SUFFICIENCY.**

Where parties are sued upon notes alleged to have been executed by them as a partnership under such conditions as import a joint liability, pleas which simply deny that the notes were executed by them as a partnership, and which do not deny a joint liability, present no defense to the declaration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1515; Dec. Dig. § 475.\*]

**2. PARTNERSHIP (§ 43\*) — HOLDING OUT AS PARTNER.**

Parties may be stockholders in a corporation, and yet may so deal with others as to be liable as partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 60; Dec. Dig. § 43.\*]

**3. BANKRUPTCY (§ 432\*)—DISCHARGE—DEBTS INCURRED IN ANOTHER CAPACITY.**

The fact that a corporation of which the defendants are stockholders has been adjudged a bankrupt does not relieve those stockholders of debts contracted by them as partners.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 551; Dec. Dig. § 432.\*]

**4. JUDGMENT (§ 540\*) — "RES JUDICATA" — IDENTITY OF CAUSE OF ACTION AND PARTIES.**

In a plea of "res judicata" there must be, first, identity in the thing sued for; second, identity of the cause of action; third, identity of person and parties to the action; and, fourth, identity of the quality in the persons for or against whom the claim is made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1079; Dec. Dig. § 540.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6126-6130; vol. 8, pp. 7786, 7787.]

**5. HUSBAND AND WIFE (§ 85\*)—CONTRACTS BY WIFE—NOTES.**

A married woman's notes, under the Constitution and laws of Florida, are void, and afford no basis for a common-law suit.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 336; Dec. Dig. § 85.\*]

**6. HUSBAND AND WIFE (§§ 89, 97\*) — CONTRACTS BY WIFE—PARTNERSHIP—RATIFICATION.**

A married woman, under the Constitution and law of Florida cannot be a member of a partnership, so as to make herself liable personally for its debts, and a contract by her is incapable of ratification after the death of her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 359, 373; Dec. Dig. §§ 89, 97; \* Contracts, Cent. Dig. §§ 365, 366.]

(Syllabus by the Court.)

Error to Circuit Court, Bradford County; J. T. Wills, Judge.

Action by the Virginia-Carolina Chemical Company against F. A. Fisher and others, copartners. Judgment for defendants, and plaintiff brings error. Reversed.

On the 3d of November, 1906, the plaintiff in error brought a suit at law in the circuit court of Bradford county against the defendants in error; the declaration containing three special counts on three several promis-

sory notes, each of them dated Lawtey, Fla., April 24, 1905—the first for \$1,397.10, and the other two for \$1,397 each. The first became due November 1, 1905, the second November 15, 1905, the third December 1, 1905. In other respects they were alike. The first of these notes is in the following words and figures:

"\$1397.10. Lawtey, Fla., Apr. 24, 1905.

"November 1, 1905, next, after date, we promise to pay to Virginia-Carolina Chemical Company, or order, without offset, thirteen hundred ninety-seven <sup>10</sup>/<sub>100</sub> dollars, for value received, payable at V. C. C. Co.'s office, Savannah, Ga., with interest from maturity at the rate of eight per cent. per annum, with all costs of collection, including ten per cent. attorney's fees, if collected by law or through an attorney.

"And each of us, whether maker, security, or indorser on this note, hereby waives and renounces for himself and family any and all homestead and exemption rights to which he or they may, in any event, be entitled under any provisions of the Constitution or laws, state or federal, as against this note or any renewal thereof.

"No. 7219.

F. A. Fisher Co.

"Due 11/1/1905."

The declaration also contains a common count for the price of goods, etc., in the sum of \$1,208.05, one for money lent, etc., in the same sum, and one for money found to be due on an account stated in the same sum.

The defendants filed the following pleas:

"(1) Now come the defendants, F. A. Fisher, M. E. Edwards, D. R. Edwards, and G. W. Brown, by A. V. Long and John E. Hart-ridge & Son, their attorneys, each for himself and collectively, and for plea to the declaration herein and each of the several counts thereof say that they never were at any time and are not now partners under the name of the F. A. Fisher Company, or any other name. [This plea was confined by the court to the special counts.]

"(3) And for a third plea to the declaration the defendants severally and collectively and each for himself say that they did not execute said promissory note, dated April 24, 1905, for \$1,397.10, payable on November 1, 1905, with interest from maturity at 8 per cent. per annum, as a copartnership, as set forth in plaintiff's declaration."

Similar pleas, 4 and 5, were filed to each of the other special counts.

A seventh plea was filed by M. E. Edwards: "That before and at the time the said claims as set forth in the declaration accrued she was a married woman."

The second and sixth pleas were stricken out on motion. The plaintiff demurred to the third, fourth, and fifth pleas on the grounds substantially:

(1) Neither of said pleas presents an issu-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

able fact, which could be met by replication, or upon which issue could be joined.

(2) Neither of said pleas denies the execution of either of said promissory notes.

(3) Neither of said pleas denies the drawing or making of said notes, or either of them, as required by rule 64 of the rules of circuit court in common-law actions.

(4) Neither of said pleas presents a legal defense.

This demurrer was overruled. After this the defendant by leave of court filed six amended pleas. The first was limited by the court to the special counts, and so far as we can see is in effect a practical duplicate of the first plea. A demurrer to this plea was overruled.

The second amended plea was stricken on motion.

The third plea was "never indebted" as to the fifth and sixth counts.

The fourth plea was as follows: "And for a fourth plea to the first, second, and third counts of the declaration herein the defendants severally and collectively, and each for himself and herself, say that they did not execute the promissory note, set forth in the first, second, and third counts of the declaration, as a copartnership."

This plea seems to us to be in effect substantially the same as the original third, fourth, and fifth pleas. A demurrer to the fourth plea was overruled.

The fifth plea was as follows: "And for a fifth plea to the declaration, and each of the several counts thereof, the defendants severally and collectively, and each for himself and herself, say that they were stockholders in a corporation duly created under the name of the F. A. Fisher Company, under the laws of the state of Delaware, and that before the commencement of this action the said F. A. Fisher Company was duly adjudged a bankrupt in the United States District Court for the Southern District of Florida, a court having jurisdiction of the subject-matter, to wit, of bankruptcy proceedings, and that the said F. A. Fisher Company, so adjudged a bankrupt as a corporation, is the same company sued herein as a copartnership. And the said F. A. Fisher Company was on March 8, 1906, by order of James W. Locke, Judge of the District Court of the United States for the Southern District of Florida, duly discharged from all debts and claims provable by act of Congress against it, and the notes and debts, the subject-matter of this suit, were provable claims under said act of Congress." A motion to strike this plea was denied.

The sixth amended plea was as follows: "And for a sixth and further plea in this behalf, for M. E. Edwards, the said defendant M. E. Edwards says that, before and at the time the said notes in the first, second, and third counts were executed, and before and at the time the indebtedness secured as represented by the fifth and sixth counts of

the plaintiffs' declaration, she was a married woman." Issue was joined on this plea.

The plaintiff joined issue on the first amended plea of the first, second, and third counts of the declaration, and also upon the third and fifth amended pleas. The plaintiff also filed the following replication to the fourth amended plea:

"(3) For replication to the fourth amended plea, plaintiff says: That the consideration for the several notes sued upon herein, and declared upon in the first, second, and third counts of plaintiff's declaration, was fertilizers consigned and shipped by the plaintiff to the defendants as a copartnership, conducting a mercantile business under the firm name of F. A. Fisher Company, at Lawtey, Florida, and said goods were received by the F. A. Fisher Company as a copartnership, and pursuant to a written agreement theretofore made between the parties, reciting the partnership, consisting of F. A. Fisher, M. E. Edwards, D. R. Edwards, and G. W. Brown, as alleged in plaintiff's declaration, and all dealings by said defendants with the plaintiff in relation thereto were as a copartnership under the firm name and style of F. A. Fisher Company, and pursuant thereto the said notes were signed by a member of the said firm, and the manager of the said firm, to wit, F. A. Fisher, in the said firm name, to wit, F. A. Fisher Company, being the same F. A. Fisher who made the original contract, and had all dealings and transactions in relation thereto, with the plaintiff, and the plaintiff accepted the said notes, signed with and in the said firm name as a copartnership, believing in good faith when said notes were accepted that the same was a copartnership composed of the individuals as alleged in plaintiff's declaration."

The plaintiff also filed the following replication to sixth amended plea:

"(5) For replication to defendants' sixth amended plea, plaintiff says: That subsequent to the execution of the notes sued upon, to wit, on the — day of December, A. D. 1905, D. R. Edwards, husband of the defendant M. E. Edwards, died, and the said M. E. Edwards thereby became a widow, and thereafter the said M. E. Edwards continued in the said business with and as a member of the firm of F. A. Fisher Company as a copartnership, as alleged in plaintiff's declaration, and the copartnership, of which the said M. E. Edwards was a member, after the death of the said D. R. Edwards, was in possession of a part of the fertilizers that were the consideration for the notes and account sued upon, and the said copartnership thereafter continued to sell the said fertilizers, and receive moneys therefor, the said moneys being received in trust for the plaintiff herein, and thereby and by reason thereof the said M. E. Edwards, a widow, ratified and confirmed the making of the said notes and the contracting of the said indebtedness by the said firm

of F. A. Fisher Company, and thereby rendered herself liable for the said indebtedness."

The plaintiff also filed a further replication as follows: "That the said M. E. Edwards, with other members of the said firm of F. A. Fisher Company, claiming to be a corporation under the laws of the state of Delaware, but in fact not a legal corporation, admitted the said indebtedness for which plaintiff now sues in and by a pretended assignment for the benefit of the creditors, the plaintiff herein being among the said creditors, as appears by the records of Bradford county, Florida."

The defendant demurred to replications numbered 3 and 5, and assigned the following grounds:

(1) The manner in which defendant dealt with plaintiff could not change or alter the status of defendant as to its corporate existence.

(2) The adjudication of the defendant as a bankrupt precluded and estopped the plaintiff from now raising the question as to whether the defendant is a corporation or a copartnership.

(3) The dealings with the plaintiff after the death of D. R. Edwards could not bind one or more or all of the incorporators as copartners or individually.

(4) The ratification of M. E. Edwards of the making of the notes and of the indebtedness sued on could not render the individual liable for the debts of a copartnership, or a corporation. The adjudication of the defendants as bankrupts precluded and estopped the plaintiff from now raising the question as to whether the defendants were a corporation or a copartnership. The ratification by a widow of an indebtedness assumed during coverture by either a corporation or a copartnership could not impose a liability on the defendant M. E. Edwards, now widow.

The foregoing demurrer was sustained by the circuit judge. Issue was joined on the pleas, and on the trial, after the evidence was submitted, the trial judge directed a verdict for the defendants, and after a motion for new trial was made and overruled a judgment was entered in favor of the defendants. The case is here on writ of error from this judgment.

W. W. Hampton and J. E. Futch, for plaintiff in error. J. E. Hartridge and A. V. Long, for defendants in error.

HOCKER, J. (after stating the facts as above). The assignments of error embrace the rulings of the trial judge on the demurrers to the special pleas of the defendants and the rulings on the demurrer of the defendants to the replications of the plaintiff. These rulings involve the sufficiency of each and every one of the special pleas, for the ruling on the demurrer to the replications

reaches back to the sufficiency of the substance of the pleas themselves.

As to the original pleas numbered 1, 3, 4, and 5, and amended pleas numbered 1 and 4, they one and all set up in substance that the defendants did not execute the notes sued on as a copartnership, or that they never were a partnership under the name of F. A. Fisher Company.

Rule 65 of the rules of circuit court in common-law actions requires that in actions on promissory notes a plea must traverse the drawing or making, or indorsing, or accepting, or presenting, or notice of the dishonor, of the bill or note. Neither of these pleas traverse in direct terms the making of the notes sued on by the defendants.

In the case of Marx v. Culpepper, 40 Fla. 322, 24 South. 59, the defendants were sued as partners for goods sold and delivered. They severally pleaded in abatement that neither was at the time of pleading, nor on the date mentioned in the declaration, nor at any intermediate time, a member of a copartnership composed of defendants doing business as Culpepper & Dupont, or otherwise. On demurrer this court held these pleas presented immaterial issues and were bad. It was held, though the declaration alleged a partnership in the defendants, that it alleged a joint liability, and it was immaterial whether defendants were or were not partners; that "not only are members of a partnership actually existing jointly liable for partnership debts, but when persons contract as partners, or hold themselves out to the public as such, or allow themselves to be so held out, they may be jointly liable, though no partnership in fact existed.

There is no distinct allegation in any one of these pleas that the notes sued on were not executed by the defendants, and no distinct allegation that they were executed by a corporation. The defendants may have been stockholders in a corporation known as the F. A. Fisher Company, and yet may have dealt with the plaintiff so as to make themselves liable to the plaintiff as partners, or as individuals. It seems to us that these pleas presented no defense to the suit.

The fifth amended plea seems also to us to present no defense to this action. Granting that the F. A. Fisher Company was adjudged a bankrupt by the United States District Court and discharged from all its corporate debts, there is in this plea no direct allegation that the notes and other indebtedness sued on were made and contracted by the F. A. Fisher Company as a corporation, and not by the defendants as partners, or under such circumstances as would render them individually liable. Nor is there any allegation that the liabilities sued on in this case, were adjudged in the bankrupt court to be liabilities of the corporation. It may well be that the plaintiff might have waived its alleged rights against the defendants and have proven its claims in the

bankruptcy court against the alleged corporation. But there is no allegation that it did so. We do not see how the fact that the alleged corporation was adjudged a bankrupt and discharged from its debts could affect the liabilities of the stockholders as partners or as individuals. *Corey v. Perry*, 67 Me. 140, 24 Am. Rep. 15. This plea is intended to be one of *res judicata*, and it is essential in such a plea that the parties must have appeared in the same capacity in the former as in the latter suit. 24 Ency. Pl. & Pr. 734. In such a plea there must be (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made. Id. p. 778; *Yulee v. Canova*, 11 Fla. 9, text 56. Also see *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910. The adjudication by the bankruptcy court established the status of the corporation described as the F. A. Fisher Company as a bankrupt, with all the legitimate consequences flowing from that adjudication; but it does not distinctly appear from the plea that the claims sued on in the instant case were claims against the corporation. 1 *Remington on Bankruptcy*, §§ 444-447; *Fowler v. Stebbins*, 136 Fed. 365, 69 C. C. A. 200.

We next consider the sixth amended plea filed by Mrs. M. E. Edwards, alleging that she was a married woman when the notes and debts sued on were executed and contracted, and the replication thereto, to the effect that after the death of her husband she still continued to be a member of the alleged partnership of the F. A. Fisher Company, which was in possession of a part of the fertilizers and received the moneys therefor in trust for the plaintiff, and thereby ratified and confirmed the making of the notes and the contracting of the indebtedness, and thereby rendered herself liable therefor.

This court has been committed to the doctrine that a married woman's note is void since the case of *Hodges v. Price*, 18 Fla. 342, and has also been committed to the doctrine that a married woman cannot be a member of a partnership since the case of *De Graum v. Jones*, 23 Fla. 83, 6 South. 925. We know of no constitutional or statutory changes affecting these decisions. It is laid down in 2 *Page on Contracts*, § 931, "that as a married woman's contract is void, and not voidable, it is incapable of ratification by any agreement or conduct after the woman acquires the power to make contracts, whether such power is acquired by the death of the husband, or by her obtaining an absolute divorce from him, or by a change in the law giving her power to make contracts, etc. In obiter some dissent from this view may be found. Under some statutes, more-

over, a contract of a married woman may be voidable only, and subject to ratification. Ratification must be at least as formal, even under these statutes, as an original contract. It must also be affected by conduct unequivocally intended as a ratification," etc. It seems to us that the plea of Mrs. Edwards, if true, was sufficient to protect her from any judgment in this case imposing personal liability upon her, and that the replication, under the authorities cited, set up no sufficient reply to the plea. The court, therefore, did not err in sustaining the demurrer to this replication.

Several other questions are presented by the assignments of error, but it seems to us that they depend upon those which we have discussed. It seems to us that the parties should be permitted to reform the pleadings in this case, so as to present squarely and directly the issues, first, whether the notes and debt sued on were contracted and made by the F. A. Fisher Company as a corporation; or, second, by the defendants as individuals or as partners. In the case of *Duke v. Taylor*, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232, this court has clearly laid down the law relating to the conduct of business in this state by a foreign corporation, and it is useless to repeat here what is there expressed. So far as we can discover from the facts alleged in the pleadings, it was not possible for the bankruptcy court to have adjudicated the questions involved in this suit. The facts in this case are unlike those in *Bluthenthal v. Jones*, 51 Fla. 396, 41 South. 533, 13 L. R. A. (N. S.) 629, 120 Am. St. Rep. 181, in which no question was raised as to the character in which the parties dealt with each other.

The judgment of the circuit court is reversed, and the case remanded for further proceedings.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

# THOMPSON v. STATE.

(Supreme Court of Florida, Division A. Oct. 12, 1909.)

## 1. BURGLARY (§ 42\*)—EVIDENCE—POSSESSION OF STOLEN PROPERTY.

Where it is shown that a building has been entered and property stolen therefrom, and soon thereafter the property is found in the possession of the person charged with entering the building with intent to steal, such possession, unexplained, may warrant the jury to infer guilt of the crime of entering the building with intent to steal. The guilt of the accused does not follow as a presumption or conclusion of law from the unexplained possession of property recently stolen; but an inference of guilt as a matter of fact may be drawn therefrom by the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jury, to be considered by them in connection with the other evidence.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 80, 104-107; Dec. Dig. § 42.\*]

**2. LARCENY (§ 58\*)—CIRCUMSTANTIAL EVIDENCE—IDENTITY OF STOLEN MONEY.**

The identity of stolen money may be determined by the jury from circumstantial evidence.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 166; Dec. Dig. § 58.\*]

**3. CRIMINAL LAW (§ 1159\*)—APPEAL—SUFFICIENCY OF EVIDENCE.**

Where there is testimony from which the jury might legally have inferred all the essential elements of the crime charged, and it does not appear that the jury were influenced by considerations other than the evidence, a verdict of guilty will not be disturbed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

**4. CRIMINAL LAW (§ 1122\*)—APPEAL—REFUSAL OF INSTRUCTION.**

Where the bill of exceptions shows that all the charges given by the court to the jury are not brought to the appellate court, a mere refusal to give a requested charge will not be held error, since, even if the requested charge is correct in terms, a charge sufficiently covering the point may have been given.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2943; Dec. Dig. § 1122.\*]

**5. CRIMINAL LAW (§ 338\*)—EVIDENCE—ADMISSIBILITY.**

Any legal evidence from which the jury may legitimately deduce guilt or innocence is admissible, if, when taken with other evidence in the case, its relevancy appears.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 752-757, 787, 788, 801, 855; Dec. Dig. § 338.\*]

**6. LARCENY (§ 50\*)—EVIDENCE.**

Where larceny of money is at issue, evidence tending to show that the defendant had no money before and considerable money after the larceny is admissible to be considered with other circumstances in the case.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 142; Dec. Dig. § 50.\*]

**7. LARCENY (§ 45\*)—EVIDENCE.**

Where money found on a defendant corresponds in description with stolen money, the circumstances may be relevant in an issue involving larceny of the money.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 135, 136; Dec. Dig. § 45.\*]

**8. CRIMINAL LAW (§ 956\*)—NEW TRIAL—APPLICATION.**

Applications for a new trial on the ground of newly discovered evidence should be supported by affidavits setting up all the necessary facts, as required by repeated decisions of this court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2373-2391; Dec. Dig. § 956.\*]

(Syllabus by the Court.)

Error to Criminal Court of Record, Dade County; H. F. Atkinson, Judge.

David Thompson was convicted of breaking and entering, and brings error. Affirmed.

John C. Gramling, for plaintiff in error.  
Park Trammell, Atty. Gen., for the State.

WHITFIELD, C. J. The plaintiff in error was convicted in the criminal court of record

for Dade county of the crime of breaking and entering a store building with intent to steal.

On writ of error it is contended that the verdict is contrary to law and the evidence. There is evidence that the building was broken and entered, and that the day after the breaking and entering the accused was found in possession of money that was identified as the money stolen from the house. It does not appear that the accused gave any account of his possession of the money when it was found in his purse and in his shoes, and his account given at the trial apparently did not raise in the minds of the jury a reasonable doubt of the defendant's guilt.

Where it is shown that a building has been entered and property stolen therefrom, and soon thereafter the property is found in the possession of the person charged with entering the building with intent to steal, such possession, unexplained, may warrant the jury to infer guilt of the crime of entering the building with intent to steal. The guilt of the accused does not follow as a presumption or conclusion of law from the unexplained possession of property recently stolen; but an inference of guilt as a matter of fact may be drawn therefrom by the jury, to be considered by them in connection with the other evidence. *Collier v. State*, 55 Fla. 11, 45 South. 753; *Lamps v. State*, 51 Fla. 51, 40 South. 180; *Roberson v. State*, 40 Fla. 509, 24 South. 474; *Rimes v. State*, 36 Fla. 90, 18 South. 114; *Leslie v. State*, 35 Fla. 171, 17 South. 555; *Tilly v. State*, 21 Fla. 242. See, also, *State v. Brady*, 121 Iowa, 561, 97 N. W. 62, 12 L. R. A. (N. S.) 199.

The identity of stolen money may be determined by the jury from circumstantial evidence. *McDonald v. State*, 56 Fla. 74, 47 South. 485.

While the evidence in this case may not be regarded as conclusive, there is testimony from which the jury might have inferred all the essential elements of the crime alleged in returning a verdict of guilty against the accused, and as it does not appear that the jury were influenced by considerations other than the evidence the verdict will not be disturbed. See *McDonald v. State*, supra.

The court charged the jury, if they do not believe from the evidence beyond a reasonable doubt that the defendant broke and entered the storehouse with intent to commit a felony, to find the defendant not guilty, and refused to charge at defendant's request that the jury must believe from the evidence to a moral certainty that the defendant broke and entered the storehouse before they can find the defendant guilty.

As the bill of exceptions shows all the charges given by the trial court are not brought here, the mere refusal to give the requested charge cannot be held to be error; for a charge sufficiently covering the point

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



may have been given, even if the charge first quoted above is not sufficient of itself.

A witness was asked if he knew of the defendant's "general financial condition." This question was objected to, because irrelevant, because defendant had not been connected with the crime, and because it would prejudice the jury. The objection was overruled, and an exception taken. It is urged that this is an irrelevant inquiry into the defendant's financial condition, to his injury. Any legal evidence from which the jury may legitimately deduce innocence or guilt is admissible, if, when taken with other evidence in the case, its relevancy appears. See *Milton v. State*, 40 Fla. 251, 24 South. 60; *Mobley v. State*, 41 Fla. 621, 26 South. 732; *Reynolds v. State*, 52 Fla. 409, 42 South. 373.

Where the larceny of money is at issue, evidence tending to show that the defendant had no money before a larceny and considerable money after is admissible, since a sudden and unexplained possession of means about the time the larceny was committed has the tendency to connect the defendant with the crime, where there are other circumstances to support it. See *Perrin v. State*, 81 Wis. 135, 50 N. W. 516; *Commonwealth v. Devaney*, 182 Mass. 33, 64 N. E. 402; *Leonard v. State*, 115 Ala. 80, 22 South. 564; 2 *Bishop's New Crim. Proc.* p. 344; 18 *Am. & Eng. Ency. Law* (2d Ed.) 495. Where the money found on the defendant corresponds in description with that stolen, the circumstance is clearly relevant. 1 *Wigmore on Evidence*, § 154. The defendant was entitled to make a full disclosure of his financial condition. See *Teston v. State*, 50 Fla. 138, 39 South. 787.

The application for a new trial on the ground of newly discovered evidence was not supported by affidavits setting up the facts, required by repeated decisions. See *Mitchell v. State*, 43 Fla. 584, 31 South. 242; *Howard v. State*, 36 Fla. 21, 17 South. 84; *Williams v. State*, 53 Fla. 89, 43 South. 428.

This disposes of all the points properly presented.

The judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

# KING LUMBER & MFG. CO. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida, Division A. Oct. 12, 1909. On Rehearing, Nov. 2, 1909.)

## 1. CONSTITUTIONAL LAW (§§ 87, 240, 296\*)—RIGHT TO ACQUIRE AND PROTECT PROPERTY—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS.

The constitutional right of "acquiring, possessing, and protecting property" is not in-

fringed by valid governmental regulations of the use of property employed in rendering a public service. Nor are the burdens of valid regulations that affect such property a taking or depriving of property without due process of law, or a denial of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156-171; Dec. Dig. §§ 87, 240, 296.\*]

## 2. CARRIERS (§ 1\*)—REGULATION—POWER OF LEGISLATURE.

The Legislature has full power to pass laws regulating the intrastate business of common carriers, and, when statutes providing such regulations do not violate some provision or principle of constitutional law governing the subject, the legislative will as expressed in a duly enacted statute should be enforced.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 2; Dec. Dig. § 1.\*]

## 3. CONSTITUTIONAL LAW (§ 209\*)—CLASS LEGISLATION.

The rule requiring classifications made by statutes to be reasonable has reference to those who are affected by a regulation, and not merely to the subject regulated.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. § 209.\*]

## 4. CONSTITUTIONAL LAW (§ 209\*)—CLASS LEGISLATION.

Where a regulation affects alike all similarly situated with reference to the subject regulated, a wide discretion is accorded to the Legislature in selecting subjects for regulation. A subject of legislative regulation may be comprehensive or restrictive, where constitutional provisions are not violated.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. § 209.\*]

## 5. CONSTITUTIONAL LAW (§§ 87, 297, 241\*)—COMMERCE (§ 61\*)—REGULATION OF CARRIER—ACQUIRING AND PROTECTING PROPERTY—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—INTERSTATE REGULATION.

Sections 2864, 2865, 2866, Gen. St. 1906, regulating the transportation by a carrier of lumber or timber on "cars belonging to such carrier," do not deny to the carrier the constitutional right of "acquiring, possessing, and protecting property," nor do they amount to a taking or a deprivation of property without due process of law, do not appear to be unreasonable and arbitrary in the classification of persons affected by the regulation, so as to deny to the carrier the equal protection of the laws, and do not constitute a burden upon interstate commerce.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156-171, 700-701, 825-830, 835-846; Dec. Dig. §§ 87, 297, 241.\* Commerce, Cent. Dig. §§ 81, 84, 89; Dec. Dig. § 61.\*]

(Syllabus by the Court.)

Error to Circuit Court, De Soto County; J. B. Wall, Judge.

Action by the King Lumber & Manufacturing Company against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

W. E. Leitner, for plaintiff in error. Sparkman & Carter, for defendant in error.

WHITFIELD, C. J. The plaintiff in error brought an action against the Atlantic Coast Line Railroad Company to recover the amounts fixed by the statute for the failure of the railroad company to equip its flat cars "with all proper and sufficient standards, supports, stays, strips, railing and other equipments and appliances necessary to hold and keep" lumber or timber being transported firmly in place. A demurrer to the declaration was sustained, and, as the plaintiff declined to plead further, final judgment was entered for the defendant. On writ of error the order sustaining the demurrer to the declaration and giving judgment for the defendant is urged as error.

The grounds of the demurrer to the declaration are in effect that the statute denies to the defendant the right of "acquiring, possessing, and protecting property," and is a taking or deprivation of the defendant's property without due process of law; that the statute is unreasonable and arbitrary in its classification, and therefore denies to the defendant the equal protection of the laws; that the statute constitutes a burden upon interstate commerce.

The statute, first enacted in 1903, now appears as sections 2864, 2865, and 2866 of the General Statutes of 1906:

"2864. Must Provide Flat Cars with Suitable Appliances for Hauling Lumber, etc.—It shall be the duty of every railway company or other person engaged in the business of carrying for hire in this state to efficiently and suitably equip and supply every and all flat cars and cars belonging to such carrier, and which may be furnished on which to load any cargo of lumber or timber with all proper and sufficient standards, supports, stays, strips, railing, and other equipments and appliances necessary to hold and keep the cargo firmly in place.

"2865. Appliances Welghed as Part of Cars.—The standards, supports, stays, strips, railings, equipments, appliances, contrivances, etc., provided for in the preceding section shall constitute and be held and considered part and parcel of said cars and the weight of the same shall be added to the weight of the car and shall be deducted from the weight of the cargo of lumber and timber shipped, so that the freight charges shall be charged by the carriers only on the cargo.

"2866. Penalty for Not Providing Appliances.—Whenever any such carrier shall fail in the duty imposed upon it, in respect of its said cars in the two preceding sections, and the unsupplied standards, supports, strips, and other proper equipments shall be provided by the shipper, it shall be and is hereby made the duty of such carrier owning car, to pay the shipper one and one-half dollars for each and every car to which it may be necessary for said shipper to supply or provide any such standard, support, strips or other equipments, as compensation

to the said shipper for the same, payment of which said sum shall be made by said carrier to said shipper upon demand of said shipper made upon any agent of said carrier, and said shipper shall have a lien therefor on said car."

The constitutional right of "acquiring, possessing, and protecting property" is not infringed by valid governmental regulations of the use of property employed in rendering a public service. Nor are the burdens of valid regulations that affect such property a taking or depriving of property without due process of law, or a denial of the equal protection of the laws. *State v. Florida East Coast Railway*, 57 Fla. 522, 49 South. 43.

The Legislature has full power to pass laws regulating the intrastate business of common carriers, and, when statutes providing such regulations do not violate some provision or principle of constitutional law governing the subject, the legislative will as expressed in a duly enacted statute should be enforced.

The contention is that a failure to make the regulation applicable to cars not owned by the carrier renders the statute unconstitutional, because by limiting the regulation to cars owned by the carrier the necessary classification of those affected by the regulation is arbitrary, and operates to deny to the defendant the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States. The operation of the statute upon the subject regulated affects alike all common carriers of lumber or timber by the use of flat cars. There is no violation of the constitutional provision where all are similarly affected under like conditions. The rule requiring classifications made by statutes to be reasonable has reference to those who are affected by a regulation, and not merely to the subject regulated. In this case the regulation affects all similarly situated with reference to the subject regulated, and the wide discretion accorded to the Legislature in selecting subjects for regulation does not appear to have been abused. A subject of legislative regulation may be comprehensive or restricted, where constitutional provisions are not violated.

The "penalty" or obligation to compensate may be avoided by observing the very reasonable regulation. It does not appear that the penalty or obligation is excessive. *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 South. 960; *Garrison v. Southern Ry. Co.* (N. C.) 64 S. E. 578.

If the regulation is just and reasonable, the railroad company cannot be heard to question the constitutionality of the statute, because the regulation and the penalty prescribed for its enforcement are confined to the use of cars owned by the carrier, as distinguished from the use of cars owned by others, but operated by the defendant car-

rier. The burden of regulation imposed upon the carrier is not increased, but is diminished, by limiting the regulation to cars owned by the carrier. The regulation affects all common carriers alike with reference to the subject regulated, to wit, transportation of lumber or timber on flat cars. *Seaboard Air Line Railway v. Simon*, 56 Fla. 545, 47 South. 1001. The defendant cannot claim that the act is unconstitutional as to it on the ground that the protection to the public or to the shippers of lumber is not complete, because the act does not extend to cars used by one carrier and owned by another. The Legislature may have a lawful reason for confining the regulation to a restricted subject, and a wide discretion should be accorded to the Legislature when acting within its powers. The regulation does not appear to be unreasonable or arbitrary with reference to those who are affected by it, and all similarly situated are affected alike by the regulation.

Whether or not other subjects of transportation are regulated is immaterial in considering the validity of regulations of particular subjects. The validity of one legislative regulation is not affected by the mere failure to regulate other matters within the legislative power. The choice of subjects of regulation is for the Legislature within its powers.

The declaration specifically alleges that the transportation that gave rise to this controversy was between points within this state. The fact that the railroad company was also engaged in interstate commerce does not relieve it of its duty to observe all valid state regulations as to its intrastate business. It does not appear that the transportation in this case imposed any burden upon interstate commerce. The statute undertakes to regulate only intrastate business. *State v. Atlantic Coast Line Ry. Co.*, 56 Fla. 617, 47 South. 969. See, also, 7 Am. & Eng. Ann. Cas. 5, for extensive note.

The judgment is reversed, and the cause remanded for further proceedings.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### On Rehearing.

WHITFIELD, C. J. In a petition for rehearing, it is suggested that the court failed to notice that the statute affects only those carriers who own and furnish the cars used in transporting lumber or timber, and does not affect carriers who do not own the cars used by them in transporting lumber or timber, and that the provision of the statute requiring the weight of the standards, etc., to be a part of the car and not of the cargo

applies only to cars owned by the carrier, and that consequently the statute is unconstitutional, because it unjustly discriminates against carriers who own the cars used by them in transporting lumber or timber, and in favor of those who use cars owned by other carriers.

It is true the statute is applicable only to carriers who use "cars belonging to such carrier"; but the regulation is addressed to the business of carriers in transporting lumber or timber in their own cars, and it affects alike all carriers who use their own cars in such business. The Legislature may impose lawful and reasonable regulations upon any portion of the business of common carriers that does not arbitrarily or unreasonably discriminate between carriers. This statute applies alike to all carriers who use their own cars in transporting lumber or timber within this state, and consequently does not discriminate against any carrier as to the subject regulated, to wit, the transportation of lumber or timber in cars owned by the carrier. The regulation that the weight of the standards, supports, etc., shall be regarded as a part of the weight of the car, and not of the cargo, applies alike to all carriers who use their own cars in transporting lumber and timber, and it is incidental to the main purpose of the act. The regulation is not shown to be unreasonable or arbitrary. Rehearing denied.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

STATE ex rel. McKINNON v. WOLFE, Circuit Judge.

(Supreme Court of Florida. Oct. 19, 1909.)

#### 1. MANDAMUS (§ 151\*)—WHEN ALLOWED—DEFECT OF PARTIES.

Where it appears that substantial interests of third parties not before the court are involved, mandamus will not be awarded.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 293; Dec. Dig. § 151.\*]

#### 2. MANDAMUS (§ 4\*) — COURTS — ADEQUATE REMEDY BY APPEAL.

Mandamus lies to compel a court to exercise its lawful jurisdiction, when it refuses to do so; but mandamus will not be awarded to correct alleged errors in rendering a judgment, where there is an adequate remedy by writ of error.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 9; Dec. Dig. § 4.\*]

(Syllabus by the Court.)

In Banc. Application by the State, on the relation of D. L. McKinnon, for writ of mandamus, to J. E. Wolfe, Circuit Judge. Alternative writ dismissed.

D. L. McKinnon, in pro. per. Liddon & Carter, for respondent.

**PER CURIAM.** An alternative writ of mandamus was issued in this cause, requiring the circuit judge to show cause why he does not enter a judgment in a civil action different from the judgment actually entered.

A motion is made to quash the alternative writ upon the ground that the judgment defendant is not a party to this proceeding.

Where it appears that substantial interests of third parties not before the court are involved, mandamus will not be awarded. See *State ex rel. v. Trustees I. I. Fund*, 20 Fla. 402; *State ex rel. Sunday v. Richards*, 50 Fla. 284, 39 South. 152.

Mandamus lies to compel a court to exercise its lawful jurisdiction, when it refuses to do so; but mandamus will not be awarded to correct alleged errors in rendering a judgment, where there is an adequate remedy by writ of error. See *State ex rel. Matheson v. King*, 32 Fla. 416, 13 South. 891; *State ex rel. Hart v. Call*, 41 Fla. 442, 26 South. 1014, 79 Am. St. Rep. 189.

Upon consideration it appears to the court that the party against whom the judgment is asked is not before this court, and that an appropriate remedy may be afforded all parties by writ of error to the judgment complained of. Therefore mandamus should not be awarded.

An order will be entered dismissing the alternative writ of mandamus issued herein. All concur.

(124 La.)

No. 17,429.

**PETIT ANSE COTEAU DRAINAGE DIST.  
v. IBERIA & V. R. CO.**

(Supreme Court of Louisiana. June 30, 1909.  
Rehearing Denied Oct. 18, 1909.)

**1. WATERS AND WATER COURSES (§ 51\*)—  
OBSTRUCTION—NATURAL DRAINS.**

It has always been recognized by our law and jurisprudence that the alluvial soil of this state can no more be cultivated, or kept in habitable condition, without frequent open drains, than it can be traversed without roads, and the prohibition against the obstruction of the natural drains is, and has always been, part of the law, to be read into every title by which land is held. When, therefore, defendant (railroad company) acquired its right of way, crossing all the natural drains in the western part of the parish of Iberia, leading to Vermillion Bay on the south, it did so sub modo; the condition being that it would not obstruct the natural drains.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 42, 43; Dec. Dig. § 51.\*]

**2. DRAINS (§ 18\*)—NATURAL DRAINS—POLICE POWER.**

The opening, maintenance, and control of natural drains is within the police power of the state, and such power is conferred by Act No. 139, p. 293, of 1902, and Act No. 61, p. 142, of 1904, and other legislation, upon the boards of

commissioners of the drainage districts established in conformity with these laws. Such boards are authorized to enter upon lands through which natural drains pass for the purpose of doing the work necessary to render, and keep, them efficient, and, after reasonable demand for the removal of obstructions thereto, and the failure of the party responsible for the same to move them, may cause them to be removed. They may also enlarge such drains to meet the requirements of the systems of drainage proposed and in course of construction by them. Where, however, new drains are to be cut, they must expropriate, and pay for, the property required for that purpose.

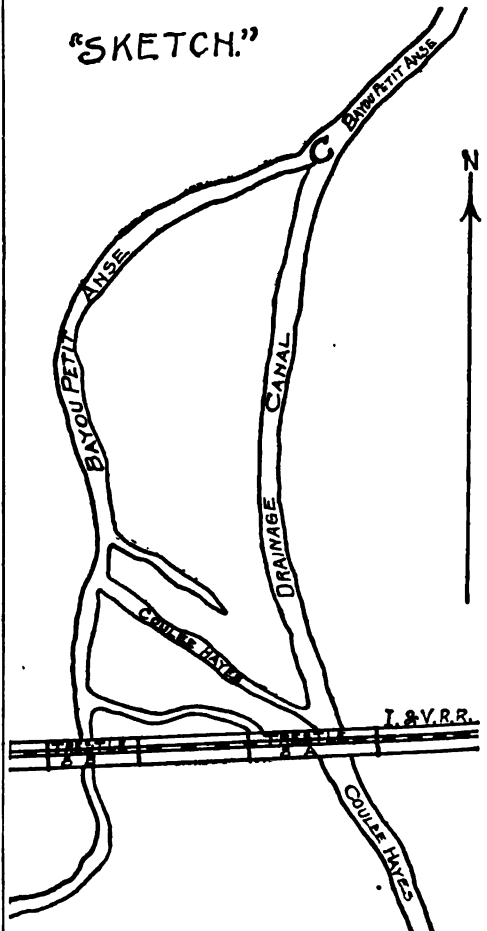
[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 11; Dec. Dig. § 18.\*]

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Action by the Petit Anse Coteau Drainage District against the Iberia & Vermillion Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the plat referred to in the opinion:



Weeks & Weeks, Denegre & Blair, and D. Coffery, for appellant. Burke & Burke, for appellee.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## Statement of the Case.

MONROE, J. Plaintiff is a public corporation, and was created for the purpose of draining the district (whose name it bears) lying in the western part, and extending from the northern boundary of, the parish of Iberia to Vermillion Bay, into which it drains. The district is traversed from west to east by defendant's railroad, and there is a watershed of some 25,000 or 30,000 acres of land to the north of the railroad, which must drain under, over, or through the right of way. The main natural drain is Bayou Petit Anse, which enters the district from the parish of Lafayette on the north, and flows in a general southwesterly direction. More than 100 years ago the greater proportion of the waters of the bayou were deflected at a point, as we take it, a little above that at which the railroad now crosses into a local drain, known since then as Coulee Hayes, and from a period beyond the memory of man Coulee Hayes has been the main channel of the bayou from the point mentioned down to the Salt Mine Canal (originally constructed by the Spanish commandante), which carries its waters into Vermillion Bay. In periods of high water, however, the entire "platin" (or low ground) between the bayou and the coulee (say 1,000 or 1,200 feet in width at the railroad crossing) serves as a drain, though we infer that since the building of the railroad (15 years ago) some filling has been done which may separate the two streams at the crossing even in high water. The railroad company has a bridge (as it is called, though it appears to us to be merely a trestle) known as "8 A," 345 feet long, over the coulee, and another, known as "8 B," 150 feet long, over the bayou. The situation, so far as it need be shown for the purposes of this case, is roughly represented by the subjoined "sketch," which, making no pretensions to absolute accuracy, has been prepared from a number of sketches offered in evidence, no two of which are altogether alike. In accordance with a scheme of drainage proposed by plaintiff and approved by the board of state engineers, and which contemplates the opening, and incidentally, perhaps, the widening, deepening, and straightening, of the natural drains, plaintiff started its dredge boat into Coulee Hayes from the Salt Mine Canal and worked up stream until it reached defendant's bridge "8 A," which obstructed the further passage of the boat. Defendant was thereupon appealed to, and, through its representative, expressed itself, in civil terms, as being willing to facilitate the work. It, however, did nothing, save to carry on negotiations and correspondence, which lasted several months, during which time, or part of which time plaintiff's contractor was delayed and the dredge boat was kept idle below the bridge. Plaintiff's engineer suggested that the most feasible, if not the only, thing to be done was to open the

bridge and let the boat go through, and no better or other plan was suggested by defendant; the only question upon which the parties were really unable to agree being who should bear the expense of removing and restoring so much of the bridge (or trestle) as it might be necessary to remove for the passage of the boat. Plaintiff finally offered to make a deposit of \$2,500 (which appears to have been sufficient) by way of security, and leave the question of liability to be settled by the courts, but defendant for some reason not explained would not accept the offer. There was, then, some talk of plaintiff's forcing a passage, and defendant obtained a writ of injunction restraining it from disturbing the bridge over Bayou Petit Anse. Plaintiff was not interested, however, in the bridge (8 B) over Bayou Petit Anse proper, but was obstructed by the bridge (8 A) over Coulee Hayes, and it also went into court, and, alleging the obstruction (though it, like defendant, designated the bridge over Bayou Petit Anse as the one in which it was interested), obtained *ex parte* an injunction enjoining and commanding defendant to "desist and abstain from opposing, obstructing, impeding, or interfering with the work of dredging in Bayou Petit Anse, herein above described, and, in default of defendant's removing the crossing within 24 hours," directing that it be removed by the sheriff.

It may be here stated that the petition further alleges as follows:

"Your petitioners further show that at this time it is simply their desire to cross the said railroad track with the dredge boat in order to continue their work of dredging, but they reserve their right to compel and to force the said railroad company hereafter to span the said Bayou Petit Anse with a railroad bridge which will meet the requirements of the board, and not interfere with the drainage of the district"

—and the right of plaintiff to claim damages was reserved.

When defendant learned of the issuance of the writ so obtained, it appealed to this court for a writ of prohibition, and a rule nisi was issued with the usual restraining order, but, before the papers could be served, the delay allowed by the district court had expired and the trestle (8 A, over Coulee Hayes) had been in part removed, and the dredge boat had passed. This court, however, proceeded to consider the case as presented by the petition of defendant and the returns, and rendered judgment, prohibiting further action under the mandatory injunction (obtained by plaintiff) until defendant should have been heard. *Board v. Railroad Company*, 117 La. 940, 42 South. 433. Thereafter defendant appeared in the district court, and made answer, in substance, as follows:

It alleges that its road is built upon land owned by it, including the beds of Bayou Petit Anse and Coulee Hayes. It denies that plaintiff has acquired any rights over the same, and admits "positively refusing to al-

low any dredge boat to pass through said property, or to allow other entry thereon." It alleges that plaintiff, under color of the mandatory injunction, caused the bridge over Coulee Hayes to be destroyed, and, further trespassing, caused its contractor to dredge a canal through defendant's right of way to a depth below tide level and to a width exceeding that of the coulee.

"Defendant admits that said Bayou Petit Anse, which is some distance west of said Coulee Hayes bridge and said canal, is the natural drain of the lands of the Petit Anse Coteau drainage district, but shows: That plaintiff is now purposely making said canal a substitute therefor, and is making said canal the main drain of the lands of said drainage district. That above respondent's said land and railroad plaintiff is intentionally directing all the waters of the said bayou and of said land into said canal, and is thus changing their natural course, and is artificially causing same to flow upon, and over, respondent's land at said Coulee Hayes bridge. That plaintiff is draining, or about to drain, into said canal, above said bridge, by cutting through watersheds, lands which naturally drain in wholly different directions. That in these and other ways plaintiff is both imposing new burdens on respondent's said land at Coulee Hayes bridge, and is rendering more burdensome any natural servitude of drain which may be owing by said land, though none is admitted to be due."

Defendant denies that the acts and claims of plaintiff are authorized by Act No. 259 of 1898 (meaning No. 159, p. 293, of 1902), and alleges that, if it be otherwise held, said act contravenes articles 2 and 167 of the state Constitution and the fourteenth amendment of the Constitution of the United States. It denies that plaintiff has any right to enter upon its land, and alleges that, in any event, it could do so only after expropriation by judicial proceedings and compensation first made; denies that the canal through and above its lands was cut along any channel selected by the drainage district and approved by the board of state engineers, and denies that it is a public drainage canal, or that plaintiff has control of it; and it alleges that the acts complained of have caused it great loss and injury, for which it reserves the right to claim damages.

"Wherefore respondent prays that plaintiff's demand be rejected, and that, in so far as it may be necessary, in view of the decree of the Supreme Court, making peremptory said writs of certiorari and prohibition, the said writ of mandatory injunction herein issued be decreed to have issued illegally and without due process of law, and be set aside and dissolved; also, that there be judgment recognizing the land forming respondent's right of way at said Coulee Hayes bridge to belong in full ownership to this respondent, and decreeing that said plaintiff corporation is without right to enter upon defendant's said property or exercise any functions thereon; further, that respondent have judgment decreeing illegal and tortious all of said acts of plaintiff, including its entries through said sheriff, as well as through its agents, and said dredging on the said property of respondent, the destruction of said bridge and other property, the creating of burdens thereon, as well as the increasing the burden of any servitude which may have previously been due by said land, though none such is admitted; further, that there be judgment requiring the

said plaintiff within a delay not exceeding 30 days from the date of the judgment herein to refill the said excavation, dredged by it through defendant's land at Coulee Hayes, in such manner and to such extent as to restore said Coulee Hayes, through respondent's land, to a width and depth not less than it properly had prior to the said excavation and wrongful acts, and requiring plaintiff within 30 days from date of said judgment to dam and obstruct said canal above respondent's said land at Coulee Hayes bridge; and that in the event of plaintiff's not complying with the requirements as above prayed, or with the requirements of whatever judgment may be rendered against it within said time, then that this respondent shall be authorized by said judgment to refill said excavation, after said time shall have elapsed, to said extent and to cause said works to be constructed and to protect the property from said increased flow of waters, and to recover from plaintiff and the surety on the injunction bond herein given, all expenses thus incurred."

Upon the trial in the district court it was shown that the original channel of Bayou Petit Anse is obstructed by the piles, which support defendant's trestle, and by silt and debris, which has lodged against them, and that for a mile or more below the trestle, until it almost loses itself in the swamp, it is exceedingly tortious and is obstructed by growing trees, fallen timber, silt, etc., the evidence satisfying us that the main channel through Coulee Hayes (which is also called Bayou Petit Anse) was wisely selected for plaintiff's purposes. It was shown that Coulee Hayes required dredging; that it was necessary, in the doing of that work, that plaintiff's dredge boat should pass defendant's bridge "8 A"; and that the method proposed and adopted for the passage of the boat was the most feasible and subjected defendant to as little inconvenience as any that could have been adopted. It was shown that the coulee was obstructed by the piles which supported the bridge and by other piles which had supported a pre-existing bridge, and which had been sawed off beneath the surface of the water; that it was dredged to a somewhat greater depth and width beneath the bridge and across defendant's right of way than existed prior to the dredging; and that, after passing the right of way going north, plaintiff, instead of following the coulee into the bayou, and then around the arc to the point, C (as indicated by the sketch), cut a channel (or canal) along the chord of the circle, thus making its drain straighter and necessarily shorter. The evidence fails to show that, as a consequence of the work thus done any more or other water will be attracted into the coulee, at the railroad crossing than would naturally flow there without such work, the most that can be said upon the subject being that, by reason of its increased capacity, the coulee will hold and carry off more water at one time than it did before, that the drainage will therefore be more rapid, and hence more effective, and that the tendency in high water to an overflow of the entire "platin" lying between the coulee and the bayou will be reduced Bayou

Petit Anse and Coulée Hayes are not navigable streams, and titles to land in that vicinity ignore the coulée and refer to the bayou as a boundary. We take it that defendant is the owner of the soil constituting the beds of both streams, subject, however, to such conditions as the law imposes with respect to the servitude of drain and to such authority as is legally vested in the police jury or the board of commissioners of the drainage district.

There was judgment in the district court in favor of plaintiff maintaining its injunction, and defendant has appealed.

#### Opinion.

Prior to 1888 the state of Louisiana had paid but little attention to what may be called public drainage (as contradistinguished from such drainage as affected only the interests of particular individuals). The Revised Civil Code contained certain articles (now article 660 et seq.) under the subtitle, "Of servitudes which originate from the natural situation of places" and others (now article 772 et seq.), under the title, "Of conventional, or voluntary, servitudes," and the subtitle, "Of the rights of the proprietor of the estate to which the servitude is due." Article 660 provides that the "estate situated below" is bound to receive the waters which run naturally from the estate above, provided the industry of man has not been used to create the servitude; that the proprietor of the lower estate shall do nothing to prevent this running of the water, and that the proprietor of the upper estate shall do nothing whereby the natural servitude due by the lower estate shall be rendered more burdensome. Articles 772, 773, and 774 provide that he to whom the (conventional) servitude is due shall have the right to make the necessary works for its preservation, and that he may go on the debtor estate and construct or repair such works at his own expense. And there are some other provisions under both the titles mentioned which need not be more particularly referred to.

The only other legislation upon the subject was an act of 1813 (now contained in the Revised Statutes as section 2743), which confers upon the police juries the power "to cause to be opened, in any town, suburb, or other place, divided into house lots, or, when a point of land, on the Mississippi river or other water course, shall be divided among several proprietors, such ancient, natural, drains as have been obstructed by the owners of the adjacent lands, and to prescribe the mode to be observed in that respect" (the right being saved by an act of 1814 to the proprietors to make their complaints, if any they should have), and an act of 1858 (now contained in the Revised Statutes as section 2750), which confers upon the police juries the power "to pass all such ordinances as they may deem necessary, relative to roads, bridges and ditches, and to impose such fines

and penalties to enforce the same, as they may think proper." The interpretation of article 660 has been broadened as compared to that originally placed on it, and, by the more recent decisions of this court, it has been held that the owner of the estate to which the servitude is due is not prevented from clearing his land and fitting it for cultivation by digging proper ditches and canals, whereby the running waters may be concentrated and their flow increased beyond the slow movement by which they would ultimately reach the same destination. *Sowers & Jamison v. Shiff et al.*, 15 La. Ann. 300; *Guesnard v. Executor of Bird*, 33 La. Ann. 796; *Ludeling v. Stubbs*, 34 La. Ann. 935. Upon the other hand, it has been held that article 772 et seq. apply only to conventional servitudes, and that the owner of the upper estate, claiming under article 660, "is not entitled to enter, at pleasure, on the contiguous tract, without the consent of its owner, whenever it may be necessary to remove any obstruction to the enjoyment of the servitude, nor, can he widen the drain by which the waters are carried off."

The case from the syllabus of which the foregoing excerpt is taken was decided in 1848, and the court proceeded to say (quoting from the opinion):

"This improvement [the widening of the drain] if necessary, can alone be made by the police jury upon an adequate compensation to the defendant for the damage he may sustain thereby." *Landry et al. v. McCall*, 3 La. Ann. 134.

There was at that time no law under which the police jury could have taken the action suggested, their power, with respect to drainage, being confined to the opening of ancient drains on property divided into house lots and upon points of land on the Mississippi and other streams and to drainage immediately affecting the public roads, etc., under their control. *Parish of Concordia v. Railroad Co.*, 44 La. Ann. 613, 10 South. 809. In so far, however, as that power went, it has been recognized as what is called a "police power." Thus in *May v. Ransom*, 5 La. Ann. 425, after referring to the difficulty encountered in construing Rev. Civ. Code, § 660, this court said:

"To obviate this difficulty, the Code of France provides that courts of justice are to decide in such manner as to reconcile the respect due to property with the interest of agriculture. This discretion is not expressly given to us. But more ample and beneficent powers on this subject have been vested elsewhere by the Legislature."

And, the case being one concerning ancient drains upon a point on the Mississippi river, the opinion proceeds to call attention to powers with respect thereto conferred by the act of 1813 on the police juries. And so in *Walsh v. Arnous*, 6 La. Ann. 98, it was said:

"In dismissing the petition, we again repeat what we stated in *Ransom's Case*, that ample powers to settle this controversy to the advantage of both parties are vested in the police jury by the act of 1813. \* \* \* Police ju-

ries have the exclusive right under the law to determine how lands situated within the points on the Mississippi river shall be drained, without regard to their relative positions, as superior or inferior estates, and to apportion among the several proprietors the cost of the drainage."

In 1888 "Ransom's" (or "Rancon's") Case was again referred to in a controversy between the successors in title of the parties to that litigation, as follows, to wit:

"This question of drainage has been a mooted one between the proprietors of Glendale and Gold Mine plantations for a great many years, and in 1850 \* \* \* there was a litigation between Thomas May and Norbet Rancon, the object of which was to coerce the drainage of Bonnet Carre point and Gold Mine over Glendale. \* \* \* As a means of solving the difficulty presented the court took occasion to recommend the parties to seek relief under the act of March 25, 1813. \* \* \* That decision was rendered in 1850, and it was in pursuance of the recommendation by the court that the police jury ordained and established company canal. \* \* \* In *Avery v. Police Jury of Iberville*, 12 La. Ann. 554, the court upheld the constitutionality of the act of 1813. \* \* \* There was a clause in the act of March 3, 1814, which is explanatory of section 6 of the act of 1813, saving to persons aggrieved the right of complaining of the making or opening of such natural drains when \* \* \* hurtful to them before any court of competent jurisdiction as in case of a common civil action. \* \* \* The judge a quo held 'that, the servitude having been established under the police power of the parish authorities, the control of the common canal or ditch known as the "Company Canal" still remains in the police jury; that neither can the defendant prevent or oppose the dredging or cleaning of any portion of the canal through which the servitude has been established, nor can the plaintiff or other individuals go at their pleasure on defendant's land without its consent for the purpose of dredging or improving the condition of the drainage canal; and that such improvements must be done by order of the police jury on such terms and in such manner as they may think proper.' These observations are eminently wise and correct, and should be enforced."

And the judgment appealed from was accordingly affirmed. *Sarpy et al. v. Hymel et al.*, 40 La. Ann. 423, 4 South. 439.

A few months after the decision thus quoted was rendered, the General Assembly deemed it advisable in the public interest to broaden the authority of the police juries, and it passed Act No. 107, p. 172, of 1888, which provides:

"Section 1. \* \* \* That the police juries \* \* \* are authorized and empowered to divide their respective parishes into as many districts as they may deem necessary or advantageous for the more readily draining the land in said parishes," etc.

Section 2 provides for the appointment by police juries of drainage commissioners; and section 4 provides:

"That the duties of said commissioners shall consist in opening and cleaning all the natural drains in their respective districts. \* \* \* They shall, likewise, have the power of cutting and opening new drains, when deemed necessary, provided that, when, in the estimation of the said commissioners, it is necessary to cut and open new drains, the matter shall be submitted to the landowners of said district who

shall decide on the advisability of the same and on the manner and location in which said drains shall be cut."

Provision is also made for the levying of a tax, with the consent of the landowners, "in order to raise the funds necessary to carry out the provisions of this act." Act No. 37, p. 40, of 1894, is to the same effect, and contains further provisions relating to the manner of obtaining the approval of the landowners, and Act No. 125, p. 180, of 1896, further provides that:

"Whenever the commissioners shall have been authorized to cut and open a new drain, or new drains \* \* \*, the police jury \* \* \* shall have full power to expropriate any land, or lands, across, or through, which, it is proposed to cut and open said new drain, or drains, in accordance with the expropriation laws of the state."

The matter of public drainage was, however, still in an unsatisfactory condition, and the convention by which the present Constitution was adopted dealt with it (in article 281 of that instrument) to the extent of authorizing drainage districts to contract debts, issue bonds, and impose special taxes for the payment of the same. In 1899 an act was passed purporting to carry article 281 of the Constitution into effect, but it was an incomplete piece of legislation, and the following year, at its regular session, the General Assembly passed Act No. 12, p. 12, of 1900, authorizing the establishment of drainage districts, composed of land in different parishes, making other provision with regard to the organization of the board of commissioners, and further providing:

"Sec. 6. \* \* \* That the said drainage boards \* \* \* shall have the power, and it shall be their duty, to open all natural drains which they may deem necessary in their respective districts, and to perform all work, therewith connected, which they may deem necessary to make the opening of said natural drains effective. They shall have the further power of cutting and opening new drains and canals, when deemed necessary. Power is especially conferred upon any drainage district organized under the provisions of this act, and the commissioners thereof, to secure rights of way, necessary for the cutting of canals, or other works, for the drainage of their districts, and, to do this, they shall have power to bring expropriation suits and expropriate all lands that may be necessary for the purpose of securing said rights of way."

Section 17 imposes a penalty upon any persons who may dam, obstruct, or injure any drain canal created or improved under the provisions of this act, and there are other provisions which do not concern this case. Act No. 159, p. 293, of 1902, amends the act above quoted, but confers power on the drainage commissioners in the same terms. Act No. 61, p. 142, of 1904, provides:

"Section 1. \* \* \* That the various levees and drainage districts of the state shall have control over all public drainage channels within the limits of their respective districts, and for a space of 100 feet on each side thereof selected by the district and recommended and approved by the board of state engineers, whether such



drainage channels have been approved by the levee or drainage district or have been adopted without improvement, as necessary parts of, or extensions to, improved drainage channels, and shall have authority to adopt rules and regulations for preserving the efficiency of said drainage channels."

Section 2 of the act provides that:

"Any one shall be guilty of a misdemeanor and shall be subject to fine, or imprisonment, or both who shall obstruct such drainage channels, by bridging same, except in accordance with plans, specifications and instructions prescribed by the District, construct locks, dams, or gates on channels; \* \* \* or, in any manner, obstruct such drainage channels or violate any of the rules or regulations adopted and promulgated by the district for preserving and maintaining the efficiency of such drainage channels."

Our conclusion from the law and jurisprudence to which we have thus referred is that it has always been recognized in both that the alluvial soil in this state can no better be cultivated or kept in habitable condition without "frequent open drains" (quoting the language of this court in one of the cases cited) than it can be traversed without roads. The prohibition against the obstruction of the natural drains is, and has always been, part of the law, and is to be read into every title by which land is held. When, therefore, defendant acquired its right of way, say 150 feet in width, crossing all the natural drains in the western part of the parish of Iberia, leading to Bay Vermillion on the south, it did so sub modo; the condition being that it should not obstruct those drains. The Southern Pacific Railroad (the parent road), it may be remarked, in like manner traverses almost the entire southern part of the state, thereby crossing practically all of the drains, save the Mississippi river, which lead from the upper part of the state to the Gulf of Mexico. The maintenance and control of these drains, we take it, is as clearly within the police power of the state as is the maintenance of the public roads, and the power which the state has conferred upon the police juries in that regard has been recognized by this court as power of that character. *Sarpy et al. v. Hymel*, 40 La. Ann. 432, 4 South. 439.

The same view has been taken by the Supreme Court of the United States in a comparatively recent case, which, as to the main principles of law involved, we are unable to distinguish from the case at bar, and in which it is held that the police power of a state includes the power necessary, not only to the opening and maintenance, but to the widening and deepening of the natural drains; that the imposition upon a railroad company of the entire cost of removing and rebuilding a bridge constructed by it across such drain and of a culvert rendered necessary by the widening and deepening of the channel for drainage purposes is not a taking of private property for public use, which requires compensation in order to afford due process of law; that the equal protection of

the law is not denied to such company in requiring it to remove and rebuild its bridge and culvert for the purpose stated; that the expense of removing the soil attendant upon the widening and deepening of such drain cannot, however, be imposed upon such company without denying it due process of law. In the course of the opinion the Supreme Court, through Mr. Justice Harlan, quotes the following from the opinion of the Supreme Court of Illinois, from which the case had been brought by writ of error, to wit:

"The right of drainage through a natural water course or a natural waterway is a natural easement appurtenant to the land of every individual through whose land such natural water course runs, and every owner of land along such water course is obliged to take notice of the natural easement possessed by other owners along the same water course. \* \* \* Where lands are valuable for cultivation, and the country, as this, depends so much upon agriculture, the public welfare demands that the land shall be drained; and, in the absence of any constitutional provision in relation to such laws, they have been sustained upon high authority as the exercise of police power."

Quoting from its own opinion in the case of *New Orleans Gaslight Company v. Drainage Commission*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831, and referring to the case of *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 228, 17 Sup. Ct. 581, 41 L. Ed. 979, the court said:

"In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the state was not taking property without compensation. In our view, that is all there is in this case. The gas company by its grant from the city acquired no exclusive right to the location of its pipes in the streets as chosen by it under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with the requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*." *Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596.

It will thus be seen that in Illinois the right of drainage in a natural waterway has been found in the common law. In this state it has been found in the Revised Civil Code. In Illinois it is held that such right in the interest of agriculture and the public welfare may be enforced through the exercise of the police power of the state. It has been so held here. In the case cited it is held that a general grant of authority to a gaslight company to lay its pipes in the streets of a city does not carry with it a warranty that it may not be required to change the location of such pipes for the promotion of a purpose necessary to the public health. In the instant case the general authority contained in its charter, under which defendant con-

structed its road and bridged or trestled the natural drains of the state, conferred upon it no right to obstruct those drains or to render them inaccessible for purposes of maintenance. Nor did it guarantee the defendant against the deepening and widening of the drains by the state in the proper exercise of its police power.

It is true that it has been held as between individuals dealing with each other that the owner of the upper estate cannot require the enlargement of the drain upon the lower estate, but, under the jurisprudence at that time, the owner of the upper estate was not permitted to concentrate the drainage water upon his land and empty it upon his neighbor in a single ditch or canal. The later decisions hold that he can effect the drainage of his place in that way, and it would appear to follow that his neighbor must receive the drainage as thus delivered.

If, therefore, the owners of the 25,000, or 30,000 acres of land which plaintiff is endeavoring to drain were before the court, showing that, by means of ditches and canals leading into Coulee Hayes, they had fitted their land for cultivation, and demanding an outlet through that natural drain across plaintiff's right of way for the water thus concentrated, we are inclined to think that they would be entitled to at least respectful consideration. As the matter stands, the plaintiff actually before the court is a public corporation created, as many corporations identical in character have been created, for a purpose which is vital to the welfare and prosperity of the state, and which can be reasonably accomplished in no other way than by the exercise of the sovereign power of the state.

In the capacity stated, plaintiff represents whatever rights and interest the state may have in promoting and maintaining the efficiency of its natural drains, and in so doing represents the rights and interests of the owners of the particular lands which it is seeking to drain and of the body of citizens of the state at large, and it is vested with such power as the state possesses for the vindication of those rights. The question, then, is do the rights, interests, and powers thus represented constitute a sufficient basis upon which to rest the judgment for which plaintiff prays? We are of opinion that they do. Defendant never acquired the right to obstruct Coulee Hayes, or, as against the state, to render it inaccessible for the purpose of maintenance, and it has both obstructed and rendered it inaccessible for such purpose by the piling which it has driven in the bed of the stream for the support of its different trestles. Whether as between it and the individual owner of a tract above it could be required to permit the enlargement of the drain is a matter which need not be here decided. As between it and the state,

represented by plaintiff, exercising the police power of the state, we are of opinion that it can be so required. It is true that the law (which has been quoted) contemplates the expropriation of property, and payment therefor, when new drains are cut, but we do not understand it to mean that the owner of land through which an old, natural, drain passes is to be compensated for such shovelfuls of earth as are removed in making such drain efficient.

We may say, in conclusion, that we find the authority granted to plaintiff to open and clean out natural drains sufficient justification for its entry for that purpose upon the property of defendant through which such a drain passes, and we are of opinion that, after reasonable demand for the removal of an obstruction to the drain here in question, and the failure of the defendant to remove it, plaintiff was authorized to cause its removal without appealing to the court. It is hardly necessary to add that the case here presented is a very different one from that which we supposed was presented on the application for the writ of prohibition. We, however, attribute no blame to the counsel in the matter, and are glad to have an opportunity of dealing with the whole case after a full hearing of both sides.

Judgment affirmed.

(124 La.)

No. 17,843.

Succession of PAVEY.

In re COCO et al.

(Supreme Court of Louisiana. Oct. 18, 1909.)

1. COURTS (§ 202\*)—PROBATE COURT—ORDERS REVIEWABLE—APPOINTMENT OF TEMPORARY KEEPER OF PROPERTY.

A suspensive appeal will not lie from an order of the probate judge appointing a temporary keeper of succession property pending a contest over the appointment of an administrator.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 486; Dec. Dig. § 202; Appeal and Error, Cent. Dig. § 104.]

2. EXECUTORS AND ADMINISTRATORS (§ 22\*)—TEMPORARY KEEPER—POWER TO APPOINT.

Under the provisions of Act 109, p. 173, of 1906, relative to inheritance taxes, it is made unlawful for any heir or legatee to take or be in possession of property composing the inheritance until he shall have obtained the authority of the court to that effect. This statute places all successions in gremio legis, and by necessary implication empowers the court to conserve the property of the estate by the appointment of a temporary keeper until an administrator can be appointed or the heirs or legatees sent into possession.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 116; Dec. Dig. § 22.\*]

(Syllabus by the Court.)

In the matter of the succession of F. M. Pavey. Application by Adolph V. Coco,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

agent, and others, for writs of mandamus and prohibition. Application dismissed.

Coco, Couvillion & Coco, for relators. W. H. Peterman, for respondent.

LAND, J. Relators, as heirs of F. M. Pavey, seek in this proceeding to coerce the granting of a suspensive appeal from an order of the respondent judge appointing Olivier P. Couvillion keeper or guardian of all the property belonging to the succession of F. M. Pavey, pending the decision of the contest over the appointment of an administrator of said succession.

The record facts may be summarized as follows:

On June 20, 1909, Olivier P. Couvillion presented an application to be appointed administrator of the succession of Francis M. Pavey, representing that there were debts which rendered an administration necessary, and that the widow and heirs of the decedent did not wish to administer the estate, but desired that the applicant be appointed administrator of the same upon his qualifying according to law, as shown by the following exhibit attached to the application, viz.:

"We, the heirs of Francis M. Pavey, do not wish to administer for the succession. We have agreed and do wish to have Olivier P. Couvillion appointed as administrator of the succession.

"[Signed] Mrs. S. J. Rabalais.

"Mrs. B. Baudin.

"Mrs. L. A. Couvillion.

"Mrs. F. M. Pavey."

The judge ordered that notice of the application be published, and that all the property belonging to the succession be inventoried and appraised according to law.

On July 10, 1909, John J. Pavey, a non-resident, Mrs. S. J. Rabalais and Mrs. B. Baudin presented a petition to the court, representing that they and their sister, Leonora Pavey, widow of Fulgence Couvillion, were the sole heirs at law of the late Francis M. Pavey; that they desired to accept the succession of their said brother simply and unconditionally; that one Olivier P. Couvillion, a stranger to the succession, had recently applied to be appointed administrator of the same; that he based his title to such appointment upon the written consent of two of the petitioners, Mrs. Rabalais and Mrs. Baudin, and that of Leonora Pavey, widow of Fulgence Couvillion; that the consent of Mrs. Rabalais and of Mrs. Baudin was given upon a misapprehension of facts and their rights, and that they desired to and did revoke said consent; that an administration of said succession was unnecessary, and would cause useless expense and delay in the settlement and partition thereof; but, should the court deem an administration necessary, then that one or more of the petitioners were entitled to the appointment by preference over the said O. P. Couvillion.

The petitioners prayed that the application of the said Couvillion be dismissed, with

costs; that the petitioners be recognized as the heirs and legal representatives of the late Francis M. Pavey, deceased; that the court declare an administration of said succession to be unnecessary, and that petitioners be put in full possession and control of the same; and, in the alternative, that John J. Pavey, or Mrs. Sarah Jane Pavey, or both of them, be appointed to administer said succession.

On July 24, 1909, Mrs. Leonora Pavey, widow of Fulgence Couvillion, and, as above stated, one of the four heirs at law of Francis M. Pavey, presented a petition, verified by affidavit, setting forth the application of Couvillion to be appointed administrator and the opposition thereto of her three coheirs; that pending such contest over the administration there was no person qualified to conduct the affairs of the succession, nor legally in possession of the effects thereof; and that one Ernest Rabalais, acting by direction of the other heirs, or with their knowledge and consent, had without warrant of law taken possession of the property of the succession, especially the plantation of the decedent, and also threatened to take possession of the store of the decedent, which contained a stock of merchandise, and was using and disposing of the effects of the succession, all without any order or authority of the court. The petitioner further represented that it was necessary to appoint a guardian or keeper of the property and effects of the succession, in order to conserve her rights and interest as heir, and prayed accordingly. The judge thereupon appointed Olivier P. Couvillion guardian and custodian of all the property belonging to the succession pending the decision of the contest over the appointment of administrator, with authority to preserve the property, to manage the plantation and gather the crops, and to contract debts necessary for that purpose.

Relator did not move to vacate or modify this order of appointment, but petitioned for an order of appeal, both suspensive and devolutive, therefrom. The judge granted the relators a devolutive appeal, but refused to allow them a suspensive appeal.

The only question in the case is whether a suspensive appeal will lie from an order appointing a provisional keeper or custodian of a succession pending a contest over the appointment of an administrator.

This question must be determined on the face of the record as it existed at the date of the appointment.

In Succession of Clark, 30 La. Ann. 806, the court, while denying the power of the probate judge to appoint a "provisional administrator" pending a contest over the administration of a succession, said:

"Whilst it may be, and doubtless is, true that, in the discretion of the judge, some such appointment, for the preservation of the property of an estate, might be made pending a contest before him, he certainly would have the right of revocation also. But under such an appoint-

ment the appointee would be a guardian or keeper, rather than an administrator. \* \* \* Besides, the duration of the appointment of such a guardian would necessarily be short, for the law requires speedy and summary trial of such questions as contests for administration, and does not allow the decree to be suspended by appeal."

The text of the law provides that judgments appointing tutors, curators, administrators, and provisional syndics shall not be suspended by appeal, but shall have effect until the appeal be decided. Code Prac. arts. 580, 1059.

This rule is founded on the necessity of conserving the property of minors, interdicts, insolvents, and successions pending applications for or contests over administration. The case of a provisional keeper appointed for the sole purpose of conserving an estate for a brief period of time is much stronger than any of the cases specially provided by law. The suspension by appeal of orders making such temporary appointments might work irreparable injury to the parties in interest. In the instant case, by reason for the contest over the administration, the property of the estate consisting in part of a plantation with growing crops thereon, was left without a legal keeper or administrator. The question of administration *vel non*, and of the recognition of relators as heirs and sending them into possession, was pending before the court; one of the heirs insisting on the appointment of an administrator. Under this state of facts, the judge appointed a keeper or guardian, as already stated. The relators allege that the keeper so appointed ousted the possession which they had taken *pendente lite*. The judge in his return states that the relators subsequently ousted the keeper under the shelter of the temporary restraining order issued by the Supreme Court in this proceeding. This case, however, must be decided on the state of facts existing at the date of the appointment of the keeper, as shown by the record.

At that time the relators were before the court opposing an administration of the estate, praying to be recognized as heirs, and to be put in possession of all the property of the succession, which at that date was in *gremio legis*.

The surviving widow and one of the heirs had not revoked the consent to the appointment of Couvillion as administrator, and he was still an applicant for this office.

Act No. 109, p. 173, of 1906, to enforce the constitutional provisions relative to inheritance taxes, makes it unlawful for any heir or legatee to take or be in possession of any part of the things or property composing the inheritance, or to dispose of the same or any part thereof, until he shall have obtained the authority of the court. See section 3.

Under the sweeping provisions of this statute the court below was the custodian of the

estate of Pavey, and the rights of the heirs were in abeyance until recognized by that tribunal. It is useless, therefore, to discuss what the rights of the relator may have been under the Civil Code and prior jurisprudence, as they cannot affect the decision of the present controversy. The only question before us is relators' right, as heirs out of possession, to suspensively appeal from the order appointing Couvillion as keeper or guardian. We cannot answer this question in the affirmative without destroying or greatly impairing the power of the courts to conserve succession property until an administrator can be appointed or the heirs can be recognized and sent into possession. If the appointment of an administrator cannot be suspended by appeal, the same rule should apply with greater force to the appointment of a keeper *pro tem.*, vested only with powers of conservation. The greater includes the less.

We conclude that the articles of the Code of Practice, already cited, by necessary implication deny a suspensive appeal in cases of this kind.

The judge has not as yet decided that an administration is necessary. Hence the cases cited to the effect that a suspensive appeal will lie from a judgment appointing an administrator, when the necessity for an administration is denied, have no application.

The contention of relators that they were in possession of the estate is bad in law, because they were forbidden by the statute to take or hold possession of the same without the express authority of the court, which they were seeking, but had not obtained. None of the heirs were in lawful possession of the succession, and at least one of them was in court demanding an administration. The functions of the keeper will cease as soon as the judge decides whether he will appoint an administrator or send the heirs into possession.

It is therefore ordered that the rule nisi be discharged, the temporary restraining order revoked, and relators' application herein be dismissed, with costs.

(124 La.)

No. 17,859.

STATE v. ROSE.

In re ROSE.

(Supreme Court of Louisiana. Oct. 18, 1909.,

1. CRIMINAL LAW (§ 589\*)—APPEAL—STAY OF OTHER PROSECUTIONS.

An accused, pending his appeal from a conviction of violating a statute, is not entitled to a stay of proceedings against him upon other charges for violations of the same statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1315; Dec. Dig. § 589.\*]

2. CRIMINAL LAW (§ 589\*)—APPEAL—STAY OF OTHER PROSECUTIONS.

The fact that a decision of the trial court that an affidavit alleging a violation of a crim-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

inal statute charged an offense thereunder was error would be no ground for staying proceedings in subsequent prosecutions under the same statute pending an appeal in the first case; the proper remedy being by appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1315; Dec. Dig. § 589.\*]

**3. CRIMINAL LAW (§ 1083\*)—APPEAL—EFFECT ON OTHER CASE PENDING IN TRIAL COURT.**

If the same legal questions happen to be involved in several separate cases against the same accused, pendency of an appeal in one of the cases does not deprive the trial court of jurisdiction of the other cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2732; Dec. Dig. § 1083.\*]

**4. PROHIBITION (§ 17\*)—PREREQUISITES—PLEA TO JURISDICTION OF LOWER COURT.**

As a prerequisite to an application for prohibition to prevent proceedings in the juvenile court, there must have been a plea to the jurisdiction of that court.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 66; Dec. Dig. § 17.\*]

**5. PROHIBITION (§ 3\*)—GROUNDS—CRIMINAL PROSECUTION—FORMER JEOPARDY.**

The question of former jeopardy is for the trial court to decide, subject to review on appeal, and cannot be raised by prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 15; Dec. Dig. § 3.\*]

**6. PROHIBITION (§ 3\*)—GROUNDS—CRIMINAL PROSECUTION—CHILD LABOR.**

In a prosecution for violation of the child labor law (Act No. 301, p. 453, of 1908), prohibiting employment of any child under the age of 14 years to labor in a theater or concert hall, the contention that the violation of the statute involves no moral turpitude, but is good for the child, must be passed upon, if at all, by the trial court, subject to appeal, and cannot be raised by prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 15; Dec. Dig. § 3.\*]

**7. PROHIBITION (§ 3\*)—GROUNDS—CRIMINAL PROSECUTION—CHILD LABOR.**

Upon prosecutions for violation of the child labor law (Act No. 301, p. 453, of 1908), pending appeal in a prior prosecution, the contention that the charges in the subsequent cases are made for alleged violations of the same statute as in the case on appeal, and that therefore such alleged violations are but a continuance of the offense prescribed in the first case, though the child therein alleged to have been employed was not the same, and did not appear on the same days, nor on the stage of the same theater, must be decided by the trial court, subject to appeal, and cannot be raised by prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 15; Dec. Dig. § 3.\*]

**8. PROHIBITION (§ 3\*)—GROUNDS—CRIMINAL PROSECUTION—CRUEL AND UNUSUAL PUNISHMENT.**

The contention that to attempt to punish accused every time he violates the statute would be to attempt to punish him for one continuing offense, and would be cruel and unusual punishment, is a question for the trial court, subject to appeal, and cannot be raised by prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 15; Dec. Dig. § 3.\*]

**9. PROHIBITION (§ 17\*)—GROUNDS—CHALLENGE OF JURISDICTION OF LOWER COURT IN ANOTHER CASE.**

A challenge of jurisdiction of the trial court in a prosecution for violation of a statute would be operative only in that case, and could afford

no basis for a prohibition in succeeding prosecutions for violation of the same statute.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 66; Dec. Dig. § 17.\*]

Low Rose was convicted of violating the child labor law (Act No. 301, p. 453, of 1908), and pending his appeal applied for a writ of prohibition to stay subsequent proceedings against him for violation of the same statute. Dismissed.

Arthur B. Leopold and B. C. Shields, for relator. St. Clair Adams, Dist. Atty., for the State.

**PROVOSTY, J.** The child labor law (Act No. 301, p. 453, of 1908) makes it criminal to employ any child under the age of 14 years "to labor or work" in any theater or concert hall. The relator was prosecuted before the juvenile court under this statute; the affidavit against him charging that he employed a certain named child under 10 years "to appear and perform on the stage" of his theater. The relator was tried and convicted. He appealed, and his appeal is now pending in this court. Other affidavits were made against him before the same court for the appearance upon the stage of his theaters of other children upon other occasions. He refused to go to trial upon these other charges, and has applied to this court for a writ of prohibition to prevent the judge of the juvenile court and the district attorney from forcing him to go to trial. To the customary rule nisi issued to the judge and the district attorney these officers have made return, and the matter to be considered is said application for prohibition.

We proceed to consider the reasons assigned by the relator in his petition why the prohibition should issue, and to dispose of them in regular order:

First. That pending the appeal on the first charge against him all proceedings against him upon charges for violations of the same statute should be stayed. This contention can hardly be serious. If it were well founded, a defendant could not be prosecuted for larceny pending his appeal on a previous conviction for larceny, although the subsequent prosecutions were for offenses distinct and separate in point of time and place.

Second. That the decision of the juvenile court holding that the affidavit charges a crime under the child labor statute is erroneous. The answer is that the proper mode of correcting such error, if error there be, is by appeal.

Third. That, if the prosecution of these other cases is proceeded with in the juvenile court, that court will be trying questions involved in the appeal pending in this court, which questions this court alone has jurisdiction to try. The answer is that, if the same legal questions happen to be involved in several separate cases against the same de-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pendant, the pendency of an appeal in one of the cases does not deprive the trial court of jurisdiction of the other cases. Moreover, no plea to the jurisdiction of the juvenile court appears to have been filed, which is a prerequisite to an application for prohibition.

Fourth. That to try the other cases will be placing relator in jeopardy twice for the same offense. That question is one for the trial court to decide, subject to review, if need be, on appeal.

Fifth. That the violation of said statute involves no moral turpitude, but, on the contrary, is good for the children. Here, again, is a question to be passed on, if ever, by the trial court, subject to review on appeal.

Sixth. This objection has reference to the manner of conducting relator's theater. The same thing may be said with regard to it which has been said with reference to the fifth reason.

Seventh. That the charges in these other cases are made for alleged violations of the same statute as in the case on appeal, and that therefore the alleged violations charged in these other cases are but a continuance of the offense prosecuted in the first case, although the children therein alleged to have been employed are not the same, and did not appear on the same dates, nor on the stage of the same theater. Here, again, is a matter to be decided by the trial court, subject to appeal, if need be, to this court.

Eighth. That to try and punish relator every time he violates said statute would be to try and punish him for one continuing offense, and would be cruel and unusual punishment. Here, again, is a question to be decided by the trial court, subject, if need be, to appeal to this court.

Ninth, tenth, eleventh, and twelfth are repetitions of eighth.

Relator in his brief says that by his demurrer and his motion in arrest of judgment in the case pending on appeal he challenged the jurisdiction of the juvenile court. Granting, for the argument, that his said pleas in that case had the effect of challenging the jurisdiction of the juvenile court in that case, the said pleas can be operative only in the case in which they were filed, and cannot afford any basis for a prohibition in these other cases, in which no plea to the jurisdiction has been filed.

The rule nisi is recalled, and the application of relator is dismissed, at his cost.

(124 La.)

No. 17,559.

TAYLOR v. E. C. PALMER & CO., Limited.  
(Supreme Court of Louisiana. Oct. 18, 1909.)

1. MASTER AND SERVANT (§ 196\*)—INJURIES TO SERVANT—"FELLOW SERVANTS."

Under the settled jurisprudence of this state, the master is liable in damages to one servant,

injured through the negligence of another servant in the performance of different work under their common employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 375-378, 486-488; Dec. Dig. § 196.\*]

2. APPEAL AND ERROR (§ 1005\*)—REVIEW—VERDICT APPROVED BY TRIAL COURT.

Contributory negligence is a question to be determined primarily by the jury, and when the verdict is approved by the trial judge the Supreme Court will not reverse the finding, except when clearly wrong on the face of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3870, 3948-3954; Dec. Dig. § 1005.\*]

3. APPEAL AND ERROR (§ 1004\*)—REVIEW—AMOUNT OF DAMAGES.

The quantum of damages awarded by the jury in a case of personal injury will not be disturbed by the Supreme Court, unless the award be manifestly excessive or inadequate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by William G. Taylor against E. C. Palmer & Co., Limited. Judgment for plaintiff, and defendant appeals. Affirmed.

Richard & Vidrine, for appellant. James Barkeley Rosser, Jr., for appellee.

LAND, J. This is an action for damages for personal injuries alleged to have been sustained by the plaintiff, an employé of the defendant, in the discharge of a special and unusual duty assigned to him by the master himself.

Plaintiff's petition and amended petition were dismissed on an exception of no cause of action, and thereupon he appealed to this court. The judgment on the exception was reversed, and the cause remanded for further proceedings according to law. See 121 La. 710, 46 South. 703.

The cause was tried on the merits, and the defendant has appealed from a verdict and judgment in favor of the plaintiff for \$2,500 and costs.

Plaintiff had been in the service of the defendant company as bookkeeper for 18 years. On the night of June 20, 1906, plaintiff was in the office engaged in the discharge of his clerical duties, when Mr. Palmer called him over the telephone, saying that it was raining and storming very heavily at his house, and he wanted to know if everything was all right at the store. According to plaintiff's version, he replied as follows:

"I told him that the storm had not reached downtown heavily, but that I would make a tour of the building before I went home. He said, 'All right.'"

Mr. Palmer testified:

"My recollection is that I asked him please to take a look around," and that it was quite likely

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that he used the words "and see if everything is all right."

Whatever may have been in Mr. Palmer's mind, he gave no particular instructions as to the inspection. The plaintiff was the only person on the premises, which consisted in part of three two-story warehouses used for storing paper. Plaintiff naturally construed Mr. Palmer's instructions to mean that he should inspect all the buildings, for the purpose of finding leaks that might damage the stock in trade. The plaintiff commenced the inspection, and, after locating a few small leaks, found that he needed assistance and lights. Thereupon he summoned his son, and after procuring candles both proceeded to inspect the premises. They ascended a stairway to the upper story of the third and last warehouse, and on reaching the floor heard a trickling sound like the falling of water. Both moved forward with their lighted candles, and the plaintiff, who was in the lead, suddenly fell through an open hatchway, and was in consequence badly crippled in one foot.

The opening of this hatchway was five feet square. Trapdoors were provided for closing the hatch, and there was a movable railing around it. It was the duty of a certain employé to close this hatch every evening, and this duty, as a rule, was performed. This employé testified that he was "pretty sure" he closed the hatch the evening in question, but was "not so sure" in his recollection that he "didn't close it." In the absence of evidence to the contrary, the presumption is that he, through oversight, failed to perform this particular duty on the occasion in question.

The plaintiff's duties confined him to the office, and, while he may have known in a general way that there was a hatchway in the warehouse, he knew nothing about the location of the opening in respect to the head of the stairway. The warehouse contained paper stock liable to be damaged by water, and the plaintiff conceived it to be his duty under his general instructions to inspect the second floor.

The place was very dark, and the plaintiff had only the light of a flickering candle to guide his steps. He testified that he supposed everything was safe when he went in there, that he took every precaution, and that "the opening looked just like the floor itself."

In regard to the visibility of the opening, the son testified that:

"There was no way of discovering it. It was all in darkness, with the exception of the little light made by the candle, and that was only a little circle, and there was a very high wind blowing in the building."

With the view of reaching an amicable settlement with the defendant or their security company, the plaintiff, at the request of their attorney, made a sworn statement in which he said that in stepping backward he

fell into the opening. We are satisfied, from the testimony of the father and his son given on the trial of this case, that the said statement was an honest mistake, due to a misconception of the facts.

The defense as set forth in the answer is:

(1) That the defendant was not guilty of negligence towards the plaintiff.

(2) That the plaintiff was guilty of contributory negligence.

1. This defense, so far as it is based on the proposition that the plaintiff acted beyond the scope of his instructions, or without instructions, is repelled by the evidence.

The instruction as actually given was broad enough to cover all the buildings.

Plaintiff was certainly injured by the negligence of the particular servant of defendant who was charged with the duty of closing the hatchway every evening. Plaintiff on the occasion in question was performing the entirely different duty of inspecting the warehouse for the purpose of discovering leaks. It is neither pleaded nor argued that the two were fellow servants under the laws and jurisprudence of the state of Louisiana. The common-law doctrine of fellow servants has been engrafted on the civil-law jurisprudence of this state to the extent of recognizing—

"only as fellow servants those persons who are engaged in a common work under a common employment." Weaver v. Goulden Logging Co., 116 La. 474, 40 South. 798; Evans v. Lumber Co., 111 La. 534, 35 South. 736; Merritt v. Victoria Lumber Co., 111 La. 159, 35 South. 497.

In Payne v. Georgetown Lumber Co., 117 La. 983, 42 South. 475, this principle of jurisprudence was reaffirmed, and the court, *inter alia*, said:

"In the case at bar there was no coassociation between the plaintiff and the watchman, their duties being entirely distinct.

"Article 2320 of the Revised Civil Code declares that 'masters and employers are answerable for the damages occasioned by their servants and overseers, in the exercise of the functions in which they are employed.' By jurisprudence it has been established that this doctrine does not apply to fellow servants; but, with this exception, the plain letter of the law holds the master answerable for the act of his servants. The case before us does not fall within the exception."

In that case an assistant of the sawyer in a sawmill was injured by the negligent act of a watchman.

For the reasons stated, the defendant is clearly answerable for the negligent omission of its other servant to close the trapdoors of the hatchway.

2. The question of contributory negligence was primarily for the jury to determine under all the facts and circumstances of the case, and their verdict was approved by the trial judge. Our examination of the record does not impel us to reach a different conclusion. Under the evidence the danger was not obvious.

We are asked to increase the quantum of damages, but must decline to do so, as the amount of the award is not manifestly inadequate.

Judgment affirmed.

(124 La.)

No. 17,711.

STATE v. GANTZ.

(Supreme Court of Louisiana. Oct. 18, 1909.)

1. OBJECTIONS TO STATUTE—EXEMPTION ILLEGAL.

The statute is attacked on the ground that it discriminates and does not apply to all electricians. Exception is made, and exemption, without good or reasonable cause.

2. DISCRIMINATION FATAL.

The objection is fatal. There are persons designated in the statute who have the right, under its terms, to employ electricians without evidence of their qualifications, while others have no such right.

3. DISCRIMINATION IN EMPLOYMENT OF ELECTRICIANS.

It follows, from the foregoing, that one class of electricians may be employed by persons exempted from the provisions of the act, while others have no such right.

4. CONSTITUTIONAL LAW (§ 87\*)—RIGHT TO EARN LIVELIHOOD—CONFLICT WITH CONST. U. S. AMEND. 14.

If it be of importance to employ a master electrician, it is important that he be employed by the exempted and the nonexempted; and the law which relieves and exempts certain persons from the necessity of employing him is discriminative, and repugnant to the fundamental law, which requires that all persons shall be protected in their right of property, including their right to earn a livelihood.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-171; Dec. Dig. § 87.\*]

5. CONSTITUTIONAL LAW (§ 230\*) — EQUAL PROTECTION OF THE LAWS.

An exception may be proper for the sake of public safety. The safety intended is not evident under the terms of the statute. On the contrary, it is manifest the greater safety and protection lies in general qualifications, and not in partial exemption.

Special restrictions or burdens, or special privileges, to persons engaged in the same business, in similar situations, not sustainable. They contravene equal rights, to which all are entitled, and the law cannot be enforced uniformly. *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558.

There is a denial of the equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230.\*]

6. DECISIONS IN POINT.

To decide "that some of the class engaged in a domestic trade or commerce shall be deemed criminal if they violate the regulations prescribed by the state, and others of the same class shall not be bound to regard these regulations, is so manifestly a denial of the equal protection of the law that further or extended argument to establish that position would seem to be unnecessary." *Connelly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Ex parte Hawley* (S. D.) 115 N. W. 93, 15 L. R. A. (N. S.) 138.

7. REGULATION OF BUSINESS.

The business or occupation is universally recognized as useful in the community in which

it is conducted. It may be regulated by general statute, applying to all alike.

8. STATUTES (§ 64\*)—EFFECT OF PARTIAL INVALIDITY—ELIMINATION OF OBJECTIONABLE FEATURE.

The rest of the statute cannot be made operative equally and impartially under legislative sanction, as the illegal exemption vitiates the whole statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.\*]

9. OTHER POINTS NOT DECIDED.

Other grounds of defense are passed without deciding them, as the case is disposed of on its entirety by the opinion of the court on the first ground presented.

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from Criminal District Court, Parish of Orleans; Frank D. Chrétien, Judge.

George Gantz was charged with performing the work of a master electrician without having obtained a license, and, his demurrer having been sustained, the State appeals. Affirmed.

Walter Gulon, Atty. Gen., St. Clair Adams, Dist. Atty., and Warren Doyle and A. D. Henriques, Jr., Asst. Dist. Attys. (Gilbert L. Dupré, Jr., of counsel), for the State. George B. Smart, for appellee.

BREAUX, C. J. The charge brought by the state against the defendant is that he undertook to perform the work of a master electrician without having obtained a license from the State Board of Electric Examiners and Supervisors, and that he installed wires and apparatus to convey electric currents to a building in this city, connecting the home of one of the inhabitants of the city with electricity, in violation of Act No. 178, p. 250, of 1908.

The defendant controverts the grounds of the information filed against him by the district attorney, and invoked in his defense Const. U. S. Amend. 14. He also invokes the Constitution of the state of Louisiana, as guaranteeing to him the right to continue in his occupation as electrician without the necessity of obtaining a license under an asserted illegal statute, unless such a license be required of all electricians.

The rule, sought to be laid down in the statute attacked by defendant, as relates to population, applies to every city of 50,000 inhabitants. Act No. 178, supra. It follows that this act applies within its terms only to the city of New Orleans. There is no other city in the state having near that number of inhabitants.

Under the terms of the statute in question, the qualifications of master electricians, as defined by section 5 of the cited act, are to be examined into and determined by a board of "competent, practical electricians," quoting from the section of the act.

The board is appointed by the Governor.



on the nomination of certain bodies named in the statute. The Governor has the authority to remove any member of the board for incompetency or improper conduct.

The statute defines that which is meant by "master electricians," as used in the cited act, *supra*, as including all persons engaged in installing, erecting, or repairing, "or contracting to install, erect, or repair," electric wires or conductors to be used for the transmission of electric currents for light, heat, or power purposes.

The second and last paragraph of the section provides what shall be the privileges of the master electrician under the provision of the act.

The privileges are not given to an electrician before he has obtained a license from the board to practice as a master electrician.

No license issues to any person under the age of 21.

The applicant must, at the time of filing his application, pay to the Secretary of State the sum of \$25 and furnish a bond.

Section 7 of the act cited repeats that the persons engaged in the business must secure a license, and adds that if they fail in this respect they shall be guilty of a misdemeanor, and on conviction suffer a fine provided in the act.

The license is renewable each year upon payment of a fee of \$10.

All electrical work, except work of minor importance, must be done under the supervision of a "master electrician."

This statute applies to all persons and companies and firms, except the lighting and electric railway companies and the department of police and public buildings of the city of New Orleans, which are exempted from the provisions of this act in so far as the maintenance and installation of their "equipment pole line services" and "meters" are concerned.

The judge of the district court, in a carefully prepared opinion, declared the act unconstitutional on the ground, substantially, that it denied electricians equal privileges.

The exemption is the cause of the trouble, and has given ground for the vigorous attack made by the defendant.

The plaintiff, in argument, in brief, and at bar, in the first place called attention to the restricted character of the exemption, in answer to the position of defendant that it was really a general exemption, in favor of the Electric Railways Company and the department of police and public buildings.

We take it that the pole line service and the matter of meters, mentioned in the statute, includes a large part of the work to be done. There is no necessity of deciding with precision the extent of each—the exempted work and that which is not exempted.

We will mention, however, it is common knowledge that nearly all the accidents are traced to defective line service. The light goes out, or the power fails, or is not prop-

erly regulated, nearly always, because of defects in this particular work.

It is scarcely to be presumed that the exemption would have been inserted in the statute, unless it was intended that it should amount to something. It was not inserted as a mere compliment or mild attention to the intended exemptees. Furthermore, we note that the express terms of the act exempt "unimportant work," as made very evident by the following:

"But no work other than minor electric repairs for the maintenance of established plants shall be performed by other than master electrician or under his direction." Act No. 178, *supra*.

This provision in regard to minor electric repair work already excluded the companies and the police department named, if the work is of no importance. They could have their unimportant work done under that clause; but that was not the only purpose of the exemption. Evidently the work of the intended exemptees, taken as a whole, is important. It is provided for in another section than that provided above, and it is a special exemption, with some meaning and scope. It gives the parties broad privileges.

With reference to the question involved, we will state, before going further in deciding the issues, that there is no other decision in our Reports bearing in any way upon the subject, other than the decision in *American Sugar Refining Company v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102, which affirmed the decision of this court, and that decision is not determinative of the issues in favor of the state in this case.

Upon careful reading of the decision, we found that the act attacked in that case as unconstitutional imposed a license on refiners of sugar. Planters were exempt under the terms of the act. The charge was that the law discriminated in favor of the planters. The court held that there was no unlawful discrimination. The discrimination was founded on a reasonable distinction, as the court held in the cited case.

From earliest days, the farmer and manufacturer have been considered as of different classes.

The court, in the cited case, *supra*, held that the planter or farmer, who manufactured his own product, was not a manufacturer within the intendment of the law. There is a reasonable distinction between the two; the farmer who plants the crop, and the same farmer who manufactures his crop. He (the farmer) is not a manufacturer in manufacturing his own crop, any more than he is a merchant if he sells his own crop.

There was good reason for exempting the producer. It was in keeping with the experience of ages. To make him liable would not be reasonable, as it would not be reasonable to consider him as a merchant because he sells his products in the market.

The manufacturing or refining of the prod-

uce or the sale in the market is an incident of the growth or production of the cane.

The question in the case before us is entirely different. There is no question here of a tax, as in the case last cited above. The right to work cannot be restrained without reason. Constituted authorities have been careful not to sanction unreasonable interference with the right.

Here not only there is no good reason, but there is discrimination.

Why should the companies and the department before named have the right to employ unlicensed, untrained, and even ignorant electricians, if they choose, while the average owner or employer, who does not come within the exemption, must employ only a licensed electrician?

To extend the inquiry further on the same line: Why should an electrician who has no license be able to find employment with these companies and departments, while if another electrician, equally as competent, is called upon by another owner or employer, he must produce a license or lose the opportunity to work and earn a livelihood?

Class legislation, discriminating against some and favoring others, is prohibited. *Barber v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

And, it follows, equally prohibited is legislation permitting a company or a department of public works to employ one class of artisans, and denying to this class and to others in similar situations to work for other owners and employers.

In general terms, the contention is urged by the state that the discrimination is proper, because it is legislation to carry out a public purpose for the public safety.

This does not satisfactorily appear, is our answer.

The public safety under the act cited is not the better safeguarded. The only purpose of the exemption, from all appearances, is to permit a few to employ less qualified electricians, while others are denied that right, or to permit a few to do as they please, as relates to the qualifications of electricians they employ.

We have weighed the authorities, and have arrived at the conclusion that they sustain defendant's contention of unlawful discrimination.

True, no one should seek to deny to the state the power, by legislation, of protecting the morals and the safety of the public.

Here the legislation does not look to that end. It amounts to a denial of the equal protection of the law.

Our opinion finds support in decision reported in 41 L. R. A. 689, being *State v. Gardner*, 58 Ohio St. 599, 51 N. E. 136, 65 Am. St. Rep. 785.

Special restrictions and special privileges not to be granted to persons engaged in the

same business, under conditions the same, is the tenor of the decision we have annotated.

The case cited is a particularly strong case for defendant.

After reading it, it is not possible to question its correctness with any degree of reason.

We conclude this part of the discussion. We will now discuss whether the illegal exemption, because illegally discriminative, vitiates the whole statute.

It does evidently. It is a criminal statute, as it defines a crime.

By striking out the exemption as unconstitutional, it leaves subject to criminal prosecution those the Legislature expressly intended should be exempt.

As to them it would be making that a crime which was never intended should be. The exemption renders it impossible to enforce the legislative will.

The statute must be considered as a whole, and the intention as bearing on all its clauses. The character of the intention, its indivisible nature, affects the whole statute. It cannot be enforced.

The statute, we infer, was adopted in accordance with a plan. According to it, there is exemption which is far-reaching.

Our decision extends to and renders inoperative the other parts of the statute, which are intimately and inseparably connected with the plan of legislation.

We will not take up, discuss, and decide the other grounds of defense. The points decided are sufficient to dispose of the case.

These being our views of the grounds considered by us, it only remains for us to decree that the proceedings must fall.

For reasons assigned, the judgment of the district court is affirmed.

PROVOSTY, J., dissents.

(124 La.)

No. 17,903.

BALDWIN LUMBER CO., Limited, v. TODD et al.

In re BALDWIN LUMBER CO., Limited.  
(Supreme Court of Louisiana. Oct. 18, 1909.)

1. EASEMENTS (§ 61\*)—INJUNCTION TO PROTECT.

An injunction based on an implied right of passage is properly refused, where it does not appear that the alleged place and mode of passage has been fixed by consent of parties or a judgment of court.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 134, 135; Dec. Dig. § 61.\*]

2. EASEMENTS (§ 17\*)—IMPLIED RIGHT OF PASSAGE.

An implied right of passage cannot exist, where a special place and mode of passage have been fixed by contract.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 47-49; Dec. Dig. § 17.\*]

**3. PLEADING (§ 306\*)—OYER.**

Where an action is founded on certain deeds not annexed to a petition for injunction, the defendant in a rule to show cause has the right to oyer of the documents as constituting a part of the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 918-929; Dec. Dig. § 306.\*]

**4. MANDAMUS (§ 37\*)—GROUNDS OF RELIEF—GRANTING OF INJUNCTION.**

Mandamus will not lie to compel the granting of an injunction, except on the clear disclosure of one of the special grounds set forth in article 298 of the Code of Practice.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 81, 82; Dec. Dig. § 37.\*]

(Syllabus by the Court.)

Action for an injunction by the Baldwin Lumber Company, Limited, against Nathan K. Todd and others. The injunction prayed was denied, and plaintiff applies for writs of mandamus and certiorari. Application dismissed.

Borah & Himel, for relator. Allen & Pe-cot, for respondents.

LAND, J. Plaintiff, claiming to be owner and possessor of all the cypress timber standing, lying, and being on certain swamp lands belonging to the defendants, and alleging that its employés had recently entered on said property for the purpose of laying the foundation of its railroad for skidding and removing said timber, and had been disturbed in said work, and ordered off the premises, and threatened with arrest by the defendants, instituted an injunction suit to restrain them from interfering with the plaintiff company in its works and operations in building its roadbed and skidder, and cutting and removing said timber from said lands in its alleged customary manner.

The plaintiff set forth its titles to said timber from the defendants through mesne conveyances by reference to a number of deeds, which were not annexed to the petition, and by virtue of its alleged ownership of said timber claimed the implied right to construct and operate a railroad and skidder on and through the lands of the defendants for the purpose of cutting and removing said timber.

The judge below declined to grant an ex parte injunction, but ordered a rule nisi to issue. Thereupon the plaintiff company applied to the Supreme Court for writs of mandamus and prohibition; but this court refused to interfere with the hearing of the rule nisi, and dismissed plaintiff's application. See Record, No. 17,841.

For answer to the rule the defendants excepted that the petition on its face disclosed no grounds for an injunction. Defendants further prayed for oyer of the deeds referred to in the petition. This prayer was granted. For answer to the rule, defendants averred that by contract with their vendee and

plaintiff's author it was stipulated that the timber sold was to be removed by means of a canal of certain dimensions to be constructed through the swamp lands of the defendants; that said canal was dredged, so as to connect with a navigable stream, and can be used for the purpose of removing said timber.

On the trial of the rule, the defendants offered in evidence the deeds referred to in plaintiff's petition.

The deed of sale from the defendants to their original vendee contains the following recital:

"The right is hereby granted said vendee company to dredge its canal through any portion of said above-described swamp land, and privilege is reserved to said vendor to drain into said canal as he may deem necessary."

By supplemental contract the course of the canal and its dimensions were fixed, for the purpose of drainage, pulling and floating timber through the defendants' plantation, reserving their right to cut branch canals into the main canal for the purpose of draining their lands.

Plaintiff purchased the timber in question, "with the right to use the canal which has been dug or may be dug on or through said property, or any portion thereof, for the purpose of getting the timber from said lands."

On the showing thus made the judge refused to grant the injunction prayed for by the plaintiff company, which thereupon filed the application for writs of mandamus and certiorari now under consideration.

Relator's case is based on the proposition that the judge below had no discretion to refuse the injunction or to inquire into the facts of the case, because the petition disclosed on its face one of the statutory causes for injunction set forth in article 298 of the Code of Practice, to wit:

"When the defendant disturbs the plaintiff in the actual and real possession which such plaintiff has had for more than one year either of real estate or of a real right, of which he claims either the ownership, the possession, or the enjoyment."

The allegations of the petition for injunction show that the plaintiff's cause of action is founded on an implied right of passage on and over the plantation of the defendants. The title deeds of the plaintiff, which should have been annexed to the petition, disclose that the mode and place of passage had been fixed in the contract of sale between the defendants and the original purchaser of the timber. It is obvious that under its own title deeds plaintiff has no implied right of passage as claimed in the petition. But, conceding such implied right, it does not follow that it vested in the plaintiff the right to select the place and mode of passage most convenient for its own purposes without consulting the defendants. On the contrary, the law provides that the passage must be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fixed in the place least injurious and inconvenient to the owner of the soil, provided it afford the same facility for the owner of the servitude. Civ. Code, arts. 700-703. It is equally obvious that an implied right of way cannot be exercised until it is fixed by consent of parties or judgment of the court.

The title deeds of the plaintiff, however, show that the place and mode of passage was fixed by contract. It follows that the alleged implied right of passage did not exist, and the injunction prayed for was properly refused.

The argument for plaintiff is based entirely on the allegations of the petition, exclusive of the recitals of the title deeds not annexed thereto as required by the rules of practice, and on the proposition that it was the mandatory duty of the judge to grant the injunction on the showing thus made.

This court, in refusing plaintiff's first application for mandamus, virtually held that the judge acted properly in issuing a rule to show cause why the injunction should not be granted. Defendants appeared, and prayed foroyer of the deeds on which the action was founded, and the judge properly ordered their production as an essential part of the pleadings. Code Prac. arts. 174, 175.

It is therefore ordered that the rule nisi herein be recalled, and that the application of relator be dismissed, with costs.

(124 La.)

No. 17,839.

#### STATE v. GERSDORF.

(Supreme Court of Louisiana. Oct. 18, 1909.)

#### CRIMINAL LAW (§ 1023\*)—NONSUPPORT—APPEAL—FINAL JUDGMENT.

Acts 1902, p. 42, No. 34, provides that any person, who without just cause shall desert or willfully neglect to provide for the support of his wife or minor children in destitute or necessitous circumstances, shall be deemed guilty of a misdemeanor, and shall be punished, etc. *Held*, that nonsupport under such section is a criminal offense, and that an order of the juvenile court, finding a husband guilty thereof and ordering him to pay to the sheriff each two weeks, for the support of his wife and minor children, \$7.50, was not a final, appealable judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2589; Dec. Dig. § 1023.\*]

Appeal from Juvenile Court, Parish of Orleans; A. H. Wilson, Judge.

Augustus Gersdorf was convicted of nonsupport, and he appeals. Dismissed.

James B. Rosser, Jr., for appellant. St. Clair Adams, Dist. Atty., and A. D. Henriques, Jr., Asst. Dist. Atty., for the State.

PROVOSTY, J. Act No. 34, p. 42, of 1902, provides that:

"Any person who shall, without just cause, desert or willfully neglect to provide for the support of his wife or minor children in destitute or necessitous circumstances, shall be deemed guilty of a misdemeanor and shall be punished by," etc.

Defendant was charged before the juvenile court (which court is given cognizance by law of all such offenses) as follows:

"Did unlawfully and without just cause desert and neglect to provide for the support of Jessie and Bertha Gersdorf, his minor children and lawful issue, and the aforesaid minor children of said August Gersdorf then and there were and now are in destitute and necessitous circumstances," etc.

Quoting from the transcript:

"The plaintiff was then rearraigned, pleaded not guilty, and the trial proceeded with, when, after hearing the evidence of Mrs. Gersdorf and her husband, the accused was found guilty and ordered to pay to the criminal sheriff, each two weeks, the sum of seven and <sup>50</sup>/<sub>100</sub> dollars for the support of his minor children, wife to collect."

From the order thus made, defendant has appealed; and the state has moved to dismiss the appeal, relying upon the decision of this court in the case of *State v. Mioton*, 112 La. 180, 36 South. 314, where the appeal was from a similar order, and the court dismissed it on the ground that such an order is not a final judgment of conviction, and therefore is not appealable under the terms of the law regulating appeals from the judgments of the juvenile court.

The learned counsel for defendant says that the matter charged upon defendant is not made criminal by any statute of the state, and that therefore the ruling in the *Mioton* Case does not apply. The answer is that the matter charged is made criminal by said Act No. 34 of 1902.

Appeal dismissed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

JOHNSON v. STATE.

(Supreme Court of Florida, Division A. Oct. 19, 1909.)

1. INDICTMENT AND INFORMATION (§ 110\*)—  
STATUTORY OFFENSE—SUFFICIENCY.

An information that alleges all the essentials of a statutory offense in language equivalent in force and meaning to the statutory terms, and is not so framed as to mislead the defendant, or to embarrass him in the preparation of his defense, or to expose him to another prosecution for the same offense, will not be held fatally defective on motion to quash.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 291; Dec. Dig. § 110.\*]

2. INDICTMENT AND INFORMATION (§ 110\*)—  
STATUTORY OFFENSES—RESISTING ARREST—  
ALLEGATION OF VIOLENCE.

Where, in alleging a statutory offense in which violence is an element, an allegation of the unlawful use of force may, under the circumstances alleged, be equivalent to an allegation of violence (citing 8 Words and Phrases, 7327).

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 291; Dec. Dig. § 110.\*]

3. INDICTMENT AND INFORMATION (§ 43\*)—FILE  
MARK—INDORSEMENT NUNO PRO TUNC.

Section 3882, Gen. St. 1906, authorizes informations charging offenses to be filed in vacation in the criminal courts of record; and where an information is properly lodged with the clerk of the court, an omitted file mark may by order of the court be placed upon the information nunc pro tunc, when the facts warrant it.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 154; Dec. Dig. § 43.\*]

4. CRIMINAL LAW (§ 263\*)—OMISSION OF FILE  
MARK FROM INFORMATION—EFFECT ON CA-  
PIAS.

When an information is properly marked filed nunc pro tunc as of the day it was lodged with the clerk, a capias issued after the information was so lodged is not illegal, and is admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 610; Dec. Dig. § 263.\*]

5. CRIMINAL LAW (§ 823\*)—HARMLESS ERROR  
—INSTRUCTIONS.

A charge that the defendant is presumed to know what he was doing, and whether it was right or wrong, and that the burden of proof is upon the defendant to raise a reasonable doubt in the minds of the jury as to the defendant's knowledge at the time of the commission of the offense, is not reversible error, where in the same sentence of the charge the jury is instructed that "if, from all the evidence in the case," they have a reasonable doubt as to whether the defendant knew what he was doing at the time of the commission of the offense, if an offense was committed, they will find the defendant not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

(Syllabus by the Court.)

Error to Criminal Court of Record, Orange County; J. D. Beggs, Judge.

I. N. Johnson was convicted of resisting an officer while executing a capias, thereby obstructing him in making an arrest, and he brings error. Affirmed.

Frank W. Pope, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

WHITFIELD, C. J. The information filed in the criminal court of record for Orange county against the defendant there, I. N. Johnson, was in two counts. A verdict of guilty on the second count was rendered, which operates as an implied acquittal on the first count. *Smith v. State*, 40 Fla. 203, 28 South. 854. It is, therefore, not necessary to consider any question relative to the first count of the information. *Green v. State*, 17 Fla. 669.

The charging part of the second count is that the defendant, in Orange county, Fla., on January 28, 1909, "while James A. Kirkwood, the sheriff of said Orange county, and Frank Gordon, a deputy sheriff in and for said county, were in the county aforesaid lawfully and by virtue of their said offices proceeding under a capias to arrest one Maud Johnson, did, well knowing the premises knowingly and willfully resist the said James A. Kirkwood and Frank Gordon in the discharge of their duty as such sheriff and deputy sheriff, which they, the said James A. Kirkwood and Frank Gordon, were then and there attempting to perform, by gripping the hand of the said Frank Gordon and forcibly preventing him from opening the door of the room wherein the said Maud Johnson was, and thereby obstructing the said James A. Kirkwood and Frank Gordon from entering to arrest the said Maud Johnson," etc.

Section 3500 of the General Statutes of 1906 provides that "whoever knowingly and willfully resists, obstructs or opposes any sheriff, deputy sheriff, constable or other person legally authorized to execute process, in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, shall be punished," etc.

It is contended that the information is fatally defective, because the charge is not in the language of the statute, or in language of equivalent import; that it is not alleged that the officer was legally authorized to execute the capias, or that the capias was legal process; that it is not alleged that the gripping of Frank Gordon's hand was done violently, or that there was any violence or offer of violence by the defendant.

The gist of the statutory offense charged is knowingly and willfully resisting, obstructing or opposing the execution of legal process, by offering or doing violence to the person of the officer. The information charges a knowing and willful resistance of an officer while lawfully proceeding to execute a capias, by gripping the hand of the officer and forcibly preventing him from opening the door of the room in which was the person for whom the capias was issued, thereby ob-

structing the officer in entering the room to make the arrest. This charge sufficiently states all the essentials of the statutory offense. The allegation that the officer was lawfully and by virtue of his office proceeding under a capias to make the arrest is a sufficient charge that the officer was legally authorized to execute the command of the capias, and that the capias was legal process. The allegation that the defendant gripped the hand of the officer, and forcibly prevented him from opening the door for the purpose of making the arrest under the capias, necessarily involves resistance, and an act of violence to the person of the officer while engaged in the execution of legal process. The force alleged is unlawful, and as such is synonymous with violence. See *Bouvier's Law Dic.* 1197; 8 *Words and Phrases*, 7327. The information is not so framed as to mislead the defendant, or to embarrass him in the preparation of his defense, or to expose him to another prosecution for the same offense. Sections 3961, 3962, Gen. St. 1906; *Lewis v. State*, 55 Fla. 54, 45 South. 998.

A charge that follows the language of the information is not faulty, because it fails to use the word "violence," but states facts that amount to violence.

Section 3882, Gen. St. 1906, authorizes informations to be filed in vacation in the criminal courts of record, and where an information is properly lodged with the clerk of the court, an omitted file mark may by the order of the court be placed upon the information nunc pro tunc, when the facts warrant it. A capias duly issued on an information actually lodged with the clerk of the criminal court of record is not rendered illegal because no file mark was placed upon the information. When an information is properly marked filed nunc pro tunc as of the day it was lodged with the clerk, a capias issued after the information was so lodged is admissible in evidence.

A charge that the defendant is presumed to know what he was doing, and whether it was right or wrong, and that the burden of proof is upon the defendant to raise a reasonable doubt in the minds of the jury as to the defendant's knowledge at the time of the commission of the offense, is not reversible error, where in the same sentence of the charge the jury is instructed that "if, from all the evidence in the case," they have a reasonable doubt as to whether the defendant knew what he was doing at the time of the commission of the offense, if an offense was committed, they will find the defendant not guilty.

The court refused to give the instructions requested by the defendant. Some of these instructions were not properly applicable to the facts in issue, and the others were sufficiently covered by charges given.

Charges given by the court fairly covered

the defense made of incapacity to commit the offense because of intoxication. The evidence supports the verdict, and no reversible errors are made to appear.

The judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

### POSEY v. STATE.

(Supreme Court of Florida, Division B. Oct. 19, 1909. Headnotes Filed Nov. 24, 1909.)

#### 1. CRIMINAL LAW (§ 958\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A motion for new trial upon the ground of newly discovered evidence will not be granted, where the motion has no other support than the affidavit of the defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2396-2403; Dec. Dig. § 958.\*]

#### 2. CRIMINAL LAW (§ 958\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—AFFIDAVITS OF WITNESSES.

Where the affidavit of the defendant in support of a motion for new trial upon the ground of newly discovered evidence gives the names of witnesses by whom he expects to prove certain newly discovered facts, but the defendant does not produce the affidavits of the witnesses themselves to the facts to which they are ready to testify, and he does not satisfactorily show why he cannot do so, the denial of the motion will not be disturbed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2396-2403; Dec. Dig. § 958.\*]

#### 3. CRIMINAL LAW (§ 1159\*)—APPEAL—REVIEW—CONFLICTING EVIDENCE.

Where there is evidence from which all the elements of the crime of which the defendant stands convicted may be legally inferred, and it does not appear that the jury were not governed by the evidence adduced at the trial, the appellate court will not disturb the verdict merely because the evidence is conflicting.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

(Syllabus by the Court.)

Error to Circuit Court, Pasco County; J. B. Wall, Judge.

J. Martin Posey was convicted of assault with intent to kill, and brings error. Affirmed.

Macfarlane & Davis and J. A. Hendley, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

PARKHILL, J. The plaintiff in error was convicted of an assault with intent to murder, and from the judgment and sentence therein imposed he seeks relief here by writ of error.

It is contended that the judgment should be reversed, because the trial judge should have granted the motion for new trial upon the ground of newly discovered evidence. This motion has no other support than the

affidavit of the defendant. In this affidavit the defendant sets forth that he can prove certain newly discovered facts by witnesses whose names are given; but he does not produce the affidavits of the witnesses themselves to the facts to which they are ready to testify, and he does not satisfactorily show why he cannot do so. Upon such a showing as this, a new trial upon the ground of newly discovered evidence should not be granted. *Jones v. State*, 35 Fla. 289, 17 South. 284; *Williams v. State*, 53 Fla. 89, 43 South. 423.

There is evidence from which all the elements of the crime of which the defendant stands convicted may be legally inferred; and, as we cannot see, from the record before us, that the jury were not governed by the evidence adduced at the trial, we will not disturb the verdict merely because the evidence is conflicting. *McDonald v. State*, 56 Fla. 74, 47 South. 485.

The judgment is affirmed.

TAYLOR and HOCKER, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

#### GRAHAM v. STATE.

(Supreme Court of Florida, Division A. Oct. 26, 1909.)

#### CRIMINAL LAW (§ 1159\*)—APPEAL—EVIDENCE.

Where the evidence wholly fails to show a sale or an offer to sell liquor, and the possession of liquor is properly accounted for, a conviction for the offense of selling liquor in a precinct in which the sale of liquor is forbidden by law will be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

(Syllabus by the Court.)

Error to Circuit Court, Citrus County; W. S. Bullock, Judge.

Frank Graham was convicted of illegal sale of liquor, and brings error. Reversed.

George W. Scofield, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

WHITFIELD, C. J. The plaintiff in error was convicted in the circuit court for Citrus county of the crime of selling liquor in a precinct in which the sale of liquors is forbidden by law. A writ of error was taken. The evidence wholly fails to show a sale or an offer to sell liquor, and the judgment must be reversed for this reason. It appears that the defendant had purchased in another county a number of packages of liquor, for himself and for others, who had requested him to buy for them, for which purchases receipts in the names of different persons were held by the defendant. While on his way to deliver the goods to their owners,

the defendant was arrested. There is no evidence of a sale, or of an attempted sale, and the possession of numerous packages of liquor was accounted for. The evidence wholly fails to support the verdict, and the judgment of conviction thereon is reversed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### BASS v. STATE.

(Supreme Court of Florida, Division A. Oct. 19, 1900.)

#### 1. CRIMINAL LAW (§ 1178\*)—REVIEW—ASSIGNMENT OF ERROR—FAILURE TO ARGUE.

Where an assignment is based upon the overruling of the motion for a new trial, an appellate court will consider only such grounds thereof as are argued, and, where no argument is made in support of any of the grounds, such assignment presents nothing for consideration, and will be treated as abandoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3012; Dec. Dig. § 1178.\*]

#### 2. CRIMINAL LAW (§ 778\*)—INSTRUCTIONS—PRESUMPTIONS.

In a prosecution for larceny, no error was committed in refusing to instruct the jury, at the request of the defendant, "that the taking of property openly and notoriously, without any attempt at concealment or denial, raises a strong presumption against a felonious intent, which you must find from the evidence, beyond a reasonable doubt, to have existed at the time or before the taking possession of the cattle, before you will be authorized to find him guilty of larceny." In so far as such requested instruction states the legal principle correctly, it is not a rule of law to be given in charge to a jury in prosecutions for larceny, but a presumption of fact, which the jury may apply in proper cases, and which may guide the court, in cases where it is applicable, in determining the sufficiency of evidence to support a verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 778.\*]

#### 3. CRIMINAL LAW (§§ 807, 809\*)—CONFUSING INSTRUCTIONS.

Any requested instruction is properly refused, which is confusing, involved, and argumentative, or which would have a tendency to mislead or confuse the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960-1967; Dec. Dig. §§ 807, 809.\*]

#### 4. LARCENY (§ 77\*)—INSTRUCTIONS.

There is a clear distinction between the expressions "unexplained recent possession of stolen property" and "unexplained possession of recently stolen property," and the same cannot be used interchangeably. A requested instruction is properly refused, which loses sight of such distinction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 199, 202-204; Dec. Dig. § 77.\*]

#### 5. CRIMINAL LAW (§ 829\*)—TRIAL—REQUESTED INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

Requested instructions, though announcing correct principles of law applicable to the case,

are properly refused, where such principles are fully covered in other instructions given at the trial, even though couched in different language.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**6. CRIMINAL LAW (§ 1173\*)—HARMLESS ERROR—MODIFICATION OF INSTRUCTION.**

The modification or qualification of a requested instruction, which correctly states the law applicable to the case, is error, when the force of such requested instruction is essentially changed or weakened thereby; but, where the requested instruction should have been refused, the defendant is in no position to complain of a modification thereof, when, even with such modification, such instruction is too favorable to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1173.\*]

**7. CRIMINAL LAW (§ 844\*)—EXCEPTION TO CHARGE AS A WHOLE—CHARGE GOOD IN PART—EFFECT.**

Where two distinct propositions of law in a charge are excepted to as a whole, the exception must fail, if either one of such propositions is correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025; Dec. Dig. § 844.\*]

**8. CRIMINAL LAW (§ 1091\*) — PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—BILL OF EXCEPTIONS.**

Where an assignment is based upon the overruling of objections to a question, propounded by the state to the defendant on cross-examination, as to whether or not he wrote a certain letter, and such letter is not copied into the bill of exceptions and it does not appear that the same was ever introduced in evidence, such assignment must fail, because it is not made to appear that the defendant was harmed in any way by such ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2832; Dec. Dig. § 1091.\*]

(Syllabus by the Court.)

Error to Circuit Court, Polk County; J. B. Wall, Judge.

Everett Bass was convicted of larceny, and he brings error. Affirmed.

Wilson & Boswell, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

**SHACKLEFORD, J.** Everett Bass was convicted in the circuit court for Polk county of the crime of larceny of cattle, and sentenced to imprisonment at hard labor in the state prison for the term of five years, from which he seeks relief here by writ of error.

The first assignment is based upon the overruling of the motion for a new trial. This motion consists of eight grounds; but none of them are argued before us, except as they are taken up under other errors assigned. Hence, under the established practice of this court, this assignment must be treated as abandoned. See *Johnson v. State*, 55 Fla. 41, 46 South. 174, and *Putnal v. State*, 56 Fla. 86, 47 South. 864, and authorities cited therein.

The first assignment which is argued before us is the second, which is based upon the refusal of the court to give the following instruction, at the request of the defendant:

"The court instructs the jury that the taking of property openly and notoriously, without any attempt at concealment or denial, raises a strong presumption against a felonious intent, which you must find from the evidence, beyond a reasonable doubt, to have existed at the time or before the taking possession of the cattle, before you will be authorized to find him guilty of larceny." In support of this assignment, the defendant cites *Dean v. State*, 41 Fla. 291, 26 South. 638, 79 Am. St. Rep. 186, and *Black v. State*, 83 Ala. 81, 3 South. 814, 3 Am. St. Rep. 691. Evidently the requested instruction was based on the second headnote in the case of *Dean v. State*, supra. As framed, such requested instruction is defective in several respects; but it is sufficient to say that the principle enunciated in the case of *Dean v. State*, supra, was fully discussed in *Long v. State*, 44 Fla. 134, 32 South. 870, wherein the Alabama decisions were referred to, and the conclusion reached and stated that such principle was taken from *McMullen v. State*, 53 Ala. 531, and was used argumentatively by this court in discussing the facts before it—it not being intended as "a rule of law to be given in charge to a jury in prosecution for larceny, but a presumption of the fact, which the jury may apply in proper cases, and which may guide the court, in cases where it is applicable, in determining the sufficiency of evidence to support a verdict of guilty." Also see *Bird v. State*, 48 Fla. 3, 37 South. 525. This assignment has not been sustained.

The third assignment is based upon the refusal of the following requested instruction: "The jury is further instructed that the rule that a thief commits a new and distinct larceny, when he carries the stolen property into or through other counties than that of the original taking, is but a fiction to settle the question of venue in cases of larceny, and, where stolen property is thus taken from one county to another, a conviction in either county for the larceny may be had, if the elements necessary to constitute larceny shall be proven, and the jury satisfied beyond a reasonable doubt; but, before you can convict a person for larceny in a county into or through which property has been taken, you must be satisfied from the evidence beyond a reasonable doubt that all the elements necessary to constitute larceny did exist at the time and place of the original taking—that is, in the county where the larceny was first committed." The reason given by the trial judge for his refusal to give this instruction was "because of its tendency to confuse the jury," and we think this constituted a sufficient reason, as the requested instruction was confusing, involved, and argumentative. See *McCoggle v. State*, 41 Fla. 525, 26 South. 734. The requested instruction was doubtless based upon *Harrington v. State*, 31 Tex. Cr. R. 577, 21 S. W. 356, which the plaintiff in error cites in support of this assignment.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



Such cited case contains an interesting and instructive discussion of the question of venue in the case of the larceny of animals carried from one county into another; but it furnishes no support for the contention here made. The reasoning used by this court in *Long v. State*, 44 Fla. 134, 32 South. 870, to which we referred in disposing of the second assignment, applies with equal force to this assignment.

The refusal of the court to give the following instruction, requested by the defendant, forms the basis for the fourth assignment: "The court further instructs the jury that unexplained recent possession of stolen property will justify a conviction; and when one is found in possession of stolen property, but gives an explanation which seems reasonable to the jury, the possession ceases to have any evidentiary value, and raises, either alone or in connection with other circumstances, no presumption of guilt. If the crime is proved, it must be done by other evidence altogether. The defendant is not bound to prove the truth of his explanation. The presumption arising from recent possession is removed, if the explanation leaves the matter in doubt. In other words, when such a reasonable explanation is given, the prosecution must establish the falsity of it beyond a reasonable doubt."

No error is made to appear here. This instruction is infected with vices of a similar nature to those which characterized the requested and refused instruction which formed the basis for the third assignment. Moreover, it does not correctly state the principle of law sought to be invoked. Among other defects which might be pointed out, there is a clear distinction between the expressions "unexplained recent possession of stolen property" and "unexplained possession of recently stolen property." See *Leslie v. State*, 35 Fla. 171, 17 South. 555; *Bellamy v. State*, 35 Fla. 242, 17 South. 560; *Williams v. State*, 40 Fla. 490, 25 South. 143, 74 Am. St. Rep. 154; *Long v. State*, 42 Fla. 509, 28 South. 775; *McDonald v. State*, 56 Fla. 74, 47 South. 485. In these cases will be found a full discussion of the legal principles governing the framing of proper instructions upon the points involved in the requested and properly refused instruction.

The fifth assignment rests upon the refusal of the following requested instruction: "You are further instructed that, to constitute larceny, it is necessary not only that the defendant should have taken the property willfully and without mistake or claim of right, and with intent to permanently retain it and to deprive the owner thereof, but the willfulness and felonious intent must have existed at the time of the taking. If the defendant was in the employ of Louis Parker, and while in such employ, acting under the instructions of said Louis Parker, and without knowledge that the cattle were being stolen, in conjunction with the said Louis Parker, took pos-

session of cattle which did not belong to him, the said defendant, and to which he had no right, and the defendant then believing that the said Louis Parker owned or had a right to said cattle, and that there was no intent on the part of the defendant then to steal said cattle, you should acquit him, although he subsequently discovered or had reason to believe that said cattle were stolen, and he then formed and executed a design to convert said cattle to his own permanent use."

We find that the trial judge, in the charge given by him of his own motion, had already fully and correctly instructed the jury upon all the points of law involved in the requested instruction. Therefore no error was committed in refusing it. We might add that the charge so given was clearer and couched in better phraseology than this refused instruction. See *Green v. State*, 43 Fla. 556, 30 South. 656.

The defendant requested the giving of the following instruction: "You are further instructed that if you find from the evidence that the defendant assisted one Louis Parker in taking possession of cattle which he did not own, or have the right to possess, that the said defendant was then acting under the employ of the said Louis Parker and under his directions, and without being informed by the said Louis Parker, or any one else, that the cattle were being stolen by the said Louis Parker, and the defendant, not knowing that the cattle were being stolen, undertook to assist the said Louis Parker to drive them to Tampa, or any other place, you cannot find the defendant guilty of larceny, because of the lack of criminal intent on his part before or at the time of the taking of said cattle, although you further find that the defendant, after the taking of said cattle, discovered or had reason to believe that the said Louis Parker had stolen the cattle, and, after making such discovery, represented that he was some one else, or resorted to other means to destroy his identity, or his connection with said cattle." The court refused to give the instruction as framed, but did give it after adding thereto the following sentence: "But you may consider such facts, if proven, in making up your minds as to the guilty knowledge of the defendant of the cattle having been stolen." Upon this action of the court is based the sixth assignment. If the requested instruction as framed was proper, and correctly stated the law applicable to the case, and the addition made thereto by the court essentially changed the character thereof, then undoubtedly the court committed error. See *Young v. State*, 24 Fla. 147, 3 South. 881, and *Wilson v. State*, 30 Fla. 234, 11 South. 556, 17 L. R. A. 654. But it seems to us that the requested instruction was clearly erroneous, and, even with the modification, was too favorable to the defendant.

The seventh assignment is based upon the following portion of the general charge:

"Under the laws of the state, when stolen property is taken into two or more different counties, the thief may be prosecuted in any county into which the property was carried. Therefore, although the evidence may show that the cattle were taken in Osceola county, yet, if you find that they were driven into Polk county, the offense can be prosecuted in this county.

"It is also true that, in order to constitute larceny, the original taking must have been unlawful and with felonious intent. Yet, if you find from the evidence that the defendant, Bass, together with Parker, took the cattle of W. H. Savage in Osceola county, and drove them into Polk county, and that Bass made false statements about the cattle, gave a false name, sold the cattle to Ben Glover as his own property, accepting in payment a check made payable to himself under the name of Jones, while his name is Bass, had Mr. Bates cash the check, and accepted Bates' duebill payable to Jones, you may infer, from that conduct on his part, that he knew at the time the cattle were taken, that they were being stolen, and that his employment by Parker was a subterfuge; and if you are so satisfied beyond a reasonable doubt, it is your duty to convict the defendant."

It is settled law in this court that where two distinct propositions of a charge are excepted to as a whole, and one is correct, an assignment based upon such charge containing two distinct propositions must fail. See *Wood v. State*, 31 Fla. 221, 12 South. 539, and authorities there cited. It is clearly apparent that the portion of the charge so excepted to does contain two distinct propositions of law. It is separated into two paragraphs, the first of which relates solely to the question of venue, and, as we have seen from our discussion of preceding assignments, states the law correctly. Even if we were to assume that the second paragraph is erroneous, as to which we do not feel called upon to express any opinion, it would not avail the defendant.

The eighth and last assignment is based upon the overruling of objections to a question propounded by the state to the defendant, on cross-examination, as to whether or not he wrote a certain letter. As the letter in question is not copied in the bill of exceptions, we do not know what its contents may have been. We are not advised that it was even introduced in evidence. This being true, we fail to see wherein the defendant was harmed in any way by such ruling.

Finding no reversible error, the judgment must be affirmed.

WHITFIELD, C. J., and COCKRELI, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

## BUNCH v. STATE.

(Supreme Court of Florida, Division B. Oct. 19, 1909. Headnotes Filed Nov. 24, 1909.)

### 1. CRIMINAL LAW (§§ 881, 893\*)—VERDICT—INTENT OF JURY—CERTAINTY.

A verdict should be regarded from the standpoint of the jury's intention, and when this can be ascertained, if consistent with legal principles, such effect should be given to the findings as will really conform to their intention. If a verdict is not sufficiently certain to clearly show what the jury intended, it will be fatally defective.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2527; Dec. Dig. §§ 881, 893.\*]

### 2. HOMICIDE (§ 312\*)—ASSAULT WITH INTENT TO MURDER—VERDICT—VALIDITY.

The verdict of the jury was in these words: "We, the jury, find the defendant, Mamie Bunch, guilty of assault with attempt to murder in the second degree; so say we all." *Held*, that the word "attempt" carries with it the idea of intent in this verdict, and that the verdict is not fatally defective.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 664, 665; Dec. Dig. § 312.\*]

(Syllabus by the Court.)

Error to Criminal Court of Record, Suwanee County; H. E. Carter, Judge.

Mamie Bunch was convicted of an assault with intent to murder in the second degree, and she brings error. Affirmed.

L. E. Roberson, for plaintiff in error.  
Park Trammell, Atty. Gen., for the State.

HOCKER, J. Mamie Bunch, the plaintiff in error, was informed against in the criminal court of record of Suwanee county; the information charging that she and another, on the 14th of November, 1908, unlawfully assaulted one Iela Russel, from a premeditated design to kill and murder the latter. On the trial the jury found the following verdict, viz.: "We, the jury, find the defendant, Mamie Bunch, guilty of assault with attempt to murder in the second degree; so say we all." There was a motion to arrest the judgment on the grounds:

(1) The verdict does not find this defendant guilty of any crime known to the criminal laws of the state of Florida.

(2) The verdict is so irregular upon its face as to be unintelligible in its meaning and its findings.

This motion was overruled, and the plaintiff in error sentenced to two years in the penitentiary.

The only assignment of error is based on the action of the court in overruling this motion, and questions the sufficiency of this verdict.

In the case of *Washington v. State*, 55 Fla. 194, 46 South. 417, the general requisites of a verdict are stated. It is also stated that the verdict should be regarded from the standpoint of the jury's intention, and when this can be ascertained, if consistent

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

with legal principles, such effect should be allowed to their findings as will clearly conform to their verdict. If the verdict is not sufficiently certain to clearly show what the jury intended, it will be fatally defective. *Nickles v. State*, 48 Fla. 46, 37 South. 312.

The contention here is that the use of the word "attempt," instead of the word "intent," vitiates the verdict, rendering it unintelligible, and describing no crime. We do not think this contention should be sustained. To say that one attempted to commit a crime carries with it the idea that there was intent to commit the crime.

In the case of *Prince v. State*, 35 Ala. 367, it is held: "Under an indictment for rape, a verdict finding the prisoner guilty of assault with attempt to commit a rape, is equivalent in substance and legal effect to a verdict of guilty of an assault with intent to commit a rape." To the like effect, see *Johnson v. State*, 14 Ga. 55; *Rookey v. State*, 70 Conn. 104, 38 Atl. 911; *Felker v. State*, 54 Ark. 489, 16 S. W. 663, and authorities cited in these cases; 1 McClain's *Crim. Law*, § 222.

The judgment of the court below is affirmed.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

#### PRIOR et ux. v. DAVIS et al.

(Supreme Court of Florida, Division A. Oct. 26, 1909.)

#### 1. REFORMATION OF INSTRUMENTS (§ 45\*)—EVIDENCE—SUFFICIENCY—DEEDS.

The execution of a deed conveying real estate is an act of importance that is presumed to have been done with deliberation and care; and where it is sought to have such a conveyance reformed, so as to comply with a parol agreement alleged to have been made with reference to the conveyance before its execution, the proof of the parol agreement should at least be full, clear, and convincing.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Dec. Dig. § 45.\*]

#### 2. APPEAL AND ERROR (§ 1009\*)—REVIEW—FINDING ON CONFLICTING EVIDENCE.

In a suit for the reformation of a deed conveying real estate, so as to make the deed comply with a previous parol agreement, when the testimony is conflicting, and is not full, clear, and convincing in favor of reformation, a decree denying reformation will not be reversed as being contrary to the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Santa Rosa County; J. E. Wolfe, Judge.

Bill by T. J. Prior and wife against Wil-

liam M. Davis and another. Decree for defendants, and complainants appeal. Affirmed.

T. F. West, for appellants. Maxwell & Reeves, for appellees.

WHITFIELD, C. J. The appellants seek, by bill in equity brought in the circuit court for Santa Rosa county, to have a deed conveying 80 acres of land to the appellant Ona Prior reformed, so as to cover 108 acres of land, in accordance with an alleged parol agreement made before the execution of the deed of conveyance. The answer specifically denies the equities set up in the bill of complaint. Testimony was taken, and a decree rendered for the defendants, from which an appeal was taken by the complainants.

The execution of a deed conveying real estate is an act of importance, that is presumed to have been done with deliberation and care; and where it is sought to have such a conveyance reformed, so as to comply with a parol agreement alleged to have been made with reference to the conveyance before its execution, the proof of the parol agreement should at least be full, clear, and convincing. *Geter v. Simmons*, 57 Fla. 423, 49 South. 131; *Jacobs v. Parodi*, 50 Fla. 541, 39 South. 833; *Horne v. Turner Cypress Co.*, 55 Fla. 690, 45 South. 1016.

In this case the testimony as to the alleged parol agreement that 108 acres of land would be conveyed, when in fact the conveyance covered only 80 acres, is conflicting, and is not so full, clear, and convincing in favor of reformation as to warrant this court in holding that the chancellor erred in decreeing against reformation.

The decree is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### GILBERT v. STATE.

(Supreme Court of Florida, Division A. Oct. 26, 1909.)

#### 1. WITNESSES (§ 405\*)—CROSS-EXAMINATION—CONTRADICTION UPON IRRELEVANT MATTERS.

Questions on cross-examination of a witness, having no possibility of relevancy to the examination in chief, may be excluded, even though they may tend to contradict him upon new and irrelevant matters, brought out upon the cross-examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1273; Dec. Dig. § 405.\*]

#### 2. HOMICIDE (§ 169\*)—EVIDENCE—ADMISSIBILITY.

Evidence, on a trial for murder, as to the merits of a controversy between the defendant and the railroad company, whose employé was killed, should not be received.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 343; Dec. Dig. § 169.\*]

**3. CRIMINAL LAW (§ 1121\*)—BILL OF EXCEPTIONS—MATTERS TO BE INCLUDED—MOTION FOR NEW TRIAL.**

The sufficiency of the evidence will not be considered, when the bill of exceptions does not contain a motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2938, 2939; Dec. Dig. § 1121.\*]

(Syllabus by the Court.)

Error to Circuit Court, Washington County; J. E. Wolfe, Judge.

John Gilbert was convicted of murder in the second degree, and he brings error. Affirmed.

Cook & McRae, Reeves & Watson, and W. O. Butler, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

**COCKRELL, J.** Under an indictment for murder in the first degree, John Gilbert was convicted of murder in the second degree, and sentenced to life imprisonment.

The only assignments properly presented are based on the refusal to permit certain questions upon cross-examination to be asked of a state's witness, and of the accused himself.

The state's witness W. I. Harvey upon the direct testified that he saw Gilbert shoot, but did not see at whom he was shooting, where Gilbert was standing at the time, and that he had been near there 40 or 50 minutes. The man killed, Eugene Wood, was the engineer of a train, which slowed up before getting to Gilbert, and stopped very soon after the shot was fired. He went to the cab, and found the engineer dead, and saw no gun of any kind except Gilbert's. After the shooting, Gilbert walked towards the still. He saw Gilbert when he raised his gun to shoot. Upon cross-examination he was permitted to testify without objection that, shortly before the train came up, he had a conversation with Gilbert, and also had had a conversation with Wood previously, but did not hear Wood declare what he would do when he got to Gilbert's, or that he would continue to run train in spite of Gilbert. He knew that Gilbert had placed a flag upon the track, but was not permitted to testify as to whether he had advised the engineer that the flag and Gilbert were there; nor was he permitted to testify as to whether Gilbert that morning protested against the train running over his land any more. No specific objections are stated on this record; but it is evident that they are not in cross of any evidence brought out by the state. The relevancy or propriety of the questions is not indicated, nor was attempt made to bolster them up. The same observations apply to the other questions propounded to this witness, which were as to whether, representing the owners of the road, he had talked with Gilbert

about running the train across his land; that Gilbert protested, and was told the engineer said he would run the train over there, and over him, and upon leaving was told to take care of himself. Counsel urge that answers to these questions would test the credibility of the witness; but the facts testified in the direct to by him are in no wise contradicted. The only points as to which contradiction is sought were brought out by the defense, their relevancy does not appear, and further questions along this line were properly stopped.

The accused, upon taking the stand, testified that the road was running across his land, and that he had an agreement with the owner that the road would bring his freight, and was asked: "That is the point I am getting at. Upon agreement that he was to bring your freight—" to the asking of which question the state objected, and the objection was sustained. It is suggested here that an answer to the question would tend to show an innocent motive in going to the railroad at that time to make inquiries.

The question had been answered, and its further investigation would most likely have confused the jurors with issues as to the rights of the respective parties to that agreement, which had no proper place on this trial. The only shadow of a defense offered was the possibility that the defendant thought he saw a pistol in the hands of the engineer, and the jury gave some credence, at least, to this defense, in mitigating the crime from murder in the first degree to murder in the second degree.

The motion for a new trial is not in the bill of exceptions, and sufficiency of the evidence cannot be questioned.

The judgment is affirmed.

**WHITFIELD, C. J., and SHACKLEFORD, J., concur.**

**TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.**

**LOGAN et al. v. STATE.**

(Supreme Court of Florida, Division A. Oct. 26, 1909.)

**1. CRIMINAL LAW (§ 670\*)—TRIAL—RELEVANCY OF EVIDENCE NOT APPEARING OR SHOWN.**

Where testimony does not appear to be relevant, and its relevancy is not shown by the party offering it, there is no error in excluding it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1593-1596; Dec. Dig. § 670.\*]

**2. CRIMINAL LAW (§ 1160\*)—REVIEW—CONVICTION APPROVED BY TRIAL COURT.**

Where the evidence is conflicting, but there is some testimony upon which the verdict can be legally predicated, and it has been approved

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by the trial court in denying a motion for new trial, the verdict will not be disturbed by the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]  
(Syllabus by the Court.)

Error to Circuit Court, Duval County; R. M. Call, Judge.

Walter Logan and others were convicted of manslaughter, and they bring error. Affirmed.

L. F. Brothers, for plaintiffs in error.  
Park Trammell, Atty. Gen., for the State.

WHITFIELD, C. J. The plaintiffs in error were indicted in the circuit court for Duval county for murder, and convicted of manslaughter. On writ of error it is contended that the verdict is not supported by the evidence, and that error was committed in excluding certain evidence.

At the trial a witness for the defense was asked if, on the day of and before the homicide, he did not advise one of the defendants, Martin Reggina, to go to the deputy sheriff and have the deceased arrested for shooting. The court excluded the question from the jury. No error is made to appear here. Martin Reggina had already testified in his own behalf, and it was not then in evidence that Reggina had asked the deputy sheriff to arrest the deceased for shooting off firearms some time before the alleged homicide. The relevancy of the excluded question is not made to appear.

The evidence in the case is conflicting, and not altogether satisfactory; but there is testimony upon which the verdict could be legally predicated, and the verdict found has been approved by the trial judge in denying a motion for new trial. Under these circumstances, the appellate court will not disturb the verdict. No substantial errors are made to appear, and the judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### CAMP v. STATE.

(Supreme Court of Florida, Division B. Oct. 19, 1909. Headnotes Filed Nov. 23, 1909.)

#### 1. CRIMINAL LAW (§ 398\*)—EVIDENCE—BEST AND SECONDARY.

Where the matter sought to be proved is simply the fact that a written order for the payment of money was made and delivered by the defendant, as contradistinguished from the terms or provisions of such written order, the best evidence rule does not apply, and parol evidence is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. § 398.\*]

#### 2. WITNESSES (§ 240\*) — CRIMINAL LAW (§ 1153\*)—LEADING QUESTIONS—DISCRETION OF COURT—REVIEW.

Trial courts are vested with a wide discretion in permitting leading questions to witnesses, and the exercise of such discretion cannot avail as ground of error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 795; Dec. Dig. § 240; \* Criminal Law, Cent. Dig. § 3004; Dec. Dig. § 1153.\*]

#### 3. GAMING (§ 97\*)—CRIMINAL RESPONSIBILITY—EVIDENCE—ADMISSIBILITY.

The fact that a defendant, on trial for conducting a gambling house, stood bail surety for parties arrested in the act of gambling on said premises, may be shown in evidence as tending to connect the defendant with the proprietorship of such premises.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 286-290; Dec. Dig. § 97.\*]

(Syllabus by the Court.)

Error to Criminal Court of Record, Escambia County; E. D. Beggs, Judge.

William Camp was convicted of keeping and maintaining gaming tables and permitting persons to gamble on premises kept by him, and he brings error. Affirmed.

Jones & Pasco, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error was informed against, tried, and convicted in the criminal court of record of Escambia county of the crimes of keeping and maintaining gaming tables, and of keeping a gaming room, and of permitting divers persons to gamble in premises kept by him, and of knowingly renting certain premises for the purpose of gaming or gambling, and was sentenced to 18 months' imprisonment 'in the penitentiary, and to review this judgment brings the case to this court by writ of error.

There are 27 assignments of error, but all of them are abandoned here except the third, fourth, sixth, ninth, tenth, eighteenth, nineteenth, twentieth, and twenty-first.

One Brazil, a state witness, was asked the following question: "In what way did you help Mr. Davis running the game?" This question was objected to by the defendant, but his objection was overruled, and this ruling constitutes the third assignment of error. There was no error in this ruling. The evidence for the state conclusively made out a case against the defendant of maintaining a gambling room, and the witness to whom the challenged question was propounded testified himself to have been an employé of the defendant in operating such gambling room, and the question objected to tended to elicit these facts. The same witness was permitted over the defendant's objection, to testify to the fact that the defendant had given him two written orders for money on other employés of his who were conducting the gambling rooms, in payment for his own services in and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

about the same business. The objection urged was that the written orders given were the best evidence, and that the witness should not be permitted to testify as to their contents, unless it were first shown that said orders were lost or destroyed. There is no merit in this, the fourth assignment. The purpose of the testimony was to show that the defendant was the proprietor of the gambling place, and that he employed and paid the witness to conduct it with others. For this purpose the evidence objected to was legitimate, whether the written orders were in existence and accessible or not. See *Wilson v. Jernigan*, 57 Fla. 277, 49 South. 44, and authorities there cited.

Another state witness, one Johnson, who had testified to being an employé in said gambling place, was asked the question: "What were the profits of that game?" (meaning the profits that the proprietors got out of it). This question was objected to by the defendant, but the objection was overruled, and this ruling is assigned as the sixth error. There was no error here. The question and the answer thereto tended to establish the fact that the defendant maintained a gambling place where money was staked, won, and lost, and that the defendant made a money profit out of it, which was legitimate proof in such a case.

The prosecuting attorney, over the defendant's objection, was permitted to put leading questions to one Joe Harris, a witness for the state, and these rulings are assigned as the ninth and tenth errors. There was no error here that can avail the defendant. Trial courts are vested with a wide discretion in permitting leading questions to witnesses, and the exercise of such discretion cannot avail a plaintiff in error as ground of error. *Coker v. Hayes*, 16 Fla. 368; *Southern Express Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107.

The eighteenth assignment of error complains of the court's permitting the prosecuting attorney to introduce two written orders, signed by the defendant and delivered to one De Broux, a state witness, both for money, which the witness testified was for his winnings in a gambling game in the defendant's place. There was no error in this. The evidence was proper and legitimate, and tended to connect the defendant with the proprietorship of the gambling place.

A state witness was permitted, over the defendant's objections, to testify that on the night when the gambling place was raided by the police, and divers persons found there gambling were arrested, the defendant went security on the appearance bond of one Harding or Hollman, one of the parties, so arrested. This ruling constitutes the nineteenth, twentieth, and twenty-first as-

signments of error. There was no error here. The evidence tended to establish the offense charged, in that it showed a solicitude on the part of the transgressing defendant to take care of parties getting into trouble in his premises.

Finding no error, the judgment of the court below is hereby affirmed, at the cost of plaintiff in error.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

### GRAY v. STATE.

(Supreme Court of Florida, Division B. Oct. 26, 1909.)

CRIMINAL LAW (§ 970\*)—ARREST OF JUDGMENT—INFORMATION—SUFFICIENCY.

Under the provisions of section 3962, Gen. St. 1906, it is not error to deny a motion in arrest of judgment, based upon an alleged insufficiency of the information, when such information is not so vague, indistinct, and indefinite as to mislead the accused and embarrass him in the preparation of his defense, or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2458; Dec. Dig. § 970.\*]

(Syllabus by the Court.)

Error to Criminal Court of Record, Duval County; J. S. Maxwell, Judge.

Will Gray was convicted of assault with intent to commit manslaughter, and he brings error. Affirmed.

L. F. Brothers, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

TAYLOR, J. In the criminal court of record for Duval county the following information was filed against the plaintiff in error, viz.:

"In the name and by the authority of the state of Florida, De Witt T. Gray, county solicitor, for the county of Duval, prosecuting for the state of Florida, in the said county, under oath information makes that Will Gray, of the county of Duval and state of Florida, on the 17th day of April in the year of our Lord one thousand nine hundred and nine, in the county and state aforesaid, with a certain deadly weapon, to wit, a knife, which he then and there had and held, in and upon one George Walker, with a pre-meditated design and intent him, the said George Walker, then and there unlawfully to kill and murder, then and there an assault did make, and him, the said George Walker, did then and there beat, bruise, wound, and illtreat, contrary to the form of the statute in such case made and provided, and against

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the peace and dignity of the state of Florida."

Upon this information he was tried and convicted of assault with intent to commit manslaughter, and brings the judgment here for review by writ of error.

Two questions are presented here: First, the sufficiency of the information, which was questioned by motion in arrest, which motion was overruled; and, second, the sufficiency of the evidence to support the verdict.

As to the sufficiency of the information, it is substantially the same as the information tested and upheld in the case of *Pyke v. State*, 47 Fla. 93, 38 South. 577, and we see no reason for overturning the reasoning and results of that case, particularly when the assault upon the information was postponed until after verdict. We do not think that the information is either so vague, indefinite, or deficient as to have misled the accused, or to embarrass him in the preparation of his defense, or expose him after conviction to substantial danger of a second prosecution for the same offense. Section 3962, Gen. St. 1906.

Without going into any fruitless discussion of it in detail, we are of the opinion that the verdict returned is amply sustained by the proofs.

Finding no error, the judgment of the court below in said cause is hereby affirmed, at the cost of Duval county; the plaintiff in error having been adjudged to be insolvent.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and COCKRELL and SHACKLEFORD, JJ., concur in the opinion.

#### WEAVER v. STATE.

(Supreme Court of Florida, Division B. Oct. 26, 1909.)

##### 1. CRIMINAL LAW (§ 1128\*)—RECORD—MATTERS TO BE SHOWN BY—CHALLENGE TO JUROR.

The recital in a motion for new trial of the ground of challenge of a juror is not evidence of itself that the matters recited transpired during the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2951-2952; Dec. Dig. § 1128.\*]

##### 2. CRIMINAL LAW (§ 1122\*)—RECORD—MATTERS TO BE SHOWN BY—INSTRUCTIONS.

Where the record does not exhibit the entire charge given to the jury, the appellate court cannot say that the trial court erred in refusing to give a specific charge requested by the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2943; Dec. Dig. § 1122.\*]

##### 3. CRIMINAL LAW (§ 1056\*)—DECLARATION OF RULING IN WRITING—OMISSION—WAIVER.

Where a special instruction was requested by the defendant, and the court merely indorsed the same, "Refused; exception noted," dating and signing it, but did not "declare in writing

to the jury his ruling thereupon as presented," and did not "pronounce the same to the jury as given or refused," in compliance with the provisions of section 1408, Gen. St. 1906, the error is waived by a failure of the defendant to reserve an exception to the proceeding promptly before verdict. An exception taken for the first time after verdict in the motion for new trial is too late. Any expressions in *Fridenberg v. Robinson*, 14 Fla. 130, in conflict herewith, are disapproved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2670; Dec. Dig. § 1056.\*]

(Syllabus by the Court.)

Error to Criminal Court of Record, Duval County; J. S. Maxwell, Judge.

D. C. Weaver was convicted of an assault with intent to murder in the second degree, and he brings error. Affirmed.

I. L. Purcill and S. D. McGill, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

PARKHILL, J. The plaintiff in error was convicted of an assault with intent to murder in the second degree.

Error is assigned as follows: "The court erred in allowing Juror C. P. Stradler to serve as a juror over the defendant's objection; the said juror having testified that he had served three times as a juror this present year." The record does not sustain this assignment. The bill of exceptions recites: "Six men were called as jurors in this case; but one of them, viz., C. P. Stradler, was challenged by the defendant for cause, which said objection was made by the defendant on the ground that said juror, C. P. Stradler, had served three times as a juror during the present year, but not since chapter 5902, Laws of Florida, went into effect upon approval by the Governor. The court overruled the defendant's objection to the said juror, and allowed him to serve as a juror to try the defendant, which said ruling was then and there excepted to by the defendant." This ruling of the court was urged by motion as a ground for a new trial. The defendant, however, entirely failed, so far as we are advised, to testify that the challenged juror had served three times as a juror this year, and this fact does not otherwise appear to be true by the record. The recital in the motion for a new trial of the ground of challenge of this juror is not evidence of itself to us that the matters recited transpired during the trial. The court will not reverse the ruling of the trial court, overruling a challenge for cause to a proposed juror, unless the grounds of challenge are sustained by proof offered in support thereof, or are otherwise shown to be true by the record.

As the record does not show the entire charge given, we cannot say that the trial court erred in refusing to give the specific charge requested by the defendant. *Ford v. Ford*, 110 Ind. 89, 10 N. E. 648; *Parsons*

v. Baxter, 13 Fla. 580; Stewart v. Mills, 18 Fla. 57; Younglove v. Knox, 44 Fla. 743, 33 South. 427; Finlayson v. State, 46 Fla. 81, 35 South. 203; Reynolds v. State, 34 Fla. 175, 16 South. 78.

When the special instruction mentioned above was refused, the court merely indorsed the same, "Refused; exception noted," dating and signing it, but did not "declare in writing to the jury his ruling thereupon as presented," and did not "pronounce the same to the jury as given or refused," as he was required to do by the provisions of section 1498 of the General Statutes of 1906. It does not appear that the defendant reserved an exception to this proceeding at the time; but the omission of the court to comply with the statutory requirement already mentioned was made the ground of a motion for a new trial, the motion was overruled, and an exception thereto was duly taken and noted in the record. As this omission of the court was not excepted to promptly, at least before the rendition of the verdict, such exception being taken for the first time after verdict in the motion for new trial, we will have to adjudge the error to have been waived. Morrison v. State, 42 Fla. 149, 28 South. 97; Hubbard v. State, 37 Fla. 156, 20 South. 235; Southern Express Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107; Potsdamer v. State, 17 Fla. 895; Weightnovel v. State, 46 Fla. 1, 35 South. 856; Jones v. State, 18 Fla. 889; Coker v. Hayes, 16 Fla. 368; Baker v. State, 17 Fla. 406; Gibson v. State, 26 Fla. 109, 7 South. 376; Baker v. Chatfield, 23 Fla. 540, 2 South. 822.

In so far as any expressions in Fridenberg v. Robinson, 14 Fla. 130, are in conflict with the views here expressed, the same are disapproved.

The other assignments relate to the insufficiency of the evidence to support the verdict. While there is some conflict, there is sufficient evidence to authorize the finding of the jury.

The judgment is affirmed.

TAYLOR and HOCKER, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

(124 La.)

No. 17,570.

WEISSHAUS v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana. Oct. 18, 1909.)

STREET RAILROADS (§ 90\*)—INJURIES TO PERSONS ON TRACK—DUTY OF MOTORMAN.

It is the duty of a motorman in charge of an electric car, moving it up a narrow street, to guard against running it upon vehicles on the track directly in front and in full view of him. He should exercise the greatest prudence and caution to avoid inflicting injury. He has

the vantage ground over the parties in front, in knowing the exact situation and condition of affairs ahead of him. He would have no right to take advantage of even tardy action on the part of a driver of a wagon in removing it from the track, to run into and crush it. He should use every exertion to save the situation and enable the vehicle to be placed in a position of safety. The motorman in this case was greatly at fault. The plaintiff was not in the least degree blamable. He was at the time of the accident driving his covered wagon heavily loaded with charcoal slowly up Laurel street—a narrow street with a railway track upon it, planked between the rails, and with very little space outside of the rails to the curbing of the gutter. The horse was on the planks; the wagon itself mostly upon it. It was rightfully occupying the track when one of defendant's cars, in charge of a motorman, moving at full speed, ran into it without warning from the rear, breaking the wagon and painfully injuring the plaintiff. The wagon did not go upon the track just before the car reached the spot, suddenly, and too late for the motorman to stop the car. It was partly on the track all the while.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-192; Dec. Dig. § 90.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Jacob Weisshaus against the New Orleans Railway & Light Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dart & Kernan, for appellant. F. B. Davenport, for appellee.

NICHOLLS, J. In plaintiff's petition it is alleged: That on April 28, 1908, petitioner, accompanied by his two brothers, were driving in petitioner's wagon on Laurel street, between Marengo and Constantinople, this city; the said wagon being on the uptown car track of defendant company and about halfway between Marengo and Constantinople streets.

That car No. 0102 of the Magazine line owned and operated by the defendant company was going uptown, and, running at an excessive and unlawful rate of speed, dashed into the rear of petitioner's wagon with such force and violence that all of the occupants were thrown out of the said wagon into the street; the wagon being reversed and overthrown.

That the violent impact of his body with the ground rendered him unconscious, and that he received dreadful bruises and contusions on his body and spine, and internal injuries from which he suffered intensely. That he was sent to the Charity Hospital, this city, and after returning to his home was confined to his bed under the care of a physician for a period of six weeks.

That he still suffered great pain by reason of the aforesaid accident, and he was informed and believed that his injuries were permanent, and that at that time he was under the care of a physician on account of said injuries.



That he was a salesman by occupation. That he was blind, and that at the time of the accident his brother, Morris Weisshaus, was driving, and was endeavoring to get off the defendant company's track when the wagon was struck by defendant company's car. Petitioner avers that his earning capacity as a salesman had been destroyed, as he could no longer go out to solicit trade, and that he was incapable of pursuing any other occupation, and that by reason of said accident he had been deprived of his only means of making a livelihood.

That the running into the rear of his wagon, and the consequent injuries received by him, were occasioned solely and entirely by the gross fault, negligence, carelessness, and lack of skill of the motorman of the defendant company's car. That the said motorman was the employé and agent of the defendant company, and that, had he exercised prudence, ordinary watchfulness, and alertness, this accident could have been averted, petitioner's wagon being in plain view of the said agent of defendant company, and that it was the duty of the said motorman to have checked his car when he approached petitioner's wagon.

That his wagon was damaged to the extent of \$64.75; that he spent for drugs, liniment, bandages, etc., the sum of \$12.35; that he had incurred for physician's bills a sum exceeding \$30—all on account of the said accident. And for the pain, agony, suffering, both mental and physical, and for the permanent injuries and deprivation of his earning powers, caused by said accident, petitioner was entitled to have and recover of the defendant company the sum of \$10,000 and in addition he was entitled to have and recover the sum of \$107.10 for damage to his wagon, for drugs, and for physician's bills.

He prayed for trial by jury.

Defendant answered. It pleaded the general issue according to law.

Further answering, it averred: That, if plaintiff was injured as alleged, he received said injuries through no fault or negligence of respondent, its servants, agents, or employes, but that his injuries resulted from his own carelessness and negligence.

That, at the time and place described in plaintiff's petition, plaintiff's driver attempted to cross respondent's track at a time when an uptown car was so close to the crossing that it was impossible for plaintiff's conveyance to have made the crossing in safety. That plaintiff's driver was aware of the approaching car, which was sounding a warning, and the failure of the driver (for whose acts plaintiff was responsible) to heed the warning was cause of the accident in which plaintiff claims to have been injured.

In view of the premises, respondent prayed that plaintiff's demand be rejected, and for judgment in respondent's favor, and for all general and equitable relief.

The jury returned a verdict in favor of the plaintiff for the sum of \$2,000, and judgment was entered in conformity to the verdict. After applying unsuccessfully for a new trial, defendant has appealed.

Defendant's counsel summarized the testimony of plaintiff's witnesses as follows:

"Weisshaus (the plaintiff) came out of Constantinople street with his wagon on the morning of April 28, 1908, at about 9 o'clock. Morris Weisshaus (a brother of the plaintiff) was driving. They turned into Laurel street, going uptown. The wagon was partly on the track and partly on the roadway to the right of the track. The car, when the wagon turned into Laurel street, was about Austerlitz street, and coming up rapidly. The wagon continued up the street slowly. It was loaded with charcoal in paper sacks. The motorman did not ring a gong, nor did the car make much of a noise. The motorman had his head turned to the left, as if talking to some one inside the car. He did not try to stop until the car struck the wagon. At the moment of collision the wagon was being pulled entirely onto the track to avoid a pile of cinders on the roadway to the right of the track. The car struck the wagon in the rear, and threw it off the track to the roadway on the left of the track, completely reversing it, so that the horse was facing downtown. The wagon was broken in the rear and was thrown to its side. The occupants were thrown out. The car continued for about two car lengths before stopping. According to plaintiff his horse was not hurt. Two months after the accident he sold him for what he cost.

"Samuel and Morris Weisshaus, brothers of the plaintiff, were on the wagon with him. Morris was driving, and was seated on the right of the wagon. Jacob was next to him, and Samuel was on the left. Both these witnesses tell the same story in almost identical words. Neither saw nor heard the car until it ran into them from the rear.

"Mrs. Boaz was talking with Mrs. Hubener, who lived at 4022 Laurel street, which is between Marengo and Constantinople streets, on the river side of Laurel street. They were engaged in a neighborly conversation concerning certain repairs being done to a house on the opposite side of Laurel street, about the middle of the block, in front of which the accident happened. Mrs. Boaz had been sick for some time before the accident, and had gone out to seek fresh air. She and Mrs. Hubener observed identically the same details as to the position of the car, when the wagon turned on the track, and the course the wagon took—that it was partly off and partly on the track, and that the motorman was not looking (had his head turned to the left), rang no gong, and the car ran about two lengths after the accident.

"Nick Pretorius, carpenter by trade, testified that he was going up Laurel street. He had stopped at the building being repaired, and then continued on his way up Laurel street for about 90 feet, when he turned around and saw the wagon pulling full into the track, with the car coming full speed behind it, the motorman looking to the left. The wagon was partly on and partly out of the tracks, etc. His version of the occurrence at the time is told in almost the same words as the other witnesses.

"Warren Butler, a colored laborer, testified that he had been engaged in wheeling cinders from the pile into the house being repaired. Just before the accident he had gone to the middle of the square below for a piece of ice. He had returned to work, but at the time of the accident was just standing up, looking at the wagon coming up. He noticed how it was on the track, that the motorman gave no warning, had his head turned to the side, did not try to stop the car until after the collision, the

wagon was overturned, and the horse faced downtown. The car went about two lengths after the collision."

Referring to the testimony on defendant's behalf, its counsel says:

"The defendant's witnesses were the motorman, the conductor, and a passenger in the car. These witnesses say that the wagon was stopped near the pile of cinders, and as the car was about 40 or 50 feet away the wagon suddenly pulled across the track, as if the driver wanted to go around the pile of cinders; that, as the horse and front of the wagon cleared the track, the car struck the rear wheel of the wagon, overturning it; that the car went about 60 or 80 feet after the collision.

"The motorman says, and is corroborated by Mr. McCormick, the passenger, that as soon as the wagon began to pull towards the track the motorman rang his bell violently and began to apply the brake and use the appliances for making an emergency stop; that the motorman was looking ahead, and was not talking to any one in the car, and did not have his head turned to the side. McCormick was seated on the front seat on the left side. His attention was attracted by the violent ringing of the gong and hearing the motorman cry out to the wagon.

"The conductor was on the rear platform. His attention was attracted by the sudden checking of the car and the violent ringing of the gong. He looked up in time to see the wagon beginning to move onto the track. The car was then about 40 feet away. The motorman put on the brakes and tried to stop, but could not.

"Both the motorman and conductor concur in saying that a car going at the speed this car was then running could not be stopped in less than 120 to 125 feet.

"At the time of the accident the motorman had had 6 days' experience in running a car without the presence of an instructor. He had been under tutelage for 13 days before being given the car, and during that time he had operated cars by himself on all the lines of the city railroad system."

Counsel criticises the testimony of the plaintiff's witnesses, but we see nothing to break the force of their statements.

Laurel street, on which the accident occurred, is a narrow, unpaved street, with a single car track thereon, which is planked between the rails. There is a dirt roadway on each side of the track just wide enough for vehicles to clear the track by resting their outer wheels upon the curb of the gutter. The track is generally used by vehicles passing up and down the street.

The contention of the defendant is: That plaintiff's wagon, after it had been driven into Laurel street, was at one side, and on the dirt road to the right, and entirely clear of the track. That it had stopped on that road, and was in a point of safety therein, when the electric car came in sight, and as it came up the track.

That it remained so until just before the car reached it. That when matters were in this condition, and when it was too late for the motorman to have stopped the car and avoided a collision, though making every effort to do so, the driver of the wagon suddenly attempted to drive it across the track in front of the approaching car. That the wag-

on at the time of the accident was diagonally on the track. That the car struck the wagon on the side, and not in the rear, as testified to by all of defendant's witnesses.

The testimony, in our opinion, establishes beyond a doubt that at no time after the wagon turned into Laurel street was it on the dirt road clear of the track, in a position of safety from the approach of an electric car moving up that street in its rear; that at no time had it stopped on that street; that it is not true that, being in a position of safety on the side of the track, the driver of the wagon suddenly attempted to drive it in front of the approaching car, when it was too late for the motorman to avoid a collision with it, in spite of all his exertions.

On the contrary, a part of the wagon had been continuously on the track from the time it was driven into Laurel street. The right-hand wheels alone were off the track and on the roadway to the right of the track. The wagon was never stopped, but was proceeding at a slow pace up that street. The motorman was not surprised by the sudden shifting of its position from the road to the track. The wagon was in the open view of the motorman all the time, directly in front of him. There was nothing to intercept his view. The time of the collision was near 9 o'clock in the morning, and the place a public street, on which the wagon was authorized to be driven as it was; there being nothing in its front on the street at the time. The wagon was a closed one, heavily loaded with bags of charcoal. It was not pretended that as a fact any of the occupants knew of the approach of the car from the rear, and we fail to see wherein the plaintiff was chargeable with any fault. The plaintiff had a right to assume that any one approaching from the rear would give him notice of his approach. No notice was given in this case.

The car moving up the street at a leap (as the witnesses state), by which was meant full speed, ran without warning into the wagon and with great force, overturning it and throwing the occupants violently upon the ground.

The defendant was guilty of great fault in doing so, and is legally responsible to the plaintiff for damages for the same. Plaintiff's witnesses testify that the motorman did not ring his bell. Defendant's witnesses testify that he did. We are satisfied that, if the bell was in fact rung, it was at the last moment, when the ringing was of no service. The duty of a motorman in charge of an electric car, when moving upon a narrow street, to guard against running into a vehicle on the track in clear view of him and directly in his front, moving in the same direction, is too plain for discussion.

He should exercise the greatest caution and prudence. He has the vantage ground of knowing the exact situation in front. He has no right to take advantage of even tardy action on the part of the driver of the wag-

on in getting off of the track, or in crossing it to run into and crush it; but he should use every exertion to save the situation and enable the vehicle to get into a position of safety.

This was not done in this case. Defendant insists that the car did not strike the wagon in the rear, but on the side. We do not think that fact makes any difference in the legal status of the parties. Whether the wagon at the time of the accident was being moved directly to the front, or whether it was at the time being moved diagonally on the track, is of no moment. In either case the defendant was at fault.

We think the verdict of the jury in awarding the plaintiff damages against the defendant was correct. The defendant contends that, even if it be liable, the damages awarded are too great.

The evidence shows that the plaintiff is 26 years old; that his occupation is that of selling charcoal to groceries from the wagon belonging to him, which was run into by defendant's car; that the horse driven in the wagon, as well as the wagon itself, belonged to him; that from his business he was earning and had earned about \$75 a month clear; that he was blind, and had been for about five years, and required the assistance of his brothers in driving his wagon, for which service he paid them; that he was thrown violently to the ground, and was rendered unconscious by the fall; that he was taken in that condition to the Charity Hospital, where he remained, however, only a short time, when he was taken to his home, where he was confined to his bed for about a month and in his room another month; that he suffered, and still suffers, much pain from the fall. The plaintiff was severely bruised, but there was no permanent injury received. There was no fracture of the bones. Plaintiff has not been in business since the injury; but we do not think his earning capacity differs very greatly from what it was before. He was blind at the time of the accident, and had to depend to a very considerable extent upon assistance from his brothers. They, or some one else, would still be able to give him the assistance needed as before. The horse attached to the wagon was not badly hurt. Plaintiff has sold it for the same amount he gave for it. The wagon, though placed beyond service at the time, has since been thoroughly repaired at a cost of \$65. It had cost the plaintiff \$85. The principal element of damages to the plaintiff was the pain received by him, which cannot well be gauged or estimated, though beyond doubt he suffered. The jury evidently took it into consideration, and had a right to do so, in rendering a verdict. We do not think that, weighing all the facts shown on the trial, the verdict was too high, and that it was merely sympathetic.

The verdict of the jury and the judgment of the court appealed from are correct, and they are hereby affirmed.

(124 La.)

No. 17,647.

STATE ex rel. LUMBERMAN'S ACCIDENT CO. v. MICHEL, Secretary of State.

(Supreme Court of Louisiana. Oct. 18, 1909.)

1. INSURANCE (§ 4\*)—PROVISIONS NECESSARY IN CHARTERS.

Section 2 of Act No. 105, p. 134, of 1898, providing what provisions the charters of all insurance companies must contain, has not been repealed by subsequent legislation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 4; Dec. Dig. § 4.\*]

2. INSURANCE (§ 5\*)—PROVISIONS NECESSARY IN CHARTERS.

The Secretary of State properly refused to issue a certificate and license to a proposed industrial life insurance company whose charter failed to conform to several of the requirements of section 2 of Act No. 105, p. 134, of 1898.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 5; Dec. Dig. § 5.\*]

(Syllabus by the Court.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Mandamus by the State, on relation of the Lumberman's Accident Company, against John T. Michel, Secretary of State. Judgment for respondent, and relator appeals. Affirmed.

Morgan & Milner, for appellant. Walter Guion, Atty. Gen., Eugene J. McGivney, and R. G. Pleasants, for appellee.

LAND, J. This is a mandamus suit to compel the Secretary of State to file and record relator's charter and to issue a proper certificate attesting such filing and registry, pursuant to Act No. 59, p. 83, of 1898, and also to issue a certificate and license to do business, as provided by Act No. 246, p. 366, of 1908.

The Secretary of State answered:

(1) That the charter of the relator did not conform to the requirements of section 2 of Act No. 105, p. 134, of 1898, in a number of particulars.

(2) That the printed form of policy and application submitted by relator to respondent showed that the business contemplated by relator was not that of industrial life insurance.

(3) For other reasons not necessary to mention.

The case was tried, there was judgment ordering the respondent to file in his office the charter of the relator, and to issue to relator a certificate of the filing of the same, but rejecting in all other respects the relief prayed for in relator's petition. The relator has appealed.

It appears, from the reasons for judgment assigned by our learned Brother below, that the contention of relator was that section 2 of Act No. 105, p. 134, of 1898, had been repealed by subsequent legislation, and that it was admitted in argument that if said section was still in force relator was not entitled to a writ commanding the Secretary of State to issue the license prayed for by relator.

After an examination of all the subsequent statutes on the subject-matter, we concur in the conclusion of the district judge that section 2 of Act No. 105, p. 134, of 1898, is still in full force and effect.

Counsel for relator has withdrawn the admission in argument referred to by the district judge as one made improvidently and in error. We shall, therefore, give the same no weight in our consideration of the case.

Section 2 of Act No. 105, p. 134, of 1898, provides that every charter of an insurance company shall contain certain provisions enumerated in sundry paragraphs, and the Secretary of State set forth in his answer, *inter alia*, that relator's charter did not comply with paragraphs 4, 5, and 6 of said section.

Paragraph 4 reads:

"The amount of capital stock, the number of shares, the amount of each share, the time when and the manner in which payment on stock subscribed shall be made."

Article 4 of the charter reads:

"The capital stock of this corporation shall be thirty-five thousand dollars, divided into three hundred and fifty shares of one hundred dollars each."

It is patent that this article does not state "the time when and the manner in which payment on stock subscribed shall be made."

Paragraph 5 of said section reads:

"The designation of general officers, the number of directors or trustees, and their names, and the mode in which the election of directors or managers shall be conducted."

The charter of relator is silent as to the mode of conducting the election of directors.

Paragraph 6 of said section reads:

"The mode of liquidation at the termination of the charter."

The charter of relator provides no mode of liquidation of any kind.

The hiatus mentioned in article 4 of the charter is not supplied by section 2 of Act No. 246, p. 386, of 1908, providing that all industrial insurance stock companies must have a capital stock of \$10,000, fully paid up in cash, before beginning business.

Such prohibition does not limit the capital stock to \$10,000, nor does it say that all stock subscribed shall be paid in cash. In the very case at bar the payment in cash of less than one-third of the amount of the capital stock would enable the company to begin business.

It is obvious that the said section does not

refer to the time when and the manner in which stock subscriptions shall be paid into the corporate treasury. Our statutes have from the very beginning required that every charter of incorporation of a stock company shall contain "the amount of the capital stock, the number of shares, the amount of each share and the time when and the manner in which payment on stock subscribed shall be made," and paragraph 4, § 2, Act No. 105, p. 134, of 1898, is but a repetition of prior enactments. Rev. St. 1870, § 685; Act No. 131, p. 182, of 1855.

The statutory requirements on this subject seem to us to be of great public importance, as evidenced by the legislation noted, and the intention of the lawmaker to repeal them by implication cannot be presumed.

The other two defects urged by the Secretary of State are plain omissions in the charter to provide a mode for conducting the election of directors and managers and a mode of liquidation of the corporation at the termination of its charter.

It is not contended that these omissions have been supplied by subsequent legislation; but it is argued that they are mere technical requirements, that do not affect the substance of the charter. We cannot accept this view.

The lawmaker has specified what provisions charters for insurance companies must contain, and the requirements of the statute cannot be disregarded as mere surplusage.

Other issues were raised and discussed below; but our learned Brother did not deem it necessary to decide them.

One of them involved the question of what kind of insurance business the relator intended to carry on under the proposed charter. This question will properly arise when or after the relator has filed a charter in compliance with legal requirements.

Judgment affirmed.

(124 La.)

No. 17,038.

HANTON et al. v. NEW ORLEANS & C. R. LIGHT & POWER CO.

(Supreme Court of Louisiana. April 12, 1909. On Rehearing; Nov. 2, 1909.)

1. INSURANCE (§ 606\*)—SUBROGATION—ACTIONS—PARTIES.

Where the owner of property which has been destroyed by fire through another's negligence has been paid part of his losses by an insurer, who thereby becomes subrogated to the remedies of the assured, an action to recover from the wrongdoer the value of the property destroyed is properly brought in the name of the assured, and the insurer is not a necessary party to such action. The wrongful act is indivisible, and gives rise to but one cause of action.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1506; Dec. Dig. § 606.\*]

2. ELECTRICITY (§ 16\*)—ACTIONS FOR DAMAGES—DEFENSES.

The fixtures for plaintiffs' dwelling had for years been used, without injury or loss, in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

connection with the electrical wires by which the defendant company lighted the house. They had been accepted as sufficient by the company. Had anything been wrong about them, it was the company's duty to have, by examination and inspection, ascertained and reported the fact. It was engaged in that particular business, and had knowledge of what was required for safety. The other party did not.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.\*]

3. *ELECTRICITY* (§ 19\*)—ACTIONS FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

The evidence on the trial satisfied the jury that on the day of the fire which injured plaintiffs' dwelling the defendant company, by its fault, passed through the wires by which the house was lighted a current of electricity of greater power and strength than the fixtures in the house were prepared to receive and meet. The court is not prepared to say that the conclusions of the jury are erroneous.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.\*]

Monroe, J., dissenting.

On Rehearing.

4. *APPEAL AND ERROR* (§ 901\*)—BURDEN TO SHOW ERROR.

The burden rests on an appellant to show, to the satisfaction of this court, that the judgment complained of is incorrect; and where that is not done, and this court can feel no assurance that it could render a judgment that would come nearer doing justice, the judgment appealed from will be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3670; Dec. Dig. § 901.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Elizabeth Hanton and others against the New Orleans & Carrollton Railroad, Light & Power Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Denegre & Blair and Victor Leovy, for appellant. Saunders, Dufour & Dufour and E. M. Cahn, for appellees.

Statement of the Case.

NICHOLLS, J. Plaintiffs, the widow and children of Nicholas Burke, allege that the New Orleans & Carrollton Railroad, Light & Power Company is justly indebted unto petitioners in the full sum of \$26,785.53, legal interest from judicial demand until paid, for this, to wit:

"That your petitioners are, and were on the 18th day of February, 1907, the owners of the real estate and improvements described by the municipal number of 5809 St. Charles avenue, at the entrance of what is known as Rosa Park, in this city; that the improvements of said property consisted of a two-story frame building and attic, with appurtenances, which premises are used as a residence by all of your petitioners, except the said William P. Burke. That the New Orleans, & Carrollton Railroad, Light & Power Company is, and was on the 18th day of February, 1907, engaged in furnishing electric power for lighting and other purposes in this city; that on said date, and for a long time

prior thereto, said company was furnishing and did furnish electric power for the lighting of petitioners' aforesaid premises; that said premises were properly wired, and were installed with all proper customary and usual electric appliances and devices for the lighting thereof by electricity, in accordance with the rules and regulations governing such matters; and that the electric current for lighting purposes was carried in said premises by service wires connected with the said company's main line of wires, which ran along the river side of the neutral grounds of St. Charles avenue.

"That on the 18th day of February, 1907, and in the forenoon thereof, the said New Orleans & Carrollton Railroad, Light & Power Company, its agents and employees, were engaged in removing an old decayed pole supporting its main line of wires running along the neutral grounds on St. Charles avenue, in front of petitioners' premises, and in replacing said old pole by and with a new pole to support said wires, and that, in changing and substituting said poles, the said company, its agents, and employees, cut and unfastened from its said main line of wires the service wires which carried electric current from said main line unto the aforesaid residence of petitioners; that, while engaged in said work, the said company, its agents and employees, carelessly and negligently permitted the service wires hereinabove referred to, which led into petitioners' residence, to come into contact with a wire or wires carrying electric current of a greater and higher pressure than the wires and electrical fixtures in the said premises were designed to and could carry.

"That, in consequence of said service wires leading to petitioners' said premises being permitted to come into contact with a wire or wires carrying a greater and higher pressure than the electrical service in said premises was designed to and could carry, an electric current of greater pressure was carried into said premises, with the result that the insulation, fixtures, and appliances of said premises broke down, arcking was established in said wires, fixtures, and appliances, and said premises caught and were thereby set on fire.

"That said fire spread rapidly throughout said building, and was not extinguished until said building had been almost totally destroyed. That the damage to said building, resulting from said fire, was and is the sum of \$16,831.

"That there were contained in said premises, at the time of said fire, certain household articles and furnishings, ornaments, etc., more particularly itemized on the statement hereto annexed and made part hereof, and marked 'Exhibit A,' which articles were and are valued at the sum of \$8,800.30, and that said articles were completely destroyed by and in said fire.

"That certain other articles contained in said building at the time of said fire, and appearing on the itemized statement hereto annexed and made part hereof and marked 'Exhibit B,' were damaged in and by said fire to the extent of \$1,154.23.

"That petitioners were the owners, either separately or together, of all of said movable property contained in said premises and destroyed or damaged by said fire, and that petitioners have transferred and assigned to each other, and are now the owners of all claims, demands, and cause of action which they and each of them have or had against the defendant company, or any other person or corporation, for the damage by them, or each of them, sustained in consequence of the destruction and damage to said movable property hereinabove described, as will more fully appear by ref-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

erence to the assignment which is hereto annexed and made part hereof.

"That the cause of said fire was, immediately after its occurrence, examined into by the fire marshal of this city, charged by law with duty, and that said fire marshal found, upon concluding said investigation, that said fire was caused and originated as hereinabove stated.

"In view of the premises, petitioners pray that said New Orleans & Carrollton Railroad, Light & Power Company be cited; that there be judgment in favor of petitioners and against the said New Orleans & Carrollton Railroad, Light & Power Company in the sum of \$26,783.53, with legal interest from judicial demand, and costs of suit."

On February 17, 1908, defendant, with leave of court, answered and filed an amended and supplemental answer. It reiterated its original answer, save as might thereafter be admitted. Further answering, defendant averred that, if the damages alleged were caused by the acts attributed to defendant in the petition (which acts and alleged results are denied), in that event damages were contributed to by the negligence of plaintiffs in having the wiring and fixtures in the house in bad condition, without which negligence none of the damages alleged could have resulted from any of the acts charged against defendant.

This case came up for trial February 17, 1908, and on February 19, 1908, defendant's counsel, in open court and in presence of the counsel for plaintiffs, suggesting to the court that at the last hearing testimony was offered on behalf of plaintiffs to the effect that plaintiffs had, prior to institution of this suit, parted with and disposed of a portion of their interest in their alleged claims against the defendant, and further suggesting that said testimony so offered modified the petition in this cause to that extent; that the plaintiffs do not claim and are not seeking to recover for themselves and on their own behalf, as alleged in the petition, the entire amount of claim; and defendant, further stating, in order that its position might be clear, that it will, on its request for charges and elsewhere, whenever may be proper, insist that said modification, while reducing the claim of any of plaintiffs, to the amount of which they have not divested themselves, nor disposed of, yet will not enable said plaintiffs, under the pleadings in this cause, to recover any amount on behalf of any other person, firm, or corporation, and that no other person, firm, or corporation can recover anything in this suit through plaintiffs or otherwise, now moves the court to direct the plaintiffs to declare what amount, if any, they are seeking to recover for themselves and their own interest against this defendant in this suit. This motion was refused by the court.

On February 19, 1908, defendant, without waiving or modifying its pleadings or objections, claimed that the effect of plaintiffs' testimony described in defendant's motion made this day, and the effect of the pro-

ceedings had upon that motion, was to introduce certain insurance companies named in plaintiffs' return to said motion as new parties plaintiff; and defendant accordingly pleaded the exception of misjoinder of parties plaintiff between the original plaintiffs and said companies.

Defendant prayed that this exception be maintained, and this suit dismissed, and for any other order or decree which might be proper or necessary. The exception was overruled, and defendant excepted. The case was tried before a jury, which returned in this case in favor of plaintiff in the sum of \$26,783.53, by a vote of 11 to 1 when polled. The court rendered judgment in conformity to the verdict.

Defendant has appealed.

The first question to which we direct our attention is the action of the court in respect to the following special charges requested to be given:

"(1) If you find from the evidence that, prior to the institution of this suit, plaintiffs parted with any portion of their interest in their alleged claim, you cannot, under the law, find a verdict in their favor, except for such amount as was not disposed of. You cannot, under the pleadings in this case, find a verdict in their favor as representing persons or corporations to whom any such interest was transferred, and your verdict must be confined to such amount, if any, as the plaintiffs in their behalf were entitled to recover at the institution of this suit.

"(2) Burden of proof is upon plaintiffs to make out their case, or by a clear preponderance of evidence, and if it is not so proven, on consideration of all the evidence on both sides, that the alleged fire was not caused in the manner alleged in the petition, and through the fault of the defendant, you should not, under the law, render a verdict in favor of plaintiffs, even though you may not have been able to satisfy yourselves from the evidence as to the cause from which the fire did actually originate.

"(3) If you find that the fire described in the petition was contributed to by the negligence of the plaintiffs in having the wiring or appliances in the house in a defective or improper condition, you must find for the defendant, even though you may consider that defendant might have been guilty of fault contributing to the fire."

The charge given to the jury was substantially as follows:

"Gentlemen of the jury: The question in this case is this: That if you find from the evidence that the defendant, through its fault, caused or permitted its trolley current to enter the house and damage the house and furniture belonging to the plaintiffs, then you should find for the plaintiffs for the amount of such damage; but if you should not be satisfied of this from the evidence you should find for the defendant. If you should consider from the evidence that the fire did not occur in this way, but occurred through the ordinary current on account of defective wiring or appliances in the house, you should find for the defendant. There is no doubt that a plaintiff may show the defendant's liability for damages by circumstantial evidence thereby.

"The burden of proof is upon the plaintiffs to make out their case by a clear preponderance of evidence; and if it is not so proven, on consideration of the evidence on both sides, that the alleged fire was caused in the manner al-

leged in the petition and through the fault of the defendant, you should not, under the law, render a verdict in favor of plaintiffs, even though you may not have been able to satisfy yourselves, from the evidence, as to the cause from which the fire did actually originate.

"The plaintiff in a civil case is not bound, like the state in a criminal case, to prove the case beyond a reasonable doubt; but the burden is upon the plaintiff to make its case reasonably certain. You must be satisfied by the evidence that the fire was occasioned as alleged by the negligence of the defendant in the manner alleged.

"I refuse the charge numbered 1 asked by the defendant, and I charge you that you are not to consider the question of the alleged interest of the insurance companies in the case, or of plaintiffs having parted with part of their interest; the question being matters of law for the decision of the court in its ruling in this case, and for the consideration of this court, or of an appellate court, if proceedings thereafter should be taken. Accordingly, if you find that the damages to the house and furniture alleged in the petition were occasioned by the fault of the defendant you should find in favor of the plaintiffs for the entire amount of such damages, if you find the amount claimed to be correct."

And at the conclusion of the charge the defendant then and there excepted to the refusal of the court to give the charge numbered 1 in the annexed request for charges, and then and there separately excepted to the refusal of the court to give, except as above modified, charge numbered 3 in the annexed request for charges, and the defendant duly reserved its bills of exceptions, and, having presented the same to the counsel for the plaintiffs, now asked the same to be allowed, settled, and filed as of date aforesaid.

Defendants urge, in support of their complaint of the ruling of the court, articles 15 and 172 of the Code of Practice; *Church v. Ice Company*, 44 La. Ann. 1022, 11 South. 682; *Wolf v. New Orleans Tailor-Made Pants Company*, 52 La. Ann. 1357, 27 South. 893; *Barron v. Jacobs*, 38 La. Ann. 370; *Willard, Agent, v. Lugenbuhl*, 24 La. Ann. 18. The plaintiffs, on the other hand, cite *Kennedy v. Oakey*, 3 Rob. 404; *Succession of Delassize*, 8 Rob. 259; *Towne v. Cinch*, 7 La. Ann. 93; *Meyer v. R. R. Co.*, 35 La. Ann. 897; *Smith v. Atlas Steam Cordage Company*, 41 La. Ann. 1, 5 South. 413; *Chicago, St. Louis & N. O. R. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97; *Southern Bell Telephone & Telegraph Co. v. Watts*, 66 Fed. 460, 464, 13 C. C. A. 579; and *Southern Railway Co. v. Blunt & Ward (C. C.)* 165 Fed. 260.

In *Chicago, etc., R. R. Co. v. Pullman Car Co.*, cited, the court said:

"It was in proof that at the time of the fire the cars of the Great Northern & Louisiana were insured for the plaintiffs, that before the commencement of this action the insurance companies paid to it in full settlement of the loss and damage the sum of \$19,000, and that this action is prosecuted under a written agreement between the plaintiff and the insurance companies that it should be conducted jointly by their counsel, and the amount recovered by suit, settlement, or compromise equally divided between them."

It summed up its decision in these words:

"It results that the court was right in holding that the insurance upon the cars and the collection by plaintiff of the insurance money were immaterial matters in this litigation. The action was well brought in the name of the plaintiff, pursuant to its agreement with the insurance companies."

In the case of *Bell Telephone Company v. Watts* the court said:

"Where the owner of property which has been destroyed by fire through another's negligence has been paid a part of his loss by an insurer, who thereby becomes subrogated to the remedies of the assured, an action to recover from the wrongdoer the value of the property destroyed is properly brought in the name of the assured alone, and the insurer is neither a necessary nor a proper party to such action."

"It is true that the payment by the insurer works an equitable assignment of the assured's claim against the wrongdoer; but the wrongful act is indivisible, and gives rise to but one cause of action. The insurer is subrogated only to the remedies of the assured, and the rule is well settled that the suit is properly brought in the name of the person whose property has been destroyed. If he recovers a sum which, with the amount he has received from the insurers, is more than his whole loss, the excess belongs to the insurers, and he receives it as trustee for them. The wrongdoer is bound to respond in damages for the whole loss to the owner of the property, and how the money recovered is to be distributed does not concern him."

The exception which the defendant took was that there was a misjoinder of parties; that it was not proper for the Burkes, in one and the same suit brought in their names, to recover that part of the claim which they had not assigned, and for the benefit of their assignee that part also which they had assigned.

Defendant argues the exception of misjoinder as if the insurance companies were "new plaintiffs" thrown into the case after it had been instituted; but we find that they were never made parties on the record. The Burkes continued throughout the case as sole plaintiffs. On the second day of the trial, counsel for defendant, in open court, on their behalf, filed a motion, asking the court to direct the plaintiffs to declare what amount, if any, they were seeking to recover for themselves against the defendant, to which demand plaintiffs' counsel replied:

"That they were suing for \$26,785.53; that this suit was brought in their own name, and they admitted they had received \$18,500 insurance money from the Hibernia and Sun Mutual Insurance Companies; that they had subrogated the insurance companies to their own rights to the extent of the amount received from the insurance companies; that they had agreed with the insurance companies, and were authorized by the insurance companies, to prosecute this suit for the full amount of the loss by fire as alleged in the petition; and that the defendant in the case was without interest to make the motion."

Defendant, with knowledge of this condition directly brought home to it, did not claim to have any defenses against the in-

insurance company which would be cut off by the manner in which the suit was brought, nor does it claim now that it has been, in fact, in any way injured. It relies entirely upon the fact itself and the position claimed by it that, as a matter of law, plaintiffs should have been limited in the suit to prosecuting what portion of the original demand remained due to themselves. The effect of this would have been to have required that one single cause of action should be split into a number of actions, each action being by the assignee of a particular portion of the loss. Had the different parties partially interested in the loss brought separate actions, we think it can be safely assumed that the defendant would have urged as a legal proposition that the plaintiffs had no right to divide one single cause of action into a number to suit his convenience or his interests. As matters stand, we do not think defendant sets up any just cause for complaint.

We now come to the merits of the case. The case comes before this court with a verdict of a jury in favor of plaintiffs on the facts as developed by the evidence, with a judgment of the trial court affirming the correctness of the verdict and the legal questions advanced by the plaintiffs.

Defendant does not, we think, seriously contest the fact that the damage to plaintiffs' building was caused by electricity which was conveyed to it through the wires of the defendant company attached to it. There was no other electricity brought into the building, other than that through defendant's wires. Defendant insists that the fire would not have occurred, had the fixtures in plaintiffs' house been such as it (defendant) was entitled to require they should have been. Those fixtures had been in use for years before the fire, without injury or loss. They were accepted by defendant as sufficient. Had anything been wrong about them, defendant should have ascertained the fact by inspection and examination. Household-ers know nothing whatever of electricity, nor what the requirements called for to insure safety. Defendant is engaged in that particular business, and supposed to be informed fully as to what is needed in the premises. If the fixtures having been used for years without any accident, and on a particular day a fire develops in the dwelling by reason of the electricity conveyed into it by wires, some exceptional condition must have arisen on that day. The evidence in the case satisfied the jury and the trial judge that the fire was due to an increased current having been passed through the wires on that day—an unusual increase, which the arrangements in the house were not prepared to meet, through the fault of the defendant company.

Mr. Black, an expert witness on behalf of the defendant, advances a theory as to the origin of the fire which we think as-

sumes as its premises too many unseen, unascertained, and unknown facts to be accepted as correct.

We do not feel justified in reversing the conclusions reached by the jury and the trial judge.

For the reasons assigned, the judgment is affirmed.

MONROE, J., dissents.

#### On Rehearing.

MONROE, J. The majority of the court, adhering to the view that plaintiffs are entitled to prosecute this suit in their own names for the recovery of the whole amount alleged to be due, but entertaining some doubt upon the questions of fact upon which the case turns, a rehearing was granted for the further consideration of these questions, and the present inquiry will be confined thereto, although the writer of this opinion still holds to the view that, under the law regulating practice in this state, whatever may be the rule elsewhere, plaintiffs have no standing to prosecute in their own names a suit for the recovery of the amount which has already been paid them by the insurance companies, and to their right to recover which they had subrogated those companies. Proceeding, now, to the matter in hand, plaintiffs allege that said premises (referring to their house) "were properly wired," etc., for lighting, and that the fire which damaged it was caused by the negligence of defendant's employes in permitting the service wires, which they were removing, to come in contact with wires carrying an electric current of higher pressure than the installation in the house was intended for, or could stand.

Considering, again, the testimony bearing upon the first of these allegations, we find that Douglas, plaintiffs' expert, testifies that the lighting appliances were installed in 1896 (when the house was built), according to the rules then in force; that about the year 1899 a number of houses in the neighborhood were destroyed, or damaged, by fire, resulting, as we understand the testimony, from electricity carried into them by means of wiring; and that he made another inspection of the house at that time. Being asked whether he made any change in the installations, as the result of the inspection, his answer was:

"We repaired the damage."

Reed, another expert, called on behalf of the plaintiffs, says:

"I inspected their residence at the time that we had those dreadful fires along St. Charles avenue, about ten years ago. \* \* \* As well as I can remember, there was some damage done at that time."

He further says that, after the damage was repaired, he made a "wheatstone bridge test," and found that "the installation was above the standard." He adds:

"That was done before the electric current was again connected with the building."



McConnell, an inspector for the insurance companies and a witness for plaintiffs, testifies that the rules regulating the wiring of buildings have been changed during the past few years; that he was in the house whilst the fire, out of which this litigation arises, was in progress, and that he looked about in order to ascertain how it originated; that he understood that the installation was approved, at the time that it was established, but, that it would not be approved to-day, because of changes that have been made in the National Electric Board's code. Being pressed to specify some of the defects that he found, he mentioned "brass armored conduits," and said:

"Some of the fixture wiring is smaller than is called for, to-day, on account of safety."

Mr. Borde, another of plaintiffs' expert witnesses, also testified that he found brass armored conduits in the installation, and that they are not now allowed in new installations, though the board has not ordered them out of the old installations. Being asked:

"It is not considered safe?"

—he replied:

"No, sir; not from their [the board's] point of view."

Mr. Black, an expert called on behalf of defendant, testified that the installation was not in accordance with the rules in force 10 years ago; that he found a number of defects some of them dangerous, and he proceeded to specify: Absence of solder in joints; lack of proper branch blocks, where the size of the wire changed; the use of a very unsatisfactory form of fuse blocks at the fixtures generally known as bulbs; the use of brass, around conduits, particularly where it comes in contact with grounded pipes; and the absence of tablet boards, for branching the circuits. There was no attempt to rebut the testimony thus given by Mr. Black, and, when considered in connection with that given by plaintiffs' own witnesses, it seems to us to show that the installation was defective. Considering, also, the testimony bearing upon the charge which plaintiffs make, that defendant's employés, in removing the service wires which conducted the electricity for lighting purposes into the house in question, "carelessly and negligently" permitted them to come "in contact with a wire, or wires, carrying an electric current of a greater and higher pressure than the wires and electric fixtures in the said premises were designed to, and could carry," we find as follows: Plaintiffs' house was situated on (what, for convenience, we shall call) the "north side" of St. Charles avenue, facing to the south, and was supplied with electricity, for lighting, by means of two service wires, which were strung from a pole, planted on the south side of the neutral ground, to a telephone pole, planted on the north side of the neutral ground, and which

extended from the telephone pole into the house. The pole first mentioned supported defendant's main lighting and power wires, and, upon the neutral ground, which separated it from the telephone pole, and which is, perhaps, 30 or 40 feet wide, there are two car tracks, above which there are, suspended, feed wires which supply the cars with their motive power, and which, as we understand it, obtain the power so supplied from the main wire, which is strung on the poles planted along the south side of the track. One of these poles, being the first above mentioned, became rotten, and it was decided to substitute another, at a point about 100 feet further to the westward, thereby necessitating the disengagement from the old pole of the wires which were supported by it, and their attachment to the new pole, when erected, or, in the case of the service wires here in question, the substitution of new wires, since the service wires then in use were too short to have reached the new pole, 100 feet further away. The job thus described was undertaken by a gang of defendant's men, under the direction of Magner, as foreman, on the morning of February 18, 1907, and the first work done was the digging of a hole, and the preparation of the new pole, and its erection therein. This work was accomplished before 10:30 o'clock a. m., and at or about that hour one of the men, Rankin, climbed upon the rotten pole for the purpose of disengaging the service wires leading into plaintiffs' house (and the other wires, as well), whilst two other men stood on the ground, below him; one of them, Dooley, holding up the rotten pole, and the other, Himes, holding the hand line, or rope, which was to be used as will be stated a little later. Magner then climbed on the telephone pole, and another man, Conrad, took his position on the ground below him. Rankin then cut one of the service wires, and there was tied to its end one end of the hand line, or rope, the other end and bight of which was in the hands of Himes, and he (Rankin) proceeded to pay out the wire (and rope) which Magner was to pull in; the proper thing being for them, between them, to have kept the wire and rope taut, and not to have allowed the wire to sag down upon the feed wires. And the same course was pursued with reference to the other service wire, both of them having been let down by Magner, as he received them, to Conrad, who received them, in turn, and coiled them at the foot of the telephone pole. Subsequently, when they had both been passed over to the north side of the neutral ground, they were cut off from the telephone pole, and were thrown, by Conrad, into a wagon and taken (by Peter) to the defendant's stable, from which they are said to have been sold as junk. Rankin, Dooley, Himes, Magner, and Conrad were the only persons who were handling the service wires, and were the only persons who were likely to have observed whether, in handling them,

they allowed them to come in contact with the feed wires, over which they were passed, and it might reasonably be expected that one of them would be able to state, with some sort of certainty, whether such contact was allowed or not.

Rankin, who was paying the wire out by means of the rope, was asked: "Do you know whether the wire ran across the feeder?" And he answered: "No, sir." It might possibly, and under different circumstances, be supposed that, in answering as he did, the witness meant to say, not that he did not know whether the wire ran across the feeder, but that as a fact the wire did not run across the feeder. Subsequently, however, the same question was propounded to Conrad, to wit: "Do you know if that line that came across came in contact with the trolley or feeder wires?" To which the witness answered: "After the wires came over, the hand line was let go from the opposite side and got tangled." He was then asked: "Q. The wire itself, do you know whether that came in contact with the trolley?" and he replied: "No, sir." He was then asked: "If it had come in contact with the trolley, would you have known it?" And he answered: "Well, it would have burned my hands." It is evident, therefore, that the answer, "No, sir," in Conrad's case, was understood to be a correct and categorical answer to the question as propounded, and we think it should be assumed that it was so understood in Rankin's case. From which we conclude that Rankin said, and meant to say, that he did not know whether the service wire ran across—i. e., touched—the feeder or not. Conrad, as we have seen, in answer to the question, "If it had come in contact with the trolley, would you have known it?" replies, "Well, it would have burned my hands." But that was a mere inference, and unfounded, for the service wires did not reach Conrad until they had been drawn by Magner clear of the feeder wires, and, having been severed from the main wire, they could not have burned his (Conrad's) hands. In fact, they would not, necessarily, have burned his hands, even if he had received them at a time when they were resting on the feeders, since they were, for the most part, if not entirely, covered with rubber, and the electric current would have reached his hands only if it had happened that a bare place on the service wire touched the feeder at the instant that another bare place touched Conrad's bare hands.

Dooley was not questioned upon the subject of the possible contact between the service and the feeder wires.

Himes, like Rankin and Conrad, was asked: "Do you know whether they [the service wires] touched on the feeder?" And he answered: "No, sir." He was subsequently asked: "Were those service wires brought in contact with the main electric light wires in any way?" To which he replied: "No, sir." But the main electric light wires were

not the wires over which the service wires were passed. They were wires which were strung along the poles, on the south side of the neutral ground.

Coming, now, to Magner, who received the wires, on the north side of the neutral ground, while Rankin paid them out, on the south side, we find that he was asked: "Did you drag that wire over the feeder?" To which he answered: "No, sir." It may be that, if he had been asked, "Did either of those service wires, while they were being passed over the feeders, come in contact with either of the feeders?" he would have made the same answer; but we have no means of knowing that. We should have supposed that he would have known with certainty whether it was Rankin or some one else who tied the rope to the service wires, and yet, as part of his answer to the question, "Who moved the service wires?" he said, "I think that he tied the rope on the service wires. He had a man on the ground to hold it." If, however, he was mistaken about Rankin tying the rope to the service wires, and if, as a fact, the man on the ground performed that function, then the ends of the service wires must have been dropped to the ground, with the result that for a time, and at the points where they crossed, they rested on the feeders.

There was a witness called by defendant, named Peter, who was employed to drive the wagon which was used by defendant's workmen, and who was examined for the purpose of showing that the service wires, after both of them had been drawn over to the north side of the neutral ground, were cut off from the telephone pole, thrown into the wagon, hauled away, and finally sold as junk.

The examination proceeded as follows:

"Do you know what became of the wires, finally? A. Yes; rolled up in a coil and put up alongside of a fence. Q. Did they stand there all day? A. Until a quarter to 12, when they cut them down and Mr. Conrad brought them to the wagon and handed them to me. Q. Then what did you do? A. When they handed them to me, I put them in the scrap portion of the wagon. Q. What became of them after that? A. I hauled them to the stable, and the next morning I put them in the scrap pile. Q. Do you know whether those wires came in contact with the trolley? A. No; they didn't come in contact with the trolley or the feeder wire. Q. At the time of the fire were there, or not, any wires leading from the trolley across St. Charles avenue? A. No; there were none. Q. Was, or was not, the Burke residence, at the time, connected by feed service wires? A. Not at that time; no. Q. Were there, or were there not, any feed service wires between the telephone pole and the Burke house? A. At the time they were laying on the ground. Q. But, leading from the Burke house and reaching to the telephone pole, were there any? A. No, sir."

From this examination, it seems to us, to say the least, doubtful whether the witness intended to testify that, whilst the service wires were being passed over the feed wires, there was no contact, since his attention

had not been directed, by the previous questions, to that particular occasion. Moreover, he had nothing to do with the passing over of the wires. There appears to have been no reason why he should have watched the men who were engaged in that work; and we should be disposed to doubt, no matter what may have been his intention in testifying, whether he was in a position to know more than they have testified to as to the manner in which the work was done, particularly as he falls into a patent error in saying that, at the time of the fire, there were no service wires running from the telephone pole to the house; those wires, according to all the witnesses, not having been removed until after the fire was under way. On the whole, upon this branch of the case, our conclusion is that defendant has failed to prove, or to make it probable, that in the process of removing them the service wires leading into plaintiffs' house were not allowed to come in contact with the feed wires. The evidence tending to show that there was such contact, and that the fire in question was the result, including the inference which may be drawn from the unsatisfactory testimony given by the men who were handling the wires, is indirect and circumstantial. Mrs. Swarbrick, her sister, Mrs. Douglas, and their hairdresser, Mazura McCue, were sitting in Mrs. Swarbrick's room between 11:30 and 12 o'clock, when they heard what Mrs. Douglas and Mazura described as a "crash," and Mrs. Swarbrick as "a terrific noise on the side of the house," which induced Mrs. Douglas to raise one of the windows and look out into the street. In the course of the examination of the witnesses named, Mrs. Douglas described the noise as a "rumbling or falling sound," and said that it was above her. And it is argued that it was produced by the introduction, into the lighting installation of the house (by means of contact between the service and feeder wires), of the current carried by the latter. The evidence to the effect that the service wires were cut and removed at or about 10:30 o'clock, and that the noise was not heard until between 11:30 and 12 o'clock, is, however, wholly uncontradicted. Beyond that, we rather infer, from the testimony on the subject, that the noise appeared to the witnesses to come from the outside of the house, whereas the theory propounded assumes an explosion or "rumbling" within the house. Again, we have expert testimony to the effect that the introduction of the more powerful current of electricity would not produce a "rumbling," but would produce a "hissing," sound. We think it possible, therefore, that the noise referred to has nothing to do with the case. We, however, pass on to other matters. A minute or two after the noise had been heard, Mrs. Swarbrick thought she smelled smoke, and, going into the attic to investigate, she found it filled with smoke, and so reported to Mrs. Douglas, who tele-

phoned to the fire patrol and to Mr. Swarbrick, and then called, out of the window, to the men in the street, that the house was on fire. She then went downstairs, and some of the men came in and went upstairs, and the testimony of all the witnesses concurs to the effect that, evidence of fire having been discovered about a bracket (combination, gas and electricity) which came out from the wall between the hall and parlor doors, an opening was made in the wall with an ax, and flames (the first fire that was seen) immediately burst out. An effort was made by those present to subdue the flames, by throwing water through the opening made by the ax, but without success, and the fire gained headway very rapidly, so much so that in a very little while the whole of the upper part of the house was involved. Plaintiffs' expert witnesses (Borde and McConnell) testify that, in their opinion, based on the examination made by them, the cause of the fire was the introduction into the installation of the 550-volt current of electricity, carried by the feeder wires of the railway, or some similar current, and that it could not have originated in any other way. Defendant's expert (Black) testifies that his examination of the premises disclosed no such indications, and he propounds a theory of his own, which seems to us by no means as probable as that propounded by plaintiffs. Defendant's experts testify that all installations designed to carry currents of 230 volts, if in proper condition, can carry the 550-volt current used to move the street cars, and plaintiffs' experts seem to deny this; but we think it may be conceded for the purposes of the case. We have found that the installation here in question was not in proper condition, and we do not understand any of the witnesses to say that a lighting installation, not in proper condition, can carry a 550-volt current without disastrous results. Quoad the defendant's 550-volt current, however, the plaintiffs were under no obligation to keep their installation in proper condition. It seems to have served the purpose for which it was intended until the defendant's servants undertook the removal of the service wires, and it appears to us reasonably certain that if, in the course of that work, those wires were allowed to take on the extra current carried by the feeders over which they were passed, the fire must have resulted. The service wires were passed over the feeder wires, according to the uncontradicted testimony of defendant's witnesses, at 10:30 o'clock. The fire was discovered an hour or an hour and a quarter later; but, when discovered, it had gained considerable headway, and, as it appears to have originated within a closed partition, it must have been smoldering for some little while. It seems to us highly probable, therefore, that it originated at the very time that Rankin and Himes and Magner were handling the service wires, or were passing them

over the feeder. Counsel for defendant dwell with emphasis on the failure of the plaintiffs to produce the physical proofs, which were in their possession, bearing upon their theory of the case; such, for instance, as the wiring of the house, by which it might have been ascertained whether the installation had been generally burned off. If, however, we correctly understood the testimony of defendant's experts, the burning of the insulation would, generally speaking, have been confined to those wires, or places on wires, where it was insufficient. We are inclined to think, as to the evidence adduced on both sides, that it falls short of the possibilities of the occasion; but the jury had to take it as they found it, and, so taking it, they reached the conclusion that the fire was attributable to the fault of the defendant. The burden rests on an appellant to show, to the satisfaction of this court, that the judgment of which he complains is erroneous. But, after a second, careful, and deliberate study of the evidence upon which the judgment here complained is predicated, we feel no assurance that such is the case, or that any judgment that we could render would come nearer doing justice between the parties.

It is therefore ordered that the decree heretofore rendered in this case be now reinstated and made the final judgment of the court.

#### SIVLEY v. SIVLEY. (No. 14,054.)

(Supreme Court of Mississippi. Nov. 15, 1909.)

##### 1. APPEAL AND ERROR (§ 454\*)—JURISDICTION OF COURT ON APPEAL.

When an appeal is taken to the Supreme Court, the jurisdiction to determine the cause is thereby transferred to that court, and any subsequent disposition of the case can only be made with its consent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2215; Dec. Dig. § 454.\*]

##### 2. APPEAL AND ERROR (§ 456\*)—JURISDICTION OF COURT ON APPEAL.

The Supreme Court, after obtaining jurisdiction on appeal, will not allow any disposition of the cause by the nominal parties, where it is reasonably probable that the equitable interest of third persons, though not actually parties to the record, will be prejudiced.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 456.\*]

##### 3. APPEAL AND ERROR (§ 456\*)—JURISDICTION OF COURT ON APPEAL.

An attorney, prosecuting to judgment an action for a contingent fee for an insolvent client, out of the reach of the court, has an equitable interest in the litigation; and the Supreme Court, acquiring jurisdiction on appeal, will retain the cause for hearing on the merits, and will refuse the parties to the record permission to dispose of the cause.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 456.\*]

Appeal from Circuit Court, Newton County; J. R. Byrd, Judge.

Suit by Mrs. Mamie De Priest Sivley against Mrs. W. Baker Sivley. From a judgment for plaintiff, defendant appeals. Heard on motion to strike out confession of error. Granted.

This litigation was begun as an action in the circuit court by Mrs. Mamie De Priest Sivley against her mother-in-law, Mrs. W. Baker Sivley, Sr.; the plaintiff claiming damages of said defendant for the alleged alienation of the affections of plaintiff's husband, W. B. Sivley, Jr. The case resulted in a jury verdict for plaintiff in the sum of \$30,000. There was a judgment for said amount, and the defendant below appealed to the Supreme Court. The declaration in the case was prepared and filed by Geo. W. May, J. N. Flowers, and A. H. Whitfield, Jr., composing the law firm of May, Flowers & Whitfield, which said firm conducted the case to successful conclusion in the lower court. At the time the declaration was filed the plaintiff was 20 years of age, and it was brought in the name of her mother as next friend; but before it came to trial she had attained her majority, and the declaration was amended by making her the plaintiff in her own name. Said attorneys claim to have had a verbal contract with the plaintiff, made during her minority, by the terms of which they were to receive one-half of whatever amount was recovered; their fee being wholly contingent. They claimed, further, that this contract was verbally ratified after the plaintiff became of age. Plaintiff denies this fact, however. After judgment had been entered in the circuit court and execution had issued and was levied on the property of defendant, and the appeal perfected, with a supersedeas, the plaintiff, Mrs. Mamie De Priest Sivley, effected a reconciliation with her husband, from whom she had been separated for about a year, and the young couple left Jackson, Miss., where plaintiff had been making her home since she and her husband separated, and moved to Memphis, Tenn., and took up residence there, where they are still residing.

Immediately upon learning of this reconciliation and the departure of the young couple, Messrs. May, Flowers & Whitfield, becoming fearful that their interests might be jeopardized, filed a bill for injunction in the chancery court, making as parties defendant thereto Mrs. W. Baker Sivley, Sr., of Jackson, Miss., and Mrs. Mamie De Priest Sivley, formerly of Jackson, Miss., more recently of Memphis, Tenn. The bill alleged that this reconciliation was brought about by collusion, for the purpose of defeating the payment of said judgment and defrauding the attorneys out of their interest in same. The prayer of the bill was that these defendants be enjoined from making any settlement or compromise of the

said judgment which would affect adversely the interests of the attorneys in the same. The defendant Mrs. W. Baker Sivley, Sr., answered the bill, denying any collusion or any intent of defrauding the attorneys, and alleging that she had nothing whatever to do with the reconciliation. The defendant then filed a motion to dissolve the injunction. The chancellor overruled the motion, and entered a decree making the injunction perpetual. Thereafter the defendant Mrs. Mamie De Priest Sivley filed a motion, alleging that the cause was a severable one, and that she was a resident of another state, and prayed for removal to the United States Circuit Court, since the amount was above \$2,000. The chancellor held the cause not to be severable, and denied the petition for removal.

While the appeal was pending in the Supreme Court, the appellee, Mrs. Mamie De Priest Sivley, filed in her own name what purports to be a "confession of error," which is as follows: "Now comes Mrs. Mamie De Priest Sivley, the appellee in the above-entitled cause, and confesses error therein, and consents, for the manifest errors in said record, that the judgment appealed from may be reversed, annulled, and set aside." Thereafter the said attorneys, Messrs. May, Flowers & Whitfield, filed a motion for leave to appear and represent their interest in the judgment appealed from, and to have the alleged consent to a reversal stricken from the files, or restricted in its operation to the interest of the appellee in said judgment. Said motion, which was sworn to, set up the fact of their employment by the appellee upon the contingent fee of 50 per cent., concerning which fee there had never been any disagreement prior to the reconciliation; the appellee having stated to said attorneys, so they aver, after the rendition of the judgment, that she was pleased with their success, and that they should have half of whatever was realized. It is further alleged that the said attorneys had advanced certain sums of money, while the litigation was pending, to cover expenses for witnesses, etc.; the appellee being practically penniless, and having nothing out of which to pay the expenses of the suit, being left, after her desertion by her husband, without sufficient means of support for herself and infant. It is further alleged that, whereas, the elder Mrs. Sivley and the appellee were not on speaking terms prior to the rendition of the judgment, that now they are in correspondence for the purpose of defeating the interests of their attorneys in said judgment, and that the appellee has employed other counsel to represent her in their motion for removal to the federal court, and has attempted to prevent May, Flowers & Whitfield from continuing in the prosecution of her suit for damages. They allege that this purported confession of error and consent for reversal

is in violation of the injunction heretofore granted by the chancellor, in which she and the appellant were enjoined from taking any steps which would defeat the interests of said attorneys. They deny that there is any manifest reversible error in the record and allege that the case should be allowed to proceed to a hearing on its merits, and that they should be permitted to protect their interests, which had been adjudicated to them by decree of the chancellor. They allege that they have no agreement whatever with the appellee, except on a contingent basis as heretofore set out, and that said appellee is entirely insolvent, and is beyond the limits of the state, and out of reach of the process of the court, and could not be made to respond in damages. They further allege that the only effect of the confession of error would be to defeat their claim for service rendered in securing said judgment, since, if the case were reversed, no new trial could be had, while, if the case is affirmed, she still may relinquish her interest in the judgment without affecting the interest of her attorneys. They charge that the appellant and appellee are in collusion to defraud their attorneys, and pray that the said confession of error may be stricken out, and that they may be allowed to continue in the prosecution of the case to conclusion. The said attorneys filed affidavits in support of their motion, and made the various proceedings before the chancellor exhibits thereto.

The appellee answered the motion denying any collusion or fraud, and denying that she ever ratified, after attaining her majority, the contract under which her attorneys were employed; and she denies that there was ever an agreement that her said attorneys would receive half of the amount recovered, but avers that she had agreed with her attorneys that their fee should be a contingent one, and could be agreed upon later. She admits that she and her husband have become reconciled and moved to the state of Tennessee, and now avers that their separation was due to a misunderstanding, and that, in order to right any wrong which she may have done by the publicity of the suit, she is willing to relinquish any claim for damages, and desires that the case shall be reversed and dismissed. She avers that she filed this confession of error of her own motion, believing that she has a right to direct and control this litigation, and it is done for the sole purpose of repudiating a judgment which she believes to have been obtained under misapprehension and upon evidence which she now believes was untrue. She denies that said attorneys have any right to represent her any further, and prays that the case may be reversed.

R. V. Fletcher and J. O. S. Sanders, for the motion. Tim E. Cooper, J. B. Chrisman, R. N. Miller, and C. L. Sivley, opposed.

**WILLIAMSON, Special Judge.** We shall not undertake a statement of the facts contained in this motion, but leave it to be stated by the reporter. When an appeal is taken to the Supreme Court of the state by any party, the jurisdiction to determine the cause is thereby transferred to that court, and any subsequent disposition made of the case can only be made with the consent of the court. It is true, ordinarily, that the parties may withdraw their appeal, or make any other disposition of the case which they may choose to make, provided it be not inconsistent with the duties of the court, or in any way invasive of the province of the court; but even then it can be done only when all the parties legally or equitably interested in the subject-matter of the litigation agree, and the court consents. When the appeal is taken, and the appellate court obtains jurisdiction of any cause, the court will allow no disposition to be made of the cause by the nominal parties, where it is made to appear to the court that it is reasonably probable that the interest of third parties, having an equitable interest in the suit, though not actually parties to the record, will be destroyed or prejudiced.

In examining the motion under consideration, it is manifest to us that it is at least probable that May, Flowers & Whitfield have an equitable interest in this litigation, and that, if they have an equitable interest, that interest would be prejudiced by any disposition made of the case by the actual parties of record, and the court will refuse to permit the cause to be disposed of in any way by the act of any of the parties, and retains this cause for hearing on its merits.

It is further the judgment of the court that the firm of May, Flowers & Whitfield, claiming to be equitably interested in this judgment, shall have the right to appear as attorneys for themselves and argue, orally or by brief, the merits of this case.

So ordered.

**ANDERSON v. STATE.** (No. 13,981.)  
(Supreme Court of Mississippi. Nov. 22, 1909.)  
**CRIMINAL LAW (§ 596\*)—CONTINUANCE—ABSENCE OF WITNESSES.**

The refusal to grant accused, charged with assault with intent to murder, a continuance on the ground of the absence of a witness, who saw prosecutor soon after the shooting, and to whom prosecutor related the details of the shooting, was erroneous, where prosecutor denied having stated the facts which the absent witness would prove.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1330; Dec. Dig. § 596.\*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Monroe Anderson was convicted of as-

sault and battery with intent to kill and murder one Bates, and he appeals. Reversed and remanded.

See 92 Miss. 656, 46 South. 65.

Defendant, when his case was called for trial, made a motion for a continuance based on the absence of a witness, who saw Bates soon after he was shot, and to whom Bates related the details of the shooting, so the affidavit for continuance alleged. Bates denied having stated the facts which defendant alleged would have been proven by the absent witness. The court refused the continuance.

R. N. Miller, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**SMITH, J.** On the facts of this case, it was error not to grant the continuance asked for on account of the absence of the witness Levi Greene.

Reversed and remanded.

**CADE v. STATE.** (No. 14,089.)  
(Supreme Court of Mississippi. Nov. 22, 1909.)  
**CRIMINAL LAW (§ 594\*)—CONTINUANCE—ABSENCE OF WITNESSES BEYOND JURISDICTION.**

An indictment was returned on June 28th, and the case was set for trial on June 30th. Accused's uncontroverted affidavit, supporting his application for a continuance, made in good faith, on the ground of an absent witness, showed that such witness would testify to facts which would acquit; that she resided in the county, but was temporarily outside of the jurisdiction of the court, without his procurement or consent. *Held*, that an accused should have a reasonable time within which to procure witnesses, and, in view of the short time between the return of the indictment and trial, it was error to deny the application, though the witness was beyond the jurisdiction of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.\*]

Appeal from Circuit Court, Claiborne County; John N. Bush, Judge.

Charles Cade was convicted of unlawful cohabitation, and he appeals. Reversed and remanded.

R. B. Anderson and McLaurin & Thames, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**MAYES, J.** While this court will not ordinarily interfere with the discretion of the trial court in refusing to grant an application for continuance because of the absence of a witness, when it appears that the witness is beyond the jurisdiction of the court, yet there are times when the trial court should allow a continuance, even when it appears that the absent witness cannot be reached with process at the time the application is made. In this case the indictment

was returned on the 28th of June, 1909, and the trial set for the 30th, just two days after the indictment was found. The uncontroverted affidavit of defendant, made on the application for continuance, shows that the absent witness is a very necessary witness in so far as his case is concerned, that she is a resident of the county, that she is away without any procurement on his part or consent, that her absence is only temporary, and that he cannot safely go to trial without her; and what affiant states that this witness will swear to, if believed by the jury, would certainly establish his innocence. Persons charged with crime should have reasonable opportunity to obtain witnesses. Whether the witnesses will be believed or not rests with the jury; but a defendant should be allowed reasonable time to get witnesses. There is nothing in this record to suggest that the application was not made in good faith, and for the genuine purpose of obtaining the witness. It is true that it is shown that the witness is beyond the jurisdiction of the court, and, if there had elapsed any sufficient length of time between the return of the indictment and the date of trial for the defendant to have procured this witness, we would not interfere with the court's holding; but the trial was the second day after the indictment was found, thus giving defendant no reasonable time to exert himself to procure this witness.

We think the court erred, in view of the facts of this case, in refusing the application for continuance, and the cause is reversed and remanded.

McCALEB et al. v. STATE. (No. 14,070.)  
(Supreme Court of Mississippi. Nov. 22, 1909.)  
BAIL (§ 90\*)—FORFEITURE—EVIDENCE.

Code 1906, § 1466, providing that a bond for appearance having the effect to free accused from custody, shall be valid, whether taken by the proper officer, as authorized by law, or whether the officer's return identifies it or not, does not render valid the forfeiture of a bond for appearance on a charge of assault with intent to kill, on a failure of a principal to answer to a charge of murder, without proof to connect the bond on which the forfeiture was taken with the offense for which the principal was indicted.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 406; Dec. Dig. § 90.\*]

Whitfield, C. J., dissenting.

Appeal from Circuit Court, Claiborne County; John N. Bush, Judge.

Action on a bail bond in the name of the State against James F. McCaleb and Undine McCaleb. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

J. McC. Martin, for appellants. J. B. Stirling, Atty. Gen., for the State.

MAYES, J. This is an appeal from a judgment of the circuit court, making final a

judgment nisi, formerly taken on an alleged forfeiture on an appearance bond executed by Jim Harper. The facts are about as follows: The record here shows that on the 11th day of April, 1905, an affidavit was made against one James Harper before a justice of the peace in district No. 4 of Claiborne county, charging him with an assault on one John Haywood with an ax, with intent to kill and murder. The record of the justice is made a part of the state's evidence in the trial of this case, and shows only the above facts. It contains no judgment showing that the justice ever had any hearing under this charge and required the accused to enter into any bond. The state next offered proof to show that on the 12th day of April following the sheriff of the county, and not the justice, took and approved a bond, executed by Jim Harper, with James F. McCaleb and U. F. McCaleb as sureties; the bond being offered in evidence and being for the sum of \$1,000, payable to the state, containing the condition that it is given to secure the appearance of Jim Harper at the next term of the circuit court to answer the state of Mississippi on a charge of assault with intent to kill.

It will be noted that nowhere in the bond is it specified that it was given in pursuance of any judgment of the justice requiring same to be given, nor does the bond state on whom the assault was committed. The record does not show anywhere the authority of the sheriff for holding the prisoner, or by virtue of which he was authorized to take the bond. It does not appear that the sheriff had any mittimus from the justice. Of course, the absence of these things in no way affects the validity of the bond; but, if they were in the record, they might serve to identify the bond given with the offense which Jim Harper was subsequently indicted for, thus showing that the bond was intended to secure the appearance of Harper for some offense in connection with John Haywood, though the charge at the time the bond was given was for a such lighter offense than that for which he was subsequently indicted. In this condition of affairs, and on the 19th day of June following, the grand jury indicted Jim Harper for murdering one John Haywood. Now, it will be seen that the assault charged in the affidavit in the justice court is charged to have been committed on John Haywood, and the indictment subsequently returned charges the murder of the same party; but there is not a thing to connect the bond taken by the sheriff for the appearance of Jim Harper at the next term of the court to answer the state of Mississippi on a charge of assault with intent with either one of these charges, either as a matter of oral or record proof. In other words, the bond given is in no way identified with the offense charged. If the assault with in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tent charged at the time the bond was taken resulted in murder not foreseen at the time, of course, the bond remains good to secure the appearance of the party; but it must be shown that the forfeiture taken on the bond was for the default in appearance of the party under the terms of the bond for the offense charged at the time of his release, or for some graver offense resulting from the same act, and not for a wholly different offense. All the proof offered in this case is that which we have quoted; no proof being offered by the state to show, as a matter of fact, that the bond taken was for the identical offense charged in the affidavit, or was the result of the act under which the charge was made.

At the June term, 1905, the defendant and his bondsmen were called, and, the defendant failing to appear, a forfeiture was taken on his bond, and a scire facias issued. The scire facias recited that "whereas, Jim Harper, principal, and James F. and U. F. McCaleb, sureties, entered into bond before the sheriff on the 12th day of April, agreeing to pay the state of Mississippi \$1,000, unless Harper, the principal, should appear at the June term, 1905, of the circuit court, and remain from day to day and term to term, until discharged by law, to answer the charge of assault with intent to kill; and, whereas, on the 22d day of June, 1905, at the June term of court, Harper, having been called, came not, but made default, and the sureties, having been duly called to come into court and bring the body of Harper to answer charge, came not, but also made default: It is thereupon considered by the court that the state have and recover from Harper and his sureties the amount of bond," etc. After forfeiture was taken, and the parties duly summoned into court by the scire facias, they filed pleas in which they set up the following, viz.: First, a plea of nul tiel record, alleging that the judgment nisi was null and void, because there was no record in the court on which to base the judgment; second, there is a fatal variance between the scire facias and the judgment nisi, in that the judgment recites no bond named in the scire facias; and, third, that there is a fatal variance between the scire facias and the bond given, because the tenor of the bond differs from the recitals in the scire facias. All these pleas were replied to by the district attorney, and the issue thus joined resulted in a judgment in favor of the state for the sum of \$1,000 against the principal and sureties.

The question in this case is not as to whether this was a valid bond. If this bond had the effect of releasing Harper from custody on any charge known to the law, then its validity is placed beyond question by section 1463, Code 1906, which provides that: "All bonds, recognizances, or acknowledgments of indebtedness, conditioned for the appearance of any party before any court

officer, in any state case or criminal proceeding, which shall have the effect to free such party from jail or legal custody of any sort, shall be valid and bind the party and his sureties, according to the condition of such bond, recognizance, or acknowledgment, whether it was taken by the proper officer or under circumstances authorized by law or not, or whether the officer's return identify it or not."

The validity of the bond is one thing, and its identity, when placed in suit for an alleged breach, with the crime charged against a principal in default of appearance, is another thing. Before the conditions of liability under the bond attach, the failure of the principal to appear in accordance with its terms must be a failure on the principal's part to appear for trial on the identical thing he stood charged with, and for which he was held in custody when the bond released him, or for some lesser or graver crime resulting from and growing out of the same criminal act, either not known at the time or not charged in the affidavit or indictment. Thus, if one be charged with grand larceny, and execute a bond, and obtain a release from custody on that bond, if he be not subsequently indicted for that crime, but for counterfeiting or forgery, the last-named crimes being not connected with and independent of the crime charged for which the bond was given, a forfeiture cannot be taken on the bond for the failure to appear and answer the original charge, when called on the charge of forgery or counterfeiting.

There is no question as to the validity of this bond. If there has been a failure of the party to appear, the bond is just as good to-day as it was the day it was taken. Still it was necessary for the state to offer some kind of proof, either oral or record, to connect the bond on which forfeiture was taken with the offense for which the party was subsequently indicted, since there was nothing in the face of the bond or in the record which could possibly connect it in any way.

Reversed and remanded.

WHITFIELD, C. J. (dissenting). One Jim Harper was arrested and carried before a magistrate court, and put under a bond to appear before a circuit court to answer the charge of "assault to kill," as it is expressed. In the meanwhile, before the grand jury convened, the assaulted person died, and the grand jury, of course, returned an indictment for murder against Harper. The bond in this case was approved April 12, 1905, by C. S. Magee, sheriff, and Harper, of course, released; the bond being returned into court. The affidavit had been made before B. W. Smith, justice of the peace, on April 11, 1905. It will thus be seen that the bond was executed and approved, and the prisoner released, the day after the affidavit was made against the prisoner.

There is no pretense in the record that



this bond was not given to secure his release because of the offense charged against him in this same transaction wherein Haywood was killed. There is nothing in the record to suggest any doubt whatever that this bond was given before the justice of the peace to answer to a charge of what is called an "assault to kill," and no suggestion that he had made an assault upon any other person. The case of *Smith et al. v. State*, 38 South. 335, is directly in point, and squarely decisive of this case. In that case one Smith executed a bond before a justice of the peace; the conditions being to appear at the next term of circuit court to answer the charge of robbery. At the next term of the circuit court he was indicted for grand larceny. He made default, and a judgment nisi was rendered against him and his sureties; the judgment nisi reciting that he had given a bond to appear and answer the charge of grand larceny. At the next term of the court the sureties on his bond appeared and set up the defense that the bond which they had signed did not obligate Smith to appear and answer an indictment for grand larceny; that consequently the bond recited in the judgment nisi was not the same identical bond which they had executed, as shown by the judgment nisi itself. This court said: "Sections 1394, 1395, Ann. Code 1892 (same provision in the Code of 1906), were made for just such cases as these two cases. \* \* \* Under these two sections of the Code, the judgment of the court below was correct, and is affirmed."

I cannot see, for the life of me, what more there is in this case. The statute was made to cut off all such technical defenses, whenever the one thing appeared, to wit, that the bond, however informal, had the effect of securing the release of the prisoner. It is perfectly manifest, from this record, that it did secure the release of this man, Harper, and that it was given to secure his appearance to answer for an offense growing out of the very transaction in which Haywood was killed. It is very well to recur to this statute, and set it out in full. What is its language?

"1394. All bonds, recognizances, or acknowledgments of indebtedness, conditioned for the appearance of any party before any court or officer, in any state case of criminal proceeding, which shall have the effect to free such party from jail or legal custody of any sort, shall be valid and bind the party and his sureties, according to the condition of such bond, recognizance, or acknowledgment, whether it were taken by the proper officer or under circumstances authorized by law or not, or whether the officer's return identify it or not.

"1395. All bonds and recognizances taken in criminal cases, whether they describe the offense actually committed or not, shall have

the effect to hold the party bound thereby to answer to much offense as he may have actually committed, and shall be valid for that purpose, until he be discharged by the court."

#### HAYS v. STATE. (No. 13,796.)

(Supreme Court of Mississippi. June 14, 1909.  
On Suggestion of Error, Nov. 22, 1909.)

CRIMINAL LAW (§ 970\*)—OATH OF GRAND JURY—WAIVER OF OBJECTION—ARREST OF JUDGMENT.

Under Code 1906, §§ 1413, 1426, 1427, providing that a judgment of conviction shall not be arrested for any defect or omission in any grand jury which might have been raised before verdict, an objection that the grand jury was not sworn will be presumed not well taken, where the record is silent as to the fact, when first raised on motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2458; Dec. Dig. § 970.\*]

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

Sandy Hays was convicted of murder, and he appeals. Affirmed.

R. N. Miller and Albert Whitfield, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was convicted of murder in the court below, sentenced to life imprisonment in the penitentiary, and appeals to this court.

After verdict, a motion in arrest of judgment was made on the ground that the grand jury which found the indictment on which he was tried was not sworn. The minutes of the court at which the indictment was found contain no statement showing that the grand jury was sworn. It has long since been settled in this state that a grand jury must in fact be sworn before it is legally organized, and that this fact must affirmatively appear from the record. *Cody v. State*, 3 How. 27; *Abram's Case*, 25 Miss. 589; *Foster's Case*, 31 Miss. 421. This defect, being jurisdictional, is not cured by sections 1413, 1426, and 1427 of the Code of 1906—in fact, could not be cured by legislative enactment. *Arbuckle v. State*, 80 Miss. 15, 31 South. 437.

The indictment contains the usual caption, reciting that the grand jury had been "duly elected, impaneled, and sworn"; and it is argued that this recital cures the defect in the record. It has, however, long since been decided otherwise. See authorities supra. "What ought to be of record must be proved by record, and by the right record, made at the right time and in the right place." *Hughes, Grounds and Rudiments of Law*, p. 966.

The judgment of the court below is reversed, the indictment quashed, and the defend-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ant held to await the action of a legally organized grand jury.

#### On Suggestion of Error.

We are satisfied that our former opinion in this case was erroneous, and that the judgment of the court below ought to be affirmed. The cases of *Cody v. State*, 3 How. 27, *Abram v. State*, 25 Miss. 589, and *Foster v. State*, 31 Miss. 421, were decided prior to the enactment of the statutes now composing sections 1413, 1426, and 1427 of the present Code. In those cases the court, in effect, declined to apply the maxim, "Omnia presumuntur rite acta," to matters of this character, and held that it must affirmatively appear from the record that the grand jury was in fact sworn.

The effect of the statutes above referred to is to change this rule, and now, where the record is silent as to matters of this character, and no objection thereto has been made before verdict, the court is required to presume that the same have been rightfully and regularly done. *Ex parte Phillips*, 57 Miss. 357; *Spivey v. State*, 58 Miss. 743. This is true, even though the matter complained of is jurisdictional in its nature. The statute does not provide that the court may proceed with the trial of the cause without doing those things necessary to invest it with jurisdiction, but simply that, after the trial has proceeded to verdict without objection, the court will conclusively presume, so far as those matters referred to in the statute now under consideration are concerned, that the same have been rightfully and regularly done. In other words, the defendant is not cut off from raising the jurisdictional question, but the statute merely limits the time in which the same may be raised.

There being no reversible error, if error at all, in the other matters complained of, the suggestion of error is sustained, the judgment heretofore rendered in this court is vacated, and the judgment of the court below is affirmed.

#### INDEPENDENT ORDER OF SONS AND DAUGHTERS OF JACOB OF AMERICA v. MONCRIEF. (No. 14,008.)

(Supreme Court of Mississippi. Nov. 22, 1909.)

##### 1. PLEADING (§ 310\*)—COMPLAINT—EXHIBITS.

Where the bill in a suit against a fraternal order alleged that the liability of the order became fixed by specified sections of the by-laws, and made references to the constitution and by-laws, and required the order to file as an exhibit to the bill a copy of the by-laws, which was done, the by-laws were a part of the bill, in determining its sufficiency on a demurrer.

[Ed. Note.—For other cases, see Pleading. Cent. Dig. §§ 944, 946, 947; Dec. Dig. § 310.\*]

##### 2. INSURANCE (§ 750\*) — FRATERNAL INSURANCE—LIABILITY.

The by-laws of an order forfeited membership on the failure of the member to pay dues.

The order was authorized to provide a sick benefit for a sick member; but a member became entitled to such a benefit on the condition that the order had taken action and had voted him an allowance. The order made no allowance for a member, who was sick, and who did not pay dues from July to December, the date of her death. *Held*, that the membership was forfeited for nonpayment of dues, as the order was not required to pay the dues out of sick benefits.

[Ed. Note.—For other cases, see Insurance. Cent. Dig. §§ 1895, 1896; Dec. Dig. § 750.\*]

Appeal from Chancery Court, Newton County; Sam Whitman, Jr., Chancellor.

Suit by Saul Moncrief against the Independent Order of Sons and Daughters of Jacob of America. From a decree overruling a demurrer to the bill, defendant appeals. Demurrer sustained, decree reversed, and cause remanded.

The appellee filed a bill in chancery against the appellant, in which he alleged that one Adaline Moncrief, his wife, held a death benefit certificate in the appellant order, bearing date January 26, 1904; that she had paid all dues on same up to July, 1907; that his said wife became sick with tuberculosis in January, 1907, and died the following December; that during the time of her sickness the said order made no allowances to her in the nature of a sick benefit, although she was in needy circumstances; that, proper proof of death having been made, payment of the policy was refused. The bill further alleged that the wife of the complainant was, because of her poverty, unable to make payments of her monthly dues from July, 1907, until her death; that it was the duty of said order to allow her the sick benefit, and that the scribe should have had this allowance made, and deducted her dues from the amount allowed, and sent her the balance, which he failed to do; and that because of said failure his said wife was not in default in the payment of monthly dues. The bill makes the constitution and by-laws a part thereof, and refers to them specially, and alleges that complainant is not in possession of a copy of same, and prays that the defendant be required to bring them into court for inspection.

To this bill the defendant demurred, on the ground that complainant was not in good standing, because she had failed to pay assessments, being several months in arrears at the time of her death, in violation of the constitution and by-laws; that according to the constitution and by-laws no sick benefit could be allowed her, except by vote of the local lodge, and that it was not the mandatory duty of the lodge to order a sick benefit, and that it was not the duty of the scribe to do so without the matter having been acted upon by the local lodge; that, the defendant's intestate having failed, refused, and neglected to comply with the terms and conditions of her contract, she had forfeited

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

her membership and right to a death benefit, all of which would appear from the bill itself and the constitution and by-laws of said order. The court overruled the demurrer, and this appeal is prosecuted.

W. J. Latham, for appellant. J. H. Mize and F. F. Mize, for appellee.

MAYES, J. The bill in this case wholly fails to state any cause of action, and the demurrer should have been sustained. The constitution and by-laws of the order constitute a part of the bill of complaint by express allegations of the bill. Thus it is alleged that the liability of the order became fixed by sections 1, 2, 3, 4, and 5 of article 4 of the by-laws, and various other references are made to the constitution and by-laws in the complaint. It is expressly requested, as a part of the bill, by reason of the fact that the complainant has been unable to obtain a copy to file as an exhibit to the bill, that defendant be required to file a copy of the by-laws, and that same be made a part of the bill. And yet counsel for appellee argue, after this part of the prayer has been complied with, and the constitution and by-laws filed, that the court has no right to consider same on this demurrer. There is nothing in this argument. These by-laws are as much a part of this bill, in the case as it now stands, as if they had been actually copied into the face of the bill. When we examine these by-laws, we see that the failure to pay dues by members of the order forfeits the membership; and when we examine the bill, it shows that Adaline Moncrief did not pay her dues from July, 1907, to December, 1907, the last date being the date of her death. Thus it is that on the face of the bill it is shown that the insured was not a member of the order when she died, and therefore not entitled to insurance, unless there was some excusable reason for this failure to pay the dues, and made excusable under the constitution and by-laws of the order.

The excuse offered in the bill for the non-payment of the dues is that Adaline Moncrief was sick, and because she was sick became entitled to a sick benefit, and that it was the duty of the lodge to pay the dues out of this sick benefit, sending to the sick member only the surplus, after retaining all dues that might be owing; but, when the constitution and by-laws are examined, it will be seen that the order does not agree to pay to all parties who are sick a benefit. The lodge can provide a sick benefit for a sick member, but the lodge does not agree, absolutely, to allow every sick member a benefit; but a member becomes entitled to a benefit on two conditions, namely, that he is sick, and, secondly, after he is sick, the lodge take further action and vote the mem-

ber an allowance. The lodge had made no allowance in this case, and it is expressly so alleged in the bill, and until the allowance had been made there was no obligation on the part of the lodge to pay anything.

Demurrer sustained, decree reversed, and cause remanded.

# BARRIER v. YOUNG. (No. 13,937.)

(Supreme Court of Mississippi. Nov. 22, 1909.)

## DOWER (§ 34\*)—CONVEYANCE BY WIDOW—ESTATE ACQUIRED.

Where the owner of land died leaving a widow and three children, and the land descended to his children, subject only to the dower interest of the wife, a deed by her conveyed a life estate only, and on her death the property descended to the surviving child.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 34.\*]

Appeal from Chancery Court, Neshoba County; J. F. McCool, Chancellor.

Suit by B. J. Barrier against Will Young to quiet title. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

The father of the appellant died intestate in 1879, leaving a wife (who afterwards married one J. H. Ray) and three children, the appellant and two brothers, both of whom died in infancy, without issue. At the time of the death of the elder Barrier, he was the owner of the land in controversy, which descended to his children, subject only to the dower interest of his wife, who took a life estate only. The appellee claims title under a deed executed by the wife, who was Mrs. Ray at the time she executed the deed. Appellant filed a bill to cancel appellee's claim as a cloud upon his title; and from a decree dismissing his bill, he appeals.

J. C. Ward, for appellant. Byrd, Wilson & Richardson and W. M. Lewis, for appellee.

MAYES, J. The facts of this case show, beyond question, that the property involved belonged to B. J. Barrier, Sr., father of complainant, at the date of the father's death, to wit, in the year 1879. When B. J. Barrier, Sr., died, as he left no will, the only interest which his wife inherited was a dower interest; the law relative to dower then being in full force. When Albert Kelly Barrier and John Miller Barrier died, they both being under age and without issue, all their interest in this property was vested by law in the complainant. When complainant's mother, then Mrs. J. H. Ray, made the conveyance complained of in this case, she only conveyed a life interest, and, she being now dead, all this property must belong to the complainant as the sole heir, unless he is barred from setting up his claim by the statute of limitations, and the proof utterly fails to establish any such bar. The case of Har-

vey v. Briggs, 68 Miss. 60, 8 South. 274, 10 L. R. A. 62, is decisive of this case.

The chancellor having decreed the property to belong to appellee, and dismissed complainant's bill, the cause is reversed and remanded.

#### **BARRIER v. HOLLAND.** (No. 13,938.)

(Supreme Court of Mississippi. Nov. 22, 1909.)  
Appeal from Chancery Court, Neshoba County; J. F. McCool, Chancellor.

Suit by B. J. Barrier against J. H. Holland. From the decree rendered, complainant appeals. Reversed and remanded.

Barrier & Ward, for appellant. Byrd, Wilson & Richardson and W. M. Lewis, for appellee.

MAYES, J. This case is controlled by the opinion in the case of B. J. Barrier v. Will Young, 50 South. 559.

Reversed and remanded.

#### **BARRIER v. DALEY.** (No. 13,939.)

(Supreme Court of Mississippi. Nov. 22, 1909.)

Appeal from Chancery Court, Neshoba County; J. F. McCool, Chancellor.

Suit by B. J. Barrier against W. F. Daley. From the decree rendered, complainant appeals. Reversed and remanded.

Barrier & Ward, for appellant. Byrd, Wilson & Richardson and W. M. Lewis, for appellee.

MAYES, J. The opinion in the case of B. J. Barrier v. Will Young, 50 South. 559, controls this case.

Reversed and remanded.

#### **McKAY BARRIER CO. v. BOSTICK LUMBER & MFG. CO.** (No. 14,045.)

(Supreme Court of Mississippi. Nov. 22, 1909.)

Appeal from Circuit Court, Neshoba County; J. R. Byrd, Judge.

Action between the McKay Barrier Company and the Bostick Lumber & Manufacturing Company. From the judgment, the McKay Barrier Company appeals. Affirmed.

Byrd, Wilson & Richardson, for appellant. Baskin & Wilbourn, for appellee.

PER CURIAM. Affirmed.

#### **BLANCHARD v. YAZOO & M. V. R. CO.** (No. 14,116.)

(Supreme Court of Mississippi. Nov. 22, 1909.)

Appeal from Circuit Court, Bolivar County; Sydney Smith, Judge.

Action by Alice R. Blanchard against the Yazoo & Mississippi Valley Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Sillers & Owen, for appellant. Mayes & Longstreet, for appellee.

PER CURIAM. Affirmed.

#### **GATES et al. v. STATE.** (No. 14,035.)

(Supreme Court of Mississippi. Nov. 22, 1909.)

Appeal from Circuit Court, Chickasaw County; J. H. Mitchell, Judge.

Rush Gates and Polk Gates were convicted of assault and battery with intent to kill, and appeal. Affirmed.

Leftwich & Tubb, for appellants. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

#### **HARRIS v. STATE.** (No. 13,982.)

(Supreme Court of Mississippi. Nov. 22, 1909.)

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Will Harris was convicted of assault and battery with intent to kill, and he appeals. Affirmed.

Clem V. Ratcliff, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

#### **JONES v. STATE.** (No. 14,242.)

(Supreme Court of Mississippi. Nov. 22, 1909.)

Appeal from Circuit Court, Washington County; J. M. Cashin, Judge.

Polk Jones was convicted of murder, and appeals. Affirmed.

Hugh C. Watson, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

#### **BLACK v. STATE.** (No. 14,122.)

(Supreme Court of Mississippi. Nov. 22, 1909.)

Appeal from Circuit Court, Neshoba County; J. R. Byrd, Judge.

John Black was convicted of unlawfully retelling liquor, and he appeals. Affirmed.

C. L. Dobbs and W. M. Lewis, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**WARFIELD v. STATE.**

(Supreme Court of Mississippi. Nov. 29, 1909.)  
**CRIMINAL LAW (§ 636\*)—TRIAL—PRESENCE OF ACCUSED—NECESSITY.**

The absence of accused, on trial for murder, during a part of the time of the impaneling of the jury, is fatal error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1471; Dec. Dig. § 636.\*]

On suggestion of error. Sustained, and former judgment of affirmance vacated, and judgment of the trial court reversed, and cause remanded.

For former judgment of affirmance without opinion, see 50 South. 503.

**WHITFIELD, C. J.** It is shown by the affidavit of Maganos that the defendant was out of the courtroom during a part of the time the petit jury was being impaneled. The district attorney did not see proper to introduce any counter affidavit, nor was there cross-examination of the witness Maganos. It, therefore, on this record, remains true that the defendant was not in the courtroom during a part of the very important proceeding of impaneling the jury. Under the authority of *Sherrod v. State*, 47 South. 554, 20 L. R. A. (N. S.) 509, and various other authorities cited therein, this was fatal error.

Wherefore the suggestion of error is sustained, the former judgment of affirmance vacated and set aside, and the judgment of the court below is reversed, and the cause remanded for a new trial.

**MATTHEWS v. STATE. (No. 13,801.)**

(Supreme Court of Mississippi. Nov. 29, 1909.)  
**HOMICIDE (§ 250\*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.**

The testimony of a seven year old negro boy, who was very ignorant, and whose testimony as to the manner of the killing was directly conflicting in itself, and directly conflicting with statements made by him to others out of court on vital matters, was insufficient to support a conviction for murder; it being impossible for the jury not to have a reasonable doubt of the truth of his testimony.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-516; Dec. Dig. § 250.\*]

Appeal from Circuit Court, Warren County; J. N. Bush, Judge.

Jake Matthews was convicted of murder, and appeals. Reversed and remanded.

Henry, Fox & Canizaro, for appellant.  
 Geo. Butler, Asst. Atty. Gen., for the State.

**WHITFIELD, C. J.** The conviction in this case rests exclusively upon the testimony of a little negro boy about seven years of age. He made two diametrically opposite statements in the court of the justice of the peace as to how the killing occurred, and he

made a statement to three or four other witnesses, which statement was in direct conflict with his testimony on the stand, as to the vital thing involved. We cannot, under the peculiar circumstances of this case, consent to this conviction, on the testimony of this single witness, this seven year old boy, evidently very ignorant, when that testimony is contradicted by his own statement, made to many witnesses, and also made in the committing court. How the jury could have failed to entertain a reasonable doubt of the truth of his statement, it is impossible to see.

Their verdict on the facts as contained in this record is manifestly wrong, and the judgment is reversed, and the cause remanded.

**CITY OF LEXINGTON et al. v. HOSKINS. (No. 14,139.)**

(Supreme Court of Mississippi. Nov. 22, 1909.)

**1. ADVERSE POSSESSION (§ 4\*)—EFFECT AS AGAINST MUNICIPAL CORPORATIONS.**

Under the common law, limitations do not run against a municipality, by reason of mere adverse possession, and Const. 1890, § 104, to such effect is but declaratory of the common-law rule.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 4.\*]

**2. EVIDENCE (§ 372\*)—DOCUMENTS—ANCIENT RECORDS.**

Ancient surveys of a city, showing streets and lots appearing on the county records, are presumed to have been recorded by authority, though not formally certified for record.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1613-1627; Dec. Dig. § 372.\*]

Appeal from Chancery Court, Holmes County; J. F. McCool, Chancellor.

Action by Miss M. W. Hoskins against the City of Lexington and others. From a decree for plaintiff, defendants appeal. Reversed, and decree on cross-bill granted.

W. L. Dyer, for appellants. Boothe & Pepper, for appellee.

**BRAME, Special Judge.** The question involved in this case is as to the right of the city of Lexington to use and occupy a strip of land as part of a street. There is no serious disagreement as to the principles of law controlling in the case, and hence the important consideration is first to arrive at a definite and correct conclusion on the facts. If the decree appealed from rests alone upon controverted facts, and it appears that there was no error of law, we, of course, recognize the rule that the finding is not to be disturbed, unless opposed to the clear preponderance of the testimony. The material facts are substantially as follows:

The county of Holmes was created in 1833, and was authorized to locate a county site

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

within three miles of the center. O. W. Beall and Samuel Long each agreed to donate 30 acres of land for this purpose. Accordingly, in June, 1833, each executed a bond for title, and afterwards, in 1841, gave a deed conveying the adjacent tracts, making 60 acres, to the board of police of the county; the recited consideration being the location of the county site. In each of the deeds the land was described as being bounded as follows: "Beginning at the center of the courthouse on the sectional line between sections 35 and 36, in township 15, range 2 east," etc. The land thus conveyed, in a square or rectangle, formed the basis or site of the town of Lexington, which was incorporated in 1836. Meantime, before the incorporation, there had been a survey and plat of the land made by one Benjamin Griffin in 1833. It seems under the direction of the board of police. This survey divided the land into lots and streets; the courthouse being the center.

There is no record of the original plat; but what purports to be a copy thereof, made by Fleet C. Mercer, surveyor of Holmes county, of date April 21, 1851, and duly recorded about that time in the office of the chancery clerk, appears in the record. Accompanying this are the field notes of the survey of the town of Lexington, or, rather, what purports to be a copy thereof, signed by Benjamin Griffin, the surveyor, dated July 9, 1833. These field notes purport to describe the lines that were run in making the original plat, and state that the initial points were indicated by posts set in the ground. This copy of the field notes is not certified regularly by the chancery clerk; but attached to the same is an informal certificate by one L. H. Doty, who recites therein that he was employed by the board of supervisors to copy the original book of field notes and the plat, and that both are correctly copied. This certificate is signed "L. H. Doty, per A. G. Doty," and is dated July 23, 1894. referred to in the record is a map made of the town of Lexington in 1884. This map was used for some time, but has been mislaid, and could not be found. A later official map, made in 1897, purporting to be a copy of the map of 1884, is recorded in the chancery clerk's office, and is made an exhibit in this record. After this suit was brought, another survey was made, showing lots, width of streets, direction, etc., and also the location and description of the strip of land in controversy. The original plat of this last survey, by agreement of the parties, has been certified to this court, and is a part of the record in this case.

On January 18, 1908, the appellee, M. W. Hoskins, who is the owner of lot 104 in the town of Lexington, or the north part thereof, filed the bill in this case against the city of Lexington and the marshal and street commissioner, averring that the municipal authorities had recently made an order re-

quiring that her fence be drawn in on the north side of her lot some distance, in order to widen or open what was claimed to be a street, now known as "Mulberry," and which the municipal authorities asserted to be 40 feet wide. As shown by the recent survey and testimony, Mulberry street, which is the northern boundary of appellee's lot, as it is now opened and used, is 23 feet wide at the west end, where it connects with Wall street, which runs north and south, and is 27 feet 9 inches wide at the east end, where it connects with Yazoo street, running north and south. Lot 104 is designated on the several maps or plats above referred to, and is bounded on the north, east, and west by the streets above mentioned. The plat shows Mulberry street to be straight and 40 feet wide. The disputed strip, which is embraced within appellee's inclosure, is 17 feet wide at the west end, and 12 feet 3 inches wide at the east end, being 113 feet 6 inches long.

Appellee averred in her bill that she and those under whom she claims have been in the open, adverse possession of lot 104, including the disputed strip on the north, for a great many years, dating back to a period prior to the Civil War; and the proof shows this to be true, though there was some controversy as to whether the fence on the north had not been moved out into the street during the period remembered by the witnesses. The defendants demurred to that part of the bill setting up title by adverse possession, and answered part, and the answer was made a cross-bill. In the cross-bill, the facts above referred to as to the original location of the town and the several surveys and plats are set out, and it is claimed that Mulberry street, 40 feet wide, was dedicated, and was a public street, and it was averred that appellee, and those under and through whom she claims, in inclosing lot 104, had encroached on the street to the extent above stated. The complainant answered the cross-bill, setting up substantially the facts averred in the original bill, and claiming that she was the owner of the land to the full extent of her inclosure, and that she had been in the open, adverse possession thereof, claiming as owner, for many years longer than the period of limitation. The defendant demurred to so much of the answer as set up title by adverse possession. On final hearing, a decree was entered in favor of complainant, from which this appeal is prosecuted.

There were various objections made to testimony, and other questions were raised; but we do not deem it necessary to refer to these in detail. Nor do we consider it necessary to express an opinion specifically on the points raised by the demurrer to the original bill and the exceptions to the answer of defendant to the cross-bill. On the whole record, we think it is sufficiently shown that there was a dedication of the street 40 feet wide, and that the appellee and those under, whom she claims have encroached on the street to

the extent above indicated; that is to say, 12 feet 3 inches at the northeast corner of the lot, and 17 feet at the northwest corner. The dedication of the street 40 feet wide being shown, it follows that the occupancy of a part thereof, though adversely and under claim of ownership, cannot affect the right of the municipality to have the street opened. *Briel v. Natchez*, 48 Miss. 423; *Vicksburg v. Marshall*, 59 Miss. 563; *Witherspoon v. Meridian*, 69 Miss. 288, 13 South. 843; *Indianola, etc., Co. v. Montgomery*, 85 Miss. 304, 37 South. 958.

Section 104 of the Constitution of 1890, providing that statutes of limitations in civil causes shall not run against the state, or any subdivision or municipal corporation thereof, is but declaratory of the common law, firmly established in this state, so far as the rights of a municipal corporation to its streets are concerned. In this case, it is evident to us that the description of appellee's lot 104 has reference to the maps or plats referred to above. It was not shown that there was any other map on which lot 104 appeared, and there seems to have been an entire correspondence and harmony between a series of maps which extend over a period of more than 50 years, in which this lot (104) is represented as being bounded on the north by a street 40 feet wide.

The technical objections to the formality of the certificates cannot prevail against the ancient records, showing the survey. These records were placed in the record books of the county, and, though not formally certified, after this great lapse of years, are presumed to have been placed there by a proper authority.

The decree is reversed, and a decree will be entered here, dismissing the bill and granting the relief prayed for in the cross-bill.

ÆTNA INS. CO. v. RENNO. (No. 14,104.)  
(Supreme Court of Mississippi. Nov. 22, 1909.)

1. INSURANCE (§ 229\*)—CANCELLATION OF POLICY—WAIVER OF NOTICE.

Where a fire insurance agent agrees with insured to look after the business and keep up the insurance, the insured having no choice of companies, the agent has authority to waive, for the assured, the five days' notice of cancellation, provided for in the policy, and obtain a new policy from another company.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 229.\*]

2. INSURANCE (§ 136\*)—DELIVERY OF POLICY.

Where a fire insurance agent agrees with the insured to look after his business and keep up the insurance, the fact that the canceled policy remains in the hands of the insured, and that a new policy, obtained by the agent and sent to a subagent for delivery, is, by his neglect, not actually delivered to insured until after the fire, when it is accepted, will not affect the liability on the last policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 221; Dec. Dig. § 136.\*]

Mayes, J., dissenting.

Appeal from Chancery Court, Hinds County; Garland G. Lyell, Chancellor.

Suit by W. M. Renno against the Ætna Insurance Company and another. From a decree against defendant named, it appeals. Affirmed.

On October 29th, the Mississippi Home Insurance Company issued and delivered to plaintiff a fire policy, and on the next day notified its agents to cancel the policy; but plaintiff received no notice of cancellation. The agents subsequently had defendant issue a policy on the risk, which was forwarded to their subagents for delivery, but was not delivered before the premises were burned November 12th. Plaintiff was not informed of the substitution until after the fire, when he accepted defendant's policy in substitution for the one directed to be canceled. The case was tried once before, and appealed to the Supreme Court; the facts appearing in the case of *Ætna Insurance Company v. Renno*, 46 South. 947. The cause was reversed, and remanded for a new hearing; and upon the second trial the chancellor entered a decree dismissing the bill as to the Home Insurance Company, and finding for complainant and against the Ætna Insurance Company.

McLaurin, Armistead & Brien and Tim E. Cooper, for appellant. J. B. Stirling, F. M. West, and L. Brame, for appellee.

WHITFIELD, C. J. The testimony of Voltz and of Aills set out clearly and explicitly the conversation had between Voltz, Harvey, and Renno; Aills being present and hearing same. That conversation, as detailed by Aills, is in substance as follows, as set out in pages 43 and 44 of the record: That Renno and Harvey were having a conversation about this insurance. "They appeared to be looking over some papers. Renno said: 'If you insure me, I want you to insure me; and when this expires, I want you to reinsure me.' And they talked along that way in conversation, I suppose, about five minutes. Harvey said to Renno: 'If you will trust your business, or turn over your insurance, to me, we [that is, Harvey and Voltz] will keep you insured. We will look after you and keep it insured. Your place will be insured, and we will keep it insured. You need not be uneasy; just leave it to us.'" Voltz testified to the same conversation, in substance, except that he makes it perhaps more explicit and full even than Aills. The effect of this conversation, which was not testified to in the former trial by Voltz, who was then a witness, and which was never testified to by Aills until this trial, Aills never having been introduced before, was to make an entirely different state of case, on the testimony, from that presented by the former record—a state of case by which the liability of the appellant clearly appears. The learned chancellor reviewed the testimony of these two witnesses as a question of fact in the case,

and, we may say, all-controlling fact, and entered a decree, evidently on account of their testimony, changing the case entirely from what it was before, in favor of the appellee. Neither of these witnesses was in any way impeached in any mode known to the law, and Aills seems to be a reputable merchant, and both Aills and Voltz testify that they have no interest whatever in the case.

Under these circumstances, we think the decree of the chancellor, finding the facts as he did, is correct, and the decree is affirmed.

MAYES, J. (dissenting). In my judgment the nonliability of the Ætna Insurance Company to Renno was finally settled in the case of Ætna Insurance Company v. Renno, 46 South. 947; but, if I am mistaken in this, the facts of this case do not establish any liability on the part of the above company. Mr. Renno denied in the original case that Harvey or Voltz had any authority to represent him in the cancellation of the Home Insurance policy. Therefore, as declared in the former opinion, the Home Insurance policy had never been canceled and was the only insurance which attached to this risk, either under the facts of that case or under the facts of the so-called new case which comes to this court now. The facts now do not show that there was any agreement to do anything except to reinsure when the policy expired. The policy had not expired, and there was no authority given by Renno, either expressly or impliedly, to any agent of any company to cancel this policy without notice to him as stipulated in the policy and before its expiration. I do not recapitulate the facts, since they are fully stated in the case in 46 South. 947, supra.

I think the case should be reversed, and dismissed as to the Ætna Insurance Company.

HINES et al. v. SHUMAKER. (No. 14,145.) (Supreme Court of Mississippi. Feb. 8, 1910.)

1. APPEAL AND ERROR (§ 565\*)—FILING STENOGRAPHER'S NOTES—NOTICE TO ATTORNEYS—MANNER OF NOTICE.

Under Code 1906, § 797, requiring the clerk of the circuit court, as soon as the stenographer's notes are transcribed, to notify each attorney or firm interested in the case by mail or in person that the notes are on file, notice of the filing of the notes may be given to the attorneys personally by a person designated for that purpose by the circuit clerk.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2508; Dec. Dig. § 565.\*]

2. APPEAL AND ERROR (§ 565\*)—FILING STENOGRAPHER'S NOTES—NOTICE TO ATTORNEYS—PERSONS ENTITLED.

Under Code 1906, § 797, requiring the clerk of the circuit court, as soon as the stenographer's notes are transcribed, to notify each attorney or firm interested in the case by mail or in person that the notes are on file, the attorneys who must be notified are the attorneys of record, so that notice was properly given to one of the firm of attorneys who were appellee's attorneys

of record, though the firm dissolved after the suit was begun, and notice to one of them was notice to all.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2508; Dec. Dig. § 565.\*]

3. APPEAL AND ERROR (§ 565\*)—FILING STENOGRAPHER'S NOTES—NOTICE TO ATTORNEYS—NECESSITY.

Under Code 1906, § 797, requiring the clerk of the circuit court, as soon as the stenographer's notes are transcribed, to notify each attorney or firm interested in the case by mail or in person that the notes are on file, formal notice to appellee's counsel of the filing of the stenographer's notes was not necessary, where his leading counsel had the notes for the purpose of examination for more than five days after they were filed, and returned them to the circuit clerk without any written suggestions for correction; the only purpose of the notice provided being to give the parties an opportunity to inspect the notes and suggest correction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2507, 2508; Dec. Dig. § 565.\*]

Action by J. M. Shumaker against W. W. Hines and others. On motion to strike stenographer's notes from the record on defendants' appeal after judgment for plaintiff. Motion overruled.

Flowers, Fletcher & Whitfield and May & Sanders, for the motion. Tim E. Cooper and V. Otis Robertson, opposed.

WILBOURN, Special Judge. The facts, so far as they relate to the motion to strike out the stenographer's notes, are as follows:

The declaration in the cause was filed on the 18th of July, 1908, on behalf of appellee against appellants, in the circuit court of Hinds county, state of Mississippi, by Messrs. May, Flowers & Whitfield, a firm of lawyers composed of Messrs. G. W. May, J. N. Flowers, and A. H. Whitfield, Jr. The name of said firm was signed to the declaration. No other attorney or firm of attorneys ever formally became attorneys of record in the cause for the appellee in the court below; and, while it appears from the affidavits in the case that the firm of May, Flowers & Whitfield was dissolved on January 1, 1909, and that two new firms, to wit, the firm of Flowers & Whitfield, composed of the said J. N. Flowers and A. H. Whitfield, Jr., and the firm of May & Sanders, composed of the said G. W. May and J. S. Sanders, then came into existence, which facts were extensively advertised and generally known, it does not appear that the firm of May & Sanders ever became attorneys of record in the cause. The clerk of the court makes affidavit "that so far as said record showed the firm of May & Sanders had no connection with said cause, and affiant was never notified that said firm did have any connection with the case"; and, further, that while he knew of the dissolution of the firm of May, Flowers & Whitfield, he was never advised that the dissolution affected the interests of said firm as attorneys in said cause, "or that any other firm was interested for the plaintiff than that of May, Flowers & Whitfield." The cause was tried



In the court below, after the dissolution of the firm of May, Flowers & Whitfield, and at the March term 1909, of the Hinds county circuit court. Mr. G. W. May makes affidavit that the firm of May & Sanders "actively participated" in the trial, and that he and both members of the firm of Flowers & Whitfield were present throughout the proceedings in the court below, and that Mr. Sanders was "present at different times during said trial." Other than what may be inferred from the statement that the firm of May & Sanders actively participated in the trial in the court below, it does not appear how or in what way said firm was interested in the case; nor is it shown that, as a matter of fact, the dissolution of the firm of May, Flowers & Whitfield affected their relation to said cause and to the appellee as attorneys of record, nor that the firm of May & Sanders either participated in the trial of said cause, or were interested therein, by virtue of any employment of said firm by appellee or any one. For aught that appears of record, the fact that May & Sanders "actively participated" in the trial in the court below, may have been due solely to Mr. May's connection with the case, by virtue of the fact that he was bound by the contract of May, Flowers & Whitfield to represent appellee. The participation of May & Sanders in the trial was principally through Mr. May, and it is manifest that the three members of the firm of May, Flowers & Whitfield really tried the cause in the court below.

The March term, 1909, of the Hinds county circuit court adjourned April 17, 1909. The stenographer's transcribed notes were filed with the clerk of the court, and so marked by him, on May 6, 1909. The official stenographer agreed with the clerk that he would notify the attorneys in the case, and, pursuant thereto, carried the original transcribed notes so marked "Filed" to the attorneys for the appellants, who straightway, on said date, to wit, May 6, 1909, examined and approved them. Thereupon, on said date, at the request of appellant's counsel, and pursuant to his understanding with the clerk, the official court stenographer delivered the said original filed notes, so marked and so approved by counsel for appellants, to Mr. J. N. Flowers. Mr. Flowers was concededly the leading counsel in charge of the conduct of the case for the appellee, and was a member of the firm of May, Flowers & Whitfield. It is not denied that counsel for appellants told said stenographer "to carry the original notes to the firm of May, Flowers & Whitfield and ask them to approve the same at the earliest possible moment, in order that the appeal might be completed." The stenographer makes oath that he did deliver the notes to Mr. J. N. Flowers on May 6, 1909, and did ask him if he would agree to the correctness of the same. Mr. Flowers said that he preferred to look over the notes, and, it appears, retained them until June 1, 1909, and did examine them, and then returned them to

the office of the clerk by the hand of his stenographer, "without indorsing his written approval thereon, and without consent or objection, and no written suggestion of corrections of said notes was filed at any time by appellee or his counsel. Mr. Flowers remarked to the stenographer that the notes were gotten up in good shape, and also said to counsel for appellants that they were correct, except, perhaps, for some typographical errors.

It is insisted that the notice of the filing of the notes, required by section 797 of the Code of 1906, must be given by the clerk, by mail or in person, and that the notice given under the direction of the clerk, by the official stenographer, who volunteered his services to the clerk for that purpose, is not sufficient, and, further, that the notice required by the statute, by whomsoever given, was not sufficient, because not served on each attorney or firm interested in the case. We cannot agree with either of these contentions. We see no legal reason why notice of the filing of the notes may not be given to the attorneys personally, by a messenger or other person designated for that purpose by the clerk, so as to bind the parties to the suit. It is the fact of notice, not the method of giving it, that is material. Furthermore, we think the attorneys interested in the case, who are to be notified under the statute, are the attorneys of record, and that, notwithstanding the dissolution of the firm of May, Flowers & Whitfield, they continued to be the only attorneys of record in said cause under the facts of this case, and that, in all matters pertaining to said cause, notice to one of them was notice to all. There was, therefore, no failure to notify each firm of attorneys interested in the case, if these views be correct.

But, conceding that the notice required by the statute was not given, we are further of the opinion that the question of notice, or no notice, was rendered immaterial by the fact that after the transcribed notes were filed by the stenographer, and examined and approved by appellants the leading counsel for appellee retained the said notes for the purpose of examination for more than five days, did examine them, returned them to the clerk, and filed no written suggestions of correction of said notes. Clearly the object of the notice required by the statute is to afford the parties to the litigation an opportunity to inspect the notes and suggest corrections within the time allowed them, and to put them in default in the event they do not exercise the right to the use of the notes, for the purpose of inspection and correction, for the period prescribed by the statute. If the appellee exercises, himself or through counsel, the right to use and inspect the notes for the period allowed the appellee under the statute, and omits to file written suggestions of corrections, the question of notice becomes just as immaterial as is the question as to whether or not process was issued and serv-

ed in a suit where the defendant voluntarily appears. The acts of Mr. Flowers were binding upon his client, and we think, therefore, no matter whether the notice was legally sufficient or not, and irrespective of the question of notice, that the stenographer's notes became a part of the record by operation of law under the facts of this particular case, without either the signature of the judge or any agreement of counsel, and by the express provisions of the statute itself.

The motion is therefore overruled.

#### NOTE.

[a] The statement of facts appearing in the transcript not having been signed by the trial judge, it cannot be considered by the Supreme Court.

—(Ariz. 1890) *Snead v. Tietjen*, 24 Pac. 324; (Cal. 1885) *Martin v. Vanderhoof*, 7 Pac. 307; (Nev. 1881) *Baum v. Meyer*, 16 Nev. 91; (Tex. 1800) *Smith v. Tucker*, 25 Tex. 594; (1860) *Witten v. Poindexter*, 25 Tex. Supp. 378; (1866) *Wampler v. Walker*, 28 Tex. 598; (1867) *Pelham v. State*, 30 Tex. 422; (1893) *Caswell v. Greer*, 4 Tex. Civ. App. 659, 23 S. W. 331; (1894) *City of Victoria v. Jessel*, 7 Tex. Civ. App. 520, 27 S. W. 169; (1895) *Gulf, C. & S. F. Ry. Co. v. Calvert* (Civ. App.) 31 S. W. 679; (Wash. 1891) *Hanson v. Tompkins*, 2 Wash. St. 508, 27 Pac. 73.

[aa] (Ala. 1874) An agreed statement of facts, incorporated in the transcript by consent of counsel, but not signed by the judge nor established as a bill of exceptions, will not be considered in lieu of a bill of exceptions.—*Kirby v. Vann*, 51 Ala. 221.

[b] (Cal. 1854) A statement of facts must be either agreed to or signed by the judge.—*Harley v. Young*, 4 Cal. 284.

[bb] (Cal. 1859) A statement filed below on the motion for a new trial, not agreed to by the parties nor settled by the judge, is not properly authenticated.—*Doyle v. Seawall*, 12 Cal. 425.

[c] (Cal. 1865) The court will not consider a statement on appeal which is not authenticated, either by the judge or by the stipulation of the parties.—*Kavanaugh v. Maus*, 28 Cal. 261.

[cc] (Cal. 1866) A motion to dismiss an appeal from an order denying a new trial will be sustained by the Supreme Court, where the statement has not been agreed to by the respective parties, or settled and authenticated by the court below, although the motion was submitted to that court without a statement by the consent of the appellee.—*Cosgrove v. Johnson*, 30 Cal. 509.

[d] (Cal. 1891) Where there is but one notice of appeal, which is taken both from the judgment and the order denying motion for a new trial, and there is appended to the transcript a stipulation that it contains a full and true copy of all papers "necessary and proper to be used on this appeal," and that "the appeal may be heard thereon," the statement of facts on motion for new trial contained in such transcript may be considered without any further identification as having been used at the hearing of the motion.—*Moore v. Long Beach Development Co.*, 87 Cal. 483, 28 Pac. 92, 22 Am. St. Rep. 265.

[dd] (Ga. 1859) An explanatory note, appended to the bill by the judge, is to be taken as part thereof.—*Carrie v. Cumming*, 26 Ga. 690.

[e] (Ga. 1884) Where the certificate of the presiding judge shows that the bill of exceptions as presented is not true, but he certifies that it is true, with certain material qualifications, stated in the certificate, the writ of error will be dismissed.—*Anderson v. Walker*, 73 Ga. 114.

[ee] (Ga. 1885) The Supreme Court will dismiss a writ of error where, between the judge's certificate and his signature, necessary matter is interjected by the judge.—*Pretorius v. Barnes*, 75 Ga. 818.

[f] (Ga. 1886) Where, in certifying a bill of exceptions, the judge added to the usual certificate a statement that "the accompanying explanation is part of my certificate," and after his signature is an explanation, also signed by him, that, when the bill of exceptions was presented to him, there were erasures and interlineations in it, and discrepancies as to facts and rulings different from his recollection of them, and that he returned it, with his objections thereto noted, to be corrected and rewritten, and that it was afterwards returned to him with instructions that he might correct it; that he did not deem it his duty to write a bill of exceptions; and that, it being the last day allowed for certifying, he signed the certificate with this explanation—the writ of error will be dismissed, on the ground that the judge did not certify the bill of exceptions to be true.—*Graham v. Dahlonega Gold Min. Co.*, 78 Ga. 356.

[ff] (Ga. 1886) Where a judge certifies to the truth of a bill of exceptions, and adds a note of explanation stating that before doing so he had heard evidence as to the truth and correctness of the grounds, being unable to recollect the facts, inasmuch as the motion for a new trial was presented more than six months after the trial, the writ of error will be dismissed.—*Moye v. Ober*, 78 Ga. 356.

[g] (Ga. 1887) A bill of exceptions, in order to be properly before the Supreme Court, must be certified to be true. Where the presiding judge certifies that the bill of exceptions, "as corrected by notes attached and signed by me, is true," etc., and after the certificate attaches a paper signed by him, containing several notes materially altering the statements contained in such bill of exceptions, the writ of error will be dismissed.—*Masland v. Kemp*, 80 Ga. 365, 10 S. E. 124.

[gg] (Ga. 1889) When the record on appeal contains oral evidence which is not approved by the trial judge, though that part of the evidence brief containing documentary evidence is so approved, the oral evidence cannot be considered; and when it is admitted that such oral evidence was taken on the trial, and the grounds of a motion for new trial are that the verdict was contrary to the evidence, and that certain instructions were not authorized by the evidence, the judgment will be affirmed.—*Rodahan v. Terry*, 83 Ga. 399, 9 S. E. 721.

[h] (Iowa, 1891) The agreed statement of facts on which the case was tried below cannot be considered on appeal, though embodied in the abstract, when it is not certified by the trial judge, or otherwise made a part of the record.—*Underwood v. Lombard Inv. Co.*, 84 Iowa, 25, 50 N. W. 219.

[hh] (Kan. 1873) The stipulations of counsel that a case is correct will not dispense with the necessity for a signature by the judge.—*Hodgden v. Ellsworth County Com'rs*, 10 Kan. 637.

[i] (Kan. 1877) Where the only paper attached to a petition in error is what is called a "case-made," and the only authentication of such case-made is the certificate of the clerk of the district court which fails to show that the document is a copy of the case-made filed in his office, or that it is the original case-made signed by the judge, and where an examination of the paper shows that it is not in toto a copy or an original document, such paper cannot be considered as a properly authenticated document for the consideration of the court.—*Sullivan v. Leavenworth, L. & G. R. Co.*, 17 Kan. 508.

[ii] (Kan. 1878) A paper purporting to be a case-made, but not attested by the clerk, and not having the seal of the court attached, as required by statute, will not be considered.—*Karr v. Hudson*, 19 Kan. 474.

[j] (Kan.) The certificate of a judge to a case-made should show affirmatively that he has settled it.—(1881) *Allen v. Krueger*, 25 Kan. 74; (1893) *Merchants' Nat. Bank v. Becannon*, 51 Kan. 716, 33 Pac. 595; (1896) *Mudge v. Kansas Nat. Bank*, 56 Kan. 353, 43 Pac. 255;

(1896) *Mutual Ben. Life Ins. Co. v. Sackett* (App.) 43 Pac. 816.

[j] (Kan. 1882) The certificate of the clerk of court to a case-made is not required. His attestation and the seal of the court to the judge's certificate are all that are essential.—*Muscott v. Hanna*, 26 Kan. 770.

[k] (Kan. 1882) Alleged errors of the trial court will not be considered and determined, where the bill of exceptions and case-made are not certified to and attested as required by statute, and the record is otherwise irregular and defective.—*Linton v. Frazier*, 29 Kan. 20.

[kk] (Kan. 1890) A case-made, signed by the trial judge, but not attested by the clerk of the court with his signature, and the seal of the court, as required by Gen. St. 1889, par. 4649, will not be reviewed by the Supreme Court for alleged errors, when challenged for want of proper authentication.—*Limerick v. Gwinn*, 44 Kan. 694, 24 Pac. 1097; *Same v. Haun*, 44 Kan. 698, 25 Pac. 1069.

[l] (Kan. 1896) Where there has been no service of the case-made on one of the parties to a judgment, who will be necessarily affected by a modification or reversal thereof, the case-made is a nullity.—*Sheridan v. Snyder*, 4 Kan. App. 214, 45 Pac. 1007.

[ll] (Kan. 1898) A case must be served on all parties to the judgment whose reversal is sought.—*First Nat. Bank v. Pulsifer*, 7 Kan. App. 813, 53 Pac. 771.

[m] (Kan. 1898) A case-made is fatally defective where it fails to show that it was served, or attested by the clerk of the lower court, or filed in his office.—*Bank of Kincaid v. Bronson*, 8 Kan. App. 858, 54 Pac. 504.

[mm] (Kan. 1899) Where the record does not show that the case-made was ever served on defendants in error, or that they had notice of the time of the settlement thereof, the proceedings in error will be dismissed.—*Douglass v. Stewart*, 8 Kan. App. 856, 56 Pac. 1127.

[n] (Kan. 1899) In a garnishment proceeding under the statute, both plaintiffs and the garnishee excepted to the judgment, and the court entered an order giving "both plaintiffs and garnishee defendant \* \* \* each 90 days from date within which to serve case-made on the other defendants." *Held*, that the words, "on the other defendants," are mere surplusage, and not words of limitation, and that under the order the garnishee was entitled to serve a case-made on the plaintiffs.—*Hildinger v. Tootle*, 9 Kan. App. 582, 58 Pac. 226.

[nn] (Kan. 1900) Where, in an action by plaintiff against several defendants, judgment is rendered for plaintiff, and one defendant brings error, it is necessary to serve the case-made upon his codefendants, and the difficulty of service, on account of their residence abroad, will not change the rule.—*Lapham v. Bailey*, 61 Kan. 861, 60 Pac. 743.

[o] (Kan. 1903) It being unnecessary, under Act 1901 (Laws 1901, p. 505, c. 278, § 2), to serve the case-made on any party who did not appear at the trial and take part in the proceedings, failure to do so is not ground for dismissing a writ of error.—*Johnson v. Ware*, 67 Kan. 840, 73 Pac. 99.

[oo] (Mich. 1869) Where a certificate by a clerk to a case-made is so folded as to appear in the middle, instead of at the end, of the papers, the court will presume he intended to designate the proper documents for review, although a good practice requires more fullness of description.—*Wheeler v. Wilkins*, 19 Mich. 78.

[p] (Mich. 1875) Under Comp. Laws 1871, § 4947, requiring cases made after judgment to be certified to the Supreme Court by the clerk of the court below, such certificate is essential to give the Supreme Court jurisdiction to hear the cause, and the absence of such certificate cannot be cured by stipulation of counsel.—*Grand Rapids v. Whittlesey*, 32 Mich. 192.

[pp] (Mo. 1879) A clerical entry after the judge's signature to the bill of exceptions is a

nullity, and will not be noticed in the appellate court.—*State v. Lanham*, 6 Mo. App. 577.

[q] (Mont. 1889) An order denying a motion for a new trial cannot be considered on appeal, where the alleged statement of the record has not been signed by the judge of the trial court.—*Steuffen v. Jeffers*, 9 Mont. 66, 22 Pac. 152.

[qq] (Nev. 1896) A statement of a case on appeal must be settled and authenticated by the judge or referee hearing the case, or by agreement of the parties, under Gen. St. §§ 3354, 3355, 3357.—*Hayes v. Davis*, 45 Pac. 406.

[r] (N. Y. 1881) A case must contain a certificate of the court below, or a copy thereof.—*In re Bailey*, 85 N. Y. 629.

[rr] (N. Y. 1881) A statement in a case, "Return certified as required by law," cannot be accepted as a substitute for a certificate.—*In re Bailey*, 85 N. Y. 629.

[s] (N. Y. 1893) Where a case on appeal to the General Term has not been certified, and the papers do not show that the parties have stipulated in writing that the papers are copies of the judgment roll and case, the appeal will be stricken from the calendar.—*Crawford v. Price*, 68 Hun. 607, 22 N. Y. Supp. 644.

[ss] (N. Y. 1895) A case on appeal is fatally defective, unless it is certified by the trial judge, as required by Code Civ. Proc. § 997.—*Hedges v. Polhemus* (Com. Pl.) 14 Misc. Rep. 309, 35 N. Y. Supp. 709.

[t] (N. Y. 1901) The denial of a motion to require an attorney to accept service of a "case" and exceptions is proper where he has never refused to receive them when properly served, and has merely neglected to reply to a letter asking him to accept service.—*Farley v. Stowell*, 57 App. Div. 218, 68 N. Y. Supp. 119.

[tt] (N. Y. 1904) Where on appeal by one of defendants the proposed "case" and exceptions were not served on another defendant, in whose favor a judgment had been rendered in the action, the appeal as to him brought up only the judgment roll, and hence, it appearing from the decision that the judgment in favor of such defendant was proper, it was unassailable.—*McIlvaine v. Steinson*, 90 App. Div. 77, 85 N. Y. Supp. 889.

[ul] (N. C. 1896) It was agreed that, in lieu of the time prescribed by the Code, appellant should be allowed 20 days to serve the case on appeal, and appellee the same time to serve a counter case. In reply to an inquiry of appellant's counsel, "To whom shall I send the case?" appellee's counsel said, "Send to J.," and the former, understanding by this that the Code requirement of service by an officer was waived, as well as the time limit, sent the case to J. by express 6 days before the 20 days expired, writing him a letter at the same time, notifying him of the fact; and appellee's counsel made no attempt to correct the mistake till too late. *Held*, that certiorari would issue to bring up the record.—*Willis v. Atlantic & D. Ry. Co.*, 119 N. C. 718, 25 S. E. 790.

[uu] (N. C. 1896) A stipulation that appellants are "to serve the case on" respondent by a certain time does not waive service in a legal manner.—*Smith v. Smith*, 119 N. C. 311, 25 S. E. 877.

[v] (N. C. 1896) That one of respondents' counsel, on being asked to accept service of the case on appeal, stated that he had no authority to do so, and asked that it be mailed to the other counsel, is not a waiver of legal service, so as to authorize service by mail.—*Smith v. Smith*, 119 N. C. 311, 25 S. E. 877.

[vv] (N. C. 1896) Where service of case on appeal is made by mail, on the last day on which service could have been made, instead of by officer, the failure to promptly return the case does not estop respondent to deny the legality of the service, as, if the case had been promptly returned, it would have been too late for legal service.—*Smith v. Smith*, 119 N. C. 311, 25 S. E. 877.

[w] (N. C. 1896) Under Code Civ. Proc. § 550, providing that the case on appeal shall be

served on respondent, without specifying the manner of service, service must be by an officer; service by mail is insufficient.—*Smith v. Smith*, 119 N. C. 314, 25 S. E. 878.

[ww] (N. C. 1896) Where the interests of different appellees are not identical, and they are represented by different counsel, an appellant will be entitled to a certiorari to bring up the "case on appeal" only as to such appellees as have been served with the appellant's "case" in due time, either in person or by service on their counsel.—*Shober v. Wheeler*, 119 N. C. 471, 26 S. E. 26.

[x] (N. C. 1896) A motion to dismiss an appeal on the ground that the case was not properly served will not be sustained, where no objections were made to the service at the time, and exceptions to the case were subsequently filed.—*Asheville Woodworking Co. v. Southwick*, 119 N. C. 611, 26 S. E. 253.

[ix] (N. D. 1906) An omission from the copy of a proposed statement of the case of a demand for review of the case on appeal under Rev. Codes 1899, § 5630, is not ground for affirming the judgment when the original statement contained such demand, and the omission of the demand from the copy served is shown to be excusable.—*J. I. Case Threshing Mach. Co. v. Balke*, 15 N. D. 206, 107 N. W. 57.

[y] (Okla. 1897) Although a case-made may be void, as to a part of the defendants, on account of the insufficiency of the service on the attorney for the parties, yet if, attached to the case-made, there is a certificate of the clerk of the district court which is sufficient to present a transcript of the record of the case, all questions which are presented by the record, and where exceptions were saved, are properly presented for consideration by the Supreme Court.—*Board of Com'rs of Logan County v. Harvey*, 5 Okla. 468, 49 Pac. 1006.

[yy] (Tex. 1907) The statement of facts on which a case on appeal is submitted, made up by the stenographer and certified by the district judge, bearing no file mark of the district court, cannot be considered; it being required by the stenographer's act (Laws 1905, p. 219, c. 112) to be filed within the prescribed time in the district court before being sent up.—*Cockrell v. Walkup* (Civ. App.) 99 S. W. 443.

[yyy] (Tex. 1908) Where the statement of facts contained in the record does not appear to have been filed by the district clerk, the appellate court will decline to consider it.—*Thomas v. Matthews* (Civ. App.) 112 S. W. 120.

[z] (Wash. 1899) Under Ballinger's Ann. Codes & St. § 6513, providing that, on appeal, a statement of facts must be filed with the clerk of the appellate court, and a copy thereof served upon the adverse party, such copy need not contain the file marks of the clerk on the original statement.—*Spokane & I. Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

[zz] (Wash. 1901) 2 Ballinger's Ann. Codes & St. § 4889, provides that the service of a statement of facts may be personal or by delivery to the party's attorney, or it may be made during the attorney's absence from his office, by leaving the papers with his clerk therein, or with the person having charge thereof. A copy of a statement of facts was delivered to a clerk in the office of plaintiff's attorney when the attorney was present in the office. *Held*, that a motion to strike the statement of facts from the files must be granted, since it is only when the attorney is absent from the office that a copy may be left with the clerk.—*Times Printing Co. v. City of Seattle*, 25 Wash. 149, 64 Pac. 940.

[zzz] (Wash. 1906) On plaintiff's appeal, it is not necessary to serve the proposed statement of facts upon a defendant as to whom plaintiff has voluntarily dismissed.—*Sheehan v. Bailey Bldg. Co.*, 42 Wash. 535, 85 Pac. 44.

# DAVIS et al. v. ADAMS, Revenue Agent. (No. 14.110.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

## 1. COUNTIES (§ 74\*) — COUNTY TREASURER — COMPENSATION.

Under Ann. Code 1892, § 2016, providing that the county treasurer shall be allowed 2½ per cent. commission on all moneys received for the county up to \$20,000, but only 1 per cent. on the excess, in any year, but a county treasurer shall receive no more than \$1,000 for his compensation, where a county treasurer dies during his term, he and his successor cannot separately, but only together, receive \$1,000 in the year.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 74.\*]

## 2. COUNTIES (§ 98\*) — MISAPPLICATION OF FUNDS—DEFENSES—ALLOWANCES BY COUNTY BOARD.

Under Ann. Code 1892, § 907, providing that, if a county treasurer misapply money belonging to the county, recovery of double the amount misapplied may be had on his bond, it is no defense to an action for such a recovery, because of his having received greater compensation than authorized by statute, that his claim therefor was allowed by the county board; its action being ministerial, and not judicial.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 98.\*]

## 3. COUNTIES (§ 98\*) — COUNTY TREASURER — MISAPPLICATION OF FUNDS—LIABILITY FOR PENALTY—WILLFULNESS.

Even if the retention by a county treasurer of an excessive compensation must have been willful, to allow recovery on his bond, under Ann. Code 1892, § 907, of double the excess, it was such, though his intention was honest, and he believed himself entitled; he having done just what he intended to do.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 98.\*]

Appeal from Chancery Court, Yazoo County; G. G. Lyell, Chancellor.

Action by Wirt Adams, Revenue Agent, against T. F. Davis and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Henry, Barbour & Henry, for appellants. Mayes & Longstreet, for appellee.

SMITH, J. In the latter part of the year 1903, W. R. McCutcheon, treasurer of Yazoo county, died, and on November 16th appellant, T. F. Davis, having duly qualified as his successor, assumed the duties of said office. In April, 1903, prior to his death, being entitled thereto, McCutcheon was allowed by the board of supervisors the sum of \$805.95, commissions on moneys collected by him. Appellant claimed and was allowed by the board of supervisors the sum of \$702.09 as commissions on moneys collected by him from November 6 to December 31, 1903, making a total of \$1,508.04 received by McCutcheon and Davis as commissions on money collected by them during the year 1903.

Section 2016, Ann. Code 1892, provides: "The county treasurer shall be allowed two and one-half per centum on all money received by him for county purposes, except what he may receive from his predecessor in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

office; but when the amount on which he is entitled to commissions shall exceed twenty thousand dollars in any year, he shall be entitled to only one per centum on any such excess; but a county treasurer shall not receive more than one thousand dollars for his compensation."

Section 907, Ann. Code 1892, is as follows:

"If any county treasurer shall misapply, waste, or embezzle any money belonging to the treasury of the county, the board of supervisors shall forthwith cause suit to be brought on his bond against such treasurer and his sureties for money so wasted, misapplied, or embezzled; and such suit shall be tried at the return term, and shall have precedence over all other cases; and judgment shall be entered therein for double the amount found to have been wasted, misapplied, or embezzled."

Claiming that appellant had received and withheld the sum of \$508.04 more than he was entitled to as commissions, and refund thereof having been refused, this suit was instituted by appellee to recover the statutory penalty prescribed by section 907, Ann. Code 1892. From a decree directing appellant to pay to appellee the sum of \$1,016.08, double the amount claimed to have been withheld and misapplied by appellant, this appeal is taken.

The contention of appellant is that, when the office of county treasurer is filled by more than one incumbent during any one year, each incumbent may receive full commissions on money collected by him, even though the aggregate amount paid to all of them exceeds the amount of \$1,000; that each successive incumbent may receive commissions on all money collected by him, not to exceed, in each instance, \$1,000. This position is not tenable. Under the statute, the amount of commissions which can be allowed for handling the public money of a county cannot exceed \$1,000 in any one year. In other words, for the services of a treasurer in receiving money for county purposes, there cannot be paid in any one year a greater sum than \$1,000. *Barnes v. Red Willow County*, 62 Neb. 505, 87 N. W. 319. The statute is plain; but, even if it were ambiguous, we must give it that construction most favorable to the state.

The fact that this excess in commissions was allowed appellant by the board of supervisors can afford him no relief; for the board's action was ministerial, and not judicial. *Howe v. State*, 53 Miss. 57. The case of *Adams v. Coker*, 85 Miss. 222, 37 South. 744, to which we have been cited by counsel, has no application here. Even if it should be held that the retention of this excess in commissions must have been willful before the penalty could attach, as to which we express no opinion, the act of appellant

here was willful. However honest, and he undoubtedly was honest, in his intentions, he did the very thing which he intended to do, the doing of which is prohibited by the statute.

The decree of the court below is therefore correct, and is affirmed.

#### STATE v. CASTON. (No. 14,060.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

#### CRIMINAL LAW (§ 197\*)—FORMER ACQUITTAL—EMBEZZLEMENT BY FIDUCIARY.

An acquittal on an indictment drawn under Code 1906, § 1436, providing that, in an indictment for embezzlement of money by a treasurer, cashier, or other fiduciary, it shall be sufficient to describe the same as a "balance of account" and of a certain value (as in an indictment charging that defendant was cashier of a certain bank, that while acting as such cashier there was intrusted to his keeping and care \$100,000 of the money of the bank, and that then and there, while acting in such capacity and being intrusted with the funds, he embezzled \$60,478, though not charging such sum was a "balance of account"), is a bar to prosecution for embezzlement of a particular item while acting in such fiduciary capacity prior to the finding of the first indictment; the effect of the first indictment being to arraign the fiduciary on all the acts of embezzlement prior to the finding of it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 407; Dec. Dig. § 197.\*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

W. R. Caston being indicted for embezzlement demurrer was sustained to a replication to a plea of former acquittal, and the State appeals. Affirmed.

The record in this case shows that three indictments were found against W. R. Caston, cashier of the Pike County Bank & Trust Company. The first indictment, after charging that various sums of money had been intrusted to Caston in his fiduciary capacity, alleged that he "did, without the knowledge or consent of said Pike County Bank & Trust Company as aforesaid, unlawfully, willfully, fraudulently, and feloniously embezzle the sum of \$60,478.28," etc., "and convert the same to his own use." The second count of said indictment charged larceny of said amount. Caston was tried upon this indictment and acquitted, and at the next term of court was arraigned on the second indictment, which charged that he received from a certain depositor the sum of \$170.82 for deposit in said bank, and after receiving the said sum did, "without the knowledge or consent of said Bank, embezzle the said sum," etc. On the trial he pleaded former acquittal in bar of further prosecution. The state interposed a demurrer to this plea, and, the demurrer being overruled, the state filed a replication, to which defendant demurred. This demurrer was sustained, and the state appeals. The question for decision is now

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whether the offense as charged in the first indictment is identical with that charged in the second indictment.

J. B. Stirling, Atty. Gen., for the State.  
J. W. Cassedy, for appellee.

MAYES, J. It is beyond question on this record that the first indictment against Caston, and the one on which he was tried, was an indictment under section 1136 of the Code of 1906, and the procedure was under section 1436 of the Code; and, this being the case, there can be no further prosecution of Caston, on the part of the state, for any act of embezzlement committed by him, while engaged in the particular fiduciary capacity specified in the indictment, at any time prior to the finding of the indictment. If the state does not want to bring about this result, it must conduct its prosecutions for embezzlement in the common-law way, and not undertake to take advantage of a statute, enacted solely for the purpose of removing the many obstacles with which it was frequently confronted in prosecutions for embezzlement, in being required to allege and prove the specific act. In the case of a person constantly receiving things of value for deposit, coming from various sources and at various times, as in the case of a bank cashier, or other person acting in a similar fiduciary character, it was oftentimes exceedingly difficult to make that specific proof required by the common law on an indictment for embezzlement of a person acting in the above character. It was found equally difficult for the indictment to so particularize. The state would have no difficulty in showing a general shortage on the balance of account; but the specific acts of embezzlement were often so adroitly concealed that they could not be discovered, many times resulting in a defeat of justice. It was to overcome this difficulty that section 1436 of the Code was enacted, which provides that: "In an indictment for embezzlement of money or funds by a treasurer, cashier, or other fiduciary, it shall be sufficient to describe the same as a 'balance of account' and of a certain value."

When the state proceeds under this section, its effect is to arraign the fiduciary on all the acts occurring prior to the finding of the indictment, and, when so arraigned and tried, its effect is to preclude further prosecution as effectively as if an expert bookkeeper had gone through the whole account, discovering each day, time, and amount of the embezzlement, and the party so charged had been indicted and tried on each separate act. When we examine the indictment on which Mr. Caston was tried, we see that it is an almost literal compliance with the language of the statute. We would be blind to justice and forgetful of the purpose of this statute if, in the face of these facts, we did not hold that the state was precluded from further prosecution, even in the face of the fact that the indictment does not charge that the sixty-

odd thousand dollars charged to have been embezzled was a "balance of account" in the exact language of the statute. The whole indictment must be considered in the light of the proof admissible under it, and in so doing no doubt exists as to whether or not it was drawn under this statute. Let us examine it for a moment. The indictment charges the fiduciary character—I. e., it charges that Caston was the cashier, agent, employé, etc., of the Pike County Bank; that while acting as cashier there was intrusted to his keeping and care a large sum of money, to wit, \$100,000, of the money and property of the bank; that then and there, and while acting in the above capacity, and being intrusted with the funds, he embezzled the sum of \$60,478, etc. The above indictment, being the one on which Caston was tried, covered his fiduciary capacity, and arraigned him on same for a period of time beginning on January 16, 1905, to September 8, 1908. The other indictments, on which it is now sought to try Caston, arraign him for the same period of time, about a default occurring in the same fiduciary capacity, differing from the first indictment only in the fact that it is alleged that a different amount was embezzled.

We think the court below was correct in holding that this could not be done, and the action of the court below in so holding is approved.

#### POLK v. STATE. (No. 14,063.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Circuit Court, De Soto County: W. A. Roane, Judge.

Alex Polk was convicted of murder, and appeals. Affirmed.

Farley & Lauderdale, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

#### THOMAS v. STATE. (No. 14,057.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Circuit Court, Jackson County: W. H. Hardy, Judge.

William Thomas was convicted of crime, and appeals. Affirmed.

Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

#### GREER v. YAZOO & M. V. R. CO.

(No. 14,085.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Circuit Court, Bolivar County: Sydney Smith, Judge.

Action by Julia L. Greer against the Yazoo & Mississippi Valley Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Sam Cook and Jones & Hardee, for appellant. Mayes & Longstreet, for appellee.

PER CURIAM. Affirmed.

**CATCHING v. PULLMAN CO.** (No. 14,117.)  
(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Circuit Court, Bolivar County; J. M. Cashin, Judge.

Action by Lee Catching, by his next friend, against the Pullman Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Sillers & Owen, for appellant. F. B. Daniels, Charles Scott, Woods & Scott, and McWillie & Thompson, for appellee.

**PER CURIAM.** Affirmed.

**INDEPENDENT ORDER OF SONS AND DAUGHTERS OF JACOB v. MADISON.** (No. 14,183.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Chancery Court, Warren County; J. S. Hicks, Chancellor.

Action by Elmonia Madison against the Independent Order of Sons and Daughters of Jacob. Judgment for plaintiff, and defendant appeals. Affirmed.

W. J. Latham, for appellant. Wells & Wells, for appellee.

**PER CURIAM.** Affirmed.

**KATZENMEYER BROS. v. SWIFT & CO.** (No. 14,214.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Circuit Court, Warren County; J. N. Bush, Judge.

Action between Katzenmeyer Bros. and Swift & Co. From the judgment, Katzenmeyer Bros. appeal. Affirmed.

Brunini & Hirsch, for appellants. Bryson & Dabney, for appellee.

**PER CURIAM.** Affirmed.

**NEWBERGER COTTON CO. v. GRENADA COMPRESS CO. et al.** (No. 14,190.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Chancery Court, Madison County; G. G. Lyell, Chancellor.

Action between the Newberger Cotton Company and the Grenada Compress Company and the Illinois Central Railroad Company. From the judgment, the Newberger Cotton Company appeals. Affirmed.

H. B. Greaves, for appellant. W. H. & Robert H. Powell and Mayes & Longstreet, for appellees.

**PER CURIAM.** Affirmed.

**KELLY v. ROBY (JACKSON, Claimant).** (No. 14,137.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Circuit Court, Attala County; G. A. McLean, Judge.

Action between Bill Kelly and Will Roby; F. Z. Jackson, claimant. From the judgment, Kelly appeals. Affirmed.

Campbell & Campbell, S. L. Dodd, and Flowers, Fletcher & Whitfield, for appellant. Thomas Land and L. Brame, for appellee.

**PER CURIAM.** Affirmed.

**COOPER v. MERIDIAN WAGON FACTORY.** (No. 14,098.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Circuit Court, Rankin County; J. R. Byrd, Judge.

Action between L. E. Cooper and the Meridian Wagon Factory. From the judgment, Cooper appeals. Affirmed.

A. M. Edwards, for appellant. Hilton & Hilton, for appellee.

**PER CURIAM.** Affirmed.

**SOUTHERN RY. CO. v. HARRISON.** (No. 14,181.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action by Ford O. Harrison against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fewell & Bozeman and Catchings & Catchings, for appellant. R. A. Collins and Witherspoon & Witherspoon, for appellee.

**PER CURIAM.** Affirmed.

**GRAND LODGE, K. P. (Colored), v. BINGHAM et al.** (No. 14,140.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

Appeal from Chancery Court, Holmes County; J. F. McCool, Chancellor.

Action between the Grand Lodge, Knights of Pythias (Colored), and Charlotte Bingham and others. From the judgment, the Grand Lodge appeals. Affirmed.

W. J. Latham, for appellant. Boothe & Pepper, for appellees.

**PER CURIAM.** Affirmed.

**DICKINSON v. DICKINSON.**

(Supreme Court of Florida, Division A. Oct. 26, 1909.)

**DIVORCE (§ 308\*)—SUPPORT OF CHILDREN—LIABILITY AFTER DIVORCE.**

Where a divorce decree gives the custody of a young son to the mother, but makes no order as to the custody of an older son, who elects to live and does live with the mother, and the decree contains an order providing for an annual sum of money to be paid to the mother, "for her to spend, hold, and use in such way and manner as she may see fit for the benefit of herself and the children," and such decree is construed by the court making it as relieving the father of liability to the mother for support of the elder son while living with her, notwithstanding a statement in the decree that the amount is given during the life of the mother "as alimony in full," the construction will not be held to be erroneous.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 308.\*]

(Syllabus by the Court.)

Error to Circuit Court, Volusia County; M. S. Jones, Judge.

Action by Margaret J. Dickinson against John M. Dickinson. Judgment for defendant, and plaintiff brings error. Affirmed.

Stewart & Bly, for plaintiff in error. Landis & Fish, for defendant in error.

**WHITFIELD, C. J.** The plaintiff in error brought an action of assumpsit in the common counts against the defendant in error. By direction of the court a verdict was rendered for the defendant, and from a judgment thereon the plaintiff took writ of error. The parties were formerly husband and wife. A decree divorcing them contains the following:

"It is further ordered and decreed that the complainant be and she is hereby awarded the income from the sum of \$10,000 in cash for and during the term of her natural life as alimony in full, the said \$10,000 to be placed by the defendant, John M. Dickinson, in the hands of some trust company or individual, subject to agreement between the complainant and defendant, the income only of the said \$10,000 to be turned over to the said Margaret J. Dickinson as it accumulates, for her to spend, hold, and use in such way and manner as she may see fit for the benefit of herself and the children; the said principal of \$10,000 to be invested for and during the natural life of the said Margaret J. Dickinson, and on her death the said principal sum of \$10,000 shall be turned over, share and share alike, to the said Gordon M. and Neville S. Dickinson, the two sons born of the said marriage, or their issue, and in case of the death of either without issue then to the survivor, the same to be their own property absolutely."

The decree awarded the custody of the son Gordon to the mother, but made no or-

der as to the custody of the elder son, Neville, who elected to live with the mother. The mother in this action seeks to recover of the father for the son Neville's support. The case was tried on issues made by a plea of never was indebted, and a plea setting up the decree above quoted and a compliance therewith by the father. As the special plea was proven, its construction was for the court, and this was determined by giving an affirmative charge for the defendant. The effect of the charge was to hold that the decree relieved the father of liability for the elder son's support, when he by choice lived with his mother, to whom an allowance had been made, "for her to spend, hold, and use in such way and manner as she may see fit for the benefit of herself and the children." The provision in the decree that the amount secured to the wife during her life was "as alimony in full" does not qualify the meaning of the other portion of the decree last above quoted, relative to spending the amount "for the benefit of herself and the children." The decree is fairly susceptible to this construction placed upon it by the judge who rendered it, and this court will not hold it to be error. See *Pearson v. Helvenston*, 50 Fla. 590, text 594; 39 South. 695. Issue being joined on the plea, its proof and construction was a bar to recovery under the facts of this case. Therefore the judgment is affirmed.

**SHACKLEFORD and COCKRELL, JJ.** concur.

**TAYLOR, HOCKER, and PARKHILL, JJ.** concur in the opinion.

**CITY OF OCALA v. ANDERSON.**

(Supreme Court of Florida, Division A. Oct. 26, 1909.)

**1. EQUITY (§ 310\*)—ANSWER—FAILURE TO SIGN, SEAL, OR VERIFY.**

An answer, without signature, seal, or verification by or for the defendant, may be treated as a nullity, and a decree pro confesso entered.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 612; Dec. Dig. § 310.\*]

**2. EQUITY (§ 420\*)—RELIEF AWARDED—DECREE PRO CONFESSO.**

A decree pro confesso entitles the complainant to the relief for which a proper predicate has been laid in the bill of complaint.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 970; Dec. Dig. § 420.\*]

**3. EMINENT DOMAIN (§ 274\*)—IMPROVEMENTS—INJUNCTION.**

Where a bill in equity, brought to enjoin the construction by a city of a highway on complainant's land, alleges in specific terms the title and possession of the complainant, and the acts of the officers and agents of the city in constructing the highway on the land without authority of law or notice to or permission from or compensation to the complainant, and prays for appropriate injunction, the relief prayed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



may be granted, whether the city authorized the acts of its agents or not.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 765-768; Dec. Dig. § 274.\*]

**4. INJUNCTION (§§ 5, 133\*)—MANDATORY ORDER—RESTORATION OF PROPERTY—TIME OF ORDER.**

Under special circumstances warranting it, a mandatory order may be made by a court of equity to restore to its former condition property that has been trespassed upon. Such mandatory decrees should, except in rare cases, be made only on final hearing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 4, 302; Dec. Dig. §§ 5, 133.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Marion County; W. S. Bullock, Judge.

Bill by H. L. Anderson against the City of Ocala. Decree for complainant, and defendant appeals. Affirmed.

Davis & Martin, for appellant. H. M. Hampton, for appellee.

**WHITFIELD, C. J.** The appellee brought a suit in equity in the circuit court for Marion county to enjoin the city of Ocala from unlawfully constructing a public street upon appellee's land against his consent, alleging that no condemnation proceedings had been taken to subject the property to the public use, and no compensation for such use had been made or tendered. An answer, without signature or seal or other verification by the defendant city or its officers or agents, was disregarded, and a decree pro confesso was entered by order of the court, and a final decree as prayed was rendered, from which the defendant appealed.

An answer, without signature, seal, or verification by or for the defendant, may be treated as a nullity, and a decree pro confesso entered. See *Worley v. Dade County Security Co.*, 52 Fla. 666, 42 South. 527; *Balard v. Kennedy*, 34 Fla. 483, 16 South. 327; *Dudley v. White*, 44 Fla. 264, 31 South. 830; *Kahn v. Weinlander*, 39 Fla. 210, 22 South. 653; section 1877, Gen. St. 1906.

A decree pro confesso entitles the complainant to the relief for which a proper predicate has been laid in the bill of complaint. *Price v. Boden*, 39 Fla. 218, 22 South. 657; *City of Orlando v. Equitable Building & Loan Ass'n*, 45 Fla. 507, 33 South. 986.

The bill of complaint alleges in specific terms the title and possession of the complainant to and of the land, and the acts of the officers and agents of the defendant in constructing a highway on the land without authority of law or notice to or permission from or compensation to the complainant, and prays for an appropriate injunction. A decree in substantial accord with the allegations and prayer, and the rights of the complainant on the case-made, was entered.

The construction of the street as alleged is an unconstitutional taking of the complain-

ant's real estate, that may be enjoined. Whether the city authorized its agents and officers to violate the complainant's rights or not, it is alleged they were doing so as agents and officers of the city, and they were properly enjoined. Under the special and general prayer, and the facts alleged, it was not improper for the court to incorporate in its final decree a mandate to restore the property to its condition at the time the unlawful construction of the street thereon was begun. *Taylor v. Fla. E. C. Ry.*, 54 Fla. 635, 45 South. 574, 18 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155; *Fla. E. C. Ry. v. Taylor*, 56 Fla. 789, 47 South. 345.

The decree is affirmed.

**SHACKLEFORD and COCKRELL, JJ.**, concur.

**TAYLOR, HOCKER, and PARKHILL, JJ.**, concur in the opinion.

**TELFAR v. STATE.**

(Supreme Court of Florida, Division A. Oct. 26, 1909.)

**1. CRIMINAL LAW (§ 814\*)—TRIAL—INSTRUCTIONS.**

In a criminal prosecution for uttering a forged instrument, a charge that, "If you believe from the evidence that the defendant himself forged the instrument in question, no matter how guilty the evidence shows him to be of uttering it, you must find him not guilty," is properly refused, since whether the defendant was guilty of the forgery was not within the issues being tried. For the same reason, pleas and evidence as to a former acquittal of the charge of forgery were properly rejected.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 814.\*]

**2. CRIMINAL LAW (§ 1124\*)—REVIEW—BILL OF EXCEPTIONS—MATTERS TO BE INCLUDED IN.**

Evidence dehors the record in support of a motion for new trial should be incorporated in the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2946-2948; Dec. Dig. § 1124.\*]

**3. CRIMINAL LAW (§ 1169\*)—WRIT OF ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Where a written instrument is admitted in evidence, testimony as to its then and its former condition may not be reversible error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.\*]

**4. CRIMINAL LAW (§ 432\*)—WRITTEN INSTRUMENT—ADMISSIBILITY.**

When a written instrument is relevant evidence, the name by which it is called is immaterial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 432.\*]

**5. WITNESSES (§ 286\*)—REDIRECT EXAMINATION.**

Testimony given on redirect examination is not necessarily subject to the rule governing evidence in rebuttal.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 286.\*]

**6. CRIMINAL LAW (§ 1166½\*)—HARMLESS ERROR—REMARK OF COURT.**

The action of the court in saying to counsel during the argument that a paper in evidence is not a rent note, but an evidence of a purchase, and that counsel must not read a part of the instrument, and make argument on it, without reading all of it, is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1166½.\*]

**7. CRIMINAL LAW (§ 1159\*)—REVIEW—CONVICTION SUPPORTED BY EVIDENCE.**

Where there is evidence to sustain a second verdict of guilty, and no errors appear in the record, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3081; Dec. Dig. § 1159.\*]

(Syllabus by the Court.)

**8. CRIMINAL LAW (§ 844\*)—TRIAL—INSTRUCTIONS—ASSIGNMENT EN MASSE.**

An assignment en masse, on a refusal to give instructions containing separate propositions, cannot be considered further than to ascertain if any one of the instructions was properly rejected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025; Dec. Dig. § 844.\*]

Error to Circuit Court, Jackson County; J. E. Wolfe, Judge.

William Telfair was convicted of uttering a forged instrument, and he brings error. Affirmed.

W. E. B. Smith, for plaintiff in error.  
Park Trammell, Atty. Gen., for the State.

WHITFIELD, C. J. Plaintiff in error has for the second time been convicted in the circuit court for Jackson county of uttering a forged instrument. The former conviction was reversed. *Telfair v. State*, 56 Fla. 104, 47 South. 863.

On this writ of error the overruling of the motion for new trial is the only error assigned.

The ground of the motion for new trial, that the court erred in refusing to give 14 different requested instructions containing separate propositions, is treated as an assignment en masse, and cannot be considered here, further than to ascertain if any one of the refused instructions was properly rejected. *Kirby v. State*, 44 Fla. 81, 32 South. 836.

One of the refused instructions was: "If you believe from the evidence that the defendant himself forged the instrument in question, no matter how guilty the evidence shows him to be of uttering it, you must find him not guilty." This instruction was properly refused, because the charge against the defendant was uttering a forged instrument, and whether he was guilty of the forgery was not with the issue being tried.

For the same reason, there was no error in rejecting pleas and evidence as to a former acquittal of a charge of forgery.

The ground of the motion for new trial, that one of the jurors was asleep while a portion of the charge was being given, cannot be considered here, as the affidavits relating

to this ground appear in the transcript outside of the bill of exceptions. Evidence dehors the record in support of a motion for new trial should be incorporated in a bill of exceptions.

A witness testified as to the difference between the alleged forged instrument when it was issued and when offered in evidence before the instrument was filed. As the instrument was filed in evidence, there was no reversible error in receiving the testimony as to its former and then condition.

Another paper, called by different names, introduced to show the obligation for which the forged instrument was given, was not improperly admitted in evidence. Its contents showed its relevancy, and the name by which it was called was immaterial.

Testimony given on redirect examination is not necessarily subject to the rule governing evidence in rebuttal, and in this case evidence given on redirect was not improperly received.

The action of the court in saying to counsel for the defendant that an instrument in evidence was not a rent note, but an evidence of a purchase, and that counsel must not read a part of the instrument, and make an argument on it, without reading all of it, was not an abuse of discretion, calling for a reversal of this judgment.

There is evidence to sustain this, the second, verdict of guilty on the charge here made, and the record does not disclose errors for which the judgment should be disturbed.

Let the judgment be affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

**BOARD OF PUBLIC INSTRUCTION OF POLK COUNTY v. BOARD OF COM'RS OF POLK COUNTY.**

(Supreme Court of Florida, Division A. Oct. 28, 1909.)

**1. CONSTITUTIONAL LAW (§ 24\*) — IMPLIED AMENDMENT OF CONSTITUTION.**

A Constitution may be amended by implication in the adoption of amendments that by fair intendment and meaning and in effect accomplish such a result.

[Ed. Note.—For other case, see Constitutional Law, Cent. Dig. § 22; Dec. Dig. § 24.\*]

**2. CONSTITUTIONAL LAW (§ 24\*)—REPUGNANCY BETWEEN AMENDMENT AND ORIGINAL—IMPLIED REPEAL.**

Where there is a repugnancy between a constitutional amendment and some provision in the original, which cannot be so construed as to have them both stand and leave to each a legitimate office to perform, the original must be deemed to have been repealed by the amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 22; Dec. Dig. § 24.\*]

### 3. CONSTITUTIONAL LAW (§ 24\*)—“AMENDMENT” — REPUGNANCY BETWEEN AMENDMENT AND ORIGINAL—IMPLIED REPEAL.

An “amendment” of a Constitution repeals or changes some provision in, or adds something to, the instrument amended. Where an amendment is the last expression of the will and intent of the lawmaking power, duly exercised, such amendment is controlling, and prior provisions, inconsistent with or repugnant to the amendment, are modified or superseded to the extent of the inconsistency or repugnancy.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 22; Dec. Dig. § 24.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 368-370; vol. 8, pp. 7573, 7574.]

### 4. CONSTITUTIONAL LAW (§ 24\*)—REPUGNANCY BETWEEN AMENDMENT AND ORIGINAL—IMPLIED REPEAL.

While implied repeals or amendments of Constitutions or laws are not favored, yet the primary consideration is to give effect to the lawful intent of the lawmaking power as duly expressed, and this should be done, even if it results in a repeal or modification of older inconsistent or repugnant provisions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 22; Dec. Dig. § 24.\*]

### 5. CONSTITUTIONAL LAW (§ 24\*)—REPUGNANCY BETWEEN AMENDMENT AND ORIGINAL—IMPLIED REPEAL.

Where an amendment contains no express repeal or modification of existing provisions of law, the old and the new provisions should stand and operate together, if it can be done without contravening the intent of the lawmaking power as duly and fairly expressed in the later provision; but, to the extent that a fair construction or interpretation of the new provision discloses inconsistency with or repugnancy to an older provision, the later provision controls to effectuate the lawmaking intent.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 22; Dec. Dig. § 24.\*]

### 6. CONSTITUTIONAL LAW (§ 16\*)—CONSTRUCTION — CIRCUMSTANCES OF ADOPTION OF AMENDMENT.

In construing an amendment to the state Constitution, it is proper to consider the circumstances which led to the adoption of the amendment and the purpose designed to be accomplished.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 12, 13, 16; Dec. Dig. § 16.\*]

### 7. FINES (§ 1\*)—SCHOOL FUNDS—CONSTITUTIONAL PROVISIONS—IMPLIED REPEAL.

The provision of section 9 of article 12 of the Constitution, that “the net proceeds of all fines collected under the penal laws of the state within the county” shall be a part of the county school fund, to “be disbursed by the county board of public instruction solely for the maintenance and support of public free schools,” is repealed by the amendment to section 9 of article 16 of the Constitution, adopted in 1894, requiring the counties to pay the legal costs and expenses of criminal prosecutions, and providing that “all fines and forfeitures collected under the penal laws of the state shall be paid into the county treasuries of the respective counties as a general county fund to be applied to such legal costs and expenses.”

[Ed. Note.—For other cases, see Fines, Dec. Dig. § 1.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Polk County; J. B. Wall, Judge.

Bill by the Board of Public Instruction of Polk County against the Board of County

Commissioners of Polk County. Decree for defendant, and complainant appeals. Affirmed.

H. K. Olliphant, for appellant. Wilson & Swearingen, for appellee.

WHITFIELD, C. J. The appellant sought by bill in equity in the circuit court for Polk county to in effect require the appellee county commissioners to ascertain and pay into the school fund of Polk county the net proceeds of all fines collected under the penal laws of the state in said county.

A demurrer to the bill of complaint was sustained, and the bill dismissed. On appeal it is contended that the provision of section 9 of article 12 of the Constitution, that “the net proceeds of all fines collected under the penal laws of the state within the county” shall be a part of the county school fund, to “be disbursed by the county board of public instruction solely for the maintenance and support of public free schools,” is not affected by the amendment to section 9 of article 16 of the Constitution, adopted in 1894, requiring the counties to pay the legal costs and expenses of criminal prosecutions, and providing that “all fines and forfeitures collected under the penal laws of the state shall be paid into the county treasuries of the respective counties as a general county fund to be applied to such legal costs and expenses.”

The amendment to section 9 of article 16 of the Constitution does not in terms purport to amend any other section or provision of the organic law; but a Constitution may be amended by implication in the adoption of amendments that by fair intent and meaning and in effect accomplish such a result.

“Where there is a repugnancy between a constitutional amendment and some provision in the original, which cannot be so construed as to have them both stand and leave to each a legitimate office to perform, the original must be deemed to have been repealed by the amendment.” People ex rel. Killeen v. Angel, 109 N. Y. 564, 17 N. E. 413; Poppinger v. Yutte, 102 N. Y. 38, 6 N. E. 259; State v. Cox, 8 Ark. (3 Eng.) 436.

An amendment of a Constitution repeals or changes some provision in, or adds something to, the instrument amended. Where an amendment is the last expression of the will and intent of the lawmaking power, duly exercised, such amendment is controlling, and prior provisions, inconsistent with or repugnant to the amendment, are modified or superseded, to the extent of the inconsistency or repugnancy. While implied repeals or amendments of Constitutions or laws are not favored, yet the primary consideration is to give effect to the intent of the lawmaking power, as duly expressed; and this should be done, even if it results

in a repeal or modification of older inconsistent or repugnant provisions. Where an amendment contains no express repeal or modification of existing provisions, the old and the new provisions should stand and operate together, if it can be done without contravening the intent of the lawmaking power, as duly and fairly expressed in the later provision; but, to the extent that a fair construction or interpretation of the new provision discloses inconsistency with or repugnancy to an older provision, the later provision controls, to effectuate the lawmaking intent. In giving effect to the plain terms of the amendment to section 9 of article 16 of the Constitution, requiring all fines collected to be applied to the payment of the legal costs and expenses of criminal prosecutions, the inevitable result is to supersede or repeal that portion of section 9 of article 12 which makes the net proceeds of fines collected a part of the county school fund; and, in view of the objection designed to be accomplished and the terms used, this must be held to have been the intent of the lawmaking power in proposing and adopting the amendment.

In construing an amendment to the state Constitution, it is proper to consider the circumstances which led to the adoption of the amendment and the purpose designed to be accomplished. State ex rel. Attorney General v. Bryan, 50 Fla. 293, 39 South. 929; 1 Cooley on Const. Lim. (7th Ed.) 100.

In amending section 9 of article 16 of the Constitution, the purpose designed was to transfer from the state to the counties the legal costs and expenses of criminal prosecutions, in order that such expenditures may be more carefully guarded by county officials, upon whom a direct and immediate responsibility in such matters was cast. As an incident to this charge, and for the purpose of aiding the counties in the burden put upon them, it was expressly provided that all fines and forfeitures collected under the penal laws of the state shall be paid into the county treasuries of the respective counties, as a general county fund to be applied to such legal costs and expenses.

The provision requiring all fines collected to be paid into the general county fund, to be applied to the payment of the legal costs and expenses of criminal prosecutions in the county, is wholly inconsistent with the original provision in section 9 of article 12 that the net fines should be used for school purposes.

The amendment should be given the effect required by a fair interpretation of its plain terms, to accomplish the evident design to aid the counties in the burden put upon them, and such effect necessarily is a repeal by implication of the former provision contained in section 9 of article 12. If all fines

collected in the county are to be "applied" to the payment of the legal costs and expenses, including the fees of officers, in criminal prosecutions in the county, there would not in contemplation or in fact be any "net proceeds" to be used for school purposes. The fact that the Legislature may provide other sources of revenue for paying the costs of criminal prosecutions, and that a surplus may exist in the funds provided from all sources for the payment of the costs of criminal prosecutions, does not affect the amendment to the Constitution. The purpose, the plain terms, and the legal effect of the amendment to section 9 of article 16, requiring all fines collected to be applied to criminal prosecutions, necessarily repeal by implication the provision of section 9 of article 12, providing that "the net proceeds of all fines" shall be used solely for school purposes.

The decree is affirmed.

SHACKLEFORD and COCKRELL, JJ.,  
concur.

TAYLOR, HOCKER, and PARKHILL, JJ.,  
concur in the opinion.

PHENIX INS. CO. OF BROOKLYN, N. Y.,  
v. BRYAN et al.

(Supreme Court of Florida, Division A. Oct. 26, 1909. Headnotes Filed Nov. 29, 1909.)

1. APPEAL AND ERROR (§ 1078\*)—GROUNDS OF MOTION FOR NEW TRIAL NOT ARGUED—EFFECT.

In passing upon an assignment based upon the overruling of the motion for a new trial, an appellate court will consider only such grounds thereof as are argued, treating the other grounds as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

2. APPEAL AND ERROR (§ 1078\*)—ARGUMENT IN SUPPORT OF ERROR ASSIGNED.

It is not sufficient merely to repeat the error assigned, and state that in the opinion of counsel the action or ruling of the court complained of constitutes error, or that an inspection of the record upon the point in question will show that error was committed. Unless the error complained of is so glaring or patent that no argument is needed to demonstrate it, counsel must call the attention of the court to the specific points upon which he relies to show error; otherwise, the court will feel warranted in treating such assignment as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

3. APPEAL AND ERROR (§ 1005\*)—REVIEW—QUESTIONS OF FACT—VERDICT APPROVED BY TRIAL COURT.

In an action upon a fire insurance policy, wherein two principal points upon which the defendant company seeks to avoid its liability and justify its refusal to pay the amount of insurance are (1) that gasoline was kept and used on the premises, contrary to one of the provisions of the policy, and (2) that the plaintiffs

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

permitted the building to be used for the purpose of carrying on the business of a pressing club and pool room, which business was of "greater hazard than the business of a cold drink and fruit store, the risk assumed by said policy, and requiring the payment of a larger premium," and the jury found adversely to such contentions, and the trial judge concurred in such finding by refusing to disturb the verdict, and the appellate court, from an examination of all the evidence adduced at such trial, is of the opinion that as reasonable men the jury might well have found such verdict from the evidence, such court will likewise refuse to disturb such verdict, or to reverse the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3954; Dec. Dig. § 1005.\*]

(Syllabus by the Court.)

Error to Circuit Court, Suwannee County; B. H. Palmer, Judge.

Action by W. H. Bryan and another against the Phoenix Insurance Company of Brooklyn, N. Y. Judgment for plaintiffs, and defendant brings error. Affirmed.

Rees & Rees and J. F. Harrell, for plaintiff in error. Hardee & Rutler, for defendants in error.

**SHACKLEFORD, J.** A judgment is brought here for review which the plaintiffs recovered against the defendant in an action at law upon a fire insurance policy. The declaration substantially follows the statutory form in such actions, and a copy of the policy is attached thereto. Four pleas were filed, as were also replications and rejoinders; but, as no assignment is based upon the pleadings, we do not set any of them forth. Only one error is assigned, the overruling of the motion for a new trial, which contains 12 grounds, some of which are expressly and others are impliedly abandoned, and some grounds are argued together. As we have repeatedly held, in passing upon an assignment based upon the overruling of the motion for a new trial, we will consider only such grounds thereof as are argued, treating the other grounds as abandoned. See *Johnson v. State*, 55 Fla. 41, 46 South. 174, and *Putnal v. State*, 56 Fla. 86, 47 South. 864. We have likewise repeatedly held that it is not sufficient merely to repeat the error assigned and state that in opinion of counsel the action or ruling of the court complained of constitutes error, or that an inspection of the record upon the point in question will show that error was committed. Unless the error complained of is so glaring or patent that no argument is needed to demonstrate it, counsel must call the attention of the court to the specific points upon which he relies to show error; otherwise, the court will feel warranted in treating such assignment as abandoned. See *Hoodless v. Jernigan*, 46 Fla. 213, 35 South. 656, and prior decisions of this court therein cited. A number of subsequent decisions to the same effect may be readily found.

This reasoning applies with like force and effect to the grounds of the motion for a new trial, when an assignment of error is predicated upon the ruling of the court thereon.

We shall not treat separately or in detail the grounds of the motion that are argued, but shall consider what we deem to be the vital and decisive points presented.

The two principal points upon which the defendant seeks to avoid its liability and to justify its refusal to pay the amount of insurance are (1) that gasoline was kept and used on the premises, contrary to one of the provisions of the policy, and (2) that the plaintiffs permitted the building to be used for the purpose of carrying on the business of a pressing club and pool room, which business was of "greater hazard than the business of a cold drink and fruit store, the risk assumed by said policy, and requiring the payment of a larger premium."

The policy in question was a standard policy, and contained the provisions and covenants found in such policies, which are so well known that we deem it unnecessary to copy the provisions upon which defendant relies. No contention is made by the plaintiffs that the defendant practiced any fraud or deception upon them in issuing such policy, or that any of the provisions thereof are unlawful. We are warranted, therefore, in assuming the validity and legality of such provisions. This being true, the defendant was entitled to base its defense to an action upon such policy upon the failure of the plaintiffs to comply with any of the provisions of such policy. See *Southern Home Insurance Co. v. Putnal*, 57 Fla. —, 49 South. 922. It may be that some of the pleadings in the instant case are defective in some of the respects pointed out in the case just cited, and in *Southern Home Insurance Co. v. Murphy*, 57 Fla. —, 49 South. 537; but, as the validity of such pleadings was not called in question, they are not before us for construction. We shall copy the evidence adduced upon these two points.

W. K. Collins, a witness introduced on behalf of the defendant, testified as follows: "I know Dr. Bryan and Mr. Sealey. I was occupying the building belonging to them at the time of the fire. I was conducting the business of cold drink and fruit stand. There was no other kind of business besides that operated by me in that building. There were pool tables in the building. No one had charge of them. They were not used at all. The boys used them a little bit in the daytime; roll the balls about on them. There was a boy who conducted some other business in the building. He pressed a few clothes in there. I think there was gasoline kept in the building. There was gasoline kept in the building. I could not say what quantity. He kept a little there for the purpose of clean-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexer.

ing clothes. He used it as a preparation for cleaning clothes. I don't know what all he had in the preparation for cleaning clothes. I do not know whether he had as much as one-half gallon of gasoline in there at a time or not. I do not know how much he had in there. I do not know whether he had as much as a gallon there or not. I did not carry gasoline in there myself. He had gasoline in a gallon oil can he used a part of the time. I do not remember his getting gasoline but twice. He used it for the purpose of cleaning clothes. He used a preparation of gasoline and kerosene and something else for the purpose of taking dirt out of the clothes. I suppose he kept it there all the time as a preparation for cleaning. I was there in the building all the time. He did not burn gasoline there at all. To heat the irons or anything of the kind they used wood alcohol on Dr. Bryan's stove. Yes; used wood alcohol. The fellow I was speaking about being in the building with me having the pressing club was the one that done the pressing, a darkey by the name of Arthur Hicks. He done the pressing for himself. He was running the pressing club himself. He attended to Dr. Bryan's horse for him. Dr. Bryan was frequently in the building himself. I suppose he knew what was going on in the building. He was there nearly every day. I paid the rent for the building to Dr. Bryan.

Cross-examination: "Yes; I only knew of twice that the darkey bought gasoline. I suppose that was used in the general mixture he had. No, sir; I do not know that it went into the general mixture, but I suppose that was what he used it in. No gasoline was sold there in the store. Gasoline was kept for no other purpose, except for the preparation I have spoken about. I do not think he had more than a quart or two, because he always mixed in quart bottle. There were several articles in this mixture. I do not know what all they were. So far as I know there was no gasoline, except what was in that bottle. I do not know whether they mixed ammonia and alcohol in that bottle or not. I do not know what was in it. The darkey had been gone eight or ten days when the fire occurred. He had been sick, and had been down for a month. After he got up, he was round the Park there for quite a while. He was back there to the place in the room where he stayed only about a couple of weeks after he got up from his spell of sickness. He was back there a couple of times. I do not know how many times. He had been round there several days after he got up from his bed of sickness, because he went away and had been in Tallahassee some four or five days before the fire occurred."

Redirect: "The gasoline they used there they used entirely for the pressing club. I did not use any in my business. I do not know whether there was any gasoline in the building at the time of fire or not. I knew

that, back before the fire a month or two weeks, three or four weeks, gasoline was used there, and from then on back for quite a while there had been gasoline in the building. There were two pool tables there. Yes; I had cues and balls, etc. There was no charge made for pool playing on the tables. Anybody could come in and knock them around."

W. H. Bryan, one of the plaintiffs, being recalled by them in rebuttal, testified as follows: "I do not know what the preparation consisted of now that was used for the purpose of cleaning clothes, occasionally, on two occasions, I have seen the preparation on the boy's table there. It was a whitish preparation, milky preparation."

This is all the evidence which sheds any light upon such points. The jury found adversely to the two contentions of the defendant, and the trial judge concurred in such finding by refusing to disturb the verdict. We are by no means prepared to say that as reasonable men the jury could not have found such verdict from the evidence. See *Wilson v. Jernigan*, 57 Fla. —, 49 South. 44. We do not intend to make the impression that we are inclined to disapprove the verdict. On the contrary, we are of the opinion that the jury might well have so found.

No instructions were requested by either party. The defendant excepted, in its motion for a new trial, to certain specified portions of the general charge given by the court. Subjecting the entire charge to a careful examination, we are not prepared to declare that any reversible error has been made to appear in the portions so excepted to. Taken as an entirety, the law applicable to the issues being tried would seem to have been pretty fairly stated. We see no useful purpose to be accomplished by copying the charge in this opinion, or by discussing the exceptions taken thereto. If the defendant desired further or more explicit instructions upon any point, it should have prepared and presented them to the trial judge.

We have examined all the authorities cited to us by the respective counsel, as well as others. As is true of almost every point of insurance law, we find the authorities very divergent and conflicting as to the construction and applicability of the provision in insurance policies concerning the keeping and using of gasoline and other substances of like nature upon the insured premises.

Upon the pleadings and the evidence in the instant case, we do not see wherein a discussion of the authorities would be of any benefit. Finding no reversible error, the judgment must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

## LOUISVILLE &amp; N. R. CO. v. BERRY.

(Supreme Court of Florida, Division A. Oct. 26, 1909. Headnotes Filed Nov. 29, 1909.)

## 1. CARRIERS (§ 249\*)—CARRIAGE OF PASSENGERS—MINIMUM FARE.

Where the regular fare charged by a railroad company is 4 cents per mile, and a passenger, who boarded one of the trains thereon, tendered in payment of his passage from one station to another on such road, a distance of 126 miles, his mileage book, containing coupons for 125 miles, and 5 cents in money, such company has no legal right to demand of such passenger 5 cents additional fare, under the rule, adopted by the State Railroad Commission: "Ten (10) cents as a minimum fare may be collected where the regular fare would be less than that sum."

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 249.\*]

## 2. CARRIERS (§ 248\*) — ARBITRARY ENFORCEMENT OF REASONABLE RULE—LIABILITY.

Reasonable conditions, regulations, or rules may be enforced by a railroad company in such an arbitrary and unreasonable manner as to make such company liable to respond in an action for damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 994; Dec. Dig. § 248.\*]

(Syllabus by the Court.)

Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Action by W. J. Berry against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 50 South. 414.

Blount & Blount & Carter, for plaintiff in error. Avery & Avery, for defendant in error.

SHACKLEFORD, J. The defendant in error brought an action against the plaintiff in error to recover damages for his alleged wrongful expulsion from a passenger coach on one of the defendant's trains, and recovered a judgment for the sum of \$50, which the defendant brings here for review. As is admitted by the defendant in its brief, all the material facts in the case are practically undisputed. The plaintiff boarded defendant's train at Cottdale, one of its stations, distant 126 miles from Pensacola, and tendered the conductor of such train, in payment of his passage from Cottdale to Pensacola, a mileage book, which had been duly issued to plaintiff by defendant, containing only 125 miles, at the same time tendering 5 cents for the additional mile which his mileage book was short. The conductor refused to accept such mileage book and 5 cents for such passage, demanding of the plaintiff 5 cents additional fare. The plaintiff refused to comply with this demand, and at Aycock, the next station beyond Cottdale, the plaintiff was ejected from such train. Several errors are assigned; but, as the defendant admits in its brief, all of such assignments "depend

upon the question as to whether plaintiff was lawfully ejected from the train."

The defendant, in support of its contention, relies upon the contract in the mileage book, which was signed by the plaintiff, and which contained the following conditions:

"(7) Nonmodification of terms: No agent or employé of any line has power to alter, modify or waive any conditions of this contract or any stipulations printed hereon."

"(12) From this ticket one coupon shall be detached for each mile or fraction of a mile traveled. Four (4) coupons will be detached for distances of four (4) miles or less."

"(14) This ticket shall only be available for transportation to the regular schedule stopping points of train or boat upon which it is presented."

"In consideration of the reduced rate at which ticket is sold, I, the original purchaser, hereby accept and agree to be governed by all of the conditions of this contract and other stipulations printed on this ticket, and acknowledge that the description punched hereon correctly indicates my personal appearance according to the terms used."

The defendant also introduced and read in evidence the following rule, adopted by the Railroad Commission of the State of Florida, governing transportation of passengers:

"Ten (10) cents as a minimum fare may be collected where the regular fare would be less than that sum."

It seems that the plaintiff made a motion to exclude this rule; but at what stage of the trial, or upon what grounds, or what ruling was made thereon, we are not advised. The trial judge made a certain statement concerning the matter, in the presence of the jury, to which defendant noted an exception, and which constitutes one of the errors assigned. We decline to set out the language used, for the reason that, even though technical error may have been committed, it must be held to be harmless error. See *Cross v. Aby*, 55 Fla. 311, 45 South. 820, and authorities there cited.

The jury could not have been misled by the statement made by the trial judge, or the defendant harmed, since the peremptory instruction was given to the jury to find a verdict for the plaintiff. It is true that the correctness of this instruction or direction is challenged by the defendant in an assignment of error; but we are of the opinion that such assignment has not been sustained. The regular fare charged upon defendant's road is 4 cents per mile.

Conceding that plaintiff was bound by the conditions of the contract which he signed, and the same were reasonable, as is also the rule of the Railroad Commission, copied above, yet it does not follow that defendant has the right to enforce such conditions, regulations, and rules in an arbitrary and unreasonable manner. There is a clear distinction

between a minimum fare of 10 cents and the fare demanded in this case for the extra mile of continuous passage. It seems to us that this is too obvious for discussion or comment. See 28 Am. & Eng. Ency. of Law (2d Ed.) 174. We have examined all the authorities cited to us by defendant, but fail to find wherein they support its contentions.

Finding no reversible error, the judgment must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

### CLINTON et al. v. STATE.

(Supreme Court of Florida, Division A. Nov. 3, 1909.)

#### 1. DISTRICT AND PROSECUTING ATTORNEYS (§ 3\*)—"ASSISTANT SOLICITORS."

Private counsel, who gives aid in the prosecution of a case as the solicitor may permit or require, are not "assistant solicitors," within the contemplation of Gen. St. 1906, § 3880.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-17; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 1, p. 583.]

#### 2. ARSON (§ 31\*)—EVIDENCE OF MOTIVE.

Hostilities between the families of the person whose dwelling is burned and those accused of the arson are admissible as tending to show motive.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 66; Dec. Dig. § 31.\*]

#### 3. WITNESSES (§ 337\*)—IMPEACHMENT.

If an accused voluntarily becomes a witness, his general reputation for truth and veracity may be impeached.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129-1132; Dec. Dig. § 337.\*]

#### 4. CRIMINAL LAW (§ 1137\*)—APPEAL—ERROR INVITED BY APPELLANT.

Where a state's witness testifies in chief only to reputation for truth and veracity, the defense cannot complain of evidence as to general bad character, elicited only in the cross-examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3009; Dec. Dig. § 1137.\*]

#### 5. CRIMINAL LAW (§ 696\*)—STRIKING OUT EVIDENCE—IMPEACHING TESTIMONY.

Evidence impeaching a witness will not be stricken, because its probative force has been weakened on cross-examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1639; Dec. Dig. § 696.\*]

#### 6. SUFFICIENCY OF EVIDENCE.

The evidence justified the verdict.

(Syllabus by the Court.)

Error to Criminal Court of Record, Orange County; I. A. Stewart, Judge.

Buck Clinton and Edward Clinton were convicted of arson, and bring error. Affirmed.

S. J. Hilburn and L. G. Starbuck, for plaintiffs in error. Park Trammell, Atty. Gen., for the State.

COCKRELL, J. The plaintiffs in error were convicted of arson, and were sentenced to the state's prison for the terms of ten and two years, respectively. This is the third time this case has been before this court. See 53 Fla. 98, 43 South. 312, and 56 Fla. 57, 47 South. 389.

The first two assignments are upon the failure of the minutes to show the appointment and qualification of Attorneys Perkins and Landis as assistant county solicitors. It does not appear that they acted as such. On the contrary, the county solicitor was at all times in active charge of the case; the two attorneys rendering only such aid as he might permit or require. The statutory office of "assistant solicitor," with power to perform the duties of the solicitor, has wholly different duties and powers, and section 3880, Gen. St. 1906, relied on, has no applicability.

The state was permitted to show various acts of hostilities exhibited by the Clinton family against Goodrich, the owner of the dwelling that was burned. Without specifying them, we may say that in the main similar objections were held untenable on the former hearing, and were admissible as showing motive.

Other assignments are upon the impeachment of the defendants, who voluntarily became witnesses at this trial. It is argued that they did not put their character in evidence, and therefore the state could not attack it. That well-known rule has been wholly misunderstood by counsel. The state did not attack their general character; but their reputation for truth and veracity was made a possible issue when they took the stand as witnesses. This distinction was clearly drawn in the opinion upon the first appearance of the case in this court, and the state kept clearly within the rule. Upon cross-examination of one of the impeaching witnesses for the state, something was brought out that looked to a general impeachment of character; but the state was not responsible for this evidence. One impeaching witness, after a lengthy cross-examination, surmised that something other than the general reputation for truth and veracity of the defendant may have influenced his opinion that he could not be believed on oath, and the defense immediately moved to strike the whole testimony. The answer tended to shake the weight to be given his testimony, and opened the way for further examination along the same line; but we think it hardly sufficient to destroy the admissibility of the evidence.

Several exceptions are reserved to the argument of counsel for the state. While the



language objected to is forceful, and at times borders on the limits of propriety, we do not find any of it going so beyond as to call for reversal.

After so many verdicts of impartial juries, and approval by different trial judges, it would take much weaker evidence than is disclosed on this record to justify us in reversing upon the facts. The defendants have had every safeguard provided by the law, they have been fairly convicted, and we discover no error of law.

The judgment is affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

### BREWER v. KELLUM.

(Supreme Court of Florida, Division A. Nov. 3, 1909.)

COUNTIES (§ 51\*)—COUNTY COMMISSIONERS—CHAIRMAN.

Assuming, since it was so treated by the parties and the court below, that the position of chairman of a board of county commissioners is an office the title to which can be inquired into and determined by quo warranto proceedings, under section 769 of the General Statutes of 1906, a board of county commissioners may elect a chairman at any regular meeting. However questionable as a matter of policy such course might be, the members of such a board would seem to have the legal right to elect a chairman to preside over their meeting as often as they saw fit so to do, provided such election is held at a legal meeting.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 62; Dec. Dig. § 51.\*]

(Syllabus by the Court.)

Error to Circuit Court, Dade County; M. S. Jones, Judge.

Quo warranto by Medford R. Kellum, by A. E. Heyser, his attorney, by leave of the Attorney General, against Thomas Brewer. Judgment for Kellum, and Brewer brings error. Reversed, with directions.

F. H. Rand, Jr., for plaintiff in error. A. E. Heyser, for defendant in error.

SHACKLEFORD, J. Having first sought and obtained leave so to do, Medford R. Kellum, by A. E. Heyser, his attorney, filed an information in the nature of a quo warranto, in the name of the state of Florida upon the relation of the Attorney General, against Thomas Brewer; the object thereof being "to determine the proper person to exercise the duties and functions of chairman of the board of county commissioners of Dade county, Fla." It is unnecessary for us to set forth the pleadings and proceedings in detail. It is sufficient to state that it is alleged in the information that Medford R. Kellum had

been duly elected chairman of such board of county commissioners at a regular meeting thereof on the 5th day of January, 1909, and had continued to act as such chairman until the early part of July, 1909, since which time Thomas Brewer had been acting as such chairman, claiming to have been elected to such position at a meeting of such board held on or about the 5th day of July, 1909. Various and sundry irregularities are alleged in connection with the election of Thomas Brewer as such chairman; but, in view of the contention made here and of the conclusion which we have reached, we need not set them out or discuss them. A rule was issued against Thomas Brewer, the plaintiff in error here, by whom a demurrer was filed, and also an answer. At the same time was filed an agreed statement of facts, consisting of extracts from the proceedings of different meetings of such board of county commissioners. The cause coming on to be heard, the demurrer was overruled, and a final judgment of ouster rendered against the plaintiff in error as such chairman. This judgment is brought here for review.

We assume, but without deciding, since it has been so treated by the respective parties and the court below, that the position of chairman of a board of county commissioners is an office the title to which can be inquired into and determined by quo warranto proceedings. It is admitted by the respective parties that a construction of section 769 of the General Statutes of Florida of 1906 will decide all the questions presented on this writ of error. Only the first paragraph of such section is involved, the same reading as follows:

"Sec. 769. (578.) Powers and Duties.—The board of county commissioners of each county shall have power, at any legal meeting, to elect one of their number chairman, and to make such orders concerning the care of and the improvement of the corporate property of the county as may be deemed expedient, and also." Then follow other powers delegated to such boards.

The problem would seem to be of easy solution. The statute does not provide or prescribe that the chairman shall be elected for any specified time. This being true, it would seem to follow that a board of county commissioners could elect a chairman at any regular meeting. In other words, however questionable as a matter of policy such course might be, the members of such a board would seem to have the legal right to elect a chairman to preside over their meetings as often as they saw fit so to do, provided such election is held at a legal meeting. It being made to appear from the agreed statement of facts that the plaintiff in error was elected chairman of such board at a legal meeting thereof, it necessarily follows, from what has been said, that the judgment must be revers-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed; and it is so ordered, with directions to discharge the rule. The costs are to be taxed against Medford R. Kellum; the Attorney General, in granting permission to institute the proceedings in the name of the state, having expressly stipulated that the state should not be liable for any costs in any event.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

### JENKINS v. STATE.

(Supreme Court of Florida, Division B. Oct. 19, 1909. Headnotes Filed Nov. 24, 1909.)

#### 1. WITNESSES (§ 269\*)—CROSS-EXAMINATION—SCOPE.

Questions on the cross-examination must be confined to the matters elicited on the direct, unless to test memory, credibility, etc.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.\*]

#### 2. CRIMINAL LAW (§ 1170\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error in excluding a question is without injury, where the question is afterwards answered without objections.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8148; Dec. Dig. § 1170.\*]

#### 3. CRIMINAL LAW (§ 355\*)—EVIDENCE—MATERIALITY.

Where it is sought to show drunkenness of the defendant in excuse for crime, questions not limited to the condition of the defendant, but tending to raise the immaterial issue of the use of intoxicating liquor by "the boys," are properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 761; Dec. Dig. § 355.\*]

#### 4. LARCENY (§ 26\*)—DEFENSES—PAYING FOR STOLEN PROPERTY.

Paying for stolen property will not purge the original taking of its felony, or constitute a defense to a prosecution therefor; and hence evidence of that fact is properly excluded.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 54; Dec. Dig. § 26.\*]

#### 5. CRIMINAL LAW (§ 413\*)—EVIDENCE—SELF-SERVING ACTS.

The defendant cannot show self-serving acts before or subsequent to the crime, for this would permit him to make evidence for himself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.\*]

#### 6. WITNESSES (§§ 262, 263\*)—CRIMINAL LAW (§ 1153\*)—EXAMINATION IN REBUTTAL—REPETITION—RIGHT TO RECALL WITNESS—DISCRETION OF COURT—REVIEW.

After a witness has been examined in chief, and is recalled in rebuttal, the court may properly prevent a simple repetition of his testimony. A party, after his examination of a witness, and after closing his testimony, has no absolute right to recall this witness to establish matters not in rebuttal. Whether this rule ought to be varied is a question for the trial court; and an appellate court, if it interferes at all, will only do so where it sees that injustice has been done through this action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 797, 902; Dec. Dig. §§ 262, 263; Criminal Law, Cent. Dig. § 3064; Dec. Dig. § 1153.\*]

#### 7. BURGLARY (§ 3\*)—BREAKING AND ENTERING STOREHOUSE—INTENT.

To constitute the crime of breaking and entering a storehouse with intent to commit petit larceny, the defendant must have had an intent to commit the misdemeanor in the house; otherwise, the breaking and entering would amount to a trespass.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 24-27; Dec. Dig. § 3.\*]

#### 8. CRIMINAL LAW (§ 53\*)—DEFENSES—INTOXICATION—BURGLARY.

Upon the trial of a defendant for breaking and entering with intent to commit a misdemeanor, his intoxication, though voluntary, becomes a matter for consideration by the jury, with reference to the ability of the accused to form or entertain such intent. If, therefore, the defendant was too intoxicated to entertain or form this essential particular intent, such intent could not exist, and the crime of which it is a necessary element could not be committed by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 67; Dec. Dig. § 53.\*]

#### 9. BURGLARY (§ 45\*)—QUESTIONS FOR JURY—INTENT.

A criminal intent is not necessarily implied from the simple fact of breaking and entering; but the question as to whether the defendant was capable of the criminal intent is a question of fact, to be decided by the jury from all the circumstances of the case.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 110; Dec. Dig. § 45.\*]

#### 10. CRIMINAL LAW (§ 1160\*)—REVIEW—CONVICTION APPROVED BY TRIAL JUDGE.

Upon a trial for breaking and entering with intent to commit a misdemeanor, the verdict of guilty will not be set aside upon the ground of drunkenness of the defendant, where the evidence falls short of showing that he was intoxicated at or immediately before he broke and entered the building to such an extent that he was unable to form or entertain the intent to commit the misdemeanor charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

(Syllabus by the Court.)

Error to Circuit Court, Taylor County; B. H. Palmer, Judge.

Dave Jenkins was convicted of breaking and entering a storehouse with intent to commit petit larceny, and he brings error. Affirmed.

L. E. Roberson, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

PARKHILL, J. The plaintiff in error was convicted of the crime of breaking and entering a storehouse of J. N. Goodman with intent to commit the misdemeanor of petit larceny.

On cross-examination of the prosecuting witness, Goodman, counsel for the defendant asked the following question: "Did you give the boys some whisky while they were there that morning?" In the same way, the defendant asked the state's witness, Dick York, the following question: "Did the boys drink anything while in there?" Objections to these questions were sustained, and these rulings are made the basis of the first and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

second assignments of error. There was no error here. The first question was not in cross of anything brought out on the direct examination. Even if the second question could be said to be in cross of the direct examination of the witness, it was fully answered upon cross-examination of this witness, when he was recalled by the state in rebuttal later on. Besides, the defendant did not make the materiality of these questions to appear; and if they were intended to show the drunkenness of the defendant in excuse for the crime, the inquiry was not limited to the condition of the defendant, but tended to raise the immaterial issue of the use of intoxicating liquor by "the boys."

The third, fourth, fifth, sixth, seventh, and eighth assignments of error have been argued and may be considered together. They are based upon the action of the court in sustaining objections to questions that sought to elicit the information that the defendant subsequently went to Mr. Goodman and made reparation by paying for the property taken. There was no error here. Paying for stolen property will not purge the original taking of its felony, or constitute any defense to a prosecution therefor; and hence evidence of that fact is properly excluded. 8 Ency. Ev. 130: *Truslow v. State*, 95 Tenn. 189, 31 S. W. 987. See *Thalheim v. State*, 38 Fla. 169, 20 South. 933.

These acts of the defendant constituted no part of the *res gestæ* of the offense, and the state had introduced no testimony bearing on this point. The defendant cannot show self-serving acts before or subsequent to the crime; for this would permit him to make evidence for himself. *Clark's Crim. Proc.* 511; *Thomas v. State*, 47 Fla. 99, 36 South. 161; *Fields v. State*, 46 Fla. 84, 35 South. 185.

After the defendant had closed his testimony, Dick York was recalled as a witness for the state, and was asked this question: "When you went to the store, as you came back from Lake Bird, and after the defendant had gone into the store and came out, then where did you go?" This question was objected to on the ground that it was not in rebuttal of the case made by the defendant. This objection is without merit. In *Coker v. Hayes*, 16 Fla. 368, this court said: "After a witness has been examined in chief, and is recalled in rebuttal, the court may, very properly, prevent a simple repetition of his testimony. A party, after his examination of a witness, and after closing his testimony, has no absolute right to recall this witness to establish matters not in rebuttal. Whether this rule ought to be varied is a question for the circuit court; and an appellate court, if it interferes at all, should only do so where it sees that injustice has been done through this action."

The question objected to here did not relate in any way to the testimony elicited from

this witness upon his examination in chief. It seems to have been directed to a rebuttal of that part of the defendant's case that traced his movements after he had broken and entered the store, and that showed his physical and mental condition. We cannot see that the defendant suffered any injustice by this action of the trial court.

The tenth assignment raises the question whether the verdict is contrary to the evidence; it being contended that the defendant was in such a state of intoxication that he was incapable of forming an intent to commit the crime charged against him. To constitute this crime the defendant must have had an intent to commit the misdemeanor in the house; otherwise, the breaking and entering would amount to a trespass only. 5 Am. & Eng. Ency. Law (2d Ed.) 59. This being so, the intoxication of the defendant at the time of the breaking and entering of the building, though voluntary, became a matter for consideration by the jury, with reference to the ability of the accused to form or entertain such intent. If, therefore, the defendant was too intoxicated to entertain or be capable of forming this essential particular intent, such intent could not exist, and consequently the crime of which it is a necessary element could not be committed by the defendant. *Garner v. State*, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232; *Cook v. State*, 46 Fla. 20, 35 South. 665; *Ryan v. U. S.*, 26 App. Cas. (D. C.) 74, 6 Am. & Eng. Ann. Cas. 633. A criminal intent is not necessarily implied from the simple fact of breaking and entering; but the question as to whether the defendant was capable of the criminal intent is a question of fact, to be decided by the jury from all the circumstances of the case. *Jones v. State*, 18 Fla. 889, text 896; *State v. Bell*, 29 Iowa, 316; *People v. Phelan*, 93 Cal. 111, 28 Pac. 855; *Feister v. People*, 125 Ill. 348, 17 N. E. 748. See, also, *Ashford v. State*, 36 Neb. 38, 53 N. W. 1036; *U. S. v. Bowen*, 4 Cranch, C. C., 604, Fed. Cas. No. 14,629; *State v. Maxwell*, 42 Iowa, 208.

Considering the evidence in the light of these principles of the law, we cannot set aside the verdict that has been rendered by a jury and approved by a judge, who saw the witnesses and heard them testify. While there are general statements by the witnesses that the defendant was drunk at different times during the day, there is scarcely any evidence to the effect that the defendant was intoxicated, at or immediately before he broke and entered the store, to such an extent that he was unable to form or entertain the intent to commit the misdemeanor therein.

The judgment is affirmed.

TAYLOR and HOCKER, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

**REGISTER et al. v. PRINGLE BROS.**

(Supreme Court of Florida, Division A. Oct. 26, 1909. Headnotes Filed Nov. 29, 1909.)

**1. JUDGMENT (§ 108\*)—BY DEFAULT—FAILURE TO PLEAD—PENDENCY OF MOTION.**

Where the defendant in an action at law waits until the rule day on which he is required to plead to file a motion for a more definite bill of particulars, and such motion is of such a character that the plaintiff is justified in treating it as a nullity, he may disregard it, and cause the clerk to enter a default for failure to plead or demur.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 108.\*]

**2. PLEADING (§ 308\*)—FILING CAUSE OF ACTION OR COPY THEREOF WITH DECLARATION—PURPOSE.**

The object of section 1449 of the General Statutes of 1906, and rule 14 of Circuit Court Rules in Common-Law Actions (37 South. vii) in requiring the cause of action, or a copy thereof, in the class of instruments designated therein, to be filed with the declaration, is to have the plaintiff apprise the defendant of the nature and extent of the cause of action alleged against him, in order that he may plead thereto with greater certainty.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 935-941; Dec. Dig. § 308.\*]

**3. JUDGMENT (§ 108\*)—BY DEFAULT—FAILURE TO PLEAD.**

In an action of assumpsit, brought by a wholesale merchant against a retail merchant upon an open account, wherein the declaration is in the usual form in such cases, containing the common counts, and the copy of the cause of action attached thereto consists of an invoice or itemized bill or account in the form customarily used between wholesale and retail merchants, the plaintiff is justified in disregarding a motion filed by the defendant for a more definite bill of particulars, on the ground that the bill of particulars so filed is too indefinite, vague, and uncertain to enable the defendant to plead to the declaration, and in treating such motion as a nullity, especially when the same is not filed until the rule day on which the defendant is required to plead, and in causing the clerk to enter a default for failure to plead or demur.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 108.\*]

**4. PLEADING (§ 328\*) — MOTION FOR MORE DEFINITE BILL OF PARTICULARS—TIME FOR.**

The practice of waiting until the very day on which a plea or demurrer is due to file a motion for a more definite bill of particulars is disapproved. In furtherance of justice, such motions should be filed and called up for disposition as early as practicable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 992; Dec. Dig. § 328.\*]

**5. JUDGMENT (§ 128\*)—BY DEFAULT—OBJECTIONS TO VALIDITY.**

While section 1425 of the General Statutes of 1906, authorizing the entry of a final judgment by the clerk of the court after a default, must be strictly complied with, where it affirmatively appears on the face of such final judgment that proof was produced before such clerk, and also what that proof was, such judgment is not voidable by reason of the fact that the affidavit to the account, upon which proof such judgment was entered, was made prior to the date of the default.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 128.\*]

(Syllabus by the Court.)

Error to Circuit Court, Taylor County; R. M. Call, Judge.

Action by Pringle Bros., a corporation, against D. S. Register and another, copartners. Judgment for plaintiff, and defendants bring error. Affirmed.

W. B. Davis, for plaintiffs in error. Hendry & McKinnon, for defendant in error.

**SHACKLEFORD, J.** The defendant in error brought an action of assumpsit against the plaintiffs in error in the circuit court for Taylor county. The declaration was filed on the 6th day of January, 1908, but service was not had on the defendants, until the 3d day of February, 1908. With the declaration, as the cause of action, was filed an itemized account of goods, wares, and merchandise alleged to have been sold by plaintiff to defendants, and for the price of which the action was brought. The affidavit of the secretary of the plaintiff corporation, dated the 30th day of September, 1907, was attached to the account. On the 2d day of March, 1908, the defendants entered their appearance, and on the 6th day of April, 1908, filed a motion for a more definite bill of particulars, to which motion was attached the following affidavit:

"Before me on this day personally came W. B. Davis, and he, being by me first duly sworn, says that he has examined the bill of particulars filed and attached to plaintiff's declaration in the foregoing cause; that he, affiant, is of counsel for defendants in said cause, and that said bill of particulars is so indefinite, vague, and uncertain, in that it does not show the amount of the articles purchased, the value of the articles, and such other things as are required to be shown to make said bill of particulars definite and sufficient for defendants to plead and answer to the declaration filed in said cause.

"W. B. Davis.

"Sworn to and subscribed before me this 6th day of April, A. D. 1908.

"[Seal.] John C. Calhoun, Clerk,

"By Roscoe E. Lee, D. C."

On the 1st day of June, 1908, the plaintiff filed a præcipe for default, and on the same day a default judgment was entered by the clerk of said court. On the 21st day of August, 1908, the following order for a final judgment was made:

"The foregoing cause came on this day to be heard upon motion of plaintiff's attorneys for a final judgment; and it appearing that a default judgment has been regularly entered in said cause against the defendants on rule day in June, 1908, and that Hon. B. H. Palmer, judge of said court, is now absent from the state of Florida, it is, therefore, thereupon ordered and adjudged that the clerk of said court, upon the filing of proofs of claim sued upon as required by

statute in such case, enter a final judgment against the said defendants in said cause.

"Done and ordered at Jacksonville, Florida, this 21st day of August, 1908.

"R. M. Call,

"Judge 4th Judicial Circuit, State of Florida."

On the 1st day of August, 1908, the following final judgment was entered by the clerk:

"The defendants having been adjudged on the 1st day of June, 1908, to be in default for want of plea or demurrer, or other proper pleading, to the declaration in this cause, and the plaintiff having moved for final judgment consequent upon such default, and the judge of the Fourth judicial circuit of Florida, in the absence from the state of the judge of this court, by his order, dated August 21, 1908, directed that said final judgment be entered herein, and the plaintiff having produced and filed the account sued upon, duly proven, and the court having ascertained the amount which the plaintiff is entitled to recover upon the open account sued upon by affidavit made by Geo. T. Radcliff, Jr., and filed herein, and found the same to be \$884.41, it is now, therefore, considered by the court that the said plaintiff do recover of the said defendants the said sum of \$884.41, as principal and interest, and the further sum of \$6.71 as costs.

"Done this 1st day of Sept. 1908.

"[Seal.] John C. Calhoun,

"Clerk Circuit Court, Taylor Co., Fla.

"Entered, filed, and recorded in office this 1st day of Sept. A. D. 1908.

"John C. Calhoun, Clerk.

"The above judgment was entered and rendered upon the following proof:

"State of South Carolina, County of Charleston.

"Personally appeared before me, Geo. T. Radcliff, Jr., who on oath says that he is secretary of Pringle Brothers, of Charleston, state of South Carolina, and that the attached claim against D. S. Register & Co. Perry, Fla., amounting to eight hundred thirty-nine and  $\frac{27}{100}$  dollars (\$839.27), is just, true, and correct, and that no part of said debt has been paid, except that which appears in the itemized statement hereto attached.

"Geo. T. Radcliff, Jr.

"Sworn to before me this 30th day of September, A. D. 1907.

"[Seal.] F. A. Kirk, Notary Public.

"Which was filed in office with the declaration January 6, 1908."

The defendants seek a reversal of this judgment here by writ of error, and have assigned two errors as follows:

"The court erred:

"First. In entering default against the defendants, when there was a motion for a more specific bill of particulars on file, and when defendants were not in default.

"Second. The court erred in entering final judgment in said cause."

This court, in *Dudley v. White*, 44 Fla. 264, 31 South. 830, held that, "if a motion to dismiss filed by the defendant in an action at law within the time allowed by the statute for filing a plea or demurrer be of such a character that the plaintiff will be justified in treating it as a nullity, he may disregard it, and cause the clerk to enter a default for failure to plead or demur; but, if the motion be not of that character, no default can be entered until the motion is disposed of." We fully approve of the reasoning in the opinion rendered in that case, and it applies with equal force to a motion for a more specific bill of particulars. The point now presented to us for consideration and determination is as to the character of the motion filed in the instant case. We have a long line of decisions to the effect that the object of the statute and rule in requiring the cause of action, or a copy thereof, to be filed with the declaration, is to have the plaintiff apprise the defendant of the nature and extent of the cause of action alleged, in order that he may plead thereto with greater certainty. Such authorities will be found collected in *State v. Seaboard Air Line Ry.*, 56 Fla. 670, text 678, 47 South. 986, text 989. If it plainly appears that the copy of the cause of action attached to the declaration in the instant case sufficiently complied with such statute and rule to accomplish their purpose, then it necessarily follows that plaintiff was justifiable in disregarding the motion and causing the default judgment to be entered. Upon inspection, we find that the declaration is in the usual form in such cases, containing the common counts, and that the copy of the cause of action attached thereto consists of an invoice or itemized bill or account in the form customarily used between wholesale and retail merchants. The contention that it is too indefinite, vague, and uncertain to enable the defendants to plead to the declaration is utterly without merit and cannot be seriously entertained. We are not enlightened upon this point by the defendants' brief. The judge of the Fourth judicial circuit, acting in the absence of the judge of the Third judicial circuit, found that the judgment by default had been properly and regularly entered, and we fully concur with him in such finding. We are further of the opinion that the practice of waiting until the very day a plea or demurrer is due to file a motion for a more definite bill of particulars is not to be commended, to say the least of it. In the furtherance of justice, such motions should be filed and called up for disposition as early as practicable. The first assignment signally fails.

We pass, now, to the consideration of the second assignment, as to whether or not the court erred in entering final judgment. It is contended that the clerk was not warranted or authorized in entering final judgment up-

on the production and filing of the same sworn or verified account which had been filed with the declaration. It is settled law here that the statute (now section 1425 of the General Statutes of 1906) authorizing the entry of a final judgment by the clerk, after default, must be strictly complied with. See *Ropes v. Snyder-Harris Bassett Co.*, 37 Fla. 529, 20 South. 535; *Southern Insurance Co. v. Smith-Tyler*, 43 Fla. 297, 31 South. 247; *Glens Falls Insurance Co. v. Porter*, 44 Fla. 568, 33 South. 473. Other decisions of this court will be found referred to in these cited cases. However, it cannot be seriously contended that the judgment in question is void on its face, for not only does it affirmatively appear that proof was produced before the clerk; but it is also shown what such proof was. See *Einstein v. Davidson*, 35 Fla. 342, 17 South. 563, and *Lord v. Dowling*, 52 Fla. 313, 42 South. 585. But it is contended that such judgment is voidable, and, since it is directly attacked upon writ of error, should be reversed for the reason that the affidavit to the account, upon which proof the judgment was entered, was made in September, 1907, while the judgment was not entered until September, 1908. No authorities are cited to support this contention, and we are of the opinion that it is untenable. Possibly it might be the safer and better practice to have the affidavit in such cases made after the entry of the default, though that would not seem to be imperative. So far as is disclosed, no attempt was made to have the trial judge open up the default. The second assignment has not been sustained, therefore the judgment must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### HOOKS v. STATE.

(Supreme Court of Florida, Division B. Nov. 3, 1909.)

##### 1. SUNDAY (§ 13\*)—EXECUTION OF CONTRACT ON SUNDAY—VALIDITY.

By the common law the fact that a contract was executed on Sunday did not vitiate or affect it.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 36; Dec. Dig. § 13.\*]

##### 2. SUNDAY (§ 13\*)—EXECUTION OF CONTRACT ON SUNDAY—VALIDITY—STATUTORY PROVISIONS.

Whether or not a contract is affected by the fact of having been executed on Sunday depends upon the terms and provisions of the state statute on the subject.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 36; Dec. Dig. § 13.\*]

##### 3. SUNDAY (§ 13\*)—EXECUTION OF CONTRACT ON SUNDAY—VALIDITY.

Section 3565, Gen. St. 1906, inhibits the following or performance on Sunday only of

such pursuit, business, or trade as requires the use of manual labor or animal or mechanical power to conduct or perform it. The execution of a note, mortgage, or other contract, involving neither manual labor nor animal or mechanical power, is not prohibited by this statute to be performed on Sunday, and, consequently, the validity of any contract made in this state is not affected by the fact that it was executed or delivered on Sunday. The purpose of our statute, when all of its provisions are considered, seems to be to prohibit the performance on Sunday only of those works or pursuits that from their nature have to be performed in public, and that may, therefore, be offensive to the sensibilities of the Christian community in which they are carried on, if followed on the Lord's Day.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 36, 38, 40; Dec. Dig. § 13.\*]

##### 4. CHATTEL MORTGAGES (§ 230\*)—SALE BY MORTGAGOR—CRIMINAL RESPONSIBILITY—DEFENSES.

It is no defense to a prosecution under our statute forbidding the sale of mortgaged property without the consent of the mortgagee that such property was sold for just enough, or less than enough, to pay the rent of the land on which it was grown and the hire of laborers in gathering and shipping it to market.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 489; Dec. Dig. § 230.\*]

(Syllabus by the Court.)

Error to Circuit Court, Jackson County; J. E. Wolfe, Judge.

I. B. Hooks was convicted of disposing of mortgaged personalty without the mortgagee's consent, and he brings error. Affirmed.

Calhoun & Campbell, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, by writ of error, brings here for review a judgment of the circuit court of Jackson county, whereby he was convicted of the statutory misdemeanor of disposing of mortgaged personal property without the consent of the mortgagee. The indictment alleged that the defendant unlawfully sold and disposed of a crop of watermelons grown and raised by him in Jackson county during the year 1908, that was mortgaged to the Farmers' Union Warehouse Company, a corporation, without first paying off and discharging such mortgage, and without the consent of the said mortgagee.

To make out its case the state offered in evidence the following paper writing:

"State of Florida, Jackson County.

"\$258.98. 4/23/08.

Cottondale, Fla.

"On or before Oct. 1st, 1908, I promise to pay to Farmers' Union Warehouse Co., or bearer, two hundred and fifty-eight dollars and ninety-eight cents for 100 sacks animal bone fertilizer, for five sacks nitrate of soda, sold to me by Farmers' Union Warehouse Company. Should this note remain unpaid at maturity and placed in the hands of an attorney for collection or adjustment, there shall also become due and payable on this

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

note an attorney's fee of ten per cent. on the amount of said principal and interest due and to become due thereon. This note bears interest from its maturity at the rate of eight per cent. per annum until paid. The consideration of this note is the commercial fertilizers mentioned above, and which has been sold to me by the said Farmers' Union Warehouse Co.; expressly understood that said company has refused to make and does not make any warranty of the quality or value of such fertilizer, or any representation as to its quality, and that I am to rely as to such quality or value solely upon the fact that the laws of said state as to the analysis of such fertilizer have been complied with in so far as it is necessary to offer the same for sale in this state. The said fertilizer for which this note is given has been advanced to me for the express purpose of aiding me in carrying on my farming operations during the present year on my farm, containing ——— acres more or less in section ———, Farmers' Union Warehouse Company ——— in said state and county, and I hereby create a lien in favor of the said Farmers' Union Warehouse Company and its assigns for the principal amount of said note and the interest thereon and an attorney's fee as above provided on all crops and products that shall be made or grown on said farm during the present year and also upon ———.

"Witness my hand and seal this 23d day of April, A. D. 190—.

"[Signed] I. B. Hooks. [Seal.]

"Signed, sealed, and delivered in our presence: [Signed] F. E. Dickson."

Appended thereto was what purported to be an acknowledgment by the maker before a notary public of the execution and delivery thereof.

To the introduction of this paper in evidence the defendant objected, on the grounds that the paper was vague, indefinite, uncertain, and did not constitute a valid lien or mortgage on the watermelons set forth in the indictment; (2) because said paper was not sufficiently definite to create a lien or mortgage on the melons set forth in said indictment, and was not a mortgage. These objections were overruled, and the paper, upon proof of its execution, was admitted in evidence, to which ruling exception was taken, and this is assigned as error. There was no error here. Under the broad terms of section 2494, Gen. St. 1906, declaring what shall be deemed and held to be mortgages, it is clear that the instrument in question is a mortgage, and we fail to discover any vagueness or indefiniteness in its terms. It expressly creates a lien as security for the debt therein promised to be paid "on all crops and products that shall be made or grown on said farm during the present year." The melons mentioned in the indictment were shown to have been grown and raised during

the year 1908 as part of his crops by the defendant, and under the express terms of the instrument were covered thereby.

The defendant offered to prove by himself as a witness, and also by other witnesses, that the note or mortgage was made and executed by him on Sunday, and was therefore void, and requested the court to instruct the jury to the effect that, if they believed that the mortgage in question was executed on Sunday, then the same was void, and they should acquit the defendant; but this proffered proof was excluded, and the requested instructions were refused, and these rulings are assigned as error, and present the question whether contracts made on Sunday in this state are ipso facto void. At the common law the fact that a contract was executed on Sunday did not vitiate or affect it; but in many of the American states statutes have been adopted which have been construed by their courts as having the effect of annulling any contract executed and delivered on Sunday, on the ground that such statutes prohibited the making of contracts on that day, and that all contracts made on said day were in violation of such statutes, and were therefore null and void. All the authorities agree that whether or not a contract is affected by the fact of having been executed on Sunday depends upon the terms and provisions of the state statute on the subject. Our Florida statute on the subject (section 3565, Gen. St. 1906) provides as follows: "Whoever follows any pursuit, business or trade on Sunday, either by manual labor or with animal or mechanical power, except the same be work of necessity, shall be punished by a fine not exceeding fifty dollars."

This being a penal statute, of course, the same must be strictly construed. What pursuit, business, or trade does it inhibit the following or performance of on Sunday? Clearly such as requires manual labor or animal or mechanical power to perform it. The execution of a note, mortgage, or other contract requires neither manual labor nor any animal or mechanical power, and we do not think that their execution on Sunday is prohibited by this statute, and that, consequently, the validity of any contract made in this state is not affected by the fact that it was executed or delivered on Sunday. The purpose of our statute, when all of its provisions are considered, seems to be to prohibit the performance on Sunday only of those works or pursuits that from their nature have to be performed in public, and that may, therefore, be offensive to the sensibilities of the Christian community in which they are carried on, if followed on the Lord's Day. 1 Page on Contracts, §§ 455, 456; Bloom v. Richards, 2 Ohio St. 387; Johnson v. Brown, 13 Kan. 529; Horacek v. Keebler, 5 Neb. 355; Ray v. Catlett, 12 B. Mon. (Ky.) 532; Boynton v. Page, 13 Wend. (N. Y.) 425; Moore v. Murdock, 26 Cal. 515; Roberts v.

Barnes, 127 Mo. 405, 30 S. W. 113, 48 Am. St. Rep. 640; Hellams v. Abercrombie, 15 S. C. 110, 40 Am. Rep. 684; Fitzgerald v. Andrews, 15 Neb. 52, 17 N. W. 370. There was no error in the rulings complained of.

The defendant also offered to prove that the crop of melons sold by him did not realize more than enough to pay the rent of the land on which they were grown and for the hire of labor in gathering and shipping them; but this evidence was excluded, and such ruling is assigned as error. There was no error here. The statute violated forbids the sale of mortgaged property, and makes no exception in favor of the party who sells such property for less than enough, or only enough, to pay the rent of land on which it was produced and the hire of labor to gather and ship it.

Finding no error, the judgment of the court below in said cause is hereby affirmed, at the cost of Jackson county; the plaintiff in error having been adjudged to be insolvent.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

(124 La.)

No. 17,814.

H. L. BAIN & CO. v. OLIPHANT.

In re MORRIS & DICKSON CO., Limited.

(Supreme Court of Louisiana. Oct. 18, 1909.)

1. APPEAL AND ERROR (§ 124\*)—DECISIONS REVIEWABLE—DEFAULT JUDGMENT—RIGHT OF GARNISHEE TO APPEAL.

Though the failure of a garnishee to answer in a justice's court (or in city court of Shreveport) may be taken as an acknowledgment that he is indebted to the plaintiff in execution, and judgment may thereupon be rendered against him, such presumed admission of indebtedness is not a confession of judgment, in such sense to deprive the garnishee of his right of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 882; Dec. Dig. § 124.\*]

2. MANDAMUS (§ 57\*)—GROUNDS OF RELIEF—REINSTATEMENT OF APPEAL.

Mandamus may issue to compel the reinstatement of an appeal improperly dismissed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 120; Dec. Dig. § 57.\*]

(Syllabus by the Court.)

Action in the city court of Shreveport by H. L. Bain & Co. against Zach Oliphant. Plaintiff obtained judgment, and thereafter, under execution, garnished the Morris & Dickson Company, Limited, against whom judgment was rendered pro confesso. The Morris & Dickson Company, Limited, thereupon appealed to the district court, where the appeal was dismissed, and then it applied for writs of certiorari and mandamus to reinstate the same. Peremptory writ of mandamus granted.

Blanchard, Barrett & Smith, for relator. J. H. Stephens, Jr., for H. L. Bain & Co.

MONROE, J. Plaintiff obtained judgment against the defendant (Oliphant) in the city court of Shreveport for an amount aggregating, with interest and costs, \$140.56, and thereafter, under execution, garnished Morris & Dickson Company, Limited (the relator now before this court); and, it failing to answer within the delay allowed, judgment was rendered against it, pro confesso. It thereupon (two days later) moved that the judgment so rendered be set aside and a new trial granted, on the grounds that it owed defendant nothing; that its president is mayor of Shreveport, and "a very busy man"; that he gave the papers in the case to the bookkeeper, and, they not having been returned to the president, he inadvertently failed to give the matter any further consideration. The new trial was refused, and relator appealed to the district court, where plaintiff moved to dismiss, on the ground that an appeal does not lie from a judgment pro confesso, and, the motion having been sustained, the appeal was dismissed. Having applied, in vain, for a rehearing, relator now prays that this court issue a writ of mandamus directing the district court to reinstate the appeal. The judge of the district court answers that no appeal lies from a judgment by confession—

"and that the appeal in the instant case was from a judgment of the city court, rendered against the garnishee pro confesso, said garnishee having failed to answer the garnishment process served on him, and that, according to article 1123, Code Prac., such failure, or refusal to answer shall be considered as an acknowledgment of indebtedness to the defendant in a sufficient sum to discharge the demand, and judgment shall be rendered against him in favor of the plaintiff."

There can be no doubt that, under the article cited, the failure of the garnishee to answer authorizes a presumption upon the basis of which a judgment in favor of the seizing creditor may be predicated. But Act 226, p. 343, of 1908, provides that:

"Appeals from the judgments rendered by justices of the peace, in civil matters, \* \* \* shall be allowed irrespective of the amount in dispute. \* \* \*"

And there is nothing in the text of the law anywhere, so far as we are informed, which denies the right of appeal in such cases to the garnishee who is condemned by reason of his failure to answer.

It is true that Code Prac. art. 567, provides that the party against whom judgment has been rendered cannot appeal:

"(1) If such judgment has been confessed by him, or if he has acquiesced in the same by executing it.

"(2) If he has suffered the time prescribed by law for appealing to elapse."



But article 567 applies "only to the district and parish courts" (Code Prac. art. 124), and there is no such article under title 4, "Of Proceedings Before Justices of the Peace." It appears that relator has neither acquiesced in the judgment of the city court nor allowed the time prescribed by law for appealing to elapse, and that it could, therefore, be denied its appeal only upon the theory that it has confessed judgment. The most, however, that can be said upon the subject, is that its failure to answer certain interrogatories, inquiring whether it was indebted to defendant, was taken as an admission that it was so indebted. But a mere admission of indebtedness, though constituting a proper basis for a judgment, is not altogether the same thing as a judgment, and still less is that the case where the admission is not made as a fact, but arises from a presumption established by law and based upon acts or omissions which may have been caused by error, inadvertence, or misfortune.

It may happen, too, that a garnishee, for failing to answer, has been condemned in a case in which no legal service, or no service at all, has ever been made on him.

We are therefore of opinion that relator's appeal was improperly dismissed, and it is accordingly ordered, adjudged, and decreed that the alternative writ of mandamus, heretofore issued, be now made peremptory, that the relator's appeal be reinstated in the district court, and the case thereby presented heard and decided in due course.

(124 La.)

No. 17,754.

REYNOLDS v. EGAN.

(Supreme Court of Louisiana. Oct. 18, 1909.)

**1. APPEAL AND ERROR (§ 654\*)—OMISSIONS FROM TRANSCRIPT—RIGHT TO HAVE SAME SUPPLIED—MOTION TO SUPPLY MISSING DOCUMENTS.**

Appellant filed a motion suggesting the omission of the clerk of the district court of her motion and order of appeal and copy of bond of appeal.

The appellant produced copies in due time.

They were properly filed as part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2819; Dec. Dig. § 654.\*]

**2. APPEAL AND ERROR (§ 538\*)—RECORD OF ANOTHER SUIT ON APPEAL—RIGHT TO FILE FOR CONSIDERATION.**

There was another record in the clerk's office of the Supreme Court, involving similar questions. Appellant filed a motion to have it filed as part of the present case, for such reference as the court might deem proper.

The court ordered it to be filed.

The order is not rescinded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2406; Dec. Dig. § 538.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Mrs. Margaret Reynolds against

Mary L. Egan. Judgment for defendant, and plaintiff appeals. Motion by plaintiff to be allowed to file her motion, order of appeal, and a copy of her bond omitted by the clerk, and to be allowed to annex the transcript of another appeal. Motion granted.

See, also, 123 La. 114, 294, 48 South. 764, 940.

Carleton Hunt and Chas. Louque, for appellant. Benjamin Rice Forman, for appellee.

BREAUX, C. J. Plaintiff's demand for damages was dismissed on the 11th day of May, 1909.

She moved for an appeal, which was granted. The record of appeal was brought to this court and filed on the 28th of June, 1909. On June 30, 1909, her counsel filed a motion in this court, in which he alleged in behalf of his client that the clerk of the district court omitted from the transcript a copy of her motion, the order of appeal, and a copy of her bond.

In this motion appellant urged that he be allowed to file a certified copy of the record which the clerk had omitted to copy in the transcript.

A supplemental transcript containing these copies was brought up and filed.

In the motion containing the foregoing, appellant asked to be allowed to annex transcript No. 17,287—another appeal—and that it be considered in connection with the transcript in the appeal before the court in the present case, No. 17,754. The words "without prejudice" form part of the prayer of the motion.

There are, therefore, two questions before us for decision: One, whether missing documents shall be filed and the record of appeal be made complete; the other, whether record in No. 17,287 shall be annexed to and form part of the present appeal, and the issues it brings up here be considered.

The court granted the above motion to supply the missing record without prejudice on June 30, 1909.

The attorneys for Mrs. Egan object, and move the court to recall the order of June 30, 1909, and to dismiss the devolutive appeal of Mrs. Reynolds, because the allegation of incompleteness of the record is not true, as the transcript contains all needful proceedings, and because Mrs. Reynolds has not made the required deposit to meet costs of appeal.

The appellant had the right to have a correct transcript made part of the transcript.

The other objection was to annexing the record of another suit, and to the prayer of Mrs. Reynolds to have the issues in the case annexed considered at this time and decided in the case now pending before us.

The objection to the motion of appellant for an order to file another transcript, to

be considered by this court, is not maintained.

The filing of the transcript is not prejudicial. It cannot affect the issues one way or the other, except to the extent that they may have bearing in the present case.

The consolidation of the two cases by such a motion is not to be thought of. If such was the purpose of the motion, then it must fail of its purpose to that extent. The record of the other suit filed will be considered only if it contains evidence or brings issues which can or should be considered in deciding the present case, and no further.

As the two cases relate to the same issues, and the transcript brings issues that are germane, we think of no good reason to exclude the record filed, which will be considered to the extent before mentioned.

As relates to the costs of appeal: That is not a matter which can be brought up as an objection of the appellee to a motion to dismiss the appeal.

The motion of appellant is granted to the extent stated. It follows that defendant's objections to the motion are overruled.

(124 La.)

No. 17,883.

**FRISCOVILLE REALTY CO. v. POLICE JURY OF PARISH OF ST. BERNARD.**

In re FRISCOVILLE REALTY CO.

(Supreme Court of Louisiana. Oct. 18, 1909.)

**APPEAL AND ERROR (§ 361\*)—SUSPENSIVE APPEAL—APPLICATION.**

Since proceedings in the district courts are required to be in writing, a verbal application over the telephone for a suspensive appeal cannot serve as the basis of a proceeding in the Supreme Court to compel the judge to grant the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 361.\*]

Action by the Friscoville Realty Company against the Police Jury of the Parish of St. Bernard. On an order denying plaintiff's application for a suspensive appeal from an ex parte order dissolving an injunction on bond, he applies for mandamus, certiorari, and prohibition to require the granting of such appeal. Application denied.

Oliver S. Livaudais and Fred A. Ahrens, for relator. F. Estopinal and N. H. Nunez, for respondent.

PROVOSTY, J. Relator applies for a mandamus directing the judge of the lower court to grant him a suspensive appeal from an ex parte order dissolving an injunction on bond. Relator alleges that its application for the appeal was made over the telephone. This allegation is fatal to the application. Proceedings in the district courts must be in writing, and an application for appeal made verbally (and still less by telephone) cannot

serve as the basis for a proceeding in this court.

The application of relator is rejected at its cost.

(124 La.)

No. 17,557.

**MINOR'S ESTATE v. CRUSEL.**

(Supreme Court of Louisiana. Oct. 18, 1909.)

Rehearing Denied Nov. 15, 1909.)

**1. SALES (§ 163\*)—CONTRACT—BREACH BY SELLER.**

Defendant, having contracted to furnish plaintiff 20,000 barrels of oil, deliverable during certain months at defendant's option, breached the contract by notifying plaintiff that he could not deliver more, after having delivered 16,335 barrels.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 163.\*]

**2. SALES (§ 417\*)—CONTRACT—BREACH—DAMAGES—MARKET VALUE—EVIDENCE.**

Defendant contracted to deliver to plaintiffs 20,000 barrels of oil, at 58 cents a barrel, between February and September, 1906, and, after delivering 16,335 barrels, wrote plaintiffs, on February 14, 1907, that he was unable to deliver any more, offering, however, to purchase their supply for the ensuing year at a price that would save them from loss, and advising them not to make purchase at present; that sales were then being made at 96 cents to \$1 a barrel f. o. b. shipping point, which, with freight added, made the cost at point of delivery \$1.27 to \$1.32 per barrel. Plaintiffs, in May, 1907, contracted for 12,000 barrels at \$1.33 delivered, and sued for the difference. Held, that such facts sufficiently showed that \$1.33 per barrel was the market price at the point of delivery at the time of defendant's breach.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 417.\*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by the estate of H. C. Minor against J. Edward Crusel. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Lapeyre and Hall & Monroe, for appellant. Clegg, Quintero & Gidliere, for appellee.

PROVOSTY, J. The plaintiffs, John D. Minor and others, are the owners of the Southdown plantation, situated near Houma, in the parish of Terrebonne, which plantation uses oil as fuel in its sugar mill or refinery. The defendant is an oil dealer and purchaser operating in the Jennings and other oil fields. In January, 1906, the parties entered into a contract for 20,000 barrels of oil at 58 cents per barrel delivered on the plantation, shipments at option of seller between February and September. After 16,335 barrels had been delivered under the contract, defendant, on February 14, 1907, wrote to plaintiffs that he was unable to make any further delivery. This was a clear default on the contract; but, for greater precaution, the plaintiffs made a formal demand upon defendant through their attorneys. Plaintiffs

were then already in the market for the purchase of 12,000 to 15,000 barrels for the ensuing crop. Defendant offered them his service for making this purchase, representing that if they would allow him time, and would not bring suit, he could make it at a price sufficiently low to offset any loss they might otherwise suffer from his default on the other contract. At that time plaintiffs had already been canvassing the market for making this purchase. They continued to do so, and eventually, in May, 1907, contracted for 12,000 barrels at \$1.33 delivered on the plantation, shipments at option of seller between date of contract and September, 1907. During this time the lowest offer defendant made to plaintiffs under his tender of services was \$1.34 delivered on plantation. The present suit is for the difference between the 58 cents per barrel, contract price for the 3,665 barrels which defendant failed to deliver under his contract, and \$1.33 per barrel, market price at the time the oil should have been delivered.

Defendant acknowledges his default and his liability, but contends that there is no proof in the record of what was the market price of oil at the time in question.

There is abundant evidence that plaintiffs canvassed the market at that time and continuously thereafter, and that the best price which could be secured was the \$1.33 per barrel. But this canvassing, and the purchase of the 12,000 barrels of oil, were, says defendant, for future, and not for immediate delivery, and hence are no criterion of the market price of oil for immediate delivery.

No reason is assigned why the price of oil for delivery in the course of the ensuing few months should be higher than that for immediate delivery, or, if it is, why the difference should not be offset by the diminution in price which the evidence shows attends a large transaction—the purchase, for instance, of as much as 12,000 barrels, instead of 3,665.

The purchase thus made by plaintiffs in good faith, after every effort to secure the lowest possible price, is, we think, a sufficiently safe criterion.

Defendant's tender of services for purchasing the 12,000 to 15,000 barrels of oil was made in the same letter in which he announced his inability to make further delivery under his contract. He added that he advised plaintiffs not to make the purchase just then, because, he said:

"The sales being made now are bringing 95 cents to \$1 per barrel f. o. b. cars at shipping point."

The prices thus named by defendant are those at shipping point. Now, if we add to them the cost of transportation from shipping point to plantation, namely, 32 cents per barrel, we have \$1.27 and \$1.32 per barrel as having been the ruling price for Feb-

ruary—figures which, with the admitted continuous rise in the market, would easily account for the \$1.33 which plaintiffs found themselves compelled to pay in May.

The very delay of plaintiffs in making purchase—in May, instead of in February, or thereabouts—defendant complains of. But this he does with a bad grace, since it was largely at his instance.

We are satisfied that, if any material discrepancy had existed between the price at which plaintiffs bought the 3,665 barrels which had failed of delivery and the market price, defendant, a dealer in oil, and therefore perfectly familiar with this market price, would have taken the trouble to show it on the trial.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that the plaintiffs have judgment against the defendant, J. Edward Crusel, in the sum of \$2,748.75, with 5 per cent. per annum interest thereon from April 22, 1907, and the costs of this suit.

(124 La.)

No. 17,740.

BENEDICT et al. v. PASLEY et al.

(Supreme Court of Louisiana. Nov. 2, 1909.)

1. APPEAL DISMISSED BELOW.

The appeal was dismissed in the district court for want of proper bond.

2. NO APPEAL TAKEN.

No objection was raised to the proceedings in the district court, taken to the end of having the appeal dismissed. No appeal was taken from the judgment dismissing the appeal.

3. APPEAL AND ERROR (§ 475\*)—SUSPENSIVE APPEAL BOND—SUFFICIENCY—POWER OF DISTRICT COURT.

That court had jurisdiction to pass on the sufficiency of the bond of appeal. It will not reinstate the appeal dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 475.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Jane West Benedict and others against Mrs. George Pasley and others. Judgment for plaintiffs, and defendants appeal. Plaintiffs move to dismiss the appeal. Appeal dismissed.

Armand Romain, for appellants. Cage, Baldwin & Crabites, for appellees.

On Motion to Dismiss.

BREAUX, C. J. The action was petitory. Plaintiff Mrs. Jane W. Benedict claims one-half of the property as the survivor in community, and the heirs the remainder.

Defendants did not sustain their defense in the district court. That court rendered judgment in favor of plaintiffs on the 21st day of May, 1909.

On June 1, 1909, defendants and appel-

lants, through counsel, filed a motion for a suspensive appeal on a bond of \$250. On July 7, 1909, the plaintiffs and appellees appeared in the district court and filed a rule to dismiss the appeal.

After having heard evidence and argument, the district court ordered defendants in rule—appellants here—to furnish an additional bond of appeal in the sum of \$600, with good and solvent surety, and in default of furnishing such a bond in five days the appeal to be dismissed; that is, the original bond was for \$250. The district court did not think it was large enough, and for that reason ordered an increase of \$600.

After the five days had elapsed, the appeal was dismissed by the district court.

In this court motion was filed asking for a dismissal of the appeal.

The prayer of the appellees, we have noted, was granted in the district court. No appeal was taken from the judgment of the district court dismissing the appeal. That court had jurisdiction, subject to appeal, to inquire into the sufficiency of the bond. *Edwards v. Edwards*, 29 La. Ann. 599; *Succession of Charmbury*, 34 La. Ann. 21; *Surget v. Stanton*, 10 La. Ann. 318; *Wood v. Harrell*, 14 La. Ann. 61; *Vredenburg v. Behan et al.*, 32 La. Ann. 475.

Whenever evidence is produced to show that the bond is insufficient, the district court has jurisdiction to hear evidence and argument, and primarily to pass upon the weight and effect of the testimony, and decide whether or not the bond is sufficient.

The court *a qua* exercised that jurisdiction. No complaint was raised. The appellants tacitly adopted the correctness of the ruling of the district court directing them to furnish additional surety within the time specified.

The court, in issuing the supplemental order of appeal, in regard to the question of its necessity, acted upon evidence produced, which is not before us, and no objection is urged to its nonproduction on appeal.

In the absence of all complaint that the court has gone beyond its jurisdiction, or has exceeded the discretion with which it is invested, it only remains for us to dismiss the appeal.

The appeal is dismissed.

(124 La.)

No. 17,497.

HARVEY v. HARVEY.

(Supreme Court of Louisiana. Oct. 18, 1909.  
Rehearing Denied Nov. 13, 1909.)

1. ASSAULT AND BATTERY (§§ 12, 34\*)—ACTIONS FOR DAMAGES—MITIGATION.

More abusive words, however insulting and irritating, will not justify an assault and battery; but, in a civil action for damages, such

provocation may be considered in mitigation of damages.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 10, 48; Dec. Dig. §§ 12, 34.\*]

2. APPEAL AND ERROR (§ 1002\*)—REVIEW—QUESTIONS OF FACT.

In actions for damages, where the evidence is conflicting, the verdict of the jury is entitled to great weight, both on the facts and the quantum of damages.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Edna L. Harvey against Horace H. Harvey. Judgment for plaintiff, and defendant appeals. Affirmed.

Dart & Kernan, for appellant. Charles Louque, for appellee.

LAND, J. Plaintiff sued for damages for an alleged malicious slap in the face administered by the defendant, who for answer admitted the assault and battery, but pleaded son assault demeane in the way of a violent kick, and that the plaintiff provoked the difficulty.

A divided jury found a verdict in favor of the plaintiff for the sum of \$500 and costs.

The trial judge seriously doubted the correctness of the finding of the jury, but at the same time overruled defendant's motion for a new trial, to the end that "this unfortunate family disturbance be finally settled" by a judgment of the Supreme Court.

The defendant has appealed, and it becomes out duty to review the verdict, both on the law and the facts.

Plaintiff is a divorced woman, who has resumed her maiden name. She is a niece of the defendant, who was secretary and manager of the Harvey Canal Company. Plaintiff was a stockholder of the same corporation, and was also president and manager of a brick manufacturing company, located on the Harvey Canal, and using the same for the purposes of transportation. It appears that there was friction between the plaintiff and the defendant over business matters, and that plaintiff, womanlike, had aired her grievances in the community.

On July 23, 1907, the plaintiff went to the defendant's office for the purpose of using the long-distance telephone. Defendant came in, and a conversation arose over the payment of canal tolls due by the plaintiff. According to plaintiff's version, she owed tolls, but did not know the amount, and, on so saying, the defendant contemptuously remarked, "Such brains!" and also denied any knowledge of a certain agreement relating to tolls which the plaintiff asserted she had made with the company.

Defendant's version, in the main corroborated by the testimony of his bookkeeper, is

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that, on his request for a settlement of tolls, the plaintiff flew into a violent passion, and poured forth a torrent of abusive language, relative to the manner in which the defendant had treated herself and others in business transactions.

Thereupon the defendant left his office and walked rapidly down the hall toward the front porch. The plaintiff immediately followed on his heels, crying, "You snake in the grass!"

When the parties reached the porch, a "fight" ensued.

Defendant testified that the plaintiff, coming on the porch, called him a "hound" and kicked him. Plaintiff testified that she did not kick him, or attempt to kick the defendant, and did not use such abusive epithet, but that, when she reached the porch, the defendant turned and slapped her in the face. The only witness who claims to have seen the beginning of the affray testified that the defendant struck the first blow; and the defendant himself stated to a friend that he had slapped plaintiff because of "words" spoken by her. It does not appear that the defendant, on the occasion in question, stated to any one that the plaintiff had kicked him.

On the conflicting evidence in the record, we are not prepared to say that the defendant has sustained his plea of self-defense; but it abundantly appears from the testimony of independent witnesses that the plaintiff, after insulting and abusing the defendant in his office, followed him to the porch, still villifying him.

Of course, in criminal law, mere insulting words do not justify an assault and battery. They, however, constitute provocation, and the question is what effect provocation has in a case of this kind.

This court, in *Masset v. Keff*, 116 La. 1107, 41 South. 330, where the plaintiff sued for damages for assault and battery, said:

"He was, therefore, the offender and aggressor from beginning to end, and his case falls within the doctrine that he who is in fault, and sues for damages resulting therefrom, cannot recover for the injuries inflicted on him, although the perpetrator was not justified in law in his conduct"—citing a number of authorities.

In *Johns v. Brinker*, 30 La. Ann. 241, the plaintiff, a chambermaid on a steamboat, sued defendant, the captain, for damages for assault and battery. This court, finding that the blow complained of was provoked by the plaintiff's insolence, insubordination, and threats of personal violence, affirmed the verdict in favor of the defendant. In all the cases in our own Reports on this subject which have been cited by counsel there was some act of physical aggression or threat of violence on the part of the complainant. In *Masset v. Keff*, 116 La. 1107, 41 South. 330, there were villification, threats, and a hostile attitude, which induced the defendant to believe that he was about to be assailed.

Where the alleged provocation consists of mere abusive words, however much they may be calculated to excite and irritate, they will not justify an assault and battery; but in a civil action such provocation may go in mitigation of damages. *Richardson v. Zuntz*, 26 La. Ann. 313. This rule is in accord with the general jurisprudence on the subject. See 4 Cent. Dig. Assault and Battery, 48 (C).

Hence the provocation in this case does not excuse or justify the assault and battery in question, but merely constitutes a mitigating circumstance in favor of the defendant.

Considering the state of public sentiment on the subject of assaults and batteries by men or women, we are persuaded that the jury, in assessing the damages, gave the defendant the benefit of all the mitigating circumstances of the case. We must assume that the jury found that the defendant did not strike in self-defense. If the provocation had not been considered, the verdict would in all probability have been for a much larger amount. We cannot say that the verdict is excessive on the facts disclosed by the record.

Defendant complains of the exclusion of evidence tending to show that the plaintiff on some former occasion kicked another man, without cause or provocation, in the same manner in which she attempted to kick the defendant, according to the averments of his answer.

The relevancy of such evidence in a case of this kind is, to say the least, too remote to affect the final result, and its admission would have confused the issues before the jury, by leading them into the investigation of the right or wrong of plaintiff's conduct in another affray with a different person. Counsel for defendant has not deemed the exclusion of such evidence of sufficient importance to request the remanding of the case for a new trial.

It is therefore ordered that the verdict and judgment be affirmed; defendant to pay costs of appeal.

Mr. Justice PROVOSTY takes no part, not having heard the argument.

(124 La.)

No. 17,717.

LANDRY v. RAMOS LUMBER & MFG. CO.,  
Limited.

In re RAMOS LUMBER & MFG. CO.,  
Limited.

(Supreme Court of Louisiana. Nov. 2, 1909.)

1. CERTIORARI (§ 29\*)—TIME FOR APPLICATION  
—EFFECT OF FAILURE TO APPLY IN TIME.

Unless the application for the review of a judgment rendered by a Court of Appeal be made within the time allowed by article 101 of the Constitution (that is to say, within 30 days after the rendition and entry of the judgment

refusing a rehearing), this court is prohibited from exercising such jurisdiction.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 57, 60; Dec. Dig. § 39.\*]

## 2. CERTIORARI (§ 39\*)—TIME FOR APPLICATION—COMMENCEMENT OF RUNNING.

The delay within which an application for the review of a judgment rendered by a Court of Appeal must be made begins to run from the rendition and entry of the judgment in the Court of Appeal, and not from the date upon which such judgment may be filed in the district court.

[Ed. Note.—For other cases, see *Certiorari*, Dec. Dig. § 39.\*]

## 3. CERTIORARI (§ 66\*)—REVIEW—PRESUMPTION.

Where, upon the face of the record, it appears that a judgment was rendered by a Court of Appeal on a particular day, and was filed on that day by the clerk of the court, it will be presumed, in the absence of any suggestion to the contrary, that it was entered upon the minutes on the same day.

[Ed. Note.—For other cases, see *Certiorari*, Dec. Dig. § 66.\*]

(Syllabus by the Court.)

Action by Louis Landry against the Ramos Lumber & Manufacturing Company, Limited. Plaintiff had judgment, which was affirmed in a Court of Appeal, and defendant applies for certiorari or writ of review to the Court of Appeal. Application dismissed.

Beattie & Beattie, for applicant. Marks, Wortham & Le Blanc, for respondents.

MONROE, J. Plaintiff obtained a judgment in the district court, which was affirmed in the Court of Appeal by judgment rendered on April 14, 1909. A rehearing was applied for, and was denied by a judgment rendered in chambers and filed on May 8, 1909, and which we are bound to assume (there being no suggestion to the contrary) was entered upon the minutes upon the day that it was rendered and filed. This application was made more than 30 days afterwards. Counsel for plaintiff, suggesting the facts stated (which appear upon the face of the record) and the law applicable thereto, move that the application for review be dismissed, as not having been made within the delay allowed by law. Counsel for the applicant call attention to the fact that the decree of the Court of Appeal denying the rehearing was filed in the district court on May 13, 1909, and contend that the delay allowed for this application began to run from that date.

The Constitution (article 101), in providing for the review by this court of judgments rendered by the Courts of Appeal, declares:

"That the Supreme Court shall, in no case, exercise the power conferred on it by this article unless the application be made to the court, or to one of the justices thereof, not later than thirty days after the decision of the Court of Appeal has been rendered and entered."

And Act No. 191, p. 437, of 1898 (section 2), reads, in part:

"That, within 30 days after the rendition and entry of a judgment in any case by the Court of Appeal, the party cast in the suit or any other person, in interest, who may feel aggrieved thereby, shall have the right to bring the case before the Supreme Court. \* \* \*

"The party desiring to avail himself of the remedy provided by this section, pursuant to the provision of article 101 of the Constitution, shall, within the delay above mentioned, file, in the clerk's office of the Supreme Court, his petition and application," etc.

We think it clear that the date at which the decree of the Court of Appeal was filed in the district court has no bearing upon the question at issue, and that, the application now under consideration having been made after the expiration of the time allowed, this court is prohibited by the Constitution from exercising the jurisdiction invoked. *Rimmer v. Jones*, 117 La. 910, 42 South. 421.

It is therefore ordered, adjudged, and decreed that the order heretofore made in this case be rescinded, and that this application be dismissed, at the cost of the applicant.

(124 La.)

No. 17,718.

AUCOIN v. RAMOS LUMBER & MFG. CO., Limited.

In re RAMOS LUMBER & MFG. CO., Limited.

(Supreme Court of Louisiana. Nov. 2, 1909.)

## CERTIORARI (§ 40\*)—TIME FOR APPLICATION—EFFECT OF FAILURE TO APPLY IN TIME.

This court is without jurisdiction to review a judgment rendered by a Court of Appeal, when the application for such review was made after the expiration of the delay allowed by article 101 of the Constitution.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 58; Dec. Dig. § 40.\*]

(Syllabus by the Court.)

Action by Helena Aucoin against the Ramos Lumber & Manufacturing Company, Limited. Plaintiff had judgment, which was affirmed by a Court of Appeal, and defendant applies for certiorari or writ of review to the Court of Appeal. Application dismissed.

Beattie & Beattie, for applicant. Marks, Wortham & Le Blanc, for respondents.

MONROE, J. In this case, as in the case of *Louis Landry v. Ramos Lumber & Manufacturing Co., Ltd.* (No. 17,717, this day decided) 50 South. 593, the application for the writ of review was made after the expiration of the delay allowed by article 101 of the Constitution; the dates upon which the judgments were rendered and entered and upon which the applications for review were made having been the same in both cases. This court is therefore, and for the reasons fully stated in the case referred to, without jurisdiction to review the judgment here complained of; and it is accord-

ingly adjudged and decreed that this application be now dismissed, at the cost of the applicant.

(124 La.)

No. 17,719.

**SIMONEAUX v. RAMOS LUMBER & MFG. CO., Limited.**

In re RAMOS LUMBER & MFG. CO., Limited.

(Supreme Court of Louisiana. Nov. 2, 1909.)

**CERTIORARI (§ 40\*)—TIME FOR APPLICATION—EFFECT OF FAILURE TO APPLY IN TIME.**

This court is without jurisdiction to review a judgment rendered by a Court of Appeal, when the application for such review is made after the expiration of the delay allowed by article 101 of the Constitution.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 68; Dec. Dig. § 40.\*]

(Syllabus by the Court.)

Action by Elles Simoneaux against the Ramos Lumber & Manufacturing Company, Limited. Plaintiff had judgment, which was affirmed by a Court of Appeal, and defendant applies for certiorari or writ of review to the Court of Appeal. Application dismissed.

Beattie & Beattie, for applicant. Marks, Wortham & Le Blanc, for respondents.

**MONROE, J.** In this case, as in the case of *Louis Landry v. Ramos Lumber & Manufacturing Co., Ltd.* (No. 17,717, this day decided) 50 South, 593, the application for the writ of review was made after the expiration of the delay allowed by article 101 of the Constitution; the dates upon which the judgments were rendered and entered and upon which the applications for review were made having been the same in both cases. This court is therefore, and for the reasons fully stated in the case referred to, without jurisdiction to review the judgment here complained of; and it is accordingly adjudged and decreed that this application be now dismissed, at the cost of the applicant.

(124 La.)

No. 17,928.

**STATE ex rel. MULLER, Dist. Atty., et al. v. CYR et al.**

In re CYR et al.

(Supreme Court of Louisiana. Nov. 2, 1909.)

**1. SCHOOLS AND SCHOOL DISTRICTS (§ 53\*)—REMOVAL OF MEMBERS OF SCHOOL BOARD—STATUTES—CONSTRUCTION.**

Under Acts 1902, p. 408, No. 214, § 6, providing that for incompetency, neglect of duty, or malfeasance in office the Governor may remove members of the parish boards of school directors, subject to the ratification of the State Board of Education, a removal by the state board is not a removal by the Governor; the action of the board, even though the Governor be a member and vote with the majority,

not being his action, and his mere approval not satisfying the statute.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 53.\*]

**2. SCHOOLS AND SCHOOL DISTRICTS (§ 53\*)—REMOVAL OF MEMBERS OF SCHOOL BOARD—CAUSES—STATUTES—CONSTRUCTION.**

Acts 1902, p. 408, No. 214, § 6, providing that for incompetency, neglect of duty, or malfeasance in office the Governor may remove members of the parish boards of school directors, is restrictive, and does not authorize a removal for "the deplorable condition of the school affairs of the parish," since such condition may have resulted from causes entirely disconnected with any incompetency, etc., on the part of members of the board.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 53.\*]

Action by the State, on the relation of A. N. Muller, District Attorney, and others, against Paul N. Cyr and others. Judgment for relators, and respondents apply for writs of certiorari and prohibition. Judgment set aside, and suit dismissed.

Andrew Thorpe and Cammack & Broussard, for relators. Anthony N. Muller and Porteus R. Burke, for respondents.

**PROVOSTY, J.** The relators were elected members of the school board of the parish of Iberia at the election of November, 1908, in pursuance of Act No. 60, p. 92, of 1906. They qualified duly, and were in office when on June 19, 1909, the State Board of Education adopted the following resolution:

"Resolved, that, owing to the deplorable condition of the school affairs in the parish of Iberia, the State Board of Education deems it necessary to remove from office the parish board of directors of the parish of Iberia, and does by these presents remove the said parish school board of the said parish of Iberia.

"Resolved, further, that the State Board of Education elects the following as the parish board of directors of the parish of Iberia: First ward, E. D. Guidry, vice president, removed; Second ward, Henry N. Pharr, vice A. C. Dublon, removed; Third ward, George L. Fisk, vice L. L. Gonsoulin, removed; Fourth ward, Dr. Guy A. Shaw, vice John D. Walet, removed; Fifth ward, Adolph Romero, vice Edward Leblanc, removed; Sixth ward, G. A. King, vice Eugene Guillot, removed; Seventh ward, E. T. Weeks, vice J. W. Eckart, removed; Sixth ward, Edgar Delhommer, vice A. B. Murray, resigned; Seventh ward, Michel Delcambre, vice A. D. Delcambre, removed; Eighth ward, Dr. E. D. Tarleton, vice H. R. Minvielle, removed; Eighth ward, St. Paul Bourgeois, vice Paul N. Cyr, removed.

"Resolved, further, that in the event that any of the above mentioned, named as the parish school board of the parish of Iberia, shall fail or refuse to qualify, then in that event the Governor be and he is hereby authorized and empowered to fill such vacancies."

The persons elected by this resolution were commissioned by the Governor, and they qualified under said commission, and have brought the present suit (under the intrusion into office act) against the relators to have themselves recognized as the legal school board of said parish.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The authority of the State Board of Education to remove the relators is said to be derived from section 6 of Act No. 214, p. 408, of 1902, which reads as follows:

"Be it further enacted, etc., that for incompetency, neglect of duty, or malfeasance in office, the Governor may remove a member or members of the parish boards of school directors, subject to the ratification of the State Board of Education."

Relators contend that, by said section, the authority to remove is vested in the Governor, and not in the State Board of Education; and so in fact the section reads. But the plaintiffs contend that, the Governor being a member of the board, a removal by the board is a removal by him—especially that the admission is made of record that he "concurred in the resolution." We do not think that a removal by the State Board of Education is a removal by the Governor. The action of the board, even though the Governor be a member, and even though voting with the majority, is not the action of the Governor. This conclusively appears from the fact that a measure might be validly adopted by the board, though the Governor disapproved of it, and actually voted against it. The removal is required by said section 6 to be the act of the Governor himself as Governor. In the present case, it has not been such. The most that can be said is that it has had his approval. A mere approval does not satisfy the statute. Ours is a government by public opinion. The power confided to an officer is accompanied by responsibility before the tribunal of public opinion for its exercise. If the removal of the relators in this case were allowed to stand, the responsibility for it would rest, not upon the Governor, but upon the State Board of Education. The Governor would merely have approved the act of the State Board of Education.

Relators also contend that the specification, in said section 6 of Act No. 214, of the cause for which the removal is authorized, is restrictive, and that consequently a removal for any other cause is unauthorized. There can be no serious question of the soundness of this proposition. 29 Cyc. 1410. Nor can it be seriously said that the cause assigned in said resolution, viz., "the deplorable condition of the school affairs of the parish," is convertible with any one or all of the causes specified by section 6, viz., "incompetency, neglect of duty, or malfeasance in office." The alleged "deplorable condition," if it really existed, may have come about from causes entirely disconnected with any "incompetency, neglect of duty, or malfeasance in office" on the part of the members of the school board. For instance, the present squabble between the two school boards has brought about a deplorable condition in the school affairs of said parish, and for this de-

plorable condition the plaintiffs are as much responsible as the relators; and yet no imputation of incompetency, neglect of duty, or malfeasance in office is laid at the door of either plaintiffs or relators.

Relators also contend that the said section 6 of Act No. 214 was repealed by Act No. 60 of 1906, and also that said section 6 is unconstitutional. As, however, we have concluded that no removal has been made in this case, we do not feel called upon to consider whether a removal, if made, would be valid. And for the same reason we do not deem it necessary to follow plaintiffs into the inquiry how far a removal may be made without notice or hearing, and without assigning a cause, in a case where the power of removal is conditional upon there being a certain specified cause, or certain specified causes.

The judgment of the district court is set aside, and the suit of the plaintiffs is dismissed, at their costs.

(124 La.)

No. 17,760.

MOORE v. GULF REFINING CO. et al.

(Supreme Court of Louisiana. Nov. 2, 1909.)

PARTITION (§ 7\*)—SALE OF MINOR'S INTEREST ALONE—VALIDITY.

Where, in what purports to be a partition proceeding, the interest of a minor alone in the property is sold at private sale, the purchaser acquires no title. The law requires a sale, whether public or private, to effect a partition of property in which a minor is interested, to be made of the whole property, and this whether the purchaser be the co-owner or a third person.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 18; Dec. Dig. § 7.\*]

Breaux, C. J., and Land, J., dissenting.

(Syllabus by the Court.)

Action by Dudley G. Moore against the Gulf Refining Company and others. Judgment for plaintiff and the Gulf Refining Company appealed to the Court of Appeal, which court certifies questions to the Supreme Court. Questions answered.

Blanchard, Barret & Smith, for appellant. Pugh, Thigpen & Herold, for appellees.

MONROE, J. The Court of Appeal, Second Circuit, certifies the following question for decision, to wit:

"Whether, when a tract of land (160 acres) in which a minor has an interest is sold at private sale to effect a partition, the whole property must be sold, or may such sale be made of the minor's interest only, after a family meeting has advised its sale and appraised its value and fixed the terms of sale, and after the judge has homologated and approved the proceedings of the family meeting? That is to say, the family meeting, convoked at the instance of the tutor of the minor, having considered it to be to the interest of the minor to sell in order to effect a partition, and having considered it to be to the in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



terest of the minor to sell at private sale to effect the partition, and having agreed upon the appraised value of the minor's interest in the property, and fixed the terms of the sale—the undertutor being present and concurring, and the judge having approved all this—and thereupon the tutor of the minor, acting under this authority, sells the minor's interest at private sale, and the same is bought by the minor's co-owner, at the valuation agreed upon at the family meeting and upon the terms of sale fixed by the family meeting, to wit, cash, and the tutor received the price, does the vendee in such case acquire a good title?"

The law applicable to the immediate questions at issue, as found in the Revised Civil Code, reads as follows:

"Art. 1339. When the property is indivisible by its nature, or when it cannot be conveniently divided, the judge shall order, at the instance of any one of the heirs, on proof of either of those facts, that it be sold at public auction. \* \* \*

By subsequent legislation, incorporated in the Revised Statutes of 1870, it was provided:

"Sec. 2667. When heirs of a succession hold property in common and it is the wish of any one of them, or of a minor, represented by his tutor or tutrix, to effect a partition, on the advice of a family meeting, duly convened according to law to represent the minor or minors, said property may be sold at private sale, for its appraised value, said appraisement to be made and the terms of said sale to be fixed by the family meeting and said proceedings to be homologated by the judge of probate of the parish in which the said minor resides."

In 1878 an act was passed (Act No. 25, p. 47, of the session of that year), the provisions of which are identical with those of the section 2667 above quoted, save that, whereas, the pre-existing law applied only to the case "where the heirs of a succession" hold property in common, the act of 1878 applies to all cases "where two or more persons, some or all of whom are minors, hold property in common. \* \* \*

When all the owners in common are majors, they are, and have always been, at liberty to make an extrajudicial partition, and in so doing may, by consent, have the property sold at public auction or at private sale as they think proper. But, where minors were interested, a judicial partition was formerly required (Rev. Civ. Code, art. 1323), and where, in a judicial partition, a sale was necessary, it was required that such sale be made at public auction (Rev. Civ. Code, art. 1339). It was, then, deemed advisable to permit property held in common by the heirs of a succession, including minors, to be sold at private sale in order to effect a partition, and it was so provided. Rev. St. § 2667. And later it was thought advisable to authorize such sale in all cases where property, indivisible in kind and in which minors were interested, is to be partitioned, and the act of 1878 was adopted for the accomplishment of that purpose. No one has ever doubted that, under Rev. Civ. Code, art. 1339, it was necessary to sell the entire property; the idea being that, the property itself being indivisible, or not being susceptible of con-

venient division, the partition should be effected by its sale and a division of the proceeds. The article reads:

"Where the property is indivisible, \* \* \* the judge shall order \* \* \* that it" (i. e., the property) "shall be sold at public auction. \* \* \*

The act of 1878 reads (so far as it need be quoted):

"When two or more persons, some or all of whom are minors, hold property in common, and it is the wish of any one of them, or of a minor, represented by his tutor or tutrix, to effect a partition, on the advice of a family meeting, \* \* \* said property may be sold at private sale for its appraised value, said appraisement to be made and the terms of said sale to be fixed by the family meeting."

As to the requirement that, in a sale to effect the partition of property in which minors are interested, the entire property shall be sold, there has, therefore, been no change whatever in the law since the adoption of the Civil Code, and, so far as we have been able to discover, the propriety of such requirement is as manifest now as then, since the offer of a fractional interest is no more tempting to the average purchaser to-day than it would have been a century ago.

We regard the proceeding, the validity of which we are here called on to determine, as one which had for its purpose, not the partitioning of the property in question, whether in kind or by licitation, but merely the sale to her co-owner of the minor's interest therein. It therefore lacks the essential element of a partition proceeding (i. e., the intention to divide the property in kind, or to sell it and divide the proceeds); and, as there was no pretense of compliance with the law regulating the alienation of the property of minors, we are of opinion that the attempted alienation was abortive, and that the purchaser acquired no title. The argument of inconvenience should not be allowed to operate a change in a law, which has never been interpreted by this court otherwise than in accordance with what appears to be its plain meaning, and the wisdom of which, as so interpreted, has never been questioned by the lawmaking power.

We therefore adhere to the view, adopted by this court in the case of *Gallagher v. Lurges et al.*, 116 La. 755, 41 South. 60, and, doing so, answer the question propounded in the negative.

BREAUX, C. J., dissents.

LAND, J. (dissenting). The question submitted to us is as follows, viz.:

"Whether, when a tract of land (160 acres) in which a minor has an interest is sold at private sale to effect a partition, the whole property must be sold, or may such sale be made of the minor's interest only, after a family meeting has advised its sale and appraised its value and fixed the terms of sale, and after the judge has homologated and approved the proceedings of the family meeting? That is to say, the family meeting, convoked at the instance of the tutor

of the minor, having considered it to be the interest of the minor to sell in order to effect a partition, and having considered it to be the interest of the minor to sell at private sale to effect the partition, and having agreed upon the appraised value of the minor's interest in the property, and fixed the terms of the sale—the undertutor being present and concurring, and the judge having approved all this—and thereupon the tutor of the minor, acting under this authority, sells the minor's interest at private sale, and the same is bought by the minor's co-owner at the valuation agreed upon at the family meeting, and upon the terms fixed by the family meeting, to wit, cash, and the tutor received the price, does the vendee in such a case acquire a good title?"

Act No. 25, p. 47, of 1878, provides as follows:

"When two or more persons, some or all of whom are minors, hold property in common, and it is the wish of any one of them, or, if a minor, represented by his tutor or tutrix, to effect a partition on the advice of a family meeting, duly convened according to law, to represent the minor or minors, said property may be sold at private sale for its appraised value, said appraisement to be made and the terms of said sale to be fixed by the family meeting, and said proceedings to be homologated by the judge of probates of the parish in which said minor resides."

The purpose of this statute is to dispense with a judicial partition of particular property wherein minors have an interest, as required by article 1323 of the Revised Civil Code, and to substitute therefor a private sale when recommended by the advice of a family meeting duly homologated by the court. The statute protects the minor co-owners by requiring the appraisement to be made by a family meeting, composed of the relatives or friends of the minor, and a sale for not less than the appraised value and on the terms fixed by the family meeting. If the major co-owner is willing to sell on the basis thus fixed, the whole property may be sold at private sale. Where the whole property is sold to a third person, the tutor and the major co-owner must necessarily join in making the deed of conveyance of the property.

Can a co-owner become a purchaser under the provisions of Act No. 25, p. 47, of 1878? There is no such inhibition in the words of the statute, nor is it necessarily implied from the general provision that "the property may be sold at private sale for its appraised value."

Article 2445 of the Revised Civil Code reads:

"All persons may buy and sell except those interdicted by law."

We can find in the Civil Code no such interdiction as to co-owners. On the contrary, the Civil Code provides that coheirs, whether majors or minors, may purchase at a public partition sale to the amount of their portion and may retain the price. Articles 1343, 1344. The same rule applies to a judicial partition between ordinary co-owners. Arti-

cle 1290. I therefore conclude that a co-owner may purchase at a private partition sale made under the provisions of Act No. 25, p. 47, of 1878.

If the major co-owner can so purchase, the transaction necessarily assumes the form of a transfer to him of the minor's undivided interest in the common property, because no one can make a sale to himself. In such a case the co-owner retains his interest at its appraised value, and occupies the position as a co-owner purchasing at a public sale for a partition to the extent of the amount of his portion. Rev. Civ. Code, arts. 1343, 1344.

Where the minor's interest is thus sold at its appraised value to his co-owner, the indivision terminates, as the whole title becomes vested in the purchaser.

The minor co-owner, selling his interest to effect a partition, has always his remedy in cases of fraud or lesion. Rev. Civ. Code, arts. 1397-1399. In the case here presented there is not the slightest suggestion of injury to the minor, or that the sale was not intended for the purpose of a partition, as in *Parker v. Ricks*, 114 La. 942, 38 South. 687.

The case of *Gallagher v. Lurges et al.*, 116 La. 755, 41 South. 60, differs in its facts, and there were other grounds of illegality sufficient to support the decree rendered in that case.

Act No. 25, p. 46, of 1878, provides for a partition by private sale if any one of the co-owners wishes it, and a private sale cannot be made without the consent of all the co-owners. If a co-owner cannot purchase, then by refusing to consent he may prevent a sale to any other person. If the minor receives the full appraised value of his interest in the property, it matters not whether the purchaser be the co-owner or a third person.

I therefore dissent from the views of the majority.

(124 La.)

No. 17,730.

I. TRAGER CO. v. CAVAROC CO., Limited. (Supreme Court of Louisiana. Nov. 2, 1909.)

1. JUDGMENT BELOW ACCEPTED.

The lessor having accepted the judgment rendered in the district court as correct, the issue is limited accordingly.

2. RECEIVERS (§ 77\*)—RIGHT OF PLEDGE—RENT SECURED.

The lessee owes 12 months' rent from the date of the surrender to creditors. Act No. 128, p. 163, of 1894.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 138; Dec. Dig. § 77; \* *Landlord and Tenant*, Cent. Dig. § 1095.]

3. LANDLORD AND TENANT (§ 194\*)—SURRENDER—NECESSITY TO TERMINATE RENT.

The receiver and the trustee were in possession of the property on the premises leased

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at least part of the time after the surrender to creditors.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 788, 789; Dec. Dig. § 194.\*]

**4. BANKRUPTCY (§ 191\*)—LIEN FOR RENT—RIGHT OF PLEDGE—OCCUPATION OF PREMISES.**

The rental is secured by lessor's privilege for 12 months, whether the premises be occupied, or not occupied, the whole time by the officers in charge of the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 290; Dec. Dig. § 191.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by the I. Trager Company against the Cavaroc Company, Limited. From the judgment, plaintiff appeals. Affirmed.

See, also, 123 La. 319, 48 South. 949.

Charles Rosen, for appellant I. Trager & Co. Dart & Kernan, for appellants City Bank & Trust Co. and others. Lazarus, Michel & Lazarus, for appellee Levy. Rice & Montgomery, for appellee Pokorny. F. S. Wels, for appellee Harris. Andrew M. Buchmann, for appellees Wright & Taylor. Ernest T. Florance, for appellee Paul Jones Co.

**BREAUX, C. J.** This is the second appeal brought up to this court in this case.

In the first case the district court ordered that the funds in the hands of the receiver be turned over to the trustee in bankruptcy.

In this court on the first appeal appellees argued that the funds should be handed over to the trustees, and the judgment was affirmed.

The lessor in the first appeal controverted this demand and asked that the funds be retained in the state court to pay his demand.

This court sustained the lessor's demand and remanded the case, to be tried in the district court in accordance with the views expressed in the decision in the first case. See same title (No. 17,404) 123 La. 319, 48 South. 949.

With reference to the lessor, the court, in the decision in the first case, recognized the privilege and pledge in his favor on the property of the lessee, the Cavaroc Company, Limited, in the hands of the receiver, for the payment of the rent due lessor, to wit, the sum of \$350, with 8 per cent. interest from the 1st day of September, 1908, until paid, and a like sum and like interest from each, viz., the 1st days of October, November, and December, 1908, and from each the 1st days of January, February, March, April, and May, 1909, and the further sum of \$158.06, with like interest from the 14th day of May, 1909.

The court directed the receiver to pay to the lessor out of the funds counsel fees of the counsel of record 10 per cent., i. e., \$402.50, upon the amount of rent sued for and ac-

cruing under the lease from and including the 29th day of May, 1908, to and including the 14th day of May, 1909.

The material facts of the case are that the lessee had not paid its rent at the date it was declared a bankrupt, and that there remained a balance due on notes which matured at different dates in the future.

The lease, according to the terms of the contract, terminated only on the 30th day of September, 1912.

In addition, the act of lease provides for counsel fee on 10 per cent. in amount due and exigible.

The building remained in the possession of the authorities in bankruptcy after the surrender in bankruptcy.

The lessor has abandoned all claims except for 12 months after the late corporation of Cavaroc Company, Limited, passed into the hands of a trustee appointed by the federal bankruptcy court.

The judge of the district court rendered judgment in favor of the lessor for 12 months' rent; that is, for rent for one year from the appointment of the receiver May 14, 1908.

This is an application of Act No. 128, p. 103, of 1894, in matter of a lease on long term.

To that act effect must be here given. It is controlling. It certainly limits the claim of the lessor, as relates to lessor's pledge or privilege, to rental for 12 months, a limit on the claim which binds all parties. It has a plain meaning. The appellee is certainly bound by the terms of the act. We have noted he has expressly accepted it as binding.

As to the appellants: They are equally bound, for it expressly limits the pledge and privilege to 12 months, as allowed by the judge of the district court.

Conceding, for the moment only, that the opponents and appellants are correct in their position that the rent is due only on premises actually occupied, we take up for a moment the proposition whether all rent had been paid at the date that the receiver, under appointment of the state court, turned over the property to himself as trustee under the federal bankruptcy act.

The weight of the testimony is that the receiver, while he had charge of the property as receiver, offered to let it for account of the insolvent. He did not offer to return it to the lessor. At least one month's rent has not been paid.

After the property had been surrendered, the testimony is, in substance, that the trustee was indifferent about surrendering the premises back to the lessor.

There remained property of the bankrupt corporation on the premises; besides, the keys were not turned over to the owner.

It is incumbent upon the tenant to see that

the property is delivered to his landlord, if he wishes to put an end to all claim for rent.

This has not been done.

The lessor testified in this case on April 30, 1909.

From that date, at least, he must be held to have had full notice that the building was vacant, and that nothing remained for him to do save to take possession.

It results from the foregoing that, even if Act No. 128 of 1894 did not apply, there would be only a few months' rent to which the lessor would have no right. But we think that Act No. 128 of 1894 does apply, and for that reason, without regard to whether lessee was or was not using the property, it is bound for the rent for 12 months under the act cited.

For reasons assigned, the judgment of the district court is affirmed, at appellee's costs.

MONROE, J., concurs in the decree.

(124 La.)

No. 17,863.

#### STATE v. RIGGIO.

(Supreme Court of Louisiana. Nov. 2, 1909.)

##### 1. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

In a prosecution for an assault with intent to rape, evidence of other assaults of accused upon prosecuting witness at other times and places is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

##### 2. CRIMINAL LAW (§ 1111\*)—BILL OF EXCEPTIONS—CONCLUSIVENESS.

Under the rule that recitals of a bill of exceptions as drafted by counsel must be accepted as correct, unless contradicted by the judge, they must be considered correct, where the judge merely states that he cannot remember whether an objection was made as stated in a bill.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2894; Dec. Dig. § 1111.\*]

##### 3. CRIMINAL LAW (§ 1170½\*)—APPEAL—REVIEW—HARMLESS ERROR—CROSS-EXAMINATION.

Where, in a criminal prosecution, accused restricted a witness in direct examination to whether or not the original affidavit made before him specified any date for the alleged offense, error, if any, in permitting him to answer, on cross-examination, that prosecuting witness said that she was uncertain as to the date, was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.\*]

##### 4. INDICTMENT AND INFORMATION (§ 176\*)—ISSUES AND PROOF—DATE OF OFFENSE.

The exact time when an offense was committed, except where time is of essence, need not be proved in a criminal case; but proof that it was committed before the finding of the indictment and within the prescriptive period suffices, and hence the exact date of an assault with intent to rape need not be proved.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 584; Dec. Dig. § 176.\*]

##### 5. CRIMINAL LAW (§ 724\*)—TRIAL—IMPROPER ARGUMENT.

Act of the district attorney, in a prosecution for assault with intent to rape, in referring

to accused and his son as "these brutes," is not necessarily ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1679; Dec. Dig. § 724.\*]

##### 6. CRIMINAL LAW (§ 719\*)—TRIAL—IMPROPER ARGUMENT.

In a prosecution for assault with intent to rape, the district attorney in his argument said: "The district judge, on the preliminary examination, refused the accused the right of bail. Gentlemen of the jury, he is a magistrate learned in the law. He knew what he was doing, and you should take that into consideration in reaching a verdict in this case." Held to be ground for reversal; it having thrown the opinion and personality of the judge into the scale against accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.\*]

##### 7. CRIMINAL LAW (§ 1092\*)—BILLS OF EXCEPTION—EXPLANATION OF JUDGE—SUFFICIENCY.

In explaining a bill of exceptions, the judge must state facts, and let the appellate court judge of their importance; and a mere statement that a bill complaining of the district attorney's argument does not contain the full statement made by the district attorney is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.\*]

##### 8. CRIMINAL LAW (§ 1091\*)—BILLS OF EXCEPTION—SUFFICIENCY OF OBJECTION.

A bill of exceptions, covering a general exception to the charge as a whole, with no assignment of grounds, is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2818; Dec. Dig. § 1091.\*]

##### 9. CRIMINAL LAW (§ 858\*)—DELIBERATIONS OF JURY—TAKING WRITTEN CHARGE TO JURY ROOM.

It is not improper for the jury to take with them into their consultation room the written charge of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2059; Dec. Dig. § 858.\*]

Appeal from Judicial District Court, Parish of Plaquemines; R. Emmett Hingle, Judge.

Joseph Riggio was convicted of assault with intent to rape, and appeals. Judgment set aside, and cause remanded.

James Wilkinson, for appellant. Walter Guion, Atty. Gen., N. H. Nunez, Dist. Atty., and Fred. A. Ahrens, Dist. Atty., pro tem. (R. G. Pleasant, of counsel), for the State.

PROVOSTY, J. Defendant was found "guilty of an assault with intent to rape." and has appealed from a judgment of 10 years at hard labor.

He objected in vain to the prosecuting witness being allowed to testify to other assaults of his upon her at other times and places. This evidence was clearly inadmissible, and its admission vitiates the verdict.

The judge says in his per curiam that, not remembering what was the objection made by the accused, he is unable to say that it was the same which is stated in the bill. The rule is that the recitals of the bill as drafted by counsel must be accepted as correct, unless contradicted by the judge. State v.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Wright, 48 La. Ann. 1531, 21 South. 160; State v. Robinson, 52 La. Ann. 616, 27 South. 124; State v. Gay, 107 La. 575, 31 South. 1012. In this case the judge does not contradict the recitals. He simply cannot remember.

In his second bill defendant complains that although, in the examination in chief, he guardedly restricted his witness to the point of whether or not the original affidavit specified any date for the alleged offense, the witness, who was the officer before whom the affidavit had been made, was allowed to be asked on cross-examination, over his objection, whether the prosecuting witness, at the time of making the affidavit, had not specified a date, and was allowed to answer:

"The prosecuting witness said that she was uncertain as to the date. From her statement, it was in the early part of February."

It may be this testimony was objectionable; but, whether it was or not, we cannot see what harm it can possibly have done the accused, and hence its admission, even if error, would not be ground for reversal.

Next, defendant complains of the refusal to give a special charge to the effect that the state is required to prove with certainty beyond a reasonable doubt the time, or date, at which the offense is said to have been committed.

The law is well settled that the exact time, except in cases where time is of essence, need not be proved, but that proof that the occurrence was before the finding of the indictment and within the prescriptive period suffices. Bishop on Criminal Proc. (9th Ed.) p. 247, par. 400; Rice on Criminal Evidence, p. 407, par. 254.

Next, defendant complains that the district attorney, in his closing argument, "referred to and stigmatized the defendant and his son, Philip Rigglo, as 'these brutes.'"

This bill is very meager, in that it does not show the connection in which the expression was used. The district attorney says that it was as part of an argument in reply to an argument of the counsel for defendant. Be that as it may, the use of such an expression, however much to be deprecated, if not called for by the exigencies of the case, does not necessarily furnish ground for setting aside a verdict.

Next, defendant complains that the district attorney, in his closing argument, spoke to the jury as follows:

"The district judge, on the preliminary examination, refused the accused the right of bail. Gentlemen of the jury, he is a magistrate learned in the law. He knew what he was doing, and you should take that into consideration in reaching a verdict in this case."

This was clearly throwing the opinion and the personality of the judge into the scale against the accused, and was highly objectionable, and is manifestly fatal to the ver-

dict. In State v. Jackson, 106 La. 413, 31 South. 52, the admission of the affidavit on which the accused had been arrested caused the setting aside of the verdict. See, also, State v. Rideau, 118 La. 386, 42 South. 973; State v. Hopper, 114 La. 558, 38 South. 452.

The judge says in the per curiam that the bill "does not contain the full statement made by the district attorney." Such a vague statement as this on the part of the judge goes for nothing. The judge must state facts, not conclusions. He must not say that something of importance has been left out of the bill, but must mention that something, and let this court judge of its importance. State v. Wright, 48 La. Ann. 1531, 21 South. 160; State v. Robinson, 52 La. Ann. 616, 27 South. 124.

The next bill covers a general exception to the charge as a whole, with no assignment of grounds. Citation of authority is not necessary on the point that a vague and general objection like this goes for naught.

Finally, defendant complains that the jury were permitted to take with them into their consultation room the written charge which the judge had delivered to them. We can see no good reason why this should not be done. It has often been held to be proper. 12 Cyc. 677.

Verdict and judgment set aside, and case remanded for trial according to law.

(124 La.)

No. 17,700.

TULANE IMPROVEMENT CO., Limited, v.  
W. B. GREEN PHOTO SUPPLY  
CO. et al.

In re TULANE IMPROVEMENT CO.,  
Limited.

(Supreme Court of Louisiana. Nov. 2, 1909.)

1. LANDLORD AND TENANT (§ 246\*)—RIGHT OF PLEDGE ON SUBLESSEE'S EFFECTS—LIMITATION TO AMOUNT DUE—MEASURE OF—REV. CIV. CODE, 2706.

Such right of pledge is restricted to the amount owing by the sublessee at the moment of the seizure, and cannot be extended by implication to future rents. The measure of the lessor's pledge is the sum of rents that have accrued to date of seizure, although the same may not then be exigible under the terms of the sublease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 997; Dec. Dig. § 246.\*]

2. LANDLORD AND TENANT (§ 246\*)—RIGHT OF PLEDGE ON SUBLESSEE'S EFFECTS—DEFENSE TO.

The statutory right of pledge of the lessor on the effects of the sublessee cannot be affected by the circumstance that the sublessee has given to the principal lessee negotiable notes for the rents accruing from month to month, and that said notes are outstanding in third hands.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 997; Dec. Dig. § 246.\*]

Provosty, J., dissenting.

(Syllabus by the Court.)

The Tulane Improvement Company, Limited, having obtained judgment against the W. B. Green Photo Supply Company for rent, proceeded by rule against J. D. Bloom, a subtenant of the Photo Supply Company. The rule was dismissed, and plaintiff appealed to the Court of Appeal, where the judgment was affirmed, and plaintiff applies for certiorari or writ of review to the Court of Appeal. Reversed, and rule made absolute to extent indicated.

Carroll, Henderson & Carroll, for applicants. Denegre & Blair, for respondent Bloom.

LAND, J. Plaintiff, having obtained judgment against the defendants for rent of a building, proceeded by rule against J. D. Bloom, a subtenant of the defendant Photo Supply Company, to compel him to pay to the civil sheriff of the parish of Orleans \$75 per month for each of the months of July, August, and September, 1908, due by him to the lessee. The mover in rule represented that at the date of the provisional seizure (July 29, 1908) the subtenant was occupying a portion of the leased premises, and continued to occupy the same until October 1, 1908; that the effects of said sublessee on the leased premises were seized under the writ of provisional seizure, but were, by subsequent agreement, released unto said subtenant as if on bond by him executed according to law.

In his answer to the rule J. D. Bloom admitted that he was a subtenant of the defendant under a sublease which expired September 30, 1908, and that he occupied the premises until October 1, 1908; that the writ was levied July 29, 1908, and his effects were released from seizure pursuant to agreement as alleged in the rule. But the respondent denied the other allegations, and especially that he was indebted unto the defendant lessee at the date of the seizure, having paid the rent note falling due July 1, 1908. Respondent further averred that under his sublease he had executed and delivered to the defendant his several negotiable notes for \$75 each, for value received in rent, falling due August 1, 1908, September 1, 1908, and September 30, 1908, which had been negotiated before maturity and had passed into third hands prior to the date of said provisional seizure.

The rule was tried and dismissed in the district court, and thereupon the plaintiff appealed to the Court of Appeal, parish of Orleans, which, after having considered the cause, affirmed the judgment. The case comes before the Supreme Court on a writ of review.

The record shows that the Court of Appeal based its judgment on the text of article 2706 of the Revised Civil Code, which reads:

"This right of pledge includes not only the effects of the principal lessee or tenant, but

those of the undertenants, so far as the latter is indebted to the principal lessee at the time when the proprietor chooses to exercise his right."

The Court of Appeal construed this article to mean an indebtedness due and exigible according to the terms of the sublease at the time of the provisional seizure, and cited several authorities in support of its conclusion.

In *Vairin & Co. v. Hunt et al.*, 18 La. 498, the word "indebted" was construed to mean "owing" at the time of the provisional seizure.

In *Kittredge & Co. v. Ribas*, 18 La. Ann. 718, the sublessee had paid his monthly rent of \$40 punctually at the end of each month, and not by anticipation, and the court held that the lessor's provisional seizure of the effects of the subtenant was illegal.

In *Arent v. Bone*, 23 La. Ann. 387, the plaintiff, a sublessee, recovered a judgment against the defendant, the lessor, for the value of her property seized and sold, on the ground that she was not indebted to the lessee at the time the provisional seizure was levied on her property. In *Weatherly v. Baker*, 25 La. Ann. 229, the sublessee had paid all he owed according to the terms of the sublease. In *Campbell v. Fowler*, 28 La. Ann. 234, the facts were similar and the sublessee's injunction was maintained.

In none of these cases does it appear that the sublessee was indebted, under the terms of the sublease or otherwise, to the lessee at the time of the seizure.

Article 2706 is a reproduction of article 2676 of the Civil Code of 1825, which was promulgated in both the English and French languages. The rule has been to give effect to both texts. *Durnford v. Clark*, 3 La. 202. Article 2706 of the Revised Civil Code of 1870 reads as follows:

"This right of pledge includes not only the effects of the principal lessee or tenant, but those of the undertenant, so far as the latter is indebted at the time when the proprietor chooses to exercise his right. A payment by anticipation by the undertenant to his principal does not release him from the owner's claim."

The French text of article 2676 of the Civil Code of 1825 reads as follows:

"Ce droit de gage s'étend non seulement sur les effets mobiliers du principal fermier ou locataire, mais sur ceux du sous-fermier ou locataire, jusqu'à concurrence de la somme que celui-ci se trouve devoir au principal fermier ou locataire, au moment où le propriétaire exerce son droit."

"Le paiement fait par anticipation par le sous-locataire au locataire principal ne décharge point le sous-locataire envers le propriétaire."

A comparison of the two texts will show that the words "indebted at the time" were used as the equivalent of the French words, which we translate, "the sum which the sublessee found himself owing at the moment of the seizure."

Article 1753 of the Code Napoléon differs somewhat in verbiage, reading:

"À concurrence du prix de sous-location dont il peut être débiteur au moment de la saisie."

Article 1753, Code Napoléon, contains an additional clause providing that payments made by the sublessee in accordance with the terms of his lease or in accordance with local usage should not be considered as made in anticipation.

The framers of the Civil Code of 1825 deliberately omitted the foregoing clause, and therefore, it may be inferred, did not intend that the question of payments in anticipation should be governed by the stipulations of the sublease.

What is owing at the moment of the seizure is the measure of the sublessee's liability to the lessor. This necessarily excludes future rents, which may never accrue. If the sublessee continues to occupy the premises under the sublease, the lessor may seize again if the sublessee refuses to pay him. Any other doctrine would leave the sublessee exposed to seizure for future rents, and would work grave injustice.

In the case at bar the sublessee, at the moment of the seizure was owing rent for one month less one day, and we think that the plaintiff is entitled to such accrued rent and no more.

The contention that the giving of the rent notes by the sublessee operated a payment by anticipation is without force. The notes were mere promises to pay the rent to the lessor or other holder.

It is equally evident that the right of pledge conferred by law on the lessor was not affected by the contract between the lessee and the sublessee or the giving of the notes in question. The contrary doctrine would enable the sublessee in every case to defeat the lessor's pledge by giving negotiable notes.

It is to be noted that this is a proceeding in rem against the effects of the sublessee, and not a direct action against him. Plaintiff's claim is based on the seizure alone, which was released immediately as if on bond. There is no pretension that the rents for August and September accrued during the seizure.

It is therefore ordered that the judgment of the Court of Appeal and the judgment of the district court herein be annulled, avoided, and reversed; and it is now decreed that the plaintiff's rule be made absolute to the extent of ordering that the defendant Jefferson D. Bloom pay to said plaintiff the sum of \$72.50, with legal interest thereon from October 1, 1908, until paid, and that defendant pay all costs of this litigation in the three courts.

PROVOSTY, J. (dissenting). By article 2705, Rev. Civ. Code, the owner and lessor has for the payment of his rent a right of

pledge upon the property found on the leased premises; and by article 2706:

"This right of pledge includes not only the effects of the principal lessee or tenant, but those of the undertenant, so far as the latter is indebted to the principal lessee at the time when the proprietor chooses to exercise his right. A payment by anticipation by the undertenant to his principal does not release him from the owner's claim."

This case is here on writ of review to the Court of Appeal, Parish of Orleans. Plaintiff, owner and lessor of a certain building in this city, sued out provisional seizure against his lessee, and caused all the property found on the leased premises to be seized, including that of the sublessee of the second story of the building. The lease had yet several years to run; the sublease, only three months. Plaintiff might have put an end to the lease for nonpayment of the rent; and, had this been done, the sublease also would have come to an end. "Sublato fundamentum cadit opus." But, instead of this, the parties entered into an agreement by which the lease was to run on until the termination of the sublease, and the sublessee's property was to be liberated from the seizure as if on forthcoming bond. Accordingly, the sublessee continued in undisturbed enjoyment of the property until the end of his sublease. He had executed notes for his rent corresponding in amount and maturity with the installments of the rent, which were payable monthly at the end of each month. This he had done at the time of entering into the sublease, and in strict compliance with the terms thereof. The notes were to the order of the principal lessee. They had been transferred to a third person some time before the seizure, and were held and owned by this third person at the time of the seizure. All this had been done in the most perfect good faith, without the slightest idea of defrauding the principal lessor. The notes recited on their face that they were given for rent.

Whether these notes were or not negotiable, in the technical sense of that term, there can be no question but that the debt of the lessee was upon them, in such way that by their transfer he ceased to be indebted to the principal lessee. This appears conclusively from the fact that any attempt on the part of the principal lessee to demand payment of any part of the subrent so long as the notes were thus being held and owned by the transferee of them would have been manifestly without right.

Since, therefore, by the express terms of the hereinabove quoted article of the Code, the right of pledge of the lessor can affect the property of the sublessee only in so far as the latter is indebted to the principal lessee at the time the lessor exercises his right, it is plain that in the instant case the property of the sublessee was not liable to the seizure, unless, as is contended, the execution of said notes and their transfer can be con-

sidered to have been "a payment made by anticipation," within the meaning of the hereinabove quoted article.

When we read in said article that a payment by the undertenant to his principal "in anticipation" does not release the subtenant from the owner's claim, the question arises at once: In anticipation of what? The Code does not explain what it is that is not to be anticipated—whether the principal rent or subrent, and whether as accruing from day to day, or as becoming exigible under the terms of the lease or sublease.

But this exact question was passed on by the court in the case of *Weatherly v. Baker*, 25 La. Ann. 229. The decision is short, and may be quoted here in full:

"The plaintiff brought suit on a lease, and caused certain property on the premises to be provisionally seized. One G. Johnson, as a sublessee of the defendant, intervened, claiming to be the owner of a portion of the property seized, and from a judgment in his favor the plaintiff has appealed.

"He complains that the sublease was a verbal one, unknown to him, and the terms thereof so fixed as to enable the principal tenant to shield the price of the sublease from the pursuit of the principal lessor; and he asks that the court will expound the law on this subject for the benefit of owners of plantations who may wish to rent their lands.

"Article 2625, Rev. Civ. Code, declares that:

"The lessee has the right to underlease, even to cede his lease to another person, unless this power has been expressly interdicted. The interdiction may be for the whole, or for a part; and this clause is always construed strictly."

"Articles 2705 and 2706 give to the lessor the right of pledge on all the movable effects of the lessee found on the premises (except certain articles exempted), and also those of the undertenant, so far as the latter is indebted to the principal, at the time when the proprietor chooses to exercise his right. A payment made in anticipation, by the undertenant to his principal, does not release him from the owner's claim.

"From these provisions of the law, it is clear that, as there was no interdiction, the defendant had the right to sublease, as he did, and on such terms as might be agreed on. And as it is abundantly shown that the intervener did not make a payment in anticipation of the terms of his contract, he was not liable to the plaintiff for more than he owed to the principal lessee."

The reasoning of this decision is simply unanswerable. The decision was made 35 years ago. It has never been overruled, or even qualified. Doubtless it has been accepted by the business public as an authoritative exposition of the law. I think it ought to be adhered to. Indeed, how can a subtenant be said to have made a payment in anticipation, when he has made it in strict conformity with his contract.

Speaking of this provision against payments in anticipation, Laurent (*Droit Civil*, vol. 25, p. 233, No. 204) says:

"It has for its object to prevent the frauds which could otherwise have been committed so easily to the prejudice the lessor."

In the same connection, Troplong, on article 1753, Code Napoléon, says:

"But collusion had to be forestalled, and the proprietor not left to the mercy of a fraudulent

scheme to beat him out of his rent. Accordingly article 1753 rejects payments made by anticipation, because, in such a case, the presumption is that they are simulated."

The reason which is here given by these learned commentators for the insertion of this provision in the Code is totally inapplicable to a payment made by the sublessee in good faith in pursuance of the terms of his contract. Code Napoléon, art. 1753, expressly provides that a payment made in accordance with local usage, or in pursuance of terms of the sublease, is not to be considered as a payment in anticipation—an obvious conclusion not needing to be expressed in a Code, since by payment in anticipation is meant a payment either fraudulently or imprudently made, and a payment under the circumstances mentioned is not open to either of these imputations. The very obviousness of the conclusion is, doubtless, what led the framers of our Code to leave it out as unnecessary. Many instances are found where useless provisions of the Code Napoléon have been left out of our Code in the same way.

So long as the tenant and the subtenant are allowed full liberty of contract, they may make such a contract as the subtenant made in this case; i. e., execute negotiable notes for the monthly installments of the rent. And, if they do so, and the principal tenant negotiates the notes, and as a consequence the subtenant ceases to be indebted to the principal tenant, the lessor loses his right upon the property of the subtenant; for, by the express terms of article 2706, that right exists only in so far as the subtenant is indebted to the principal tenant.

The argument that this liberty of contract is dangerous to the rights of the lessor is answered by the statement that the lessor may protect himself against it by so simple a means as inserting in his lease a clause forbidding it. Besides, this same argument *ab inconvenienti* was pressed upon the court in vain in the *Baker Case*, *supra*.

I do not agree with the view that the subrent did not continue to accrue after the seizure. Both the principal lease and the sublease continued in full force until the expiration of the sublease. The sublessee continued in the enjoyment of the property. He owes, therefore, the subrent. But his debt for it is due to the holder and owner of the negotiable notes which he gave for it, and is not due to the principal tenant. No part of it being due to the principal tenant, it cannot serve as a basis for plaintiff's seizure.

The proposition that, in order that the lessor's right of pledge should affect the property of the subtenant, the debt of the latter must be past due and exigible, finds, in my opinion, no foundation whatever in our law. It would be to say that the subtenant is not indebted, unless his debt be actually past due and exigible, or, in other words, that a



man who owes a debt not yet matured is not in debt.

I therefore respectfully dissent from the opinion of the majority of the court.

(124 La.)

No. 17,862.

INTERSTATE TRUST & BANKING CO. v.  
POWELL BROS. & SANDERS CO.,  
Limited, et al.

In re INTERSTATE TRUST & BANK-  
ING CO.

(Supreme Court of Louisiana. Oct. 18, 1909.  
Rehearing Denied Nov. 15, 1909.)

1. APPEAL AND ERROR (§ 465\*)—SUPERSEDEAS  
—AMOUNT OF BOND.

The execution of an order of seizure and sale for a specific sum of money cannot be suspended by an appeal bond for costs. In such a case the suspensive bond should exceed the amount for which the order was granted by one-half, as in case of appeals from money judgments. *State ex rel. Bankhead v. Judge*, 22 La. Ann. 35, reaffirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2235-2240; Dec. Dig. § 465.\*]

2. APPEAL AND ERROR (§ 460\*)—SUPERSEDEAS  
—APPEAL FROM DISMISSAL OF SUSPENSIVE  
APPEAL—EFFECT.

Where a suspensive appeal is dismissed in the court below because of the failure of the appellant to file bond in the amount required by law to stay execution, no appeal thereafter allowed from the judgment of dismissal can operate to suspend the execution of the judgment originally appealed from. *Reynolds v. Egan*, 122 La. 47, 47 South. 371, reaffirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2220; Dec. Dig. § 460.\*]

3. APPEAL AND ERROR (§ 488\*)—SUPERSEDEAS  
—INJUNCTION.

A temporary restraining order issued by the judge, on his own motion, pending the hearing of a rule to set aside an order of seizure and sale, expires with the dismissal of the rule, and cannot be kept alive by a suspensive appeal from the judgment of dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 488.\*]

(Syllabus by the Court.)

The Interstate Trust & Banking Company sued out an order of seizure and sale on a mortgage note against Powell Bros. & Sanders Company, Limited, and Thomas C. Wingate, receiver. An appeal suspensive and devolutive was granted the receiver from an order dismissing his suspensive appeal from a decree of foreclosure and a suspensive appeal from the order of seizure and sale, and plaintiff applies for writs of certiorari, mandamus, and prohibition. Writs made absolute.

Howe, Fenner, Spencer & Cocke and Palmer, Williamson & Lyles, for relator. Alexander & Wilkinson and D. M. Sholars, for respondent T. C. Wingate.

LAND, J. The relator sued out an order of seizure and sale on a mortgage note for

\$25,000 with 7 per cent. interest from date, and entitling the holder to recover attorney fees and costs as stipulated in the act of hypothecation. The receiver of the mortgagor petitioned for appeals, suspensive and devolutive, and prayed the court to fix the amount of the bond for both appeals. The judge fixed the amount of bond for each at the sum of \$200. The receiver furnished bond with two sureties for \$400 to cover both appeals.

Relator moved the court to set aside the said bond on the ground that the sureties were insolvent. This motion was overruled.

Relator then moved the court to dismiss the suspensive appeal on the ground that the amount thereof as fixed by the judge was insufficient in law, and to order that the writ of seizure and sale be executed. After a hearing the judge decided that the bond was insufficient in amount for a suspensive appeal and that the relator should have the right to continue the seizure and sale as provided by law.

The receiver next proceeded by rule to set aside the order of seizure and sale on the ground that the relator, having acquiesced in his control and custody of the mortgaged property and his right to sell the same under order of the court, was concluded by its laches from resorting to executory proceedings. The court ordered all further proceedings stayed pending a final hearing of this rule. Relator excepted to the jurisdiction of the court to entertain the rule on the ground that the receiver had taken an order of appeal suspensive and devolutive from the decree of seizure and sale.

This exception was sustained by the court, and the rule was dismissed. The receiver appealed suspensively from this ruling.

The receiver also prayed for an appeal, suspensive and devolutive, from the order dismissing his suspensive appeal from the decree of foreclosure. The court granted the appeal as prayed for, and fixed the amount of the bond for the suspensive appeal at \$100, and for the devolutive appeal at the same amount. The receiver perfected this appeal by giving bond.

Relator has applied to the supervisory jurisdiction of this court to vacate the last order of appeal and to enforce its right to foreclose the mortgage. The relator seeks also to set aside the suspensive appeal from the order of seizure and sale on the ground of the alleged insolvency of the sureties on the appeal bond.

The first question to be decided is as to the receiver's right to a suspensive appeal from the decree of foreclosure on a bond for costs.

In *Tournillon v. Ratliff*, 20 La. Ann. 179, it was held that the amount of the bond for a suspensive appeal from an order of seizure and sale was sufficient when it exceeded by

one-half the amount actually due at the date of the order.

In *State ex rel. Bankhead v. Judge*, 22 La. Ann. 35, an order of seizure and sale was sued out on a mortgage note for \$13,000, and interest. The relator applied for and was granted a suspensive appeal on a bond for \$2,800 as fixed by the judge. That part of the order of appeal fixing the amount of the suspensive appeal bond was subsequently rescinded by the judge, and execution was allowed to issue. The relator applied for a writ of prohibition to restrain the execution of the judgment on the grounds: First, that the amount of the bond, being sufficient to cover costs and damages, was sufficient for a suspensive appeal, inasmuch as the appeal was from an order of a seizure and sale, and not from a personal judgment; and, second, that the judge was divested of jurisdiction by the relator's furnishing bond pursuant to the order of the court, and that, if the judge erred in fixing the amount of the bond at too small a sum, his error could be corrected by the Supreme Court only. The court ruled: First, that the order of seizure and sale was for a specific sum of money, and, under article 575 of the Code of Practice, the suspensive bond should have exceeded the amount for which the judgment was given by one-half; and, second, that the improvident order of the district judge, whether rescinded or not, in fixing the bond for less amount than that required by law, could not deprive the mortgage creditor of the right to proceed with the execution of the order of seizure and sale. The court cited *Tournillon v. Ratliff*, supra, as holding that article 575 of the Code of Practice applied to orders of seizure and sale. Both of these cases were cited with approval in *Whan v. Irwin*, Tutor, 27 La. Ann. 707, holding that the obligation of the surety on an appeal from an order of seizure and sale was the same as that of the surety on an appeal from an ordinary money judgment. See, also, *Landry v. Victor*, 30 La. Ann. 1042.

The relator in the present case contends that, under the doctrine of the recent case of *Reynolds v. Egan*, 122 La. 47, 47 South. 371, the only adequate remedy left to the relator in the premises was an appeal to the Supreme Court for relief in the exercise of its supervisory jurisdiction under article 94 of the Constitution. In that case it was held that:

"Where a suspensive appeal is allowed from a judgment for money, and is thereafter dismissed because of the failure of the appellant to furnish the bond required within the time prescribed by law, no appeal thereafter allowed from the judgment of dismissal can operate to suspend the execution of the judgment originally appealed from."

In that case the order for a suspensive appeal from the order of dismissal was vacated, and the respondent judge directed to execute the original judgment. In the same case it was pointed out that, in case the judge below errs in dismissing a suspensive appeal,

the appellant has an adequate remedy by prohibition.

As the respondent judge granted a suspensive appeal from the rescinding order, it follows that his original order granting a suspensive appeal from the order of seizure and sale on a bond for costs remained in full force and effect. Our learned Brother, however, says that the execution of the writ of seizure and sale was suspended by the restraining order issued on the rule of the receiver to set aside the order of seizure and sale on the ground of the laches of the relator in invoking that remedy. It appears that, when the rule was filed, the judge issued the usual order to show cause, and further ordered that, "in the meantime, pending a final hearing hereof, all proceedings herein be stayed." On its face this was a temporary restraining order issued by the judge on his own motion, and was revocable at his discretion.

When the judge dismissed the rule, he necessarily recalled the incidental restraining order. As to the receiver, the mover in the rule, who had not applied for any injunction or restraining order of any kind, the issuing of the order was a mere act of grace on the part of the court, and its dissolution worked no legal injury that would warrant an appeal. It follows that the position of our learned Brother as to the continuing effect of this restraining order after the dismissal of the proceedings in which it had issued is not well taken.

From the cases cited supra we find no difficulty in concluding that the suspensive appeal from the order of seizure and sale was properly dismissed for want of bond sufficient in amount. While counsel for the receiver has assailed the correctness of the jurisprudence on this subject, we see no good reasons for overruling the decisions of this court on an important question of practice, which has been considered as settled for so many years.

The case of *Reynolds v. Egan*, cited supra, is conclusive that the appeal from the judgment dismissing the suspensive appeal from the judgment of foreclosure cannot operate to suspend the execution of the order of seizure and sale.

The remaining question raised by relator is as to the insufficiency of the sureties on the appeal bond of the receiver. The two sureties signed a bond for \$400 in lieu of two bonds for \$200 each. The question whether the sureties were solvent to the extent of the small sum of \$400 is one of fact, and after reviewing the evidence we are not prepared to say that the judge erred in his appreciation of the testimony.

We have considered and determined the only questions pertinent to the relief prayed for by the relator. The judgment dismissing the rule of the receiver to set aside the order of seizure and sale and his appeal therefrom are not assailed by the relator and are not

involved in the present controversy. The devolutive appeal taken by the receiver from the order of seizure and sale and from the order dismissing his suspensive appeal is not complained of by the relator.

It is therefore ordered that the order of the respondent judge allowing Thomas C. Wingate, receiver, a suspensive appeal from the judgment dismissing and setting aside said receiver's suspensive appeal from the original order of seizure and sale on the ground of the insufficiency in amount of the appeal bond, be and the same is hereby, vacated and set aside; and it is further ordered that the respondent judge direct and allow the order of seizure and sale originally granted in favor of the relator to be executed according to law; and it is further ordered that to this extent the writs prayed for be made absolute and peremptory, at the cost of the defendants herein.

(124 La.)

No. 17,805.

# STATE v. TOLMAN.

(Supreme Court of Louisiana. Nov. 2, 1909.)

## 1. STATUTES (§ 114\*)—TITLE OF ACT—SUFFICIENCY.

Act No. 209, p. 312, of 1908, purporting to amend and re-enact section 5 of Act No. 171, p. 392, of 1898, imposing a license tax on pawnbrokers, is unconstitutional, null, and void, to the extent that it provides for a license tax on money lenders generally.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 114.\*]

## 2. STATUTES (§ 109\*)—TITLE OF ACT—SUFFICIENCY.

An act purporting to amend a certain section of a general law is limited in its scope to the subject-matter of the section proposed to be amended, under a constitutional provision that "every law shall embrace but one object, and that shall be expressed in the title."

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 109.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Rule by the State against D. H. Tolman. Judgment for plaintiff, and defendant appeals. Reversed.

Charles Rosen, for appellant. Edward Rightor and G. L. Dupre, Jr., for the State. John J. Reilley, amicus curiæ.

LAND, J. The state tax collector proceeded by rule against the defendant to collect a license tax of \$600, with interest, attorney's fees, and costs, for the year 1909, on the business of money lender or purchaser of time wages, pursuant to Act No. 209, p. 312, of 1908, entitled "An act to amend and re-enact section 5 of Act No. 171, p. 392, of 1898," the general license revenue law of the state.

The defendant, for answer to the rule, aff-

er pleading the general issue, averred that Act 209 of 1908 is null and void because in contravention of articles 31, 32, 225, and 229 of the state Constitution, and of the fourteenth amendment of the Constitution of the United States.

There was judgment in favor of the plaintiff in rule as prayed for, and the defendant has appealed.

Act 209 of 1908 is entitled:

"An act to amend and re-enact section 5 of Act 171 of Session of the Legislature of the state of Louisiana for the year 1898, entitled 'An act to levy, collect and enforce the payment of an annual license tax upon all persons, associations of persons or business firms and corporations, pursuing any trade, profession, vocation, calling or business,' etc.

Section 5 of Act 171 of 1898 reads as follows:

"Sec. 5. Be it further enacted, etc., that each and every pawnbroker or keeper of a loan office, where capital in actual use, is fifty thousand dollars or more, shall be graded as eighth class, section fourth, shall be five hundred dollars (\$500); that when the capital in actual use is less than fifty thousand dollars, shall be graded as ninth class, section fourth, the license shall be three hundred and seventy-five dollars (\$375)."

By act No. 209 of 1908 the above section is amended and re-enacted so as to read as follows:

"Sec. 5. Be it further enacted, etc., that each and every money broker, money lender, or person, firm or corporation, doing such business as is commonly known as money lending or purchasing time wages or salary of laborers, clerk or other wage-earners or other persons, whether the same is earned or unearned and whether said business is conducted in an office or otherwise, the license shall be graded according to the capital in use in said business as follows:

"First Class. Where the capital in use is \$250,000 or more, the license shall be \$2,000.00.

"Second Class. Where the capital in use exceeds \$100,000.00 and is not more than \$200,000.00, the license shall be \$1,500.00.

"Third Class. Where the capital in use exceeds \$75,000.00 and is not more than \$100,000.00, the license shall be \$1,000.00.

"Fourth Class. Where the capital in use exceeds \$50,000.00 and is not more than \$75,000.00, the license shall be \$800.00.

"Fifth Class. Where the capital in use is less than \$50,000.00 the license shall be \$600.00. Provided, that if any person, firm or corporation, carrying on the business designated in this section, shall conduct more than one office or place of business, whether in the same or under different names, such persons, firm or corporation shall pay a separate license for each and every office or place of business it shall conduct according to the hereinabove classification.

"Provided further, that this act shall not apply to persons, corporations or institutions carrying on a banking business, as provided for by section 2 of Act 171 of 1898, and provided further that this act shall not apply to persons, corporations or companies lending money, secured by mortgage upon real estate.

"Provided further, that each and every pawnbroker or keeper of a loan office where capital in actual use is fifty thousand dollars or more, the license shall be five hundred dollars (\$500). That when the capital in actual use is less than fifty thousand dollars, the license shall

be three hundred and seventy-five dollars (\$375)."

Article 31 of the Constitution of 1898 reads as follows:

"Every law enacted by the General Assembly of the state of Louisiana shall embrace but one object, and that shall be expressed in its title."

Act 209 of 1908 purports to amend and re-enact section 5 of Act 171 of 1898, which fixes license taxes only for the business of "pawnbroker or keeper of a loan office." The title of Act 209 of 1908 does not give notice of the legislative intent to amend any other section of Act 171 of 1898 or to enact additional legislation on the subject of license taxes.

In *State v. Tolman*, 106 La. 662, 31 South. 320, this court held that, as the business of money lending was not specifically taxed in any of the sections of Act 171 of 1898, it fell within the purview of the fourteenth section, providing for the taxation of certain callings "and all other business not herein provided for." The court in that case necessarily found that the business of money lending was not covered by section 5 of the general licensing act of 1898.

In the well-considered case of *State of Louisiana v. American Sugar Refining Company*, 106 La. 553, 31 South. 181, the court held as unconstitutional an act of the Legislature, which, under a title purporting to amend certain particular sections of another statute, altered the subject-matter of a different section to which no reference was made in the title.

In that case the court, *inter alia*, said that, when the Legislature "restricts the title and announces its purpose to deal with the original bill in respect only to particular matters therein, it is bound to govern itself accordingly and keep within what it had itself declared would be the limits of its proposed action." The court quoted *Dolese v. Pierce*, 124 Ill. 140, 16 N. E. 218, as follows:

"An act to amend certain sections of a general law is limited in its scope to the subject-matter of the section proposed to be amended. \* \* \* The amendment of an act in general or a particular section of an act *ex vi termini* implies merely a change of its provisions upon the same subject to which the act or section relates."

The case of *Beary v. Narran*, 113 La. 1034, 37 South. 961, is not distinguishable in principle from the one at bar. In that case, Act No. 49, p. 108, of 1904, under a title purporting to amend and re-enact section 12, p. 164, Act No. 103, of 1900, fixing licenses for theaters, places of amusement, etc., and "peddlers or hawkers," provided that such terms should be held to include "all transient merchants and itinerant vendors selling to con-

sumers by sample or taking orders, whether for immediate or future delivery."

This court held that the license taxation of commercial salesmen or travelers selling by sample, or by taking orders for future delivery, was not germane to the license taxation of peddlers or hawkers, selling and delivering goods carried by them from place to place, and that, the provisions of Act 49 of 1904 being broader than its title, the act was unconstitutional. The court said, in part, as follows:

"If the occupation or business of selling by sample or by taking orders was subject to a license, it fell within the class of all other business not specially provided, as set forth in section 14 of Act No. 103, p. 166, of 1900.

"If such occupation did not fall within the terms of the license statutes enacted prior to 1904, it was a distinct subject-matter for additional legislation. In either event, the title of the act should have set forth the legislative purpose; but the title in question purports to amend only section 12 of Act No. 103, p. 164, of 1900, and therefore is not broad enough to cover section 14, p. 166, of the same act or any new subject-matter of license taxation."

The sole subject-matter of section 5 of Act 171 of 1898 is the license taxation of the business of "pawnbroker or keeper of a loan office," referring to the same business. See *Standard Dict. verb. Loan*. "One of the subject-matters of section 1 of Act 209 of 1908 is the "business commonly known as money lending or purchasing time wages or salary of laborers," etc. After providing for the taxation of such money lenders, the statute takes up the business of "pawnbroker or keeper of a loan office" and adopts the license taxation as fixed in section 5 of Act 171 of 1898. The result is that the new act does not amend the particular section mentioned in the title, but, under the guise of its amendment, enacts new legislation imposing a different license tax on another and distinct business, which never had been taxed except as a business not otherwise provided for in the statutes. As the title gave no notice whatever to the public, or the parties to be affected, of the legislative intent to impose a new license tax on the business of money lending in any of its forms, the act necessarily contravenes article 31 of the state Constitution.

It is therefore ordered, adjudged, and decreed that the judgment below be annulled, avoided, and reversed; and it is further adjudged and decreed that Act 209 of 1908 be declared unconstitutional, and of no force and effect, in so far as it purports to levy a license tax on money lenders; and it is further decreed that the rule filed below in the name of the state by the tax collector be dismissed, with costs.

(124 La.)

No. 17,766.

LOUISIANA RY. & NAVIGATION CO. v.  
MADERE, Sheriff and Ex Officio  
Tax Collector.

(Supreme Court of Louisiana. Nov. 2, 1909.)

1. TAXATION (§ 196\*) — EXEMPTIONS — TAXES  
AFFECTED BY.

The general temporary exemption of new railroads from "taxation," as granted in article 230 of the Constitution of 1898 and in the constitutional amendment of 1904 (Laws 1904, p. 19, No. 16), includes all ad valorem district levee taxes, but not local assessments, such as acreage and produce taxes and the mileage tax levied on railroads.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 196.\*]

2. CONSTITUTIONAL LAW (§ 9\*)—STATE CON-  
STITUTION—SUBMISSION TO POPULAR VOTE.

The railroad tax exemption set forth in article 230 of the Constitution of 1898 does not violate any of the restrictions enumerated in the enabling act (Act No. 52, p. 85, of 1896), and said act has no application to the constitutional amendment of 1904, under which the plaintiff claims exemption from ad valorem taxes.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 9.\*]

3. CONSTITUTIONAL LAW (§ 6\*)—POWER TO  
AMEND STATE CONSTITUTION—LIMITATIONS.

The power of the people to amend or revise their state Constitution is limited only by the prohibitions contained in the Constitution of the United States, none of which have been pleaded in this case.

[Ed. Note.—For other cases, see Constitutional Law. Cent. Dig. § 2; Dec. Dig. § 6.\*]

4. TAXATION (§ 206\*)—EXEMPTIONS—CON-  
STITUTIONAL.

The delegated power conferred on a political agency or corporation to levy a tax on all the taxable property within a certain district does not extend to property which comes into existence under the shelter of a constitutional exemption from taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 338; Dec. Dig. § 206.\*]

(Syllabus by the Court.)

5. TAXATION (§ 1\*)—"TAX" DEFINED.

A "tax" has been variously defined as a burden, or charge imposed, or proportional contribution levied, by the sovereign, for the support of the government and for all public needs or purposes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6867-6886, 7813.]

Appeal from Twenty-Eighth Judicial District Court, Parish of St. Charles; Prentice E. Edrington, Judge.

Action for an injunction by the Louisiana Railway & Navigation Company against A. Maderé, Sheriff and Ex Officio Tax Collector. Judgment for defendant, and plaintiff appeals. Reversed.

Foster, Milling & Godchaux and Alexis Brian, for appellant. Walter Gulon, Atty. Gen., L. H. Marrero, Jr., Dist. Atty., E. B. Talbot, and R. G. Pleasant, for appellee.

LAND, J. By Act No. 16, p. 19, of 1904, the General Assembly submitted to the electors of the state a proposed constitutional amendment, reading, in part, as follows, viz.:

"There shall be exempt from taxation for a period of ten years from the date of its completion, any railroad or part of railroad that shall have been constructed and completed subsequently to January 1, 1905, and prior to January 1, 1909."

This proposed amendment was adopted at the general election holden on November 8, 1904.

It is admitted that the plaintiff company has earned this exemption by the construction and operation of its roadway from Baton Rouge to New Orleans; but it is denied that the word "taxation," as used in said amendment, embraces the taxes levied by the board of commissioners of the Pontchartrain levee district on plaintiff's railroad in the parish of St. Charles.

Said board by resolution "levied a special assessment or forced contribution" of \$100 per mile on each and every mile of railroad, and "a special levee tax of ten mills ad valorem" on all real estate and other taxable property, within said levee district.

The plaintiff company admitted that it owed the forced contribution of \$100 per mile, and also taxes on a certain lot of ground, and tendered to the tax collector the amount of the same, but claimed exemption from the ad valorem levee tax of 10 mills.

The tax collector proceeded to advertise the property of the plaintiff for sale for the satisfaction of all the taxes mentioned, with interest, penalties, and costs.

Plaintiff thereupon applied for writs of injunction, and, after hearing the parties on a rule nisi, there was judgment rejecting the plaintiff's demand, and ordering the tax collector to proceed with the collection of all the taxes assessed against the plaintiff, together with penalties and costs.

Plaintiff has appealed, and the only real question for review is whether the exemption from taxation granted by the constitutional amendment of 1904 includes the special ad valorem tax levied by the commissioners of the levee district on all the taxable property within the district.

As "taxation" means the act of levying or imposing taxes, an exemption from taxation embraces all kinds of taxes. A "tax" has been variously defined as a burden, or charge imposed, or proportional contribution levied, by the sovereign, for the support of the government and for all public needs or purposes. See Bouvier, Law Dictionary (Bawle's Revision) verb. The term "tax" is comprehensive enough to cover the entire exercise of the taxing power; but it is now settled that local assessments of a certain kind, though laid under the taxing power, are not

taxes in the ordinary sense of the term. Cooley on Taxation, p. 456.

"But this statement can only be applicable when the assessment is really made on the basis of special benefits which are supposed to be equivalent, for, if it is laid for a work of general utility, in the advantages of which the person assessed participates only as one of the general public, and not as receiving special benefits, it must be considered a general tax, and is improperly designated as an assessment." *Id.*

In the very case before the court, we find a special assessment of \$100 per mile of railroad based on supposed special benefits, and an ad valorem tax levied on all the taxable property in the levee district based on supposed general public benefit.

According to the principles announced by Judge Cooley, the first is a local assessment, and the second is a "tax" in the proper sense of the term.

Article 214 of the Constitution of 1879 authorized levee commissioners to levy a tax not to exceed 5 mills on the taxable property situated within the alluvial portions of levee districts subject to overflow. By amendment adopted in 1888 (Laws 1888, p. 8, No. 8), the limit was raised to 10 mills, and it was further provided that the rate of taxation might be increased by a vote of the property taxpayers of the district paying taxes for himself or others.

By Act No. 95, p. 99, of 1890, creating the Pontchartrain levee district, its board of commissioners was empowered to levy annually all district levee taxes authorized by article 214 of 1879 as amended, and it was made the duty of the assessor to extend said tax on the tax rolls, and the duty of the tax collector to collect said tax in the same manner that state taxes are collected, and to settle therefore with the auditor and State Treasurer.

The same act authorized the board of commissioners to levy a "special assessment or forced contribution" on certain lands, sugar, molasses, rice, cotton, and on railroads at the rate of \$100 per mile of main line within the district.

In this act the lawmaker makes a clear distinction between district levee taxes, to be levied and collected on property generally in the same manner as state taxes, and special assessments or forced contributions to be levied on particular property considered to be specially benefited by the maintenance of the levee system.

This distinction has been recognized and enforced by the Supreme Court of the state in a number of cases.

In *Planting & Manufacturing Co. v. Tax Collector*, 39 La. Ann. 455, 1 South. 873, it was contended that certain local contributions and assessments on particular property benefited by the levees violated Article 214 of the Constitution of 1879, limiting levee taxes to five mills. The court, *inter alia*, said:

"It is obvious that the last clause of article 214 was not to exclude the power of local as-

essment, but simply to confer the power of taxation, because, without it, such power could not have been exercised, being in violation of other constitutional provisions on the subject of taxation."

This decision placed levee taxes squarely on the plane of other general taxes authorized by the Constitution of 1879. The same court had already, in *Charnock v. Levee Company*, 38 La. Ann. 325, drawn the distinction between the levee tax and the levee special assessment, and had held that the former was "ordinary local taxation, levied in particular districts, it is true, but levied on all taxable property within such districts without reference to special benefit to particular property," and that the provisions of the Constitution of 1879 had no application to "that kind of taxation that falls under the denomination of strict local assessments, which are not levied on taxable property generally for the common public interest, but upon particular property specially benefited as an equivalent for the benefit conferred."

In the well-considered cases of *Munson and Others v. Board of Commissioners*, 43 La. Ann. 15, 8 South. 906, all the authorities were reviewed, and the court held that the ad valorem levee tax was a "tax" for the local purposes of the district, and was not a "local assessment" intended to be levied upon "particularized property to be benefited thereby."

The same distinction between a tax for local purposes and a local assessment was announced in *Construction Co. v. Tax Collector*, 108 La. 435, 32 South. 399, 58 L. R. A. 349, and in *Louisiana & Northwestern Railroad v. State Board of Appraisers*, 120 La. 471, 45 South. 394.

The settled jurisprudence of this state on this subject renders it unnecessary for the court to consider the numerous authorities from other jurisdictions cited in the very able brief filed by counsel for the defendant.

All the provisions of the Constitution of 1879 relative to taxation for levee purposes were incorporated in the Constitution of 1898. The term "tax," as used in article 214 of the Constitution of 1879, had been judicially construed to mean an ordinary tax, and, with this fixed construction, was incorporated in article 239 of the Constitution of 1898. It is an established rule of construction that where a constitutional provision has received a settled judicial construction, and is afterwards incorporated into a new or revised Constitution, it will be presumed to have been retained with a knowledge of that construction, and the courts will feel bound to adhere to it. See 8 Cyc. 739; *State v. Board of Assessors*, 35 La. Ann. 651.

Hence there is no difficulty in reaching the conclusion that the term "taxation," as used in article 239 of the Constitution of 1898, and in the constitutional amendment of 1904, includes local ad valorem district levee taxes, and consequently that the plaintiff railroad

is entitled to the exemption claimed in this suit.

Counsel for the defendant contend that the power of the convention of 1898 to exempt railroads from levee taxation was denied by Act No. 52, p. 85, of 1896, providing for the submission to the people of a proposition to hold a convention at a designated time and place for the purpose of framing a new Constitution, fixing the powers of the convention, etc. This enabling act, which was subsequently adopted by the people, prohibited the convention from enacting any ordinance or article affecting, impairing, or scaling the bonded indebtedness of the state, increasing the rate of taxation, removing the Capitol, etc., etc. Among these prohibitions was the following:

"Whereby the levee system as now organized under and by virtue of article 213 to 216 inclusive and 270 of the present Constitution, and the laws enacted in pursuance thereof shall be altered, amended or affected."

As the convention of 1898 adopted all of the articles referred to in the above paragraph and incorporated them in the Constitution of 1898, and in the schedule declared "that no failure on the part of the convention to re-enact, and re-ordain any article or ordinance contained in the Constitution of 1879 upon any of the subjects upon which this convention is by the act convening it prohibited from enacting, ordaining or framing any article or ordinance, shall be construed as in any manner affecting the provisions of the Constitution of 1879 upon the prohibited subjects," it is difficult to conceive how or in what manner the levee system of the state was altered, amended, or affected. It is argued, however, that the exemption from taxation of railroads to be constructed in futuro deprived the levee boards of the right to tax the same kind of property conferred on them by article 214 of the Constitution of 1879. The right so conferred was on the taxable property situated within the levee district, and whether or not certain property is taxable is to be determined from time to time under the Constitution and laws of the state. This is not the case of an exemption of property already subject to levee taxation, but of property that came into being under the shelter of a constitutional exemption.

In *Louisiana & A. Ry. v. Shaw*, 121 La. 997, 46 South. 994, this court said:

"But, however this may be, whatever rights the voting of the tax conferred on the railroad company were contingent and prospective. The tax, if earned, was to be levied on whatever taxable property might be found in the parish after the completion of the road.

"The question of the taxability of property in futuro was necessarily left to the determination of the sovereign.

"A few months after the voting of the tax, the Constitution of 1898 was adopted. The framers of that instrument, in order to encourage the construction of new railroads, offered a bonus in the form of an exemption from taxation for 10 years. The plaintiff railroad accepted this offer, and by the timely construction of its road earned the bonus or exemption.

Hence the plaintiff railroad came into existence under the shelter of the constitutional exemption, and is not and has never been taxable property in the parish of Winn."

We see no good reasons to change the views thus expressed.

While we are of the opinion that article 230 of the Constitution of 1898 does not, in letter or spirit, violate the restrictions of the enabling act of 1896, we cannot see how such restrictions are applicable to the constitutional amendment of 1904 adopted under another enabling statute which contains no restrictions or conditions of any kind. See Act No. 16, p. 19, of 1904. The legislative department of the state has no power to pass any irrepealable law. *Cooley's Const. Lim.* (7th Ed.) p. 174. The power of the people to amend or revise their Constitutions is limited only by the prohibitions set forth in the Constitution of the United States. *Id.* p. 62. It is not pleaded by the defendant that the constitutional amendment of 1904 is violative of any provision of the federal Constitution. It follows that said amendment is a paramount law, binding on the state, and on every governmental subdivision and political agency of the state.

The Constitution of 1852 inaugurated the public policy of state aid in the construction of public improvements. This policy has been adhered to in all subsequent state Constitutions. The Constitution of 1868 contained no limitations whatever on the legislative power to aid in the construction of public improvements. The reform Constitution of 1879 limited such aid to special taxes not exceeding five mills and for a period not longer than 10 years, when voted by a majority, in number and amount, of the property taxpayers of the parish or municipality. The same limitations were incorporated in the Constitution of 1898, and the framers of that instrument, to further encourage the construction of railroads, offered a general exemption from taxation to new lines of railway that might be completed within a certain period of time, except such railroad as had already been voted a tax subsidy. Such tax exemption was but another mode of aiding railway enterprises.

The plaintiff railroad has earned this tax exemption by the construction of a new railroad through the parish of St. Charles, and has thereby brought within the levee district additional property now subject to a local assessment of \$1,139 per annum, and all of which will within a few years become subject to the ad valorem levee tax of 10 mills on the dollar of valuation. The Pontchartrain levee district has been benefited by the construction of this new railroad in a far greater degree than has the state or parish, and has no just grounds of complaint in law or in equity.

It is therefore ordered that the judgment below be reversed, and it is now ordered that the defendant tax collector be and is hereby forever enjoined and prohibited from collect-

ing the levee tax of 10 mills ad valorem levied and assessed for the year 1907 on the property of the plaintiff company.

And it is further ordered that plaintiff's plea of tender of the other taxes recited in the petition be sustained, and that the defendant be enjoined from collecting any greater sum than the amount tendered.

And it is further ordered that the defendant pay the costs below and the costs of this appeal.

(124 La.)

No. 17,587.

**INTERSTATE TRUST & BANKING CO. v.  
UNITED STATES FIDELITY  
& GUARANTY CO.**

(Supreme Court of Louisiana. Oct. 18, 1909.  
Rehearing Denied Nov. 15, 1909.)

**1. INSOLVENCY (§ 73\*)—JURISDICTION—ACTION  
ON BOND GIVEN BY INSOLVENT.**

The district court for the parish of Orleans is without jurisdiction, *ratione materię*, in this suit.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. § 107; Dec. Dig. § 73.\*]

**2. VERNON PARISH DISTRICT COURT.**

By effect of the agreement among creditors, the district court for the parish of Vernon has jurisdiction.

**3. INSOLVENCY (§ 142\*)—BOND OF INSOLVENT  
—CLAIMS OF CREDITORS TO BE PRORATED.**

The bond sued on was made in favor of the district court for the parish of Vernon for the benefit of all the creditors.

The condition of the bond is that the principal and surety shall pay and discharge all creditors.

The bond is not sufficient in amount to pay all creditors. A pro rata distribution will have to be made by the court having jurisdiction.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. §§ 215, 216; Dec. Dig. § 142.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the Interstate Trust & Banking Company against the United States Fidelity & Guaranty Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Howe, Fenner, Spencer & Cocke, for appellant. J. Zach Spearing, for appellee.

**BREAUX, C. J.** This was a suit instituted on a bond to recover the balance of the value of a note of \$17,000 and interest, executed by Powell Bros. & Sanders.

The business of this firm was placed in the hands of Thomas C. Wingate, receiver, by the district court of the parish of Vernon.

Subsequently the receiver asked the court to issue an order to advertise and sell the property of that firm to pay its debts.

This application to sell the property was opposed by the company, and at its instance the attorney of the receiver met the attorneys of the company, for the purpose of examining into the business of the concern and to arrive at an agreement, if possible,

in regard to the debts, that would obviate the sale of the property.

After having examined into the financial condition of the company, the attorney for the receiver, and one of the local attorneys, whose name is not of record in this suit, who was at the time attorney for the firm and for the Guaranty Company, by which guaranty subsequently a bond for \$25,000 was furnished to secure the payment by the firm in question, joined in petitioning to procure this bond, given to secure the creditors and to enable the firm of Powell Bros. & Sanders to take possession of the property and resume operations.

After having considered the petition before referred to, signed as just mentioned, the court assented to the proposition that the property be not sold in accordance with the wish of creditors, and, in addition, discharged the receivers, conditionally, however, upon the firm complying with the court's judgment within the time stated in the judgment, and restored the property to the firm of Powell Bros. & Sanders on a bond of \$25,000, referred to above, furnished by the firm and the United States Guaranty Company, as surety, payable to the judge of the district court in and for Vernon parish, for the use and benefit of the creditors of Powell Bros. & Sanders Company, Limited.

The court stated in the judgment rendered, restoring the property, that the bond filed by Powell Bros. & Sanders Company, Limited, to secure the debts, was ample security, and hence the order issued discharging the receiver.

Over six months having elapsed from the date that the court had restored the property, and the debtor firm having failed to pay its indebtedness, several creditors petitioned the court to take possession of the property and reinstate the discharged receiver.

On this petition the discharged receiver was reappointed and commissioned as receiver, and after qualification he was directed to take possession of all the property of the firm.

The property is now in the hands of the receiver.

The suit was brought by plaintiff against defendant in the district court of the parish of Orleans, and not at the domicile of the company.

Plaintiff's suit was met by exception and answer.

We do not set out the exception and grounds of defense to the answer, as they will be stated substantially in the discussion which follows. Those stated are sufficient for the decision, which does not extend to the merits.

The exception and the answer were tried together. Evidence was heard. The court dismissed the case as in case of nonsuit.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



without prejudice to plaintiff's right to sue on the bond in question in the district court of Vernon parish, having jurisdiction of the insolvency proceedings.

The issues before us are, in the first place, whether the district court for the parish of Orleans had jurisdiction, *ratione materię*; in the second place, whether the plaintiff must establish his claim contradictorily with the firm of Powell Bros. & Sanders before suing the Guaranty Company; and whether there is no right in any creditor to sue until the formal assignment of the bond.

The defendant generally controverts plaintiff's claim.

Recurring to the first proposition for discussion and decision; that is, whether the court of first instance had jurisdiction: This is an important issue as relates to proceedings in the present case.

We have noted that all the steps taken in the matter of this litigation were before the district court of the parish of Vernon, and in that court the litigation should continue to final settlement.

The \$25,000 bond is not sufficient in amount to pay the creditors. A prorating, we infer, will be necessary.

There was an agreement between creditors and their debtors, including plaintiff. In accordance with the spirit of the agreement, the court discharged the receiver conditionally, and ordered that the property be returned to the plaintiff.

Complying with the order of the court, the debtors furnished a bond to secure the creditors, made in favor of the court for the benefit of the creditors.

To settle among the creditors, they should be made parties.

The court of the domicile where the proceedings are pending and where the bond was accepted for the benefit of all the creditors is the court of original jurisdiction. That court was made the common agent.

The court of another jurisdiction has no right to render judgment for the whole or part of the bond, to the entire exclusion of all other creditors in whose interest the bond was furnished.

There should be but one proceeding, in which all persons in interest should be made parties and their rights determined contradictorily one with the other, particularly for the reason that the amount will not pay all the debts of the corporation.

The court, in insolvent proceedings, in the absence of expressed law, has the right to see that the funds are distributed according to equity.

That equity can be exercised in the court of the domicile, in which the proceedings were originally instituted.

The position of plaintiff is that the principal and the surety are bound in *solido*, that surety has two domiciles in this state,

and that, being bound as just stated, it can be sued at either domicile.

This is ordinarily true.

But it is also true that persons, except in certain expressly excepted cases, must be sued at their domicile. It is also true that one bound in *solido* may be sued at his own domicile, though different from the domicile of his principal.

With reference to the first proposition, there is another exception under which one may be sued at another place than his domicile. If, as in the present case, a creditor entered into an agreement to grant time to his debtor, on condition that he will furnish bond, and he furnishes bond in favor of the court for the benefit of all the creditors, he is bound to seek relief on the bond furnished in the court of original jurisdiction.

These are proceedings in insolvency conducted for the benefit of creditors.

This case is exceptional, and made so by the action of the interested parties, who chose to virtually jointly consent to the bond furnished. By this consent, the solidary feature of the bond ceases to have the effect it might have had in other proceedings. This bond was not given in accordance with any special provision of law. It has been accepted, and is binding on all parties.

Although innominate, it is effective for the benefit of all the creditors here.

It is not out of place to state here that appellee joined in the appeal and asked for an amendment. As it has no merit, the amendment is not allowed.

For these reasons, the judgment of the district court is affirmed.

(124 La.)

No. 17,812.

STATE v. APFEL.

(Supreme Court of Louisiana. Oct. 18, 1909.  
Rehearing Denied Nov. 15, 1909.)

1. CRIMINAL LAW (§ 1144\*) — APPEAL — PRESUMPTION IN FAVOR OF CONVICTION.

The defendant was prosecuted in the juvenile court for having violated the provisions of section 10, Act No. 176, p. 242, of 1908, by permitting a minor to gamble with cards for money in the barroom conducted by him. In the affidavit charging the violation it was alleged that defendant had allowed a minor under 16 years to gamble with cards for money "in the rear of his bar and drinking saloon." The judge found defendant guilty, and defendant moved in arrest of judgment on the ground that "the rear of a bar as set forth in the affidavit was not a place in which gambling was prohibited by Act No. 176 of 1908." Defendant contends that the court erroneously overruled the motion. *Held*, the case having gone to trial without objection, and the defendant convicted under evidence received without objection, we have to presume that the place in which the gambling was carried on "in the rear of defendant's barroom" was shown to have been under circumstances such as to cause that place to fall under the prohibitory terms and provisions of the statute, and to cure any want of greater precision in the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

affidavit. *Marr's Criminal Jurisprudence*, p. 821; *State v. Hauser*, 112 La. 314, 38 South. 398.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3031; Dec. Dig. § 1144.\*]

## 2. INTOXICATING LIQUORS (§ 106\*)—REVOCATION OF LICENSE—SECOND CONVICTION.

Defendant urges that under Act No. 176, p. 236, of 1908, his license to conduct a barroom could only be revoked upon a "second" conviction "for violation of the terms of the act." Held, that the conviction under which the license was revoked was, under the circumstances of the case, "a second conviction," and the sentence appealed from was warranted under the law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 115; Dec. Dig. § 106.\*]

(Syllabus by the Court.)

Appeal from Juvenile Court, Parish of Orleans; Andrew H. Wilson, Judge.

Julius Apfel was convicted on two affidavits, charging, respectively, the selling of liquor to a minor and permitting a minor to gamble in his barroom, and he appeals. Affirmed.

Joseph E. Generally, for appellant. Walter Gulon, Atty. Gen., St. Clair Adams, Dist. Atty., and A. D. Henriques, Asst. Dist. Atty., for the State.

### Statement of the Case.

NICHOLLS, J. There were two prosecutions against the defendant for violation of Act No. 176, p. 236, of 1908, both based on affidavits.

The first prosecution, which bore the number 915 in the juvenile court, was based upon an affidavit of Joseph J. Carus, charging that defendant, on the 4th day of June, 1909, "did conduct a barroom and drinking saloon in the parish of Orleans, and did sell and permit to be sold, and did give and permit to be given, to one Fred Harmeyer, a minor aged 16 years, intoxicating and malt liquors."

The second prosecution, which bore the number 916 in the juvenile court, was based upon an affidavit of Joseph J. Carus, charging that defendant, on the 4th of June, 1909, "did allow one Fred Harmeyer, a minor aged 16 years, to gamble with cards for money in the rear of his barroom and drinking saloon."

By agreement between the district attorney and the defendant, both cases, Nos. 915 and 916, were tried together on June 12, 1909; the testimony taken on the trial to be used in both. After hearing the evidence, accused was found guilty on both charges on that day.

On June 19th the defendant, through counsel, filed a motion for a new trial. The court overruled the motion, to which ruling the defendant reserved a bill of exceptions. Defendant then filed a motion in arrest of judgment in the case No. 915 on the grounds:

"First. That the affidavit did not allege that the defendant knowingly permitted the said minor to gamble.

"Second. That the rear of a barroom, as set forth in the affidavit, is not a place in which gambling is prohibited by Act No. 176 of 1908."

The court took same under advisement until June 25th, when it overruled the same.

In case No. 915 the accused was ordered to pay a fine of \$150, and in default of payment to serve 2 months in the parish jail. On June 21st defendant was granted a suspensive appeal from that judgment. On June 25th the defendant was called to the bar for sentence in case No. 916, and was sentenced to pay a fine of \$50, or in default of payment to serve 30 days in the parish prison, with (this being a second conviction) a revocation of his license and permit to continue the barroom and saloon business, to which sentence his counsel reserved a bill of exceptions, and moved for a suspensive appeal.

This bill recited that, when defendant was called to the bar for sentence, the assistant district attorney moved the court to revoke the license of the defendant. Defendant's counsel objected, and called the attention of the court to the fact that the law provides that the license of an accused be revoked upon second convictions, and, further, that this was the first conviction, notwithstanding the conviction had in case No. 915, for the reason that both cases grew out of the same transaction, as was evidenced by the testimony in case No. 915, made part of the bill for reference; that is to say, the evidence offered by the state established that liquor was sold to the minor while he was playing cards, and the court ruled that, although the offense occurred at one and the same time, there being two convictions, it considered the second conviction as defined by law, and imposed a fine of \$50 or 30 days' imprisonment, and revoked the license of the accused, to which ruling and sentence defendant excepted, and reserved a bill of exception, which he presented for signature.

To this bill, the judge, in signing the same, made the following per curiam:

"The court states that Apfel was convicted in this court under No. 915 for selling liquor to a minor, as will be shown by said record, which goes to the Supreme Court on appeal. This selling of liquor to a minor was done at the same time as Apfel allowed the boy to gamble, for which he was convicted in this court, No. 916. In the court's opinion there were two offenses and convictions, and, therefore, on second conviction, Apfel's license was revoked. As both records go to the Supreme Court on appeal, this matter is properly presented for adjudication."

### Opinion.

Appellant relies in this court upon the grounds set up in the motion in arrest, that "the rear of a barroom, as set forth in the affidavit, is not a place in which gambling is prohibited in Act No. 176 of 1908," and the bill of exception taken is to the sentence

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

imposed upon appellant in case No. 916, revoking his license.

In the brief filed on behalf of defendant, counsel says that, as regards case No. 915 (selling liquor) there is no ground of complaint; that the appeal taken in that case was to have a proper transcript in the present case; that the two serious questions in case No. 916 are the issues raised in the motion in arrest and the sentence revoking the license. Counsel for the state, in answer to the contention made in the motion in arrest that the rear of a barroom may be a place where gambling is prohibited by Act No. 176 of 1908, and the affidavit properly so alleged, urges that:

"If there was any defect in the affidavit, it was aided and cured by verdict; that objections to informations or indictments should be taken advantage of by demurrer or motion to quash, and not by motion in arrest of judgment. The case having gone to trial without objection, and the accused convicted, we have to presume (under evidence taken also without objection) that the place in which gambling was carried on in the rear of defendant's barroom was shown to have been under circumstances such as to cause that place to fall under the prohibitory terms and provisions of the statute, and to cure any want of greater precision in the affidavit. *Marr's Criminal Jur.* p. 821; *State v. Hauser*, 112 La. 314, 36 South. 396.

"The point in the case most strenuously contested is whether the penalty imposed by the court upon the appellant of revocation of his permit or license was warranted and justified under the circumstances of the case. Section 6 of Act No. 176 of 1908 makes it unlawful for any person conducting a barroom where spirituous, vinous, or malt liquors are sold to sell or permit to be sold, or to give or permit to be given, any intoxicating liquors to minors, and declares that any one violating the provision of that section shall, upon conviction, be fined in a sum not less than \$50 nor more than \$500, or by imprisonment in the parish jail or prison for not more than 2 years, or by both such fine and imprisonment.

"The seventh section declares that any person convicted of selling or permitting to be sold, or giving or permitting to be given, any intoxicating liquors to minors, shall, in addition to the punishment prescribed in section 6 of the act, be permanently deprived thereafter of the privilege of conducting a barroom, and the revocation of said privilege shall be declared by the court having jurisdiction to impose the penalty fixed by section 6 of the act."

Though the court found the defendant guilty of the charge contained in the affidavit in suit No. 915, the judge of the juvenile court did not impose upon him in his sentence as a penalty the revocation of his license or privilege, and it is claimed, as he did not do so, that penalty could not thereafter be imposed, upon his being found guilty under the affidavit in case No. 916.

Judgment in No. 916 was based, as has been recited, upon a charge that "defendant had permitted a minor to gamble in the rear of his barroom," as prohibited in section 10 of the act, while section 7 of the act authorized the revocation of the license on a first conviction for the violation of the provisions of section 6. Section 8 provides that any

one violating provisions of that section, or any of the provisions of the act, shall be guilty of a misdemeanor, and upon conviction thereof be fined in a sum not less than \$50, nor more than \$500, or by imprisonment in the parish jail or parish prison for not more than 2 years, or by both such fine and imprisonment, and shall upon a second conviction be permanently deprived thereafter of the privilege of conducting a barroom, and the revocation of said permit or privilege shall be declared by the court having jurisdiction to impose the penalties fixed by the act. Appellant urges:

"That when the prosecution contends that the judgment of forfeiture could be valid in case of first conviction, it must have in mind case No. 915 (selling liquor to minors), to which section 7 of the act could be applicable; but it loses sight of the fact that in case No. 915 the court did not pronounce the forfeiture, but simply a fine, and that the forfeiture was pronounced in case No. 916 (for gambling in cards), which is a violation, if any, of section 10 of the act denouncing playing with cards.

"The agreement entered into with the assistant district attorney shows conclusively that there was but one state of facts, and the court in *State v. Augustine*, 29 La. Ann. 119, said: 'We think the spirit of our law forbids two indictments for different offenses arising out of the same state of facts.'

"The alleged second affidavit must appear as nothing more than a second count, and certainly not a second conviction, within the meaning of section 8, which is intended to cover the case of an individual who commits a second offense in point of time. It is further suggested that the second violation must be of the same character."

The violation of the statute by selling liquor within his barroom to minors is declared and provided for in a separate section from the violation of the statute allowing a minor to gamble therein. The affidavits filed in the court charged the acts as being separate violations. The offenses charged in them, though tried on the same day for convenience and economy, were never cumulated or consolidated. Each charge was disposed of by the judge by a separate judgment and by a separate sentence, all this without objection or complaint from the accused. We do not think that the acts charged constituted one single offense, nor that the finding of the defendant guilty separately on each charge can be said to evidence one single conviction; nor do we think that the judge, in pronouncing the particular sentence he did, under No. 915, and failing therein to declare the revocation of appellant's license, had forcedly waived or exhausted the penalty against him, and limited and restricted it finally to the fine.

We are of the opinion that, though the judge may have had the legal authority to have declared the revocation of defendant's license in that case under the provisions of section 7 of the act, he had the discretion and right to reserve the revocation until he had been called upon to take a further action under some additional charge.

We are of the opinion that the judgments appealed from are correct, and they are hereby affirmed.

(124 La.)

No. 17,804.

STATE ex rel. WILKINSON, Dist. Atty., v. HINGLE.

In re HINGLE.

(Supreme Court of Louisiana. Nov. 2, 1909.)

1. COUNTIES (§ 65\*)—PARISH TREASURER—TERM OF OFFICE—HOLDING OVER.

The parish treasurer was elected for two years, under provision of Act No. 121, p. 178, of 1898. He was entitled to hold over until his successor had qualified.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 97; Dec. Dig. § 65.\*]

2. OFFICERS (§ 54\*)—HOLDING OVER—EFFECT.

The holding over period of an office does not have the effect of extending the term succeeding.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 54.\*]

3. OFFICERS (§ 80\*)—TITLE TO OFFICE—COLLATERAL ATTACK.

The treasurer is precluded from questioning in a collateral attack the qualification of the members of his police jury.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 111; Dec. Dig. § 80.\*]

4. PLEADING (§ 21\*)—INCONSISTENT ALLEGATIONS—ESTOPPEL.

The police jury is not estopped by its pleading in this case. Allegations may be contradictory, and yet not give rise to estoppel.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 44; Dec. Dig. § 21.\*]

(Syllabus by the Court.)

Proceedings by the State, on the relation of James Wilkinson, District Attorney, against Felix S. Hingle, to oust him from office. Judgment of ouster was affirmed by the Court of Appeal, and Hingle applies for certiorari or writ of review. Judgment affirmed.

Olivier S. Livaudais, for appellant. N. H. Nunez, Dist. Atty., for appellee.

BREAUX, C. J. A parish treasurer, who has been the incumbent in that office, in the parish of Plaquemine, since June 16, 1900, seeks to continue in office, and to that end urges that his term of office has not expired; that the police jurors who elected his successor had not been elected and qualified; that the police jury was estopped.

The judge of the district court rendered judgment ousting the relator, and in favor of a Mr. Savole, who was elected his successor.

As above stated, relator was elected by the police jury in 1900.

Under the law two years was the term of office. Act No. 121, p. 178, of 1898.

It follows that his first term expired on June 16, 1902.

It appears from the record that he was re-elected for two years, viz., to June 16, 1904.

He held over, and on the 3d day of Janu-

ary, 1907, he was re-elected his own successor.

At these elections it does not appear by the testimony that he was elected for any particular term of office—whether for two years, or over, or less, is not shown.

Joseph Savole was elected in 1908 as the successor of relator.

The latter claimed that the office was vacant, and that he had the right to hold the office until January 3, 1909. He refused to vacate the office to his said successor.

Proceedings were sued out to oust him from office.

The judge of the district court sustained the application of the new treasurer.

An appeal was taken to this court. The appeal was transferred to the Court of Appeal, as this court did not have jurisdiction.

The Court of Appeal maintained the judgment of the district court.

From the judgment of the Court of Appeal, an application for certiorari addressed to that court was filed.

The matter is before us on the hearing of the writ issued.

The question before us for decision is whether the term of office expired every two years from the first election on the 16th of June, 1900.

In our opinion, the term expired every two years. It was not within the authority of the police jury to extend the time by failing to elect an officer.

Even according to defendant and appellant, his term of office expired on the 1st of last January, and since that time he has continued in office, although another treasurer has been elected to succeed him.

If he were to succeed in his defense, and the matter of his successor were to come up again before the police jury, and a successor other than defendant were elected, it would not be possible to successfully maintain the contention that the term of office begins from the date the office is declared vacant.

There is no reason to hold that one police jury can, by neglecting to elect at the required time, hold a treasurer an indefinite length of time. The statute fixing the term, the police jury cannot disregard the term fixed.

Officers hold until their successors are qualified.

Const. art. 172 (section 2608, Rev. St.) does not have the effect of extending the term. The election should be held at the end of the two years from the date of his election, if two years be the term.

The defendant takes the further ground, in order to continue in office, although his term has expired, that he had the right to prove, when the case was tried in the district court, that the members of the police jury had not taken the oath of office and had not regularly qualified.

This is a collateral attack made by the of-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ficer on the very body whose treasurer he is.

He cannot thus be heard to challenge the authority under which he holds. *State v. Brooks*, 39 La. Ann. 820, 2 South. 498.

The plea of estoppel has no merit.

There were two grounds pleaded, each based on the attempt of the police jury to oust the defendant. The pleas were not fatally inconsistent, and gave no good ground for the plea of estoppel.

The case was twice before us. On the appeal, decided some time since, we arrived at the conclusion that we had no jurisdiction, after we had examined thoroughly into the merits of the case. After that examination, we were convinced that defendant had no right to the office.

As we had no jurisdiction, we did not hand down an opinion.

On the present application, under our supervisory jurisdiction, we can think of no good reason to change our opinion.

The judgment is affirmed.

(124 La.)

No. 17,741.

### SCHLIEDER v. BOULET.

(Supreme Court of Louisiana. Nov. 2, 1909.)

#### 1. HUSBAND AND WIFE (§ 274\*)—COMMUNITY DEBT—ACTIONS—PARTIES.

The payment of a note representing a debt of the community and secured by mortgage, importing confession of judgment, on community property, may be enforced, after the death of the wife, in a proceeding via executiva against the surviving husband, without making the heirs of the wife parties thereto.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1026; Dec. Dig. § 274.\*]

#### 2. HUSBAND AND WIFE (§ 274\*)—JUDGMENT SALE OF COMMUNITY PROPERTY—PERSONS WHO MAY PURCHASE.

There is no law which precludes the heirs of the wife, or the surviving husband, from purchasing the property sold in such a proceeding.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1026; Dec. Dig. § 274.\*]

#### 3. HUSBAND AND WIFE (§ 274\*)—JUDGMENT SALE OF COMMUNITY PROPERTY—LIEN ON SURPLUS.

Where, in such case, the property realizes more than enough to pay the debt for which the sale was made, and the surviving husband and usufructuary, being the adjudicatee, retains the surplus, and subsequently sells the property as free of incumbrance to a third person, who sells to still another, such transferees acquire the property free of any lien or privilege in favor of the major heirs of the deceased wife, securing their interest in such surplus.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1026; Dec. Dig. § 274.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred. D. King, Judge.

Action by E. G. Schlieder against James T. Boulet. Judgment for plaintiff, and defendant appeals. Affirmed.

Irving R. Saal, for appellant. Gustave Lemle and W. Catesby Jones, for appellee. Clegg, Quintero & Gidliere, for heirs of Bright. Meyer S. Dreifus, curator ad hoc.

#### Statement of the Case.

MONROE, J. Defendant appeals from a judgment condemning him to accept title to certain real estate which he had agreed to buy from plaintiff. He admits the agreement, and avers that he is willing to comply with it, provided he can do so in safety; but he alleges that the property (the undivided one-fourth of which is the subject of this litigation) was acquired by George L. Bright, plaintiff's vendor, under the régime of the community, and was sold, after the death of his wife, and adjudicated to him, agreeably to the prayer of a petition which was prepared by him, though signed by another attorney. And, after setting forth the conditions of the adjudication and the subsequent proceedings, leading to plaintiff's acquisition of the property, defendant further alleges:

"That after assuming a debt due to the Canal Bank of \$3,860.37, and after paying plaintiff's claim of \$16,954.47, the said George L. Bright retained a balance of \$3,185.16 in his hands from the purchase price; that one-half of this balance belongs to the community, and is due to the said George L. Bright's four children; and that they \* \* \* have a vendor's privilege, or lien, on the said property, or some claim against said property, until they are settled with by their father. \* \* \* That defendant believes, and so charges, that the said proceeding \* \* \* was taken by the said George L. Bright to defeat the claims and rights of his children in the community existing between him and their mother, and in fraud of their rights, and that defendant believes and fears that, if he takes title to said property, the heirs of Mrs. George L. Bright, hereinbefore named, will hereafter make some claim against said property."

He prays that the heirs referred to (four in number, who were majors at the time of their mother's death) be made parties to this suit, and that the plaintiff's demand be rejected. On behalf of two of the heirs who are nonresidents, the curator ad hoc, who was appointed to represent them, filed an answer, which was subsequently withdrawn, and they and the other two heirs (who reside here), appearing through their own counsel, excepted to the right and cause of action, as disclosed by the answer of the defendant, whereupon, their exception having been maintained, they were dismissed from the proceeding.

The facts as disclosed by the admission and evidence in the record are as follows:

Plaintiff's author, George L. Bright, acquired the property referred to during the existence of the community between him and his wife. The wife died in 1901, leaving four major children, issue of their marriage, of whom two reside here, one in Boston, and one in England. The succession of the wife

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

has not been opened, nor has the community been settled. In October, 1902, the property was offered for sale by the sheriff, under a writ of seizure and sale issued by the civil district court for the parish of Orleans, in the matter entitled "Miss Josephine King v. George L. Bright," No. 68,569 of the docket, being a proceeding via executiva to enforce the payment of a note for \$15,815, executed by said Bright on December 26, 1895, and secured by mortgage of the same date, and it (the property) was adjudicated to the defendant in the writ for \$34,000. On January 23, 1903, the sheriff executed a deed, pursuant to his adjudication, from which it appears that the price "was settled for as follows, to wit: The purchaser retained \$8,860.37 as the balance due on a mortgage of superior rank to that under which the sale was made; he paid to the sheriff the sum required to satisfy the claim of the plaintiff in the writ, amounting, with interest and attorney's fees, to \$16,954.47; and he retained the balance of the price—say \$3,185.16, less \$2,610.28, or \$2,138.95 (there having been \$471.33 in dispute), expended in taxes and costs. On the same day (January 23, 1903) he mortgaged the property to Miss Josephine King to secure his note of \$15,815, dated December 20, 1902, and made payable in one year, with interest from date; and on December 1, 1905, he sold the property to the plaintiff now before the court for \$140,000, of which \$50,000 appears to have been paid in cash, and the balance by notes bearing interest. The agreement between plaintiff and defendant, upon which this suit is based, is said to have been entered into on November 6, 1906.

#### Opinion.

The note of December 26, 1895, represented a debt of the community and it was competent to enforce the mortgage by which it was secured, after the death of the wife and contradictorily with the surviving husband, as head of the community, without making the heirs of the wife parties to the proceeding. *Rusk, Adm'r, v. Warren, Crawford et al*, 25 La. Ann. 314; *Hawley, Pub. Ad., v. Bank et al*, 26 La. Ann. 230; *Killelea et al. v. Barrett et al.*, 37 La. Ann. 865; *Orloul, Tutor, v. Herndon et al.*, 38 La. Ann. 759; *Landreaux et al. v. Louque*, 43 La. Ann. 234, 9 South. 32; *Succession of Hooke*, 46 La. Ann. 356, 15 South. 150, 23 L. R. A. 803; *Verrier v. Sheriff*, 48 La. Ann. 723, 19 South. 677; *Luria v. Cote Blanche Co.*, 114 La. 385, 38 South. 279.

If the heirs of the wife were of the opinion that their interests would be best subserved by holding onto the property, it was their privilege to have advanced the money wherewith to pay the debt, or, by provoking

an administration, they might have shown that there were funds belonging to the community which were available for that purpose. The mortgage creditor was not, however, obliged to await their action in the matter. Again, when the mortgage creditor caused the property to be seized and advertised for sale, under a title importing confession of judgment, the heirs of the wife, being of full age, might have become the purchasers, and the surviving partner in community had the same right, and exercised it. It appears that the price at which the property was adjudicated to him was more than sufficient to pay the debt for which the sale was made, and that he retained the surplus. But what other disposition could have been made of it? One half of it belonged to him, and, in the absence of any suggestion to the contrary, we assume that he has the usufruct of the other half. If the heirs were, then, of opinion that, under the law, they were entitled to a lien or privilege on the property, for the security of the amount due them, it was open to them to assert such lien whilst the property stood, apparently unincumbered, in the name of their father. They, however, took no steps in that direction, and nearly two years later the property was sold, free of incumbrance, to the plaintiff. And even now, though the defendant before the court makes the allegations of fraud and irregularity to which we have referred, and has notified the heirs, as the parties interested, to come into the suit and protect their rights, they still decline to take any action or to countenance the charges so made. No evidence was offered in support of the allegation that the petition for the executory process, under which the property was sold, was prepared by the surviving partner in community and adjudicatee, and, it may be added, there is neither allegation or suggestion that the plaintiff, who bought the property from the adjudicatee, knew, or had any reason to suppose, that the petition in question was not prepared by the attorney who signed it.

Whatever, therefore, might be the significance, under other circumstances and in other litigation, of the allegation in question, if sustained by proof, it can have no bearing on the issue between the parties before the court, as to whom the petition for executory process is to be taken as it appears upon its face; that is to say, as having been prepared and filed by a reputable member of the bar, on behalf of a client whose past-due debt against the community was secured by mortgage importing confession of judgment. Upon the whole, we agree with the judge a quo that the title tendered to the defendant is valid.

The judgment appealed from is accordingly affirmed.

(124 La.)

No. 17,448.

SEMPLE et al. v. FRISCO LAND CO., Limited, et al.

(Supreme Court of Louisiana. Nov. 2, 1909.)

## 1. APPEAL AND ERROR (§ 361\*)—APPOINTMENT OF RECEIVER—APPEAL—AFFIDAVIT—CONSTRUCTION OF STATUTE.

Act No. 159, p. 314, of 1898, § 4, providing that any person, who by affidavit appears to be interested, upon giving bond, may appeal on the face of the record from an order appointing or refusing to appoint a receiver of a corporation, under the act, does not apply to the parties to a suit for the appointment of a receiver; and, where the appeal is by one of them, no affidavit is necessary.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 361.\*]

## 2. CORPORATIONS (§ 553\*)—RECEIVER.

Where heirs by compromise agreed to divide the successions of their parents among them according to a settlement to be worked out through a corporation to be organized, the settlement to be determined by a specified person, and the heirs to abide by his decision, if errors in the settlement proposed by him are so gross and palpable as to amount to fraud, the proper remedy would be the judicial adjustment of the accounts, and not the appointment of a receiver for the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 553.\*]

## 3. CORPORATIONS (§ 310\*)—OFFICERS—RESIDENCE.

The law does not require the president of a private corporation to reside in the parish of its domicile, nor does it forbid him from administering its affairs through agents or clerks.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 310.\*]

## 4. CORPORATIONS (§ 553\*)—APPOINTMENT OF RECEIVER—FAILURE TO KEEP MINUTES.

The failure of a secretary of a corporation to properly keep the minutes, while it might be ground for not re-electing him, would not be ground for appointing a receiver, especially in the absence of any suggestion of loss having resulted therefrom.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 553.\*]

## 5. CORPORATIONS (§ 553\*)—APPOINTMENT OF RECEIVER—GROUNDS—IRREGULARITIES OF SECRETARY.

The president and secretary, both directors of a corporation, favored a sale of timber on the corporation's land, and the third director opposed it. At the meeting at which the matter was considered, only the secretary and the third director were present, and one of them voted for and the other against the sale. The deed of sale, already signed by the president, was at the time in the secretary's hands, as well as a letter from the president favoring the sale, and the secretary, thinking that the approval of the president was equivalent to a vote at the meeting, issued a certificate that the resolution authorizing the sale had been adopted, and consummated the sale. Subsequently the sale was ratified by formal resolution. *Held*, that the secretary's act was an irregularity, which did not amount to a maladministration, justifying the appointment of a receiver.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 553.\*]

Appeal from Ninth Judicial District Court, Parish of East Carroll; Francis Xavier Ransdell, Judge.

Action by Mrs. Eugenia Semple and others against the Frisco Land Company, Limited, and others. From a judgment appointing a receiver for defendant corporation, it appeals. Judgment set aside, and suit dismissed.

Looney & Scheen and Davis & Browne, for appellant. Snyder & Gilfoil, for appellees.

## On Motion to Dismiss.

PROVOSTY, J. The defendant corporation has appealed from an order appointing a receiver to take charge of its affairs. Plaintiffs have moved to dismiss the appeal, on the ground that the application for the appeal was not accompanied by the affidavit required by section 4 of Act No. 159, p. 314, of 1898. This court has decided that, where the appeal is by one of the parties to the suit, the said affidavit is not necessary. *Davies v. Monroe Waterworks Co.*, 107 La. 145, 31 South. 694. The motion to dismiss is therefore overruled.

## On the Merits.

As a convenient mode of settling the successions of their father and mother, the plaintiffs, Mrs. Semple, Mrs. Bradley, and Miss Witkouski, and their brothers, L. L. Adolph, and Fred. Witkouski, agreed, by way of compromise, as follows: That certain real estate held by some of them, and certain other real estate which others of them had held in the past and had sold, should be considered as not having belonged to them, but to their father and mother, and to have been inherited by them in equal shares; that the property still being held should be transferred to the defendant corporation by quitclaim deed at the price of \$10 per acre, to be paid for with the stock of said corporation; that the parties should have a settlement, in which the amounts received by some of them from sales of property and collection of rents should be accounted for; that the stock of the corporation should be delivered to the parties in the proportion in which they appeared by said settlement to be entitled to it, and should in the meantime remain in the hands of Clifton F. Davis as trustee; and—

"that, in the settlement of the matters stated in this contract, all differences arising among said parties over the accounts rendered by any of them shall be left for determination and adjustment to Clifton F. Davis, and each of the said parties hereto agrees and binds himself to abide by his decision on the matters referred to him."

To provide against the contingency of the agreement falling through or being set aside, the clause was added that the admissions contained in it were made simply and exclusively by way of compromise, and not otherwise.

The corporation had in reality been organ-

ized in prevision of said compromise, for the purpose of carrying it out. Its organizers were Clifton F. Davis (the same just mentioned) and P. N. and E. W. Browne. One of the clauses of the agreement provides that the corporation is to be reorganized, and that the property transferred to it is to be sold as opportunity may offer.

The petition of the plaintiffs recites the foregoing, and then proceeds to allege that Clifton F. Davis "attempted to make up the amounts of the various heirs and to effect a settlement between them, and has attempted to show the amount of stock each heir is entitled to in said corporation, but that there are palpable and gross errors in said showing;" that Clifton F. Davis claims to be president, and Adolph Witkouski secretary and treasurer, of said corporation, though never elected by the shareholders, or, if ever rightfully occupying said offices, although their terms of office have long expired; that the said Davis has removed permanently from the parish of the domicile of said corporation, and neglects its affairs, and permits its funds to be wasted, misused, and misapplied, thereby putting the interest of the petitioners in imminent danger; that he has left the entire control and management of the affairs of said corporation to Adolph Witkouski, and that the latter is grossly mismanaging same, and committing acts ultra vires, and wasting and misapplying the property or funds of said corporation, thereby jeopardizing the rights of petitioners; that, instead of paying the debts with the money on hand, he extends them at high rates of interest, and allows the taxes due on the property of the corporation to become delinquent, and the property to be advertised for sale, thereby entailing penalties of 2 per cent. per month interest on the taxes and costs of advertising; that he is selling the lands and timber of said corporation to irresponsible persons, and allowing them to cut and remove the timber before paying the purchase price, the timber constituting in many cases the principal value of the lands; that he has without authority made concessions to vendees and lessees of the corporation in consideration of cash payments to him of smaller amounts than stipulated in the acts of sale and lease; that he is using the funds of the corporation for his private benefit; that he refuses to allow the petitioners to examine the books of the corporation.

In the brief, though not in the petition, the plaintiffs complain that there has been no reorganization of the corporation.

The petition further alleges that from a date long prior to said compromise Fred. Witkouski, one of the heirs and signers of the compromise, has been insane and wholly incapable of entering into a binding contract, and that a petition has been filed by Clifton F. Davis for his interdiction; that, owing to the said incapacity of said Fred. Witkouski,

"it is now impossible through corporate action to call or hold any election or to conduct the affairs of said corporation through the means provided by its charter."

The sole prayer of the petition is for the appointment of a receiver to the corporation.

This insanity of Fred. Witkouski, if it was known to plaintiffs and their brothers when the compromise was entered into, might be a good ground for setting aside the compromise and all proceedings had in pursuance thereof; but this could be done only at the suit of the insane person or of his legal representative. It certainly cannot be done at the suit of plaintiffs. And, besides, they are not asking for it, but are suing in affirmance both of the compromise and of the legal existence of the corporation.

The allegation that the plaintiffs have been denied access to the books is not supported by the evidence. Nor is the allegation that the corporation has not been reorganized. The two Brownes retired, and were succeeded by Adolph Witkouski and by one of the plaintiffs, Mrs. Bradley.

Clifton F. Davis was the charter president of the corporation. He has continued in office simply from the fact that until the heirs had effected the settlement provided for by the compromise their stock could not be delivered to them, and that until the stock was delivered there could not be another election of officers. And the same thing may be said of Adolph Witkouski's continuing in office. As to his accession to office, it was by the same token by which Mrs. Bradley became one of the directors. It was in pursuance of the compromise and by the consent of parties. He stepped into the shoes of E. W. Browne, as Mrs. Bradley did into those of P. N. Browne.

We are not called upon in this suit to apportion the stock of the corporation among the heirs, or, in other words, to make the settlement which the compromise provided was to be made between them. The plaintiffs agreed to leave the matter to Davis, and to abide by his decision. If the alleged errors in the settlement proposed by Davis are so gross and palpable as to amount to fraud, the proper relief to be sought by plaintiffs is the judicial adjustment of the accounts, and not the appointment of a receiver.

The removal of the president of the corporation from the parish of the domicile of the corporation is an immaterial circumstance. No law requires the president of a private corporation to reside in the parish of its domicile, or forbids him to administer through agents, clerks, etc.

The allegations of maladministration are very vague. Looking to the brief to ascertain what are the particular acts complained of, we find that they are the following:

It is said that the minutes have not been properly kept. This might be good ground for not re-electing the secretary, but not for



appointing a receiver, especially in the absence of any suggestion of loss having resulted therefrom.

It is said that Adolph Witkowski, secretary and treasurer, made a sale of timber for the sum of \$500 without authority. The facts in that regard are that Adolph Witkowski, the secretary and treasurer, and Clifton F. Davis, the president, or in other words, two of the three directors, favored a sale of the timber, while Mrs. Bradley, the third director, was opposed to it, and that at the meeting at which the matter was considered only Adolph Witkowski and Mrs. Bradley were present, and that the one voted for and the other against the sale; that the deed of sale, already signed by Davis, was at the time in the hands of the secretary, as well as a letter from him favoring the sale. The secretary considered that this approval on the part of Davis was equivalent to a vote at the meeting; and accordingly he issued a certificate to the effect that the resolution authorizing the sale had been adopted, and consummated the sale. Subsequently the sale was ratified by formal resolution. Unquestionably the secretary should have known better than to suppose that the approval of an absent director could count for a vote at a meeting; but the episode is of little, if any, significance in connection with the present application for a receiver.

The expert of plaintiffs, Mr. Byerly, went over the books of the corporation, and found them correct, with one exception, which has been explained.

The few irregularities, which, for the purpose of showing the jeopardy of their interests, the plaintiffs seek to magnify into highly reprehensible conduct on the part of Adolph Witkowski, or even into nefarious transactions, are very far from showing that the affairs of the corporation are not being well and safely administered. The record shows the contrary.

The judgment appealed from is set aside, the injunction herein issued is dissolved, and the suit of plaintiffs is dismissed, at their costs.

#### WESTERN UNION TELEGRAPH CO. v. MERRITT et al.

(Supreme Court of Florida. Nov. 4, 1909.)

#### APPEAL AND ERROR (§ 1123\*)—AFFIRMANCE BY DIVIDED COURT.

The concurrence of a majority of the members of the Supreme Court sitting as one body is necessary to a decision; but, where the members of the court sitting in a cause on writ of error or appeal are equally divided, the judgment of the lower court should be affirmed, on the authority of State ex rel. Hampton v. McClung, 47 Fla. 224, 37 South. 51.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4421-4427; Dec. Dig. § 1123.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Action by John A. Merritt and others against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant brings error. Affirmed by divided court.

See, also, 55 Fla. 462, 46 South. 1024.

J. E. Hartridge, for plaintiff in error. Blount & Blount & Carter, for defendants in error.

PER CURIAM. In this case Mr. Chief Justice WHITFIELD, Mr. Justice SHACKLEFORD, and Mr. Justice PARKHILL are of the opinion that the judgment herein should be affirmed, while Mr. Justice TAYLOR, Mr. Justice COCKRELL, and Mr. Justice HOCKER are of opinion that the judgment should be reversed. Under these circumstances, upon the authority of the decision in State ex rel. Hampton v. McClung, 47 Fla. 224, 37 South. 51, the judgment should be affirmed; and it is so ordered.

#### COPELAND v. STATE.

(Supreme Court of Florida, Division B. Nov. 3, 1909.)

#### 1. HOMICIDE (§§ 210, 218\*)—DYING DECLARATIONS—PRELIMINARY EVIDENCE—DETERMINATION OF QUESTION OF ADMISSIBILITY—METHOD OF PROOF.

To render dying declarations admissible, the trial judge must be fully satisfied that the deceased declarant, at the time of their utterance, knew that his death was imminent and inevitable, and that he entertained no hope of recovery. This absence of all hope of recovery, and appreciation by the deceased of his speedy and inevitable death, is a preliminary foundation that must always be laid to make such declarations admissible. It is a mixed question of law and fact for the judge to decide before permitting the introduction of the declaration itself. It is not necessary that such preliminary foundation should be proven by express utterances of the deceased, but it may be gathered from any circumstance or from all the circumstances of the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 457-459; Dec. Dig. §§ 216, 218.\*]

#### 2. CRIMINAL LAW (§ 479\*)—OPINION EVIDENCE—MEDICAL QUESTION—QUALIFICATION.

The settled rule is that to give an opinion on medical questions one may be qualified by study without practice, or by practice without study.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1067, 1068; Dec. Dig. § 479.\*]

(Syllabus by the Court.)

#### 3. CRIMINAL LAW (§ 1178\*)—REVIEW—ASSIGNMENT OF ERROR—FAILURE TO ARGUE.

An assignment of error not argued will be treated as abandoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.\*]

#### 4. CRIMINAL LAW (§ 448\*)—STATEMENT OF CONCLUSION.

A statement by witness that he found a bed "just like two people had tumbled out of it, \* \* \* sheet down at the foot, \* \* \* and

there was where two people had laid," gave enough facts as to the condition in which witness found the bed to relieve it from the objection of being merely his opinion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1035-1052; Dec. Dig. § 448.\*]

**5. HOMICIDE (§ 166\*) — EVIDENCE — ADMISSIBILITY.**

On a trial for murder, a witness after testifying that defendant, who for some time had been having illicit intercourse with decedent, resulting in pregnancy, had taken decedent away from her home about nine days before her death, and had been at her home on three several occasions before taking decedent away with him, was permitted to testify, over objection, that on the last occasion defendant's manner was threatening, and he then told decedent that he was going to give her one more chance. *Held*, that the testimony objected to was properly admitted as tending to prove a difference between decedent and defendant, and establish a motive for the crime.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

**6. HOMICIDE (§ 168\*) — EVIDENCE — ADMISSIBILITY — OPPORTUNITY.**

The testimony objected to was properly admitted as tending, in connection with defendant taking decedent away with him, to establish the desire by him of creating an opportunity for the crime.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 304; Dec. Dig. § 168.\*]

**7. HOMICIDE (§ 203\*) — DYING DECLARATIONS — SENSE OF IMPENDING DEATH.**

Within a few minutes after drinking a glass of water given her by defendant, decedent complained of not feeling right, and died within an hour. After the first convulsion, in reply to a proposal to send for a physician, she said: "No use to send for the doctor. [Defendant] has poisoned me. He sure gave me strychnine." *Held* to justify the conclusion that decedent knew that her death was imminent and inevitable, rendering her statement admissible as a dying declaration.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

**8. HOMICIDE (§ 166\*) — EVIDENCE — ADMISSIBILITY.**

On a trial for murder, evidence that defendant had come to witness in July, decedent having died the following October, and told him that he was in trouble with decedent, had got her pregnant, and asked witness for advice, was properly admitted as tending to show a motive for the crime, and because of the continuing condition of pregnancy of decedent to her death was not objectionable for remoteness.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

**9. HOMICIDE (§ 166\*) — EVIDENCE — ADMISSIBILITY.**

On a trial for murder, evidence that a short while before the death of decedent, with whom defendant had been having illicit intercourse, resulting in pregnancy, defendant had stated to witness that he reckoned he would have to build a house, they were going to make him support decedent, and he thought it would be cheaper to build a house than any other way, etc., was admissible to show a motive for the crime.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

**10. CRIMINAL LAW (§ 479\*) — OPINION EVIDENCE — MEDICAL QUESTION — QUALIFICATION.**

A physician, though stating he had never had any personal experience with a case of

strychnine poisoning, was properly allowed to testify to the symptoms produced by strychnine poisoning, and to the exaggeratedly congested condition of decedent's abdominal viscera, and that the conditions that he found might have been produced by strychnine or ergot poisoning.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1067, 1068; Dec. Dig. § 479.\*]

Error to Circuit Court, Santa Rosa County; J. E. Wolfe, Judge.

Andrew Copeland was convicted of murder in the first degree, and he brings error. Affirmed.

T. F. West, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

**TAYLOR, J.** The plaintiff in error brings here for review by writ of error a judgment of the circuit court of Santa Rosa county convicting him of murder in the first degree, with a recommendation of the jury to mercy, which reduced his sentence to life imprisonment.

There are 31 assignments of error; but we shall discuss those only that are argued here, treating the rest as abandoned.

A state's witness, who had testified to having seen the defendant and the deceased together at an abandoned dwelling house a short while before the deceased died in convulsions from the effect of poison, was permitted, over the defendant's objection, to testify that, on examining this house where he found them together, he found a bed in the house that was "just like two people had tumbled out of it, \* \* \* sheet down at the foot, \* \* \* and there was where two people had laid." The objection of the defendant was that it stated the opinion of the witness merely, and not facts of which he had personal knowledge. The admission of this evidence constitutes the first assignment of error.

We find no error here. The evidence was pertinent to the issues. It tended to establish in the defendant an opportunity for the commission of the crime of which he stood charged, and we think enough facts are stated by the witness as to the condition in which he found the bed in question to relieve the witness' answer from the charge of being merely his opinion.

The mother of the deceased, at whose house she died, as a witness for the state, after testifying that the defendant had taken the deceased away from her home about nine days before her death, and had been to her home on three several occasions before taking the deceased away with him, was asked the question: "State what he did to her and with her on that occasion?" To this question the defendant objected on the ground of immateriality, but the objection was overruled, and the question allowed, to which the witness answered, in effect, that the defendant's manner was threatening, and that he

then told the deceased that he was going to give her one more chance. This ruling constitutes the second assignment of error. There was no error here. The evidence objected to tended to prove the existence of a difference between the defendant and the deceased, and tended to establish motive for the crime, and also, in connection with the fact of his taking the deceased away with him from her home, tended to establish the desire by him of creating an opportunity for the crime.

Assignments of error Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 17, and 18 are all discussed together, and involve the propriety of the rulings of the trial court in admitting in evidence the ante mortem declarations of the deceased in the presence of various witnesses for the state. Briefly stated, the rulings involved in these assignments were made under the following circumstances and facts in proof: It was shown that the defendant was a married man; that for some time prior to the death of deceased he had been having illicit sexual intercourse with her, and had gotten her pregnant with child, with which she was pregnant at the time of her death; that a short while prior to her death he had endeavored to get her to bind herself by an oath before a justice of the peace not to institute bastardy proceedings against him; that about nine days before her death he went to her mother's house, where she was living, and induced her, to some extent by threats, to go away with him. She remained away until the day before her death, when she came and got her little child, 1½ or 2 years old, and went away again. On the next day, between the hours of 1 and 2 o'clock p. m., she and the defendant and her little child were seen together within a quarter of a mile of her mother's home at the abandoned dwelling house of her grandfather, where, the proof tended to show, they had spent the night before, occupying the same bed. Immediately upon seeing that she was discovered there with the defendant, the deceased picked up her little child, and went to her mother's home a quarter of a mile away. When she arrived there, her face was abnormally flushed, and she complained of not feeling right, and immediately fell into convulsions that came on more violently, and at ever decreasing intervals until she died within an hour after reaching her mother's home. After the first convulsion had subsided, her mother proposed to send for a physician, but the deceased said: "No use to send for the doctor. Andrew Copeland has poisoned me. He sure gave me strychnine"; \* \* \* that she wanted some water, and he went to the spring (at her grandfather's house) and got it, and she drank it without knowing that it was poisoned"; that she did not speak of getting well at all; said no use going to the doctor; she was poisoned, and that Andrew Copeland had poisoned her; that he had given her poison in a glass of water that she drank.

In the case of *Lester v. State*, 37 Fla. 382, 20 South. 232, it was held that, "to render dying declarations admissible, the judge must be fully satisfied that the deceased declarant, at the time of their utterance, knew that his death was imminent and inevitable, and that he entertained no hope of recovery. This absence of all hope of recovery, and appreciation by the deceased of his speedy and inevitable death, is a preliminary foundation that must always be laid to make such declarations admissible. It is mixed question of law and fact for the judge to decide before permitting the introduction of the declaration itself. It is not necessary that such preliminary test should consist of express utterances, but it may be gathered from any circumstances or from all the circumstances of the case." *Dixon v. State*, 13 Fla. 636; *Richard v. State*, 42 Fla. 528, 29 South. 413; *Clemmons v. State*, 43 Fla. 200, 30 South. 699; *Gardner v. State*, 55 Fla. 25, 45 South. 1028.

Guided by these authorities and the cases therein approvingly cited, we do not think the court erred in admitting the declarations of the deceased in this case. Within a few minutes after drinking a glass of water given her by the defendant, upon arriving at the home of her mother, the deceased complained of not feeling right with her face abnormally flushed. She immediately falls into violent convulsions, and dies within an hour. On the proposition being made to have a doctor sent for, she declares: "There is no use sending for a doctor. I've been poisoned by Andrew Copeland. He sure gave me strychnine." Under these circumstances, we think the trial judge was justified in concluding that she appreciated the hopelessness of her condition, and that she knew that her death was imminent and inevitable.

The court, over the defendant's objection, permitted a state's witness to testify, in substance, that the defendant came to him in the month of July next preceding the month of October when the deceased died, and told him that he was in trouble with the deceased, that he had gotten her pregnant with child, and asked the witness for advice as to what to do about it. Various objections to this evidence were interposed and motions made to strike it, and the adverse rulings of the court thereon constitute the twelfth, thirteenth, fourteenth, fifteenth, and sixteenth assignments of error. There was no error here. The testimony, under the circumstances of this case, tended strongly to prove the existence of motive for the crime afterwards committed, and, because of the continuing condition of pregnancy of the deceased up to the time of her death was not objectionable on the ground of remoteness.

A witness for the state, over the defendant's objection, was permitted to testify, in substance, that a short while before the death of the deceased the defendant stated to him in a conversation that he reckoned he would have to get lumber and build a house;

that they were going to make him support the deceased, Lula Dixon, and he thought it would be cheaper to build a house and take care of her than to support her any other way; that defendant told him that the deceased threatened to go up to a justice of the peace and get an affidavit that he had procured to be fixed up; and that there was some money due on it to the justice, and he wanted to get this money so as to beat the deceased.

The adverse rulings of the court in admitting this evidence and in refusing the defendant's motion to strike it out constitute the nineteenth and twentieth assignments of error. There was no error here. The evidence tended strongly to establish motive for the crime. It showed that the results of his illicit intercourse with the deceased hung like an everpresent nightmare about the defendant's neck.

A physician as witness for the state was allowed, over the defendant's objection, to testify to the physical symptoms produced by strychnine poison, and to the exaggeratedly congested condition of the abdominal viscera of the deceased which he found to exist upon an autopsy made by him of her body shortly after her death, and to state that the conditions that he found might have been produced by strychnine or ergot poisoning. This witness also stated that he had never had any personal experience with a case of strychnine poisoning; that all that he knew about it was derived from the study of medical books. The defendant also moved to strike out this evidence on the ground that the witness showed by his evidence that he had not had any experience or personal observation in cases of strychnine poisoning, but the judge denied such motion, and these rulings constitute the twenty-first and twenty-second assignments of error. There is no error here. The rule is very well settled that, to give an opinion on medical questions, one may be qualified by study without practice, or by practice without study. *Lawson on Expert*

and *Opinion Ev.* (2d Ed.) Subrule 2, p. 134; *People v. Millard*, 53 Mich. 63, 18 N. W. 562; *Fordyce v. Moore* (Tex. Civ. App. 1893) 22 S. W. 235; *Healy v. Visalla & T. R. Co.*, 101 Cal. 585, 36 Pac. 125; *State v. Green*, 48 S. C. 136, 26 S. E. 234. Also see *Schley v. State*, 48 Fla. 53, 37 South. 518.

The twenty-third, twenty-fourth, and twenty-fifth assignments of error are predicated upon cross-interrogatories propounded by the state's attorney to the defendant himself while a witness on his own behalf that were objected to by the defendant. All of these questions were objected to on the ground that they were not in pursuit of the direct examination. We think that the questions objected to were germane to the object of the examination of the witness in chief, and tended to sift the truth of his story, and that they were pertinent to the issues, and were properly admitted.

The thirty-first and last assignment of error presented is the denial of the defendant's motion for new trial upon the grounds that the verdict is not supported by the evidence, and is contrary to the evidence.

There was great conflict in the evidence touching the presence of the accused in the company of the deceased on the day of and shortly before her death, but the jury, an apparently fair and impartial one, have settled that conflict on the side of the state, and, after a careful consideration of the entire evidence, we are unable to adjudge that the verdict of the jury was not thereby fully sustained, particularly after the trial judge who saw the witnesses and heard their evidence has declined to interfere with their finding.

Finding no error, the judgment of the circuit court in said cause is hereby affirmed at the cost of Santa Rosa county; the plaintiff in error having been adjudged to be insolvent.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

MASON et al. v. LEE et al. (No. 14,154.)  
(Supreme Court of Mississippi. Dec. 6, 1909.)  
RELIGIOUS SOCIETIES (§ 12\*)—GENERAL COUNCIL—CONTROL.

Where it does not appear that a "general council," composed of representatives of local churches of a sect, was ever legally organized, or, if it was, that it was invested with any authority over the local churches, either by direct action of the churches or by the action of the duly authorized representatives thereof, its action in excommunicating the pastor of a local church for propounding certain doctrines would be no ground for enjoining the pastor and his followers among his congregation from using the church property.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 87-98; Dec. Dig. § 12.\*]

Appeal from Chancery Court, Holmes County; James F. McCool, Chancellor.

Bill by John A. Lee and others against Charles H. Mason and others. Decree for complainants, and defendants appeal. Reversed and remanded.

About the year 1896 there was established in the town of Lexington, Miss., a negro church called the "St. Paul Church of God," professing the Christian religion, but undenominational, claiming no creed except the Bible. C. H. Mason was selected as its pastor, and continued as such until the institution of this suit. At the time of its organization the church was purely congregational, and subject to the rules and regulations of no council or other organized body. A number of churches of similar persuasion sprang up, and in the year 1907 a convention of ministers and other members was held in Jackson, Miss., which undertook to adopt rules and regulations for the various churches of this sect. Soon after the organization of the St. Paul Church of God, trustees were appointed, and church property and effects were acquired, a lot was purchased, and a house of worship erected; the property being held in the name of the trustees. In this building the congregation assembled for worship until the institution of this suit.

The bill in this case was filed in October, 1908, by the appellees, about 50 in number, who were members of the St. Paul Church of God, some of them being trustees, against Mason, the pastor, and two other trustees of the church. The bill alleged that "in 1907 Mason had visited Los Angeles, Cal., where he became imbued and possessed of a rank and dangerous heresy and superstition, claiming that the spirit of God had descended upon him and given him the power to speak in an unknown tongue." It alleged, further, that after his return to Lexington a schism arose in the sect at large, led and fostered by Mason, who had commenced to preach and propagate his new doctrine and to convert members of his congregation thereto. It further alleged that this unknown tongue, which he spoke and pretended to interpret, is "neither a language living nor dead, known nor un-

known, and is not expressive of any objects, thought, or feeling, but is merely a jibberish, thought, or feeling, but is merely a jibberish and jargon of vocal and nasal and guttural sounds, and is in reality the most transparent, flimsy, and ridiculous humbug," and that such blasphemy and heresy is objectionable to the faithful members of the church (the complainants); that said Mason is seeking to establish his new faith, which is called the "Los Angeles Parham Gift of Tongue Baptism," as the faith of the St. Paul Church of God; and that the general council of their church, which met in Jackson, Miss., in 1907, had condemned this heresy, and denounced the teachings of Mason, and warned the faithful against his preaching; and that, in spite of the protests of council, Mason had persisted in his faith, and had by said council been excommunicated. They exhibit certain orders of the general council in condemnation of Mason's conduct, and also what purports to be the rules of government of the various churches of this particular sect. The prayer of the bill is that the defendants be enjoined from exercising any rights of ownership or control over the property of the St. Paul Church of God, and from the use of same, either for temporal or spiritual purposes.

The defendants answer, denying that they were guilty of any heresy or schism, and denying the right of the general council to depose or attempt to excommunicate Mason, and denying the right of said council to interfere in any way with the St. Paul Church of God, which it is charged is purely congregational and undenominational, and not responsible to any council whatever. They deny the right of the council to interfere with the local government of the church in the selection of its pastor, claiming that no such supervision was ever contemplated, or, in fact, delegated to the general council. They deny that there are any rules of government of the church, except the voice of the majority of its own congregation, which is in accordance with Mason's preachings and teachings. They deny that they are seeking to establish a new faith, but claim Biblical authority for hoping, as a reward for their faith and unceasing prayer, to enjoy certain promised blessings, among which are "those mysterious manifestations of the Divine Spirit referred to as 'working of miracles,' 'prophecy,' 'discerning of spirits,' 'divers kinds of tongues.'" The defendants further allege that they have offered to divide time with the complainants in the use of the building, but are unwilling to give up its use, since they are themselves entitled to conduct and govern it in accordance with the wishes of the majority.

There was a decree granting the prayer of the complainants, and enjoining the defendants from the use of the property, and from this decree an appeal is taken.

Tackett & Elmore, for appellants. Boothe & Pepper, for appellees.

SMITH, J. There is no sufficient evidence in this record to show that a "general council" was in fact ever legally organized, or that, if it was, it was invested with any authority over the local churches, either by direct action of the churches, or by the action of the duly authorized representatives thereof; and particularly is this true with reference to the local church at Lexington, known as the "St. Paul Church of God."

The decree of the court below is therefore reversed, and the cause remanded.

### HARRIS v. STATE. (No. 13,892.)

(Supreme Court of Mississippi. Dec. 13, 1909.)

#### 1. CRIMINAL LAW (§ 721\*)—TRIAL—IMPROPER ARGUMENT—COMMENT ON ACCUSED'S FAILURE TO TESTIFY.

In a prosecution for shooting with intent to kill, a statement in argument by the district attorney that accused murdered a white man in the house where he did the shooting which he did not deny, was a direct comment upon accused's failure to testify, and was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.\*]

#### 2. CRIMINAL LAW (§ 723\*)—TRIAL—ARGUMENT—APPEAL TO RACE PREJUDICE.

In a prosecution of a negro for shooting a white man with intent to kill, the state's evidence was contradictory. The district attorney stated in argument that he was putting it to 12 white men whether they (the jury) would convict a negro for shooting a white man, when a former jury convicted a white man for killing a negro, and that he hoped the jury would have the same sort of nerve, and convict accused for shooting a white man; that the white people of the county from which the case was transferred did not often go wrong, and would have convicted accused, who next time will be tried by 100 men, instead of 12; that it was necessary for the people to take the law in their own hands, and they would do it if the jury did not enforce the law; that this was a white man's country, bought by their blood, and they would rule it, and the time for turning a negro loose for shooting a white man would never come in the county from which the case was transferred; and accused would not have been acquitted there and knew better than to be tried there. The trial judge, though requested five times, did not rebuke the district attorney or direct the jury to disregard his argument. *Held*, that the statements were appeals to race prejudice, and reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. § 723.\*]

On suggestion of error. Suggestion sustained, judgment of affirmance vacated, judgment below reversed, and cause remanded for new trial.

For former opinion, see 50 South. 560.

WHITFIELD, C. J. The appellant, a negro, was indicted for shooting with intent to kill and murder a white man. The evidence in the case for the state abounds in

contradictions, as between different witnesses, and as to part of the testimony of one witness with other parts of the same witness' testimony. In short, the utmost confusion and uncertainty prevails throughout the testimony of the witnesses for the state, making the case an exceedingly close one on the facts—so close that any serious error must, of necessity, cause reversal.

This being the attitude of the case, the district attorney, in his closing argument for the state, as shown by five separate special bills of exception taken to his remarks in that closing argument, used the following language set out in pages 19, 20, and 21 of the record: "Gentlemen, I am putting it up now to 12 white men as to whether or not you will convict a negro for shooting a white man, and the jury last week convicted a white man for killing a negro; and I hope you will have the same sort of nerve, and convict this negro for shooting the white man." "Those white people over there do not often go wrong [meaning in Amite county]. He knew they would have found him guilty as charged. This time he is being tried by 12 men, and next time he will be tried by 100." "The people taking the law in their hands is necessary. The white people of this county will take the law in their own hands, and enforce the law to suit themselves, if you don't do it yourself." "This is our country. We bought it with our own blood, and we have a right to own and rule it, and we are going to rule it." "The time to turn a nigger loose for shooting a white man will never come in Amite county." "They had better brought his case over here. He never would have gotten a verdict of not guilty in Amite county." "The defendant is a high muckey de muck. He is above being tried in Amite county. He knew better." And, finally, the district attorney said: "That defendant murdered a man in that house, where the shooting occurred, he don't deny. This defendant was surely having a time out there murdering a white man."

The language to the effect that he murdered a white man in the house out there he did not deny is direct comment upon the failure of the defendant to testify. It is impossible for us to see any other construction to be given this language, and under repeated decisions of this court this is fatal error. But, aside from this, it certainly needs no argument to show that these remarks of the district attorney, the representative of the state, in his closing argument to the jury, were a direct appeal to race prejudice, and are of such a highly inflammatory character, and so manifestly transcend any legitimate bounds of argument, as to necessitate reversal of themselves, if there had been no other error. Every defendant at the bar of his country.

white or black, must be accorded a fair trial according to the law of the land, and that law knows no color. It must be further noted that the judge, though appealed to five separate times, did not rebuke the district attorney, nor correct his argument, nor in any manner instruct the jury to disregard that argument.

We expressly decline, at this time, to pass upon any other error assigned, leaving all other errors open for future consideration, if it should become necessary.

For the two errors indicated, and those alone, the suggestion of error is sustained, the affirmance vacated and set aside, the judgment of the court below is reversed, and the cause remanded for a new trial.

### YAZOO & M. V. R. CO. v. HUGHES.

(No. 14,202.)

(Supreme Court of Mississippi. Dec. 6, 1909.)

#### CARRIERS (§ 277\*)—PUNITIVE DAMAGES—EJECTION OF PASSENGER.

It was necessary that plaintiff and her five-year and nine-month old children change cars at H., and she testified that on approaching a certain station the flagman told her it was H., and politely assisted her to alight; but the flagman testified that she was standing in the aisle preparing to alight when he called the station, and assisted her to alight without knowing her destination. The station where plaintiff got off was not H., and when she discovered the mistake she, with her children, was driven back to the station, where she boarded the train, and on the next day went to her destination on the same ticket she had used before. *Held*, in an action for damages for being put off at the wrong station, that plaintiff could not recover punitive damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1083; Dec. Dig. § 277.\*]

Appeal from Circuit Court, Warren County; John N. Bush, Judge.

Action by Mrs. John M. Hughes against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action for actual and punitive damages. From a verdict of \$2,500, the railroad company appeals. The facts are briefly as follows: Plaintiff and her two children, aged five years and nine months, respectively, took passage on appellant's passenger train at Vicksburg, intending to go to Natchez, Miss. It was necessary to change cars at Harriston, about two hours' run from Vicksburg. The flagman came through the car and called a station, which was in fact Glass, which was about 30 minutes' run from Vicksburg. Mrs. Hughes, thinking it was Harriston, arose and prepared to disembark. She testifies that she asked the flagman if it was Harriston, and he replied, "Yes, ma'am," and assisted her to alight; that he was very polite and courteous in his manner. After alighting, she discovered that it was not Harriston, but

Glass, and there were some negroes around the station, who told her that a white man had a store near there. She sought him out, and he procured a buggy and took her and her children back to Vicksburg. They arrived there about 8 o'clock in the evening, and next day she took her trip to Natchez as contemplated, traveling on the same ticket she had used the day before; the matter having been arranged with the railroad company for her. She testified that she was very nervous and upset by her experience, and for about a week suffered with a headache. There seems to be no other special injury, and no proof of any reason for her being mistreated by the servants of the railroad company, who showed her nothing but the most courteous treatment. The flagman denies that she asked him if it was Harriston, but states that he saw her standing in the aisle preparing to get off when he called the station, Glass, and volunteered to assist her to alight, without any knowledge of what her destination was, supposing that she knew where she was getting off. Under this state of facts, the court charged the jury that punitive damages might be awarded.

Mayes & Longstreet, for appellant. Henry, Fox & Canizaro, for appellee.

WHITFIELD, C. J. Manifestly this is no case for the imposition of punitive damages. It was, therefore, fatal error to refuse the defendant the sixth instruction, charging the jury not to award punitive damages.

Reversed and remanded.

### WATSON v. STATE. (No. 13,778.)

(Supreme Court of Mississippi. Dec. 13, 1909.)

#### CRIMINAL LAW (§ 938\*)—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

Where accused was convicted of murder almost entirely upon the testimony of a witness, whose evidence was strongly contradicted by his written testimony at the coroner's inquest and by the testimony of a number of other witnesses, it was reversible error not to grant a new trial for newly discovered evidence, consisting of testimony which would corroborate accused's witnesses and tend to impeach the state's witnesses and to change the result of the trial; accused or his attorney not knowing of such testimony at trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.\*]

Appeal from Circuit Court, Warren County; John N. Bush, Judge.

"To be officially reported."

Alcorn Watson was convicted of murder, and he appeals. Reversed and remanded.

Appellant was convicted of murder and sentenced to the penitentiary for life. On

appeal one of the assignments of error is based upon the refusal of the court to grant a new trial upon the ground of newly discovered evidence—the showing made upon the application being substantiated by an affidavit stating that the witnesses, whose testimony was material, would not only give testimony in corroboration of defendant's witnesses and tend to impeach state's witnesses, but calculated to change the result of the former trial; that neither defendant nor his attorneys knew that this witness had such knowledge at the time when the case was tried. The witness' testimony is set out fully in the affidavit, which is in proper form.

Anderson, Voller & Foster and R. L. C. Barrett, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. This conviction rests almost exclusively upon the testimony of Ray Boykin. The testimony of that witness on the trial in the circuit court is so overwhelmingly contradicted by his own previous testimony, taken down in writing at the coroner's inquest, and by the testimony of Judge George Anderson, Mr. C. L. Swords, Joe Homberger, John Bianchi, and others, as to make it gravely questionable whether this court should not set aside this verdict on that ground alone, as utterly unwarranted by the testimony. We prefer, however, to rest the judgment of reversal in this case upon the ground that the newly discovered testimony of Leota Johnson was most vital and material to a just decision of this case. The application for a new trial on the ground of this newly discovered evidence conformed strictly, in all respects, to the requirements touching such applications, and the testimony being, as stated, of the most vital character, it was error, and fatal error, to overrule the motion for the new trial.

For this error, the judgment is reversed, and the cause remanded.

**MOBILE, J. & K. C. R. CO. v. KEA.**  
(No. 14,237.)

(Supreme Court of Mississippi. Dec. 13, 1909.)

**RAILROADS (§ 441\*)—INJURIES TO ANIMALS—ACTIONS—BURDEN OF PROOF—NEGLIGENCE—APPLICATION OF STATUTE.**

In an action against a railroad company for injury to a horse by becoming frightened at a train and running away, causing its injuries, the burden was upon plaintiff to establish liability by a preponderance of the evidence; Code 1906, § 1985, making proof of injury inflicted by the running of a locomotive prima facie evidence of want of reasonable care by the railroad, not applying.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1576-1591; Dec. Dig. § 441.\*]

Appeal from Circuit Court, Neshoba County; J. R. Byrd, Judge.

Action by J. J. Kea against the Mobile, Jackson & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Flowers, Fletcher & Whitfield, for appellant. Byrd, Willson & Richardson, for appellee.

SMITH, J. From a judgment in the court below, awarding appellee damages for an injury to his mare, this appeal is taken. It will not be necessary to state the facts in this case; but it will be sufficient to say that this mare was not struck by the train, or injured by the running thereof, but became frightened thereat, and ran along the side of the track for some distance, then upon and down the track ahead of the train, and into a trestle, thereby sustaining her injuries.

The court, at the request of appellee, charged the jury, under section 1985 of the Code of 1906, that proof of injury by the running of the locomotive or cars of the company was prima facie evidence of the want of reasonable skill and care on the part of the servants of the company, etc. The court also refused the following instruction, requested by appellant: "The court instructs the jury that the burden of proof in this case is upon the plaintiff to establish liability upon defendant company by a preponderance of the evidence, and unless such liability has been so shown they will find a verdict for the defendant."

The court was in error in both instances. Section 1985 of the Code has no application to this case, as the mare was not struck or injured by the running of the train. Lowe v. A. & V. R. R. Co., 81 Miss. 9, 32 South. 907.

Judge MAYES concurs in the reversal, but is of the opinion that the facts show no liability on the part of the railroad company.

Reversed and remanded.

**WELLS v. EDWARDS HOTEL & CITY RY. CO.** (No. 14,144.)

(Supreme Court of Mississippi. Dec. 6, 1909.)

**1. ASSIGNMENTS (§ 24\*)—VALIDITY—CLAIM FOR PERSONAL INJURIES.**

A cause of action for personal injuries surviving the claimant's death, an assignment by him of an interest therein is valid.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 43; Dec. Dig. § 24.\*]

**2. ASSIGNMENTS (§ 93\*)—CLAIM FOR PERSONAL INJURIES—EFFECT.**

An assignment transfers to the assignee an interest in present in whatever amount might be ascertained to be due to the claimant either by suit or by settlement; and where the one against whom the claim exists knows of the assignment, it is not protected by payment of the claim to the claimant.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 159; Dec. Dig. § 93.\*]

Appeal from Circuit Court, Hinds County; M. H. Wilkinson, Judge.



Action by W. Calvin Wells, Jr., against the Edwards Hotel and City Railway Company. There was a directed verdict for defendant, and plaintiff appeals. Reversed and remanded.

L. Brame, for appellant. Williamson & Wells, for appellee.

SMITH, J. W. F. Hoy, having been injured, as it is alleged, by the negligence of the employes of appellee in the running of one of its cars, and desiring to recover damages therefor, sent for appellant, an attorney at law, and executed and delivered to him the following contract: "In consideration of legal services rendered and to be rendered, I, William Franklin Hoy, assign and set over to W. C. Wells, Jr., my attorney, an undivided one-fourth interest in and to my right of action against the Jackson Electric Railway & Power Company for injuries received by me on the morning of July 18, 1908, by car at the corner of Pascagoula and South State streets, in the city of Jackson. "Witness my signature this July 18, 1908. W. F. Hoy." Thereupon appellant called upon the general manager of appellee for a settlement, and, according to his evidence, advised the general manager of this assignment, who thereupon requested him not to enter suit, and stated that, if a settlement was had, it would be made direct with appellant, and that he (appellant) would be protected to the extent of his interest. Notice of this assignment, and promise to settle direct with appellant, or to protect his interest, was denied by appellee's manager.

Afterward, without the knowledge or consent of appellant, a settlement was effected by appellee with, and payment was made to, Hoy, the terms of which are embodied in the following receipt: "Jackson Electric Railway, Light & Power Co. Release. Jackson, Miss., July 31, 1908. \$850.00. Received of the Jackson Electric Railway, Light & Power Company and Edwards Hotel & City Railroad Company the sum of eight hundred and fifty dollars, the same being in full settlement and satisfaction of any and all claims for damages which I have or may have against said company on account of an injury to me received by a fall from one of the street cars of the said company on South State street, in the city of Jackson, on the 18th day of July, 1908, and in full satisfaction of all claims and demands and rights of action which I may have on account of said injury; and I certify that I have not employed any attorney, and I agree to protect and save harmless the said company against any claim for attorney's fees, or any demand which may be made on account of any contract which I may have made about attorney's fees, and against any claim or demand whatsoever, except sanatorium fees

and doctors' bills, which said company agrees to pay; and I do hereby release and relinquish unto said company all rights of action or claims of any and all kinds which I now have or may hereafter have against said company, its associates, successors, or assigns, on account thereof. W. F. Hoy."

Afterwards this suit was instituted in the court below to recover of appellee the amount alleged to be due appellant by reason of the assignment hereinbefore set out. At the close of the evidence there was a peremptory instruction to find for the defendant, appellee here, and from a verdict and judgment accordingly this appeal is taken.

Under our statute, Hoy's cause of action against appellee would have survived upon his death, and consequently an assignment thereof, or of an interest therein, is valid. *Railroad v. Packwood*, 59 Miss. 280; 2 Am. & English Encyclopedia of Law, 1017. The assignment under consideration conveyed to appellant an interest in present in whatever amount might be ascertained, either by suit or settlement, to be due Hoy by appellee; and since, according to appellant, this assignment was known to appellee, appellee was not protected by its payment to Hoy. The peremptory instruction, therefore, ought not to have been given.

Reversed and remanded.

#### TURNER v. STATE. (No. 13,972.)

(Supreme Court of Mississippi. Nov. 29, 1909.)

#### CRIMINAL LAW (§ 785\*)—CREDIBILITY OF WITNESSES—INSTRUCTIONS.

In a prosecution for the unlawful sale of whisky, the only witnesses called by the state were detectives employed by the state at a fixed salary to ascertain where whisky was illegally sold, and institute prosecutions against parties selling it. It was not shown that they had any direct interest in convicting accused, or that their pay depended upon conviction. Accused asked to have the jury instructed that the consideration of the evidence and determination of its weight and the credibility of the witnesses are for the jury, and in weighing the evidence and determining whether a witness should be believed the jury could consider any interest such witness may have in the case, and if they believe that any witness has willfully sworn falsely as to any material matter the jury have a right to disbelieve the whole evidence of such witness. *Held*, that under the circumstances the instruction should have been given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774-1781, 1889-1894; Dec. Dig. § 785.\*]

Smith, J., dissenting.

Appeal from Circuit Court, Holmes County; Sydney Smith, Judge.

Clarence Turner was convicted of the unlawful sale of whisky, and appeals. Reversed.

The appellant was convicted of the unlawful sale of whisky. In the prosecution there were but two witnesses called on the

part of the state. It developed in the testimony, when these witnesses were on the stand, that they were in the service of the state at a salary of \$5 per day, as employed detectives, and were engaged in ferreting out "blind tigers" and instituting prosecutions against the parties charged with keeping same, and that, as part of their business, after ferreting out these so-called "blind tigers," it was their duty to testify in the cases. It is not shown that they have any direct interest, or that their pay depends upon conviction; but it is shown that they are paid witnesses by the state, and it may be inferred from this fact that they were vitally interested in securing convictions. At least, the jury had a right to consider these facts and such inferences as might be drawn from same, when it came to determining what weight should be given to their testimony. The state's witnesses were put through a severe cross-examination, and the testimony offered by the defendant was in direct conflict with that of the state's witnesses on many points. After the testimony was in, the appellant asked several instructions, all embodying the idea that the jury had the right to consider the interest of any witness testifying in the case in determining the credit which should be given to the testimony of any such interested witness. All instructions on this subject were refused by the court.

Boothe & Pepper and W. J. Croom, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. The fourth instruction asked by the defendant should manifestly have been given. It was in the following words, and was refused: "The court further instructs the jury, for the defendant, that the consideration of the evidence in this case, and determining the weight thereof, and whether the witnesses should be believed or not, is exclusively the province of the jury, and in weighing the evidence in this case, and in saying whether a witness who has testified in this case should be believed, the jury have a right to take into consideration what interest, if any, such witness may have in the case; and if the jury believe from the evidence that any witness in this case has willfully and corruptly sworn falsely as to any material thing or matter inquired of on the trial of this case, the jury have a right to disbelieve and disregard the whole and entire evidence of such witness." The exact counterpart of this instruction was given in the case of *McLellan v. State*,<sup>1</sup> with the single exception that in this charge the word "knowingly" is omitted; but the words "willfully" and "corruptly" are used, and this instruction was expressly approved in *Valls v. State*, 48 South. 725. It is not thinkable that a man can willfully and corruptly swear falsely without also "knowingly" swearing falsely. This

charge has been given immemorially in this state, and should manifestly have been given in this case.

It is sometimes said that the maxim, "falsus in uno, falsus in omnibus," is not a principle of law at all. Whether it be a principle of law, or whether it be "a principle of logic and common sense," as it is called in the third volume of Sackett on Instructions, p. 2116, par. (d), is utterly immaterial. Undoubtedly, it is a perfectly sound principle and a wise precautionary charge in proper cases, and we think this was a proper case in which to give this instruction. Certainly, as stated, it is an instruction which has been given in this state by universal practice of judges for time out of mind, and we see no reason now for departing from a custom which has been so long continued and which we think is a wise and salutary one. Cases are easily conceivable in which to refuse such an instruction as this would unquestionably operate prejudicially to the defendant in the highest degree. Cases may also be conceived in which such instruction would be unnecessary. Whether it should be given in a particular case depends upon the facts of that case, and in this case we think the facts were such as to require the giving of this instruction. The whole case depended upon the credibility of the testimony of the witnesses for the state. These witnesses were assailed most vigorously on the very point as to whether their testimony was true. The case was a very close one on its facts. In this attitude of the case, it seems to us it was a peculiarly appropriate case in which to give this charge, approved in this state time out of mind.

For this reason, the judgment is reversed.

SMITH, J. (dissenting). I am unable to concur with my Brethren in the reversal of this cause. This instruction seeks to invoke what this court in *Bell v. State*, 90 Miss. 104, 43 South. 84, styled the "dangerous," and in *McDonald v. State*, 28 South. 750, the "exploded," doctrine of "Falsus in uno, falsus in omnibus," and omits the element of the witness' knowledge of the falsity of the testimony given by him. In *Railroad Company v. McCoy*, 85 Miss. 391, 37 South. 706, this court said: "We again announce that, where jurors are instructed as to their right to reject the testimony of witnesses on the ground that they have sworn falsely to any part of their testimony, the instruction should always contain the limitation that such false swearing was 'willfully, knowingly, and corruptly' done." This maxim, which is in no sense a rule of law, is such a dangerous one, and the reason it is based on is so questionable, so much so that it has been discarded by eminent authority, including Mr. Wigmore, that where it is invoked the jury ought not to be left in any doubt that the falsity of the evidence must be known to the witness.

<sup>1</sup> 50 South. 496.

But, aside from this, the refusal of the instruction was not error, certainly not reversible error, as will appear from the examination of the following authorities: Commonwealth v. Clune, 162 Mass. 206, 38 N. E. 435; State v. Musgrove, 43 W. Va. 672, 28 S. E. 813; State v. Banks, 40 La. Ann. 736, 5 South. 18; State v. Hickman, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54; Paddock v. Somes, 51 Mo. App. 320. In Wigmore on Evidence, vol. 2, § 1008, that great writer says: "The maxim, 'He who speaks falsely on one point will speak falsely upon all,' is in strictness concerned, not with the admissibility, but with the weight, of evidence. The jury are told by it what force to give to a falsity after the evidence has shown its existence. \* \* \* It may be said, once for all, that the maxim is in itself worthless, first, in point of validity, because in one form it merely contains in loose fashion a kernel of truth which no one needs to be told, and in the others it is absolutely false as a maxim of life; and, secondly, in point of utility, because it merely tells the jury what they may do in any event, not what they must do, or must not do, and therefore it is a superfluous form of words. It is also in practice pernicious, first, because there is frequently a misunderstanding of its proper force; and, secondly, because it has become in the hands of many counsel a mere instrument for obtaining new trials upon points wholly unimportant in themselves."

CALDWELL et al. v. GEORGE. (No. 14,196.) (Supreme Court of Mississippi. Dec. 6, 1909.)

1. MUNICIPAL CORPORATIONS (§§ 680, 681\*)—STREETS—OBSTRUCTION—AUTHORITY OF CITY TO PERMIT.

Since streets and sidewalks are for use by the public throughout their full length and width, in absence of legislative authority, a city board of aldermen could not permit a permanent obstruction of a sidewalk, and their permission would be void, and afford no protection in a suit to enjoin the obstruction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459, 1461; Dec. Dig. §§ 680, 681.\*]

2. MUNICIPAL CORPORATIONS (§ 671\*)—USE OF STREETS—OBSTRUCTIONS—REMEDIES OF ABUTTING OWNERS—INJUNCTION.

Property owners adjacent to an obstruction to a sidewalk, who suffer special and peculiar damage therefrom different from that suffered by the general public, may enjoin its maintenance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1448; Dec. Dig. § 671.\*]

Appeal from Chancery Court, Lauderdale County; Sam Whitman, Jr., Chancellor.

Bill for injunction by James H. Caldwell and others against A. H. George. From a decree dismissing the bill, complainants appeal. Reversed, and injunction reinstated and perpetuated.

See, also, 46 South. 169.

A. H. George, needing warehouse room for the proper handling of his business, and finding that part of the land which was best adapted for his uses was laid off by the city as a street, applied to the municipal board for permission to obstruct the same by extending his warehouse over that part of the street laid off as a sidewalk (though no walk had really been laid). The municipal authorities passed an order granting him permission to obstruct the sidewalk in accordance with his petition, by extending his warehouse over it. Thereafter appellants, adjacent property owners, filed a bill to enjoin George from the obstruction of the street, on the ground that the charter of the municipality did not give the board authority to pass an ordinance granting any one permission to obstruct its streets. At the hearing the chancellor entered a decree dismissing the bill, and this appeal is prosecuted.

Ethridge & Ethridge, for appellants. Witherspoon & Witherspoon, for appellee.

SMITH, J. The streets of a municipality, including the sidewalks, "from side to side and from end to end," are for the use of the public, and, in the absence of legislative authority, a board of aldermen, or city council, have no power to permit a permanent obstruction thereof. The permission, therefore, given appellee by the board of aldermen to extend his warehouse over the sidewalk in question, was void, and afforded him no protection. It being shown that appellants suffer thereby damage peculiar to themselves, different from that sustained by the general public, the injunction ought to have been granted as prayed for.

The decree of the court below is reversed, and decree here reinstating the injunction and making same perpetual; costs here and in court below to be paid by appellee.

YAZOO & M. V. R. CO. v. FITZGERALD. (No. 13,855.)

(Supreme Court of Mississippi. Dec. 6, 1909.)

1. CARRIERS (§ 319\*)—ACTS OF CONDUCTOR—PUNITIVE DAMAGES—GROUNDS.

Plaintiff and another, starting on a journey, were induced to buy "family mileage," which had just been adopted by defendant carrier, had their baggage checked, and boarded the train. The first two conductors accepted the mileage; the second one tearing off sufficient to carry them to their destination. After they had retired for the night, a third conductor, about 3 o'clock in the morning, awakened plaintiff, telling her that the mileage was not good beyond a certain point en route, and that she would have to pay fare from that point to destination. He was rude and insulting, and demanded money, stating that she need not try to bluff him, as she had done the other conductor, that he knew his business, and that unless she paid he would put her off. The conductor finally consented to receive payment in the morning, when the matter was adjusted at

their destination. *Held*, that plaintiff was entitled to punitive damages.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1341-1343; Dec. Dig. § 319.\*]

**2. CARRIERS (§ 319\*)—MISCONDUCT OF CONDUCTOR—EXCESSIVE DAMAGES.**

A recovery of \$2,500 was excessive, and should be reduced to \$1,500.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1144, 1145; Dec. Dig. § 319.\*]

Mayes, J., dissenting.

Appeal from Circuit Court, Issaquena County; John N. Bush, Judge.

Action by Mrs. Fannie Fitzgerald against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, unless remittitur be made.

This is an action for actual and punitive damages, due to the alleged conduct of the conductor on appellant's passenger train. There was a verdict for plaintiff for \$2,500, from which an appeal is taken. The appellee, in company with her sister, Miss Brown, being desirous of going from Rosedale, Miss., to New Orleans, La., went to the station to secure transportation, when the ticket agent asked them why they did not get "family mileage," which had just been adopted by the company, and which would be good for both of them. Acting upon his suggestion, they purchased a 1,000-mile book for \$25, had their baggage checked, and boarded the train. The conductor examined the mileage, accepted it, and allowed them to proceed on their journey. The second conductor on the line also accepted it, and tore out sufficient mileage to carry them to New Orleans. After they had procured sleeping car tickets and retired for the night, another conductor came aboard, and about 3 o'clock in the morning awakened Mrs. Fitzgerald, telling her that the mileage was not good beyond the Mississippi state line, and she would have to pay fare from that point to New Orleans. She testifies that he was rude and insulting in his manner, and did not explain the situation fully to her, but simply demanded money; that, when she protested, he stated that "she needn't try and bluff him, like she had done the other conductor; that he was an old man on the line and knew his business, and that unless she paid he would put her off"; that she was very much incensed and excited over being thus disturbed, and refused to pay the fare demanded, whereupon Miss Brown, her sister, offered to pay in the morning before they disembarked at New Orleans, to which proposition the conductor acceded. The next morning the conductor took the two of them in a carriage to the passenger agent in New Orleans, where the matter was explained to them, and their mileage exchanged upon the payment of \$5 additional. The conductor testifies that he was not insulting, or rude, or threatening,

but simply did his duty as conductor, and awakened Mrs. Fitzgerald quietly, and told her that the mileage was not good beyond the state line, and that the fare was \$2.50 into New Orleans. Upon this state of facts, the question was submitted to a jury, upon instructions of the court permitting them to find either actual or punitive damages, or both.

Mayes & Longstreet, for appellant. H. P. Farish and Flowers, Fletcher & Whitfield, for appellee.

SMITH, J. On the evidence for the plaintiff, which was accepted by the jury, she was entitled to recover punitive damages. Railroad Co. v. Reid, 46 South. 146, 17 L. R. A. (N. S.) 344.

We think, however, that the verdict was excessive, but, if she will remit down to \$1,500, the judgment will be affirmed; otherwise, it will be reversed, and the cause remanded.

MAYES, J. (dissenting). When the facts of this case are thoroughly examined it is my judgment that it does not present any case for the allowance of punitive damages. I think the case should be reversed and remanded.

**AUSTIN v. VICKSBURG TRACTION CO**  
(No. 14,191.)

(Supreme Court of Mississippi. Dec. 13, 1909.)

**1. STREET RAILROADS (§ 85\*)—USE OF STREETS—RIGHT OF TRAVELERS.**

Travelers on a street and a street railway company must each use the street with reasonable regard for the safety and convenience of the other.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.\*]

**2. STREET RAILROADS (§ 81\*)—OPERATION OF CARS—DUTY OF MOTORMAN.**

A motorman must keep a reasonably careful lookout for persons lawfully using the street, and use reasonable precautions to prevent accidents to them, and the degree of care required varies according to the time, place, and circumstances.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 172-177; Dec. Dig. § 81.\*]

**3. STREET RAILROADS (§ 117\*)—OPERATION OF CARS—DUTY OF MOTORMAN.**

Whether a motorman saw, or in the exercise of reasonable care ought to have seen, the danger in which a traveler on a street was placed by reason of his horse becoming frightened by the car, and whether the motorman exercised reasonable care to prevent the injury to the traveler in consequence of the horse becoming frightened, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 117.\*]

Appeal from Circuit Court, Warren County; Jno. N. Bush, Judge.

Action by J. S. Austin against the Vicks-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

burg Traction Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

McLaurin, Armistead & Brien, for appellant. Smith, Hirsch & Landau, for appellee.

SMITH, J. Suit was instituted in the court below by appellant to recover from appellee, a street car company, damages for an injury alleged to have been sustained by him by reason of the negligent operation of appellee's road. In December, 1908, appellant was going to Vicksburg from his home, about 16 miles in the country. As he arrived at the foot of a hill, called "Hall Hill," in the suburbs of Vicksburg, he reached a point on the public road of the county on which the appellee was operating a street car line and had a street car track. At the foot of this hill there is a wire fence on each side, inclosing the street car track and public road. The car track runs east and west on the south side of the road down this hill, through a deep cut, and within the two wire fences mentioned. The public road runs along parallel with the track up this hill. This road is about 18 feet wide, the distance from the foot of the hill to the top of the hill is about 100 yards, and there is nothing to obstruct the vision from the foot to the top of the hill. When the appellant, who was driving a horse hitched to a single buggy, reached the foot of this hill, and started up the hill in the public road, he saw a street car of appellee appear on the top of the hill, coming toward him. The horse showed fright at the approaching car, and, being hemmed in by the two embankments and two wire fences on either side of the road, there was no way by which appellant could drive his horse away from the position he occupied near the street car track. When the horse showed fright at the approaching car, appellant stood up in his buggy, and waved to the motorman, and said to him: "For heaven's sake, stop your car!" Whether or not this request was heard by the motorman is not disclosed by the evidence. The car continued to advance toward appellant, and as it continued to approach the horse turned, first to the right against the embankment, backed a short distance, and then turned suddenly to the left, which brought his feet across the track; but he escaped therefrom without being struck by the car. This action of the horse overturned the buggy and threw the appellant out against the car. By striking the car he was knocked back underneath the buggy, and sustained the injury complained of. At the close of appellant's testimony the court excluded the evidence, and peremptorily charged the jury to find for appellee. From a verdict accordingly, this judgment is taken.

Assuming that a street railway company is lawfully in the occupation of a street, its and the public's right to the use thereof are equal, except in so far as this equality is

modified by reason of the fact that the street car company is confined in its operations to a single track. Each must use the street with reasonable regard for the safety and convenience of the other. It was the duty of the motorman, while running his car, to keep a reasonably careful lookout for, and use reasonable precautions to prevent accident to, persons lawfully using the street; the degree of care required of him in this regard, varying according to the time, place, and circumstances. Whether the motorman has complied with this duty presents, as a general rule, a question of fact for the jury. In the case at bar it was for the jury to say whether the motorman, under all the circumstances, saw, or in the exercise of reasonable care ought to have seen, the danger in which appellant was placed by reason of the fright of his horse, and whether he (the motorman) then exercised such care as a reasonable and prudent man would have exercised under the circumstances to prevent the occurrence of the injury. The granting of the peremptory instruction, therefore, was error. *Ellis v. Lynn R. R. Co.*, 160 Mass. 341, 35 N. E. 1127; *Muncie St. Ry. Co., v. Maynard*, 5 Ind. App. 372, 32 N. E. 343; *Thompson on Negligence*, vol. 2, § 1374, et seq., and authorities there cited; also section 1420, and authorities there cited.

Reversed and remanded.

#### MAYBEE v. STATE. (No. 14,004.)

(Supreme Court of Mississippi. Dec. 13, 1909.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Dan Maybee was convicted of murder, and appeals. Affirmed.

Greaves, Easterling & Manship, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

#### TOMPKINS v. POND. (No. 14,210.)

(Supreme Court of Mississippi. Dec. 13, 1909.)

Appeal from Chancery Court, Sunflower County; M. E. Denton, Chancellor.

Action between Mollie Tompkins and A. M. Pond. From the judgment, Tompkins appeals. Affirmed.

J. T. Manion, for appellant. J. H. Baker, for appellee.

PER CURIAM. Affirmed.

#### POSTAL TELEGRAPH CABLE CO. v. ROBB et al. (No. 14,212.)

(Supreme Court of Mississippi. Dec. 13, 1909.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by William Robb and T. A. Chichester against the Postal Telegraph Cable Company.

Judgment for plaintiffs, and defendant appeals. Affirmed.

W. R. Harper, for appellant. W. A. Montgomery, for appellees.

PER CURIAM. Affirmed.

### HENDRICKS v. GRAND LODGE OF KNIGHTS OF PYTHIAS. (No. 4,205.)

(Supreme Court of Mississippi. Dec. 13, 1909.)

Appeal from Circuit Court, Madison County; W. H. Potter, Judge.

Action between Susie Hendricks and the Grand Lodge of Knights of Pythias, of North America, South America, Europe, Asia, and Africa. From the judgment, Hendricks appeals.

E. B. Harrell, for appellant. W. J. Latham, for appellee.

PER CURIAM. Affirmed.

### MOBILE & O. R. CO. v. WILLIAMS. (No. 14,108.)

(Supreme Court of Mississippi. Dec. 6, 1909.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between J. V. Williams and the Mobile & Ohio Railroad Company. From the judgment, the railroad company appeals. Affirmed.

Baskin & Wilbourn, for appellant. Neville & Stone, for appellee.

PER CURIAM. Affirmed.

### PURVIS et al. v. SAM BROWN & CO. (No. 14,216.)

(Supreme Court of Mississippi. Dec. 6, 1909.)

Appeal from Circuit Court, Warren County; John N. Bush, Judge.

Action between Mrs. S. Purvis and Sam Brown & Co. From the judgment, Sam Brown & Co. appeal. Affirmed.

Catchings & Catchings, for appellants. Smith, Hirsh & Landau, for appellee.

PER CURIAM. Affirmed.

### COSGROVE v. STATE. (No. 14,080.)

(Supreme Court of Mississippi. Dec. 6, 1909.)

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

James Cosgrove was convicted of embezzlement, and appeals. Affirmed.

E. E. Brown, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

### CHICAGO-MISSISSIPPI LAND & LUMBER CO. v. YAZOO & M. V. R. CO. (No. 13,927.)

(Supreme Court of Mississippi. Dec. 6, 1909.)

Appeal from Circuit Court, Washington County; Sydney Smith, Judge.

Action by the Chicago-Mississippi Land & Lumber Company against the Yazoo & Mississippi Valley Railroad Company. From the judgment, the Lumber Company appeals. Affirmed.

Campbell & Cashin, for appellant. Mayes & Longstreet, for appellee.

PER CURIAM. Affirmed.

### ATLANTIC COAST LINE R. CO. v. PARTRIDGE.

(Supreme Court of Florida, Division A. Oct. 26, 1909. Headnotes Filed Nov. 29, 1909.)

#### 1. TRIAL (§ 82\*)—RECEPTION OF EVIDENCE—GENERAL OBJECTIONS.

General objections to evidence proposed, without stating the precise grounds of objection, are vague and nugatory, and are properly overruled, unless it plainly appears that the proffered evidence is prejudicial, improper, and inadmissible for any purpose.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 194-196; Dec. Dig. § 82.\*]

#### 2. TRIAL (§ 59\*)—APPEAL AND ERROR (§ 970\*)—ORDER OF EVIDENCE—DISCRETION OF COURT—REVIEW.

The trial court is authorized to regulate the order of the introduction of evidence, and its discretion in such a matter, either in receiving or rejecting it, will not be interfered with by an appellate court, unless an abuse of such discretion is clearly made to appear.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 138-145; Dec. Dig. § 59.\* Appeal and Error, Cent. Dig. § 3851; Dec. Dig. § 970.\*]

#### 3. EVIDENCE (§ 117\*)—EVIDENCE NOT COMPLETE WITHIN ITSELF.

The mere fact that proffered evidence is not full and complete within itself, but formed only one link in the chain, so that it would have to be supplemented by other evidence in order to avail the party offering it, may not render such evidence incompetent or inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 136; Dec. Dig. § 117.\*]

#### 4. APPEAL AND ERROR (§ 1019\*)—REVIEW—QUESTIONS OF FACT—REFEREE'S FINDING.

The finding of a referee upon conflicting evidence is entitled to the same weight as the verdict of a jury, and it will not be disturbed by an appellate court, unless the preponderance of evidence is such as to justify the inference that such finding was based upon influences other than a due consideration of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008-4010; Dec. Dig. § 1019.\*]

#### 5. BAILMENT (§ 35\*)—RIGHT OF BAILEE TO SUE.

A bailee has such special property in the goods intrusted to him that he may maintain an action for damage thereto, so a factor, a broker, a warehouseman, a carrier, or any person employed to perform a service in respect to the goods of another, with which he is intrusted for that purpose, may maintain an action for the recovery of them, or for any damage done them while in his charge.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 134-140; Dec. Dig. § 35.\*]

#### 6. CARRIERS (§ 76\*)—CARRIAGE OF FREIGHT—DAMAGE—PERSONS WHO MAY SUE.

One who is the owner of a number of crates of pears and has been intrusted as a commission-man with a number of other crates of pears for the purpose of shipping and selling them, such crates together constituting a car of fruit, may

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

maintain an action against a railroad carrier for any damages occasioned by its negligence in transporting and delivering such car of fruit.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 256-271; Dec. Dig. § 76.\*]

(Syllabus by the Court.)

Error to Circuit Court, Jefferson County; T. T. Turnbull, Judge.

Action by Benjamin W. Partridge against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Doggett & Smith and D. A. Finlayson, for plaintiff in error. T. M. Puleston, for defendant in error.

**SHACKLEFORD, J.** This is an action of trespass on the case, instituted by the defendant in error against the plaintiff in error, in the circuit court for Jefferson county, whereby it was sought to recover damages from the defendant below for its alleged negligence in transporting and delivering a car of pears delivered by the plaintiff to the defendant at Monticello, Fla., a station on its line of road, for shipment to Pittsburg, Pa. A demurrer was interposed to the original declaration, whereupon the plaintiff filed an amended declaration, which was likewise demurred to, and such demurrer overruled. The defendant then filed two pleas, one of not guilty, and the other "that the alleged damage and delay, if any, did not occur upon the line of this defendant, but upon its connecting carrier." Issue was joined upon these pleas, and the cause was referred to Theodore Turnbull, Esq., a practicing attorney of the court, for trial, by whom a judgment was rendered in favor of the plaintiff for the sum of \$493.94, damages, and \$42.42, costs; the plaintiff having previously entered a remittitur for the sum of \$2.10. The defendant seeks to have this judgment reviewed here by writ of error and has assigned six errors; the first and sixth assignments, however, being expressly abandoned. The second assignment is the first one which is argued before us, and is as follows:

"The court erred in admitting in evidence the account sales, marked 'Exhibit A,' over the objections of the defendant in the court below."

We find that this assignment is based upon the admission in evidence by the referee of an account of sales covering the shipment of the pears, which the plaintiff had testified to having received from the consignee over the following objections interposed thereto by the defendant:

"First, it is irrelevant and improper; second, it calls for the opinion of the witness; third, it calls for hearsay evidence of the witness; fourth, it is an improper method of proving damages."

As has been often decided by this court,

general objections to evidence proposed, without stating the precise grounds of objection, are vague and nugatory, and are without weight before an appellate court, unless the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances. See *McKinnon v. Johnson*, 57 Fla. —, 48 South. 910, and authorities there cited. It is further settled law here that the trial court is authorized to regulate the order of the introduction of evidence, and its discretion in such a matter, either in receiving or rejecting it, will be interfered with by an appellate court only when an abuse of such discretion is clearly shown. See *Stearns & Culver Lumber Co. v. Adams*, 55 Fla. 394, 46 South. 156, and authorities there cited. The mere fact that such evidence was not full and complete within itself, but would have to be supplemented by other evidence in order to avail the plaintiff, did not render it incompetent or inadmissible. It formed one link in the chain. See the discussion and reasoning in *Wilson v. Jernigan*, 57 Fla. —, 49 South. 44. We do not see wherein the introduction of this documentary evidence calls for the opinion or "hearsay evidence of the witness." This assignment has not been sustained. Even if we should assume that technical error was committed in its admission, which, however, has not been made to appear to us, no possible harm could have resulted to the defendant therefrom, since there was no jury to be misled, and the facts disclosed therein were fully established by other competent evidence. We further find that no evidence was adduced contradicting or at variance with the statements contained in such documentary evidence. See: *Jacksonville, M. P. Ry. & Nav. Co. v. Warriner*, 35 Fla. 197, 16 South. 898; *Patrick v. Kirkland*, 53 Fla. 768, 43 South. 969, 125 Am. St. Rep. 1096, 12 Am. & Eng. Ann. Cas. 540; *Sims v. State*, 54 Fla. 100, 44 South. 737; *Southern Home Ins. Co. v. Putnal*, 57 Fla. —, 49 South. 922.

The next assignment argued before us is the fourth, which is as follows:

"The court should have found for the defendant instead of the plaintiff."

This requires a consideration of all the evidence, and we have gone carefully over it, but decline to set it out, or even to attempt to make a synopsis of it, for the reason that we see no useful purpose to be subserved thereby. The defendant contends that it is not liable for the reason that the evidence shows that the primary cause of the damage to the fruit was the improper loading of the car by the shipper; but upon this point we find that the evidence is conflicting, and we are of the opinion that there is ample evidence to support the finding of the referee. This being true, we must follow the settled practice of this court and refuse to disturb it or to reverse the judgment for that reason.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

See: *Seaboard Air Line R. Co. v. Scarborough*, 52 Fla. 425, 42 South. 706, and authorities there cited; *Wilson v. Jernigan*, 57 Fla. —, 49 South. 44; *Southern Home Ins. Co. v. Putnal*, 57 Fla. —, 49 South. 922. It has been frequently held by this court that "the finding of a referee upon conflicting evidence is entitled to the same weight as a verdict of a jury, and it will not be set aside by this court, unless the preponderance of evidence is such as to justify the inference that the finding was based upon influences other than a due consideration of the evidence." See *Camp v. Hall*, 39 Fla. 535, 22 South. 792, and authorities therein cited. This assignment has not been sustained.

The third assignment is the next one presented to us: "The court below should have required a remittitur for a greater amount than was made." It is contended by the defendant in support thereof that, as the evidence discloses that the plaintiff was the owner of only a portion of the fruit in the car and was handling and shipping the residue as a broker, he was entitled to judgment only for the damage to that portion of which he was the owner; whereas, the referee found the defendant liable for the damage occasioned to all the fruit so shipped by the plaintiff, and entered judgment accordingly. Several interesting questions are attempted to be raised by the defendant in support of this assignment, which we are precluded from considering by virtue of the fact that they are not properly before us. We find that the amended declaration in this case alleges that the defendant received from the plaintiff the property in question, which is described, "of the property, goods, and chattels of the plaintiff, of great value, to wit, of the value of \$952, to be safely carried with all reasonable dispatch from Monticello, Fla., to Pittsburg, Pa., and there to be safely delivered for plaintiff, for sale on commission and for account of plaintiff, to Kammerer Bros., for a certain reasonable reward to the said defendant in that behalf, and the said defendant then and there agreed, undertook, and promised," etc.

The defendant demurred to this declaration, which demurrer was overruled and error assigned upon such ruling, forming the first assignment, which, as we have already said, was expressly abandoned. Even so, the question of ownership was not attempted to be raised therein. As we have also seen, only two pleas were filed—not guilty, and that the damage did not occur upon the line of defendant. If the defendant conceived the declaration to be defective in failing to sufficiently allege the ownership of the property in question, it should have raised such question by demurrer, and, in the event of the same being overruled, predicated an assignment thereon and presented and argued such assignment before this court. If it conceived the declaration to be sufficient in that respect, but still wished to raise such question of

ownership and the plaintiff's right to maintain the action, it should have filed a special plea to that effect, in accordance with the provisions of rule 71 of rules of circuit court in common-law actions, which rules were adopted by this court and became effective on the 1st day of June, 1873, and are prefixed to 14 Fla., at page 22. See the reasoning in *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, text 433, 43 South. 318, text 328. Such denial of ownership, as well as of the alleged negligence, was directly put in issue by the defendant in the case of *Union Feed Co. v. Pacific Clipper Line*, 31 Wash. 28, 71 Pac. 552. With the issues as made by the pleadings in the instant case, as well as by reason of the evidence adduced, we do not feel called upon to deal with the controverted question as to the respective rights of the consignor and consignee to maintain the action. For the same reasons we must decline to consider another interesting but vexed question, upon which there is irreconcilable conflict in the authorities, as to the points of difference between actions *ex contractu* and *ex delicto*. Be all these matters as they may, the great weight of authority seems to be to the effect that a bailee has such special property in the goods that he may maintain an action for damage thereto, and that any one having a special interest in the goods may maintain the action. "Thus a factor, a broker, a warehouseman, a carrier, or any person employed to perform a service in respect to the goods of another with which he is intrusted for that purpose, may maintain an action for the recovery of them, or for any damage done them while he has charge." 3 *Hutchinson's Carriers* (3d Ed.) § 1305. Also, see 6 *Cyc.* 510, and 3 *Ency. of Pl. & Pr.* 834, and authorities cited in notes. We would refer especially to: *Freeman v. Birch*, 1 N. & M. 420, 3 Q. B. 492, note "a," 43 *E. C. L.* 835, 38 *Rev. Rep.* 388; *Great Western R. R. Co. v. McComas*, 33 *Ill.* 185; *Moran v. Portland Steam Packet Co.*, 35 *Me.* 55; *Murray v. Warner*, 55 *N. H.* 546, 20 *Am. Rep.* 227; *White v. Bascom*, 28 *Vt.* 269; *Southern Ry. Co. v. Johnson*, 2 *Ga. App.* 36, 58 *S. E.* 333. Also, see the following cases for a general discussion of the question, well-reasoned opinions, and a collection of the authorities: *Carter v. Southern Ry. Co.*, 111 *Ga.* 38, 36 *S. E.* 308, 50 *L. R. A.* 354; *Blanchard v. Page*, 8 *Gray (Mass.)* 281; *Southern Express Co. v. Craft*, 49 *Miss.* 490, 19 *Am. Rep.* 4; *Carter v. Graves*, 9 *Yerg. (Tenn.)* 446; *Dunlop v. Lambert*, 6 *Clark & Fin.* 600. This assignment must be held to have failed.

The fifth assignment, based upon the overruling of the motion for a new trial, is not argued; the defendant contenting itself with the statement in its brief that "we consider the fifth pretty well covered in the discussion of the third and fourth." Those two assignments having failed, this assignment presents nothing for our consideration. See *Bass*



v. State (decided here at the present term) 50 South. 531, and the authorities there cited.

We have not considered the bearing upon this case, if any, of the Carmack amendment of section 20 of the act of Congress to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), passed June 29, 1906 (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]), as such question has not been raised or presented to us for consideration.

Finding no reversible error, the judgment must be affirmed, and it is so ordered.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

### BROWN v. BOWIE.

(Supreme Court of Florida, Division A. Nov. 3, 1909.)

#### 1. APPEAL AND ERROR (§ 1017\*)—REVIEW—QUESTIONS OF FACT—REFEREE'S FINDINGS.

The findings of a referee upon questions of fact, where the witnesses are examined before him, are entitled to the same weight as the verdict of a jury. In neither the one case nor the other would an appellate court be warranted in disturbing such findings or verdict or in reversing the judgment because the evidence adduced is conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8996-4005; Dec. Dig. § 1017.\*]

#### 2. TRIAL (§ 83\*)—RECEPTION OF EVIDENCE—GENERAL OBJECTIONS.

Where the only grounds of objection interposed to proffered evidence were that the "same was immaterial, irrelevant, and not pertinent to any issue made in the pleading," such grounds of objection are properly overruled, unless the evidence so objected to is palpably prejudicial, improper, and inadmissible for any purpose.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 199; Dec. Dig. § 83.\*]

#### 3. APPEAL AND ERROR (§§ 204, 1078\*)—OBJECTIONS TO EVIDENCE—NECESSITY OF MAKING IN COURT BELOW—OBJECTIONS NOT ARGUED.

An appellate court will consider only such grounds of objection to the admissibility of evidence as were made in the court below, the plaintiff in error being confined to the specific grounds of objection made by him in the trial court, and only such of the grounds so made below as are argued will be considered by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280, 4259; Dec. Dig. §§ 204, 1078.\*]

(Syllabus by the Court.)

Error to Circuit Court, Duval County; Wm. B. Young, Judge.

Action by Albert G. Bowie against Thomas J. Brown. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Hartridge, for plaintiff in error. Fletcher & Dodge, for defendant in error.

SHACKLEFORD, J. The defendant in error brought an action of assumpsit against the plaintiff in error, which was referred for trial and disposition to Hon. W. B. Young, by whom a judgment was rendered in favor of the plaintiff in the court below for the sum of \$2,635.18, damages, and \$33.80, costs, which judgment the defendant seeks to have reviewed here by writ of error. No point is made on the pleadings. It seems sufficient to state that both the plaintiff and defendant were competitive bidders for the erection of a certain warehouse, dock, foundation, and structure, and had entered into an agreement with each other that, whichever one of the two should be awarded the contract for such work, he would award to the other certain specified portions thereof to perform, which agreement was reduced to writing, and is admitted by both parties in their briefs to be as follows:

"Agreement entered into this day between A. G. Bowie, party of the first part, and T. J. Brown, party of the second part, witnesseth:

"That A. G. Bowie agrees to award to T. J. Brown the foundation and dock at the figures submitted to him by T. J. Brown should the contract be awarded to said A. G. Bowie.

"And T. J. Brown agrees to award to A. G. Bowie the entire contract for structure other than the foundation and dock at the figures referred to above should the contract be awarded to T. J. Brown.

"T. J. Brown agrees to furnish and drive according to specifications 592 piles at \$4.00 per pile, and the labor on the docks over piles including laying of floor at \$7.00 per 1,000.

"Agreement as specified above between A. G. Bowie and T. J. Brown for building merchants' ware dock and buildings.

"A. G. Bowie.

"T. J. Brown.

"J. S. Easterby.

"E. W. Bingham."

The defendant was the successful bidder and was awarded the contract for such work. After the work was completed, a dispute arose between the two parties to such agreement as to the proper basis of settlement. Hence this litigation. The declaration contains five counts, the first of which alleges the facts upon which the action is based, and the others are common counts. The defendant filed six pleas, which we do not deem it necessary to specify, upon which issue was joined and trial had. Six errors are assigned, the third of which is expressly abandoned. We shall not attempt to discuss the other assignments separately or in detail, but shall confine ourselves to what we conceive to be the vital points presented, which are decisive of this writ of error.

We start out with the settled proposition of law that the findings of a referee upon questions of fact where the witnesses are examined before him, as was done in this case, are entitled to the same weight as the verdict of a jury. In neither the one case nor the other would we be warranted in disturbing such findings or verdict or in reversing the judgment because the evidence adduced is conflicting. See *Atlantic Coast Line R. R. Co. v. Partridge* (decided here at the present term) 50 South. 634, and *Camp v. First National Bank of Ocala*, 44 Fla. 497, 33 South. 241, and s. c., 103 Am. St. Rep. 173, wherein other decisions of this court will be found cited.

It is earnestly contended by the defendant that the referee erred in admitting in evidence a letter signed by the defendant and addressed to the plaintiff, dated the 6th day of May, 1908, which letter is as follows:

"Jacksonville, Fla., May 6, 1908.

"Dear Sir: Will furnish, drive and saw off piling in the Durkee dock for \$4.00 per pile.

"Will work and place all lumber consisting of caps, joist and flooring for \$7.00 per 1,000 feet B. M. You to furnish all the lumber, bolts and spikes.

"This does not embrace brace piles and X-frame braces. Yours, etc.,

"T. J. Brown."

We find that the only grounds of objection interposed to the introduction of this letter were "that same was immaterial, irrelevant, and not pertinent to any issue made in the pleading." It is settled law in this court by a line of decisions that general objections to evidence proposed, without stating the precise grounds of objection, are vague and nugatory, and without weight before an appellate court, unless the evidence so objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances. See *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910, and authorities there cited, and *Atlantic Coast Line R. R. Co. v. Partridge* (decided here at the present term) 50 South. 634. It is equally well settled that an appellate court will consider only such grounds of objection to the admissibility of evidence as were made in the court below, the plaintiff in error being confined to the specific grounds of objection made by him in the trial court, and only such of the grounds so made below as are argued will be considered by an appellate court. *Cross v. Aby*, 55 Fla. 311, 45 South. 820, and authorities there cited. As we have several times held, a party who objects either to the competency of a witness or to proffered evidence should state specifically the grounds of the objection, in order to apprise the court and his adversary of the precise objection he intends to make. *McKinnon v. Johnson*, *supra*. The bill of exceptions discloses that while the plaintiff was being examined in chief in his

own behalf, and had identified and introduced in evidence the written agreement which we have copied above, the following proceedings took place: "Q. You refer to certain prices or figures submitted by Mr. Brown, and the contract mentions the figures submitted to you by T. J. Brown. Was that submission of prices made in writing? A. It was. Q. Examine this statement (paper handed to witness) and state whether or not that is the submission by Mr. Brown of the figures referred to in the contract mentioned. A. This is the letter giving me the prices that he gave me, the figures submitted by him to me, and made the basis of the contract."

Thereupon the letter in question was offered. We have no hesitancy in saying that no error was committed by the referee in overruling the grounds of objection urged. We think it well to copy the following portion of his findings dealing with that point:

"In view of the fact that the referee holds as matter of law that nothing said or understood by the parties before the signing thereof can be given in evidence to alter or change the written contract, and as I have not taken such evidence into consideration in arriving at my judgment, I do not consider it necessary to rule on the several objections to evidence the ruling on which was reserved.

"The referee wished to hear the evidence as to the conditions surrounding the parties so as to better to interpret the contract made by the parties.

"The referee finds that plaintiff and defendant had formed a combination to secure the contract from Durkee to build the warehouse and dock in question, and that, if either secured the contract from Durkee, it was to inure to the benefit of both, and before Brown would close the contract with Durkee he consulted Bowie. The referee finds that the parties entered into a written contract, and that the letter, dated May 6, 1908, and signed T. J. Brown, contains the figures submitted to Bowie by T. J. Brown, and which is referred to in the contract which they executed, and said letter is therefore to be considered as part of the contract."

This is the assignment which is principally urged before us and upon which the greatest stress is laid; the other assignments being comparatively lightly insisted upon. We have given them our careful consideration, but have been unable to detect any reversible error.

It necessarily follows that the judgment must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

## OWEN v. STATE.

(Supreme Court of Florida. Nov. 4, 1909.)

## 1. CONSTITUTIONAL LAW (§ 329\*)—WRIT OF ERROR—DISMISSAL.

Writs of error are issued as of right upon demand, and, when taken in criminal cases, may, under the rules of the court, be voluntarily dismissed for the purpose of facilitating the administration of justice, but they may not be dismissed when the apparent purpose is to delay a review of the case, and thereby violate the mandate of the Constitution that "right and justice shall be administered without \* \* \* delay."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 963; Dec. Dig. § 329.\*]

## 2. CRIMINAL LAW (§ 1182\*)—WRIT OF ERROR—MOTION TO DISMISS—AFFIRMANCE.

Where a transcript of the record proper in a criminal case has been brought to this court on writ of error, taken by a convicted defendant, and it is made to appear that no bill of exceptions was made up and authenticated in the cause, and that the process of the court will be used to in effect violate the mandate of the Constitution that "right and justice shall be administered without \* \* \* delay," an application by the plaintiff in error to dismiss the writ of error will be denied; and, upon a motion of the Attorney General acting for the state, for an affirmance of the judgment, if on a careful consideration of the transcript of the record proper brought here in response to the writ of error no errors appear in the record of the indictment, arraignment, trial, and conviction of the accused, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1182.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Alachua County; J. F. Wills, Judge.

R. H. Owen was convicted of murder, and brings error. Affirmed.

W. S. Broome and W. E. Baker, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

WHITFIELD, C. J. R. H. Owen and Mattie Owen were jointly indicted in the circuit court for Alachua county charged with the crime of murder. Both were arraigned in open court and entered pleas of not guilty. A severance was granted. The plaintiff in error was convicted of murder in the first degree without recommendation to mercy at a trial in which the record shows he was personally present. The judgment sentencing the defendant R. H. Owen to be hanged was entered March 31, 1909. On July 22, 1909, upon præcipe of counsel for the defendant, a writ of error was issued in the cause returnable October 19, 1909. A transcript of the record proper in the cause was by the clerk of the trial court sent to this court. The transcript contains no bill of exceptions. A few days before the return day of the writ of error, counsel for the plaintiff in error, defendant below, sent to the clerk of this court a præcipe for the dismissal of the writ of error. No proof and adjudication of the insolvency of the plaintiff in error having been filed here, and no deposit for costs having

been made as required by the statutes and rules of this court, the clerk referred the præcipe for dismissal of the writ of error to the court. Subsequently the Attorney General as counsel for the state filed a motion for the affirmance of the judgment imposing the death sentence upon the plaintiff in error, and presented an affidavit made by him in which it is stated "that he was informed prior to the filing of the præcipe by the plaintiff in error for dismissal of his writ of error that such præcipe would be filed, and that said writ of error was not sued out in good faith, but that it was the purpose of the plaintiff in error to trifle with the process of this court by suing out successive writs of error and dismissing them ad infinitum; that a death warrant for the execution of the plaintiff in error was issued by the Governor on the 2d day of June, A. D. 1909, in which the date for the execution of the sentence in said cause was fixed for the 9th day of July, A. D. 1909, and thereafter the Governor granted a reprieve until the 23d day of July, 1909, and that on the 22d day of July, A. D. 1909, the plaintiff in error sued out a writ of error, and had the return day thereof postponed, and fixed at the latest day that he could by law have made the same properly returnable, to wit, on October 19, 1909, and two or three days before the return day of such writ filed his præcipe for the dismissal thereof without giving or assigning any cause or reason for such dismissal; that the plaintiff in error, although he had nearly 90 days after the issuance of his writ of error in which to have prepared and filed a transcript of the record in his case, yet he failed to apply to the clerk of the circuit court as affiant is informed to prepare such transcript, but that the clerk of the circuit court has of his own motion in obedience to such writ of error prepared, certified, and sent up to the clerk of the Supreme Court a duly certified transcript of the record in said cause, which transcript is now before this court; that the plaintiff in error did not prepare or have signed by the trial judge any bill of exceptions in his said cause, \* \* \* so that the record therein consists only of the record proper."

Proof that a copy of the motion and affidavit were duly served on counsel for the plaintiff in error, as required by rules 4 and 5 of the Supreme Court Rules (18 South. vi), was filed before motion for affirmance was taken up. The grounds of the motion to affirm the judgment are as follows:

"(1) Because a writ of error was duly sued out in said cause on July 22, 1909, and made returnable to the Supreme Court on or before October 19, 1909.

"(2) Because the record proper in said case has been certified to this honorable court by the clerk of the circuit court in and for Alachua county.

"(3) Because after said writ of error was sued out, and the record in said case certified to the Supreme Court by the clerk of the circuit court of Alachua county, said case should not be dismissed upon a *præcipe* for dismissal, but should either be reversed or affirmed by this honorable court.

"(4) Because a bill of exceptions does not appear to have been prepared, settled, signed, and filed in said cause as required by law and the rules of this court.

"(5) Because it does not appear from the record proper now in the custody of the court that any part of the record of the proceedings have been omitted therefrom.

"(6) Because that said record does not show that any reversible error was committed in the lower court."

The rules provide for the dismissal of writs of error in proper cases, but they do not contemplate an improper use of the process of law. In this case it is made to appear that the writ of error was not taken till the day before the death sentence was to be executed; that the writ of error was made returnable at the most distant time allowed by the law; that no bill of exceptions was prepared, authenticated, and filed; that the clerk of the trial court sent to this court a transcript of the record proper in the cause in obedience to the writ of error that no adjudication of the plaintiff in error's insolvency was filed here as required by law; that a few days before the return day of the writ of error a *præcipe* was sent to the clerk of this court by defendant's counsel for the dismissal of the writ of error without any showing that the dismissal was desired for a lawful and proper purpose; and that the circumstances disclosed by affidavit duly served on counsel for the defendant are such that a dismissal of the writ of error will obviously permit an abuse of the processes of the law.

In a brief filed by counsel for the plaintiff in error, in opposition to the Attorney General's motion to affirm the judgment, it is stated that they "disclaim any intention or desire to trifle with the process of this court," and that it is their "duty to see that plaintiff in error has the benefit and advantage of every remedy the law affords him." Counsel contend that, as under the statutes of this state a writ of error issues on demand as a matter of right, the motion of the Attorney General to affirm the judgment on the record brought here under a writ of error issued on demand is inconsistent with the constitutional provisions that all courts in this state shall be open, so that every person for any injury done him in his person shall have remedy by due course of law. Counsel omits

to call attention to the provision in the same section of the Constitution that "right and justice shall be administered without sale, denial, or delay."

In this case there is no question as to the right to a writ of error for the writ issued on demand; and out of regard for that process the executive of the state recalled the warrant for the execution of the defendant under the sentence and judgment of the court. The question here is whether a writ of error that has been issued on demand can be so used as that right and justice cannot be administered without undue delay.

It appears that counsel have not made up and had authenticated and filed as a part of the record of the trial a bill of exceptions so as to present to this court for review the proceedings at the trial that are not a part of the record proper. In consequence of this, the only review possible in this court is confined to the record proper, which is now before us.

Counsel have failed to comply with the requirements of the statute and the rules of court in not filing an assignment of errors, and in not presenting briefs on the merits of the cause. A dismissal of this writ of error will only serve to delay the final disposition of the cause without any showing that delay will facilitate the administration of justice. On the contrary, it clearly appears by the facts and circumstances above stated that a dismissal of this writ of error will operate to infringe the constitutional mandate that "right and justice shall be administered without \* \* \* delay."

A transcript of the record proper in the cause duly certified by the clerk of the trial court is before us. There is no bill of exceptions in the transcript. The Attorney General asserts that there is no error in the record. Counsel for the plaintiff in error have filed no assignment of error and no briefs upon the merits of the cause as required by the statute and the rules, and the course pursued by the counsel must be regarded as an abandonment of the cause now here on writ of error. The transcript of the record proper has been carefully examined by the court, and no error appears in the record of the indictment, arraignment, trial, and conviction of the defendant R. H. Owen. No good reason appears for dismissing the writ of error. On this showing the motion of the Attorney General to affirm the judgment should be granted. See *McCall v. State*, 31 Fla. 218, 12 South. 845; *Phillips v. State*, 28 Fla. 77, 9 South. 826; *Stowe v. Mapes Formular & P. G. Co.*, 21 Fla. 153.

An order will be entered affirming the judgment. All concur.

## CARTER v. OWENS et al.

(Supreme Court of Florida, Division B. Nov. 9, 1909.)

## 1. BROKERS (§ 54\*)—COMPENSATION—SUFFICIENCY OF SERVICES.

The settled rule is that an agent or broker, employed to sell land, cannot recover commissions, unless he has produced to his principal a purchaser ready, able, and willing to buy on the terms specified in his contract of employment.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.\*]

## 2. BROKERS (§ 65\*)—DUTY TO DISCLOSE FACTS TO PRINCIPAL.

A real estate broker, employed to sell or to find a purchaser for land, is bound to disclose to his principal any facts known to him, material to the transaction; and, if the broker takes part in the negotiation, he is bound to exert his skill for the benefit of his principal. Any concealment from the principal of material facts known to the agent, or any collusion by the latter with the purchaser, will forfeit the right of the agent to compensation for his services.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 48-50; Dec. Dig. § 65.\*]

## 3. BROKERS (§ 65\*)—DUTY TO DISCLOSE FACTS TO PRINCIPAL.

Where a selling broker is aware that a customer is resolved and prepared to pay the price asked, he should not send the customer to his principal to negotiate directly, without communicating to the principal his knowledge of the customer's resolution; and, if he withholds such information from his principal, he forfeits any claim for commissions, even though the principal obtained from the customer the full price originally asked.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 48-50; Dec. Dig. § 65.\*]

(Syllabus by the Court.)

Error to Circuit Court, Polk County; J. W. Brady, Referee.

Action by J. C. Owens and another, co-partners against W. W. Carter. Judgment for plaintiffs, and defendant brings error. Reversed.

Wilson & Swearingen and Park Trammell, for plaintiff in error. Wilson & Boswell, for defendants in error.

**TAYLOR, J.** The plaintiff in error by writ of error seeks review here of a judgment recovered against him by the defendants in error in the circuit court of Polk county. The recovery was had before a referee, to whom the cause was referred for trial, upon a declaration alleging the employment of the plaintiffs by the defendant to effect for him a sale of certain lands and personal property on commission—the declaration alleging that the plaintiffs had secured a purchaser who was ready, able, and willing to pay for said property the sum of \$77,500, and who offered the same in cash, yet the defendant refused to execute deed to said purchaser; that the defendant agreed to pay plaintiffs for their labor and trouble in selling said property all overplus above the sum of \$75,000 at which they might be

able to sell said property, and was, therefore, indebted to them in the sum of \$2,500.

There are various assignments of error, but we will dispose of the case without any discussion of them in any specific detail.

The judgment of the referee is erroneous, and should have been in favor of the defendant below, plaintiff in error here, among others, mainly for two reasons, viz.: (1) The great preponderance of the evidence shows conclusively that the supposed purchaser procured by the plaintiffs for the defendant's property was not ready and able to purchase and pay for same on the terms and at the price that the plaintiffs were authorized by the defendant to sell the same. In *Wiggins v. Wilson*, 55 Fla. 346, 45 South. 1011, the well-settled rule was adhered to that an agent or broker employed to sell land cannot recover commissions, unless he has produced to such owner a purchaser ready, able, and willing to buy on the terms specified in his contract of employment. *Hayden v. Grillo*, 35 Mo. App. 647; *McGavock v. Woodlief*, 20 How. 221, 15 L. Ed. 884; *Mattingly v. Penlie*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; *O'Brien v. Gilliland*, 4 Tex. Civ. App. 42, 23 S. W. 244; *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326; *Cullen v. Bell*, 43 Minn. 226, 45 N. W. 428; *Neiderlander v. Starr*, 50 Kan. 766, 32 Pac. 359; *Dent v. Powell*, 93 Iowa, 711, 61 N. W. 1043. The judgment of the referee should have been for the defendant below for the reason (2) that it was shown at the trial by uncontradicted evidence that the plaintiffs, if they ever were entitled to any compensation from the defendant, had forfeited such right by the exercise of bad faith in the transaction towards the defendant, their principal, in this: It was shown that they knew that their proposed purchaser was willing to purchase the property at the price of \$75,000, but at the suggestion of such proposed purchaser withheld this information from the defendant, and in silence permitted such proposed purchaser to endeavor to get the property from the defendant at the less price of \$74,000.

A real estate broker, employed to sell or to find a purchaser for land, is bound to disclose to his principal any facts known to him, material to the transaction; and, if the broker takes part in the negotiation, he is bound to exert his skill for the benefit of his principal. Any concealment from the principal of material facts known to the agent, or any collusion by the latter with the purchaser, will forfeit the right of the agent to compensation for his services. *Young v. Hughes*, 32 N. J. Eq. 372; *Henderson v. Vincent*, 84 Ala. 99, 4 South. 180; *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; *Pratt v. Patterson's Ex'rs*, 112 Pa. St. 475, 3 Atl. 858; *Mullen v. Bower*, 22 Ind. App. 294, 53 N. E. 790; *Soule v. Deering*, 87 Me. 365, 32 Atl. 998.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the case last cited it is correctly held that, where a selling broker is aware that a customer is resolved and prepared to pay the price asked, he should not send the customer to his principal to negotiate directly, without communicating to the principal his knowledge of the customer's resolution; and, if he withholds such information from his principal, he forfeits any claim for commissions, even though the principal obtain from the customer the full price originally asked. *Skinner Mfg. Co. v. Douville*, 57 Fla. 180, 49 South. 125; *Wiggins v. Wilson*, supra.

The judgment of the court below in said cause is hereby reversed, at the cost of the defendants in error.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

#### STEWART et al. v. STATE.

(Supreme Court of Florida, Division B.  
Nov. 9, 1909.)

#### 1. CRIMINAL LAW (§ 1159\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Where the evidence entirely fails to connect a convicted party with a crime of which he was convicted, this court will reverse the judgment of conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

#### 2. WITNESSES (§ 372\*)—CROSS-EXAMINATION—MOTIVE OR INTEREST.

It is competent for a party on trial for an alleged crime, on the cross-examination of a state witness, to propound to him questions tending to show the motives, interest, or animus of the witness as connected with the cause of the parties thereto, and in this regard a wide range of cross-examination should be allowed.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.\*]

#### 3. WITNESSES (§ 271\*)—IMPEACHMENT—FOUNDATION.

A state witness cannot be cross-examined in regard to the contents of an affidavit he admits having made until the affidavit has been exhibited to him.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 960; Dec. Dig. § 271.\*]

#### 4. WITNESSES (§ 287\*)—REDIRECT EXAMINATION—WHOLE CONVERSATION.

Where a defendant on trial makes himself a witness in the case, and is asked in cross-examination whether he had made a certain statement to another party, and where he admits having a conversation with said party, but denies that he made the statement about which he had been interrogated, he should be allowed on the redirect examination to tell what the conversation was.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1002; Dec. Dig. § 287.\*]

(Syllabus by the Court.)

Error to Circuit Court, Lafayette County; B. H. Palmer, Judge.

Frank Stewart and another were convicted of murder in the second degree, and they bring error. Reversed and remanded.

L. E. Roberson and A. L. Auvil, for plaintiffs in error. Park Trammell, Atty. Gen., for the State.

HOCKER, J. The defendants in error were indicted in Lafayette county circuit court in November, 1908, for the murder of one Henry Chewning on July 18th of that year. Frank Stewart, as principal, and William Stewart, as accessory, were tried and convicted of murder in the second degree, and sentence of imprisonment for life was imposed upon each of them. They are here seeking a reversal of the judgment below. We will endeavor to give as succinct a statement of the principal facts as can be gathered from a voluminous record containing the evidence as to its bearing upon the question of William Stewart's guilt. We make this statement principally from the testimony of Sam Clark.

It seems that Henry Chewning, the deceased (otherwise known as Dick Chewning), had entered a homestead some time before he was killed and had moved from it and induced the defendant Frank Stewart to occupy the house upon the homestead land. It had been reported to Chewning that Frank Stewart would attempt to defeat him in perfecting his homestead claim, and Chewning had given him notice to vacate the homestead. On the Sunday before the killing Henry Chewning, Charles Hartman, Henry Croft, Fred Thomas, and Sam Clark all met at Frank's house (the homestead) about 10 o'clock in the morning. Henry Chewning had spent the night there. Some of these men testified that they went there as witnesses for Chewning of a demand he was going to make of Frank Stewart for the possession of the house on the homestead. It seems that they all had some sort of a grievance against Frank Stewart. He was charged by one with having threatened to burn him out, and by others with having stated that they had been marking hogs which did not belong to them. Reading between the lines, it is perfectly certain they were anxious for him to move. He promised Henry Chewning to move from the homestead on the following Friday. He seems to have been a very poor man, owning neither horse nor wagon. He seems to have made some sort of efforts to get a team to move his effects, but failed. On Friday afternoon he put his goods in one room of the house, locked up the door, left the key where it was usually put, took his wife and children, and went to his brother William Stewart's house, about two miles from the homestead. Early next morning (Saturday), about 8 o'clock, Henry Chewning and Sam Clark (who was the uncle of Chew-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ning) went to the homestead, found there the wives of Frank and William Stewart, and found the house locked up. It does not appear that they asked Frank Stewart's wife for the key, but otherwise. They found out from the Stewart women that Frank Stewart was at William Stewart's, and went on to the latter's house, a part of the time in company with the wives of the Stewarts, though they arrived a little before the Mesdames Stewart. Henry Chewning was armed with a six-chambered revolver, carried in a scabbard, and Sam Clark with a Winchester rifle. They found Wm. Stewart plowing about 250 yards in the rear of his house, and Frank Stewart pulling fodder about 150 yards in front of the house. Sam Clark, who is the only state witness as to what occurred when the killing took place, says that he and Chewning went there to get the keys to the homestead house. Sam Clark leaned his rifle against a tree in the yard, and Henry Chewning went out into the field where Frank Stewart was at work. As to what was said in the field there is no witness, except Frank Stewart, who says that Chewning used threatening language to him with his pistol in his hand, unless he took immediate steps to move his effects out of the homestead house. Chewning and Frank Stewart came to the house together. Frank was at that time unarmed. They stepped up on the porch in front of the house, upon one end of which Sam Clark was sitting. The women and five or six children also seem to have been on the porch. Mrs. William Stewart, apprehending some trouble, as she says, sent one of the little girls for her husband. Sam Clark says that Henry Chewning asked that he be sent for, to make some arrangements for moving Frank's effects. Sam Clark says that when William came up he got a chair and sat down on the porch, right facing him; that he was leaning against a post; that William was in his shirt sleeves; that he had no weapon of any kind that he saw. Clark says that Frank said: "William, what will be the chances to get your horse to-day to move my things from Dick's (Henry Chewning's) homestead down there and put them in your crib? Dick told me he had gone up there to-day with his shooting clothes on, and I want to move my things down here." Clark says: "William told him he could not get the horse, and he said: 'Henry Chewning, I do not allow you to come here and try to bulldoze Frank at my house; and, by God, you can't bulldoze me.' As he said this he stepped right off the edge of the shed on the ground, and went right by my feet, and went round, and stepped up into the shed right facing Dick. I did not look around until he stepped up on the floor, and while he was going from where he got out, I suppose—anyhow, when I looked around, Frank was coming from towards the door with his gun, and William stepped right up in Dick's face, so close Dick had no chance to do any-

thing but go right backwards and step off of the floor to the ground, and just as he stepped off on the ground Frank Stewart cocked the right-hand barrel of his gun and pulled it in shooting position at Dick. Just as he threw it at him first, he said: 'Now, God damn you, die.' Q. Did he shoot at that time? A. No, sir; William got between the muzzle of the gun and Dick, so close up that — Q. Just describe the course that was taken by these three men from that time on. A. Dick commenced going backwards with William, and walked right on around the oak here, and Frank stepped out with the gun in his hand. He lowered the gun, and right where that is he stepped behind William, and walked so close behind William, until he got to where my gun had been lying against one of the oaks here, and when he got right there Frank stopped. Q. Where was Dick then? A. Backing right on with William. He got right here to where the trails come together. William walked so close up to him that Dick had no room to do anything but walk right backward. Q. You say that Dick was walking, and that William was following, until they got to the point of the trail. Now, what became of William at that time? A. He looked back over his shoulder to where I was sitting, and then backed right off from Dick, and when he got three or four steps, I do not know exactly how far, it was the first time he had given Dick a chance, and I thought Dick would draw his pistol, and I was watching Dick when William shot me."

This witness then goes on to describe the situation of the wives of the Stewarts, their children and his own on the porch. He then testified as follows: "Q. Now, you say at the time you were shot William was looking at Dick. A. Yes, sir." This witness then says he was shot in two places while leaning against the post; one shot striking him on the side of the head, and the other penetrating his thigh. He was rendered unconscious for a few moments, and when he recovered consciousness William Stewart came to him and told him that Frank had shot Dick and killed him, and that Dick's shooting at Frank had hit the witness twice. William then told the witness he had better go in where he could lie down on the bed, and witness told him it would not do, as he was bloody all over. William helped him up, assisted him into the house, and put some liniment on his wounds. This witness also states that, though he was looking at William, he did not see him have a gun; that he did not hear any shot at all from any source, as he became unconscious when he was shot. He did not see William with any weapon of any sort, though he must undoubtedly have had one. This witness' testimony occupies more than 30 pages of the record; but we have given those parts bearing on William Stewart's connection with the killing of Henry (Dick) Chewning. All the other witnesses

testified that Will Stewart had no weapon, and it does not appear that he was in any way concerned in the various quarrels between Sam Clark, Henry Chewning, and other witnesses introduced by the state. His conduct at the time of the killing was perfectly consistent with that of a man who was seeking to prevent a conflict between his brother and Henry Chewning. Two bullets appear to have been discharged from Henry Chewning's pistol, and it is not inconsistent with the evidence that the bullets from his pistol struck Sam Clark. He seems to suppose that he was shot by William; but there is no proof at all that his supposition was correct. There is not a particle of testimony to the effect that William in any way suggested to Frank to get his gun, or that he shoot Henry Chewning. The only thing he did was to express his disapproval of the apparent bulldozing of his brother. We find nothing in this testimony to warrant the conviction of William Stewart of complicity in the killing of Henry Chewning. Henry Chewning was evidently killed by Frank Stewart, and in view of our conclusions upon the other phases of the case we express no opinion as to the bearing of the evidence as to him.

The first assignment of error questions the ruling of the court in admitting a map or diagram of William Stewart's house and premises. We have been unable to find the map in the record, and we deem it unnecessary to notice this assignment.

Several assignments of error are based on the action of the court in overruling several questions propounded to the state's witness Sam Clark, in which in various forms he was asked in effect whether he was not at Frank Stewart's house on the Sunday previous to the killing of Henry Chewning, in company with Charles Hartman, and others, and whether the witness did not then say to Frank Stewart that he must leave there by the following Friday afternoon, or that they would hunt him up and kill him. We think the court erred in refusing to permit these questions to be propounded.

In the case of *Wallace v. State*, 41 Fla. 547, 26 South. 713, it is held that, for the purpose of discrediting a witness, a wide range of cross-examination is permitted, as a matter of right, in regard to his motives, interest, or animus, as connected with the cause or the parties thereto, upon which matters he may be contradicted by other evidence. *Fields v. State*, 46 Fla. 84, 35 South. 185; *Driggers v. State*, 38 Fla. 7, 20 South. 758; *Selph v. State*, 22 Fla. 537. We know of no law which forbids the proving of threats or threatening language made by a state witness in the case against the defendant. If he used such language, it would indicate his animus.

An assignment of error is based on the re-

fusal of the court to permit counsel for the defendants to ask the state's witness Sam Clark the following question: "Did you not, on the 21st day of July, 1908, at your home in Lafayette county, Fla., make an affidavit before T. F. Bryan, as notary public, in relation to this homicide, in which you stated that on the day of the homicide, when you regained consciousness, Frank and William Stewart had both absented themselves?"

The witness had admitted making an affidavit before Mr. Bryan on the 21st day of July, 1908; but it does not appear that he was shown the affidavit, or that his attention was called to the statements therein which were contradictory of his statement on the trial. We cannot say the court erred in its ruling, as the affidavit does not appear to have been exhibited to the witness. *Simmons v. State*, 32 Fla. 387, 13 South. 896. The affidavit, however, was by order of the court copied into the record, for what purpose is not indicated; but it appears the witness had stated therein that when he regained consciousness William had absented himself—a statement inconsistent with his testimony on the trial.

Frank Stewart, while on the stand as witness, was asked on cross-examination whether on the Sunday following the killing of Chewning he had not made a certain statement to one Hannibal Locke about the killing. He admitted a conversation with Locke, but denied making that statement. On the redirect he was asked by his own counsel whether he had any talk with Hannibal Locke on the occasion referred to, and what that conversation was. The state attorney objected to this question, "unless it comes right along in a line for impeachment here." The court sustained the objection. Under the circumstances, it seems to us that the defendant should have been allowed to give his own version of the conversation with Locke. We are unable to see the force of the objection.

The last assignment of error is based on the action of the court in overruling the motion for a new trial, wherein it was contended that the verdict was against the evidence. Our views of the evidence as to William Stewart have already been stated. In view of our rulings upon other matters, we think it unnecessary to pass on this assignment as to Frank Stewart. Other assignments are argued; but we are of opinion it is not essential that they should be considered by us.

The judgments of the court below as to the plaintiffs in error are reversed, and the case remanded.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.



**MUGGE v. WARNELL LUMBER & VENEER CO.**

(Supreme Court of Florida. Nov. 23, 1909.)

**1. CONSTITUTIONAL LAW (§ 12\*)—CONSTRUCTION—RULES APPLICABLE.**

The rules used in construing statutes are in general applicable in construing Constitutions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 12.\*]

**2. CONSTITUTIONAL LAW (§ 13\*)—CONSTRUCTION—INTENT.**

In construing and applying provisions of a Constitution, the leading purpose should be to ascertain and effectuate the intent and object designed to be accomplished.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 10; Dec. Dig. § 13.\*]

**3. CONSTITUTIONAL LAW (§ 15\*)—CONSTRUCTION AS A WHOLE.**

In determining the meaning of words in a Constitution, they should be taken, not separately, but in conjunction with other words, and considered in the light of the purpose of the lawmakers, as shown by the provisions as an entirety.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 15.\*]

**4. CONSTITUTIONAL LAW (§ 14\*)—CONSTRUCTION—WORDS HAVING DIFFERENT MEANINGS.**

When words may import different meanings, they should have the meaning and effect designed to be given them, as appears by a fair consideration of the whole context, in view of the object intended to be accomplished.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 11; Dec. Dig. § 14.\*]

**5. COURTS (§ 216\*)—JURISDICTION—CONSTITUTIONAL PROVISIONS.**

When consideration is given to all the provisions on the subject, it is apparent that the intent, purpose, and policy of the Constitution is to confer upon the Supreme Court appellate jurisdiction in all civil cases that the circuit courts exercise original jurisdiction of and determine, and to vest in the circuit courts appellate jurisdiction in all civil cases that the county courts exercise original jurisdiction of and determine.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 532-535; Dec. Dig. § 216.\*]

**6. COURTS (§ 216\*)—JURISDICTION—CONSTITUTIONAL PROVISIONS—"ORIGINATING"—"ARISING."**

The words "originating" and "arising," as used in the sections of the Constitution relating to the appellate jurisdiction of the Supreme Court and of the circuit courts, refer to all cases which the circuit and county courts, respectively, exercise original jurisdiction of and determine.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 532-535; Dec. Dig. § 216.\*]

For other definitions, see Words and Phrases, vol. 6, p. 5065; vol. 1, pp. 492-496; vol. 8, p. 7581.]

**7. COURTS (§ 216\*)—JURISDICTION—ACTION COMMENCED IN CIRCUIT COURT—TRANSFER TO COUNTY COURT.**

Where a county court is established by the Legislature in a county, it has original jurisdiction over all such causes as are assigned to its jurisdiction by the Constitution, whether such causes have already been instituted in the circuit court or not; and where cases over which such county court has exclusive original jurisdiction have already, before the establishment of such county court, been instituted in

the circuit court, such circuit court, immediately upon the establishment of the county court, ceases to have original jurisdiction over all such causes, and they are transferred for trial and determination from the circuit court to such county court *ex proprio vigore* the legislative act establishing such county court, and over all such civil causes so transferred to and determined by such county court the circuit court, under the Constitution, has exclusive final appellate jurisdiction. If the judge of the circuit court is disqualified to hear and determine appellate proceedings in any such cause, because of orders made therein by him while the cause was pending in the circuit court, the law provides for a hearing therein before some other qualified circuit judge. The Supreme Court in such civil cases has no appellate jurisdiction, whether the cause was in fact originally instituted in the circuit court or not.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 216.\*]

**8. COURTS (§ 216\*)—JURISDICTION—ACTION COMMENCED IN CIRCUIT COURT—TRANSFER TO COUNTY COURT.**

The circuit court, not the Supreme Court, has appellate jurisdiction over final judgments of a county court, in causes commenced in the circuit court, but transferred by operation of law, upon the creation of the county court, to the latter court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 216.\*]

(Syllabus by the Court.)

In Banc. Action by the Warnell Lumber & Veneer Company against Robert Mugge. Judgment for plaintiff, and defendant moves for a writ of error. Motion denied.

Glen & Himes, for plaintiff in error.

WHITFIELD, C. J. The Warnell Lumber & Veneer Company brought an action against Robert Mugge in the circuit court for Hillsborough county. While the action was pending in the circuit court, a county court for Hillsborough county was established by an act of the Legislature, and the cause, not then being within the jurisdiction of the circuit court, was transferred to such county court, where a judgment was rendered in favor of the plaintiff below.

Counsel for the defendant below have presented here a motion for a writ of error to the said judgment of the county court. A writ of error is, under the statutes of this state, a writ of right, and issues on demand; but, as the case raises a question of appellate jurisdiction, the motion is presented, so the jurisdictional feature may be determined before the writ of error is issued. See Webster v. Powell, 36 Fla. 703, 18 South. 441.

The provisions of the Constitution to be considered are: "The Supreme Court shall have appellate jurisdiction in all cases at law and in equity originating in the circuit courts." Section 5, art. 5. "The circuit courts \* \* \* shall have final appellate jurisdiction in all civil and criminal cases arising in the county court." Section 11, art. 5. The county courts have no equity

jurisdiction in any county. Nor do the county courts have criminal jurisdiction in counties where criminal courts of record are established therein. Section 29, art. 5, Const.; *Jackson v. State*, 33 Fla. 620, 15 South. 250. There is a criminal court of record in Hillsborough county. The rules used in construing statutes are in general applicable in construing Constitutions. 8 Cyc. 729.

In construing and applying provisions of a Constitution, the leading purpose should be to ascertain and effectuate the intent and the object designed to be accomplished. In determining the meaning of words, they should be taken, not separately, but in conjunction with other words, and considered in the light of the purpose of the lawmakers, as shown by the provisions as an entirety. Where words may import different meanings, they should have the meaning and effect designed to be given them, as appears by a fair consideration of the whole context, in view of the object intended to be accomplished. There is no question of general and special or particular intent here. See 2 Lewis' *Sutherland*, *Statutory Construction* (2d Ed.) § 347 et seq.; *Board of Public Instruction v. County Commissioners* (decided at this term) 50 South. 574; *Conklin v. Goldsmith*, 5 Fla. 280; *Southern Bell Telephone & Telegraph Co. v. D'Alemberte*, 39 Fla. 25, 21 South. 570.

When consideration is given to all the provisions on the subject, it is apparent that the intent, purpose, and policy of the Constitution are to confer upon the Supreme Court appellate jurisdiction in all civil cases of which the circuit courts take original jurisdiction, and to vest in the circuit courts appellate jurisdiction in all civil cases of which the county courts take original jurisdiction. With this in view the language, "all cases at law or in equity originating in the circuit courts," and "all civil cases arising in the county courts," as used in the sections of the Constitution above quoted, clearly mean all cases of which such courts respectively exercise original jurisdiction of and determine.

This conclusion is supported by a consideration of the provisions of the Constitution giving to the circuit courts and the county courts specified, but different, appellate jurisdiction in civil cases, and also giving to the circuit and county courts current original jurisdiction in certain classes of civil cases. The words "originating" and "arising," as used in the sections relating to appellate jurisdiction, must refer to all cases circuit courts and county courts, respectively, exercise original jurisdiction of and determine.

If the Supreme Court has no appellate jurisdiction of cases determined in the county court, because the Constitution intends that the circuit court alone has such jurisdiction, and the circuit court has no appellate jurisdiction of cases determined in the

county court, where they did not actually commence or arise in that court, but were begun or originated in the circuit court, and were transferred to the county court when it was organized by the Legislature, then such cases cannot be reviewed by writ of error anywhere. This was not contemplated in making the organic law.

The Constitution provides, in section 18 of article 5, that "the Legislature may organize, in such counties as it may think proper, county courts which shall have jurisdiction of all cases at law in which the demand or value of the property involved shall not exceed five hundred dollars," etc., of which class of cases, that exceed the jurisdiction of justices of the peace, the circuit court had exclusive original jurisdiction before the county court was established. When a county court is established, the circuit court for the county has no original jurisdiction of such cases at law as the county court has exclusive original jurisdiction of, because the Constitution established the circuit courts, and provides, in section 11 of article 5, that "the circuit courts shall have exclusive original jurisdiction in all cases in equity, also in all cases at law, not cognizable by inferior courts," and the Constitution intended the county courts to be established to relieve the circuit courts of a part of their jurisdiction. See *Jackson v. State*, 33 Fla. 620, 15 South. 250. The Constitution expressly gives the circuit and county courts concurrent original jurisdiction in cases of forcible entry and unlawful detention.

In providing appellate jurisdiction the Constitution contemplates that the circuit courts shall have appellate jurisdiction of all cases cognizable in the county courts after they are established, including those cases that are cognizable in the county courts, but were actually begun in and transferred from the circuit courts. Therefore the phrase, "all civil and criminal cases arising in the county court," as used in the section of the Constitution above quoted, must mean and refer to all cases cognizable in the county court after it is organized by the Legislature pursuant to the authority of the Constitution, which, of course, includes the cases commenced in the circuit court and transferred to the county court when organized.

Chapter 5987, p. 199, Laws 1909, under which the county court for Hillsborough county was organized, makes no provision for the transfer from the circuit court to the county court of such causes as the latter court has jurisdiction of; but such transfer was proper under the provision of the Constitution that "the circuit courts shall have exclusive original jurisdiction \* \* \* in all cases at law, not cognizable by inferior courts," and in view of the terms and purpose of the act organizing the county court.

Where a county court is established by the Legislature in a county, it has original ju-

jurisdiction over all such causes as are assigned to its jurisdiction by the Constitution, whether such causes have already been instituted in the circuit court or not. And where cases over which such county court has exclusive original jurisdiction have already, before the establishment of such county court, been instituted in the circuit court, such circuit court, immediately upon the establishment of the county court, ceases to have original jurisdiction over all such causes, and they are transferred for trial and determination from the circuit court to such county court *ex proprio vigore* the legislative act establishing such county court, and over all such civil causes so transferred to and determined by such county court the circuit court, under the Constitution, has exclusive final appellate jurisdiction. If the judge of the circuit court is disqualified to hear and determine appellate proceedings in any such cause because of orders made therein by him while the cause was pending in the circuit court, the law provides for a hearing therein before some other qualified circuit judge. The Supreme Court in such civil cases has no appellate jurisdiction, whether the cause was in fact originally instituted in the circuit court or not.

The circuit court, not the Supreme Court, has appellate jurisdiction over final judgments of a county court, in causes commenced in the circuit court, but transferred by operation of law upon the creation of the county court to the latter court.

The decision in the case of *Blue v. State*, 32 Fla. 53, 13 South. 637, was based upon provisions of the Constitution relating to criminal cases. Whether the judge of the circuit court would be disqualified to hear and determine writs of error in cases transferred to the county court is a question of the disqualification of a particular judge, and does not affect the jurisdiction of the courts under the Constitution. The Supreme court has no jurisdiction to issue a writ of error directly to a judgment of a county court, or to determine a cause upon such a writ of error. Therefore the motion for the issuance of the writ of error is denied. All concur.

(124 La.)

No. 17,799.

STATE v. PRICE et al.

(Supreme Court of Louisiana. Nov. 15, 1909.)

CRIMINAL LAW (§ 1020\*)—COURTS (§ 224\*)—APPEAL—JURISDICTION OF SUPREME COURT.

The Supreme Court has no appellate jurisdiction in criminal cases, where the offense charged is not punishable by death or imprisonment at hard labor, except where "a fine exceeding three hundred dollars or imprisonment exceeding six months is actually imposed." Const. 1898, art. 85. The mere raising of a constitutional question in a criminal case does not vest

the Supreme Court with appellate jurisdiction. *Id.*

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2580; Dec. Dig. § 1020;\* Courts, Dec. Dig. § 224.\*]

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Niell, Judge.

Frank and Fielden Price were convicted of selling liquors to women, and for selling to both whites and negroes, and appeal. Dismissed.

D. Caffery, Jr., James R. Parkerson, and Emmet Alpha, for appellants. Walter Gulon, Atty. Gen., and T. M. Milling, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

LAND, J. Defendants were indicted in one count for selling or permitting to be sold in their licensed saloon intoxicating liquors to women, and in another count for selling or permitting the sale of intoxicating liquors for consumption on the premises to both whites and negroes.

The defendants were tried and found guilty on the first count, and not guilty on the second count. Each of the defendants was sentenced to pay a fine of \$50 and the costs of court, and in default of payment of the fine to imprisonment in the parish jail for 30 days.

Defendants have appealed, and the state has moved to dismiss the appeal on the ground of want of jurisdiction in the Supreme Court.

As the fine imposed does not exceed \$300, or the alternative imprisonment exceed 6 months, this court has no jurisdiction of the case. Const. 1898, art. 85. The mere raising of a constitutional question in a criminal case does not vest jurisdiction in the Supreme Court. *Id.*

It is therefore ordered that this appeal be dismissed.

(124 La.)

No. 17,929.

Succession of MALONEY.

(Supreme Court of Louisiana. Nov. 15, 1909.)

HUSBAND AND WIFE (§ 87\*)—LIABILITY OF WIFE—SURETY ON APPEAL BOND.

A married woman cannot bind herself as surety for her husband on an appeal bond. Rev. Civ. Code, arts. 1790, 2398.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 346-353; Dec. Dig. § 87.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred. D. King, Judge.

In the matter of the succession of Elizabeth C. Maloney. Application of Harry H. Maloney for probate of alleged last will of deceased denied, and he appealed. Dismissed.

W. F. Brewer, L. H. Doty, Geo. E. Duclaux, and Paul W. Maloney, for appellant. McCloskey & Benedict, Dinkelspiel, Hart & Davey, and Curtis, Elmer & Elmer, for appellee J. H. Maloney. Geo. W. Dodds and W. L. Hughes, for other appellees.

LAND, J. The judgment below dismissed the application of Harry H. Maloney for the probate of the alleged last will of the deceased and for his appointment thereunder as testamentary executor, and sent into possession of the estate Dr. James H. Maloney, as surviving husband and usufructuary, upon his assuming and paying the debts of the community.

Harry H. Maloney obtained an order of appeal from said judgment, and filed a devolutive appeal bond, with his wife as surety.

The appellee has moved to dismiss the appeal on the ground that the wife cannot bind herself as surety for her husband.

The law reads that "the wife cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." Rev. Civ. Code, art. 2398. The wife cannot become security for her husband's debts. Id. art. 1790; State of Louisiana v. Bradley, 37 La. Ann. 623.

It is therefore ordered that the appeal herein be dismissed, at appellant's costs.

(124 La.)

No. 17,723.

#### STATE v. WILLIAMS.

(Supreme Court of Louisiana. Nov. 15, 1909.)

CRIMINAL LAW (§ 721\*)—TRIAL—ARGUMENT OF DISTRICT ATTORNEY.

The district attorney, in his argument to the jury, said: "The accused himself has testified that he jumped the fence, as testified to by one of the state witnesses." To which it was objected that the accused had not so testified. Whereupon the district attorney explained that he was speaking figuratively, and what he meant was that the accused had admitted to the deputy sheriff that he had jumped the fence, and the deputy sheriff had testified to that fact, and therefore, figuratively, the accused had testified, through the deputy sheriff. "I could not have meant" (the district attorney proceeded to say) "that the accused had testified to that fact, because the accused has not testified at all. You know that he has not been on the stand."

Held, that the remarks of the district attorney implied no unfavorable construction of the failure of the accused to testify in his own behalf, and were not violative of either the letter or the spirit of the provision of Act No. 29, p. 39, of 1886, which reads: "And provided, further, that his failure to testify shall not be construed for or against him, but all testimony shall be weighed and considered according to the general rules of evidence, and the trial judge shall so charge the jury."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.\*]

(Syllabus by the Court.)

Appeal from Twenty-First Judicial District Court, Parish of Iberville; C. K. Schwing, Judge.

Sidney Williams was convicted of grand larceny, and appeals. Affirmed.

Paul G. Borron and Frederic P. Wilbert, for appellant. Walter Guion, Atty. Gen., and J. H. Morrison, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

#### Statement of the Case.

MONROE, J. Defendant, having been convicted of grand larceny and duly sentenced, relies in this court on a bill of exception containing the following recital, to wit:

"The district attorney, in his argument to the jury, commented to the jury on the failure of the accused to testify in the manner as follows: 'The accused himself has testified that he jumped the fence, as testified to by one of the state's witnesses, thereby contradicting Mr. Levy, who testified, for the defense, that the accused was at his store at that time.'"

That, when the district attorney made this statement, counsel for the defendant objected to the statement, and stated that the accused did not testify to that fact. The district attorney then stated that he was speaking figuratively, and what he meant was that the accused had admitted to the deputy sheriff that he jumped the fence, and the deputy sheriff had testified to that fact, and therefore, figuratively, the accused had testified, through the deputy sheriff.

"I could not" (he said) "have meant that the accused had testified to that fact, because the accused has not testified at all. You know that he has not been on the stand."

To which statement counsel for the accused objected that it was injurious and prejudicial to his client.

#### Opinion.

It is not disputed that the state witness had testified that the accused had admitted to him "that he jumped the fence," and, whilst we are disposed to give the accused the full benefit of that provision of our statute (Act No. 29, p. 39, of 1886) which reads:

"And provided further, that his failure to testify shall not be construed for, or against, him, but all testimony shall be weighed and considered according to the general rules of evidence, and the trial judge shall so charge the jury"

—we find nothing in the language used by the district attorney which would warrant the conclusion that either the letter or the spirit of that provision was thereby violated. It was legitimate argument that the testimony of the state witness to the admission made by the accused was the equivalent of testimony given by the accused, and neither in making that argument nor in the explanation which was provoked by the objection of the counsel for the accused was there any attempt to draw an unfavorable deduction from the fact that the accused had failed to testify in his own behalf. In the

case of *State v. Marceaux*, 50 La. Ann. 1137, 24 South. 611, it appeared that the district attorney had said:

"Why did Marceaux not go on the stand and testify in his own behalf, if he was not guilty? He had the right to do so? He did not do it because he knew better"

—which was, distinctly, to construe his failure to testify against him. In *State v. Robinson*, 112 La. 939, 36 South. 811, the district attorney said:

"Gentlemen of the jury, the accused has confessed that he shot John Hase, the party whom he is charged with having killed, and this confession has been proved by the old man, Robert Turpin; and, gentlemen of the jury (pointing his finger at the defendant Lee Robinson), he has not denied it. He had the right, under the law—"

And he was there stopped by the counsel for the accused and the court. And there, again, the failure of the accused to testify in his own behalf was emphasized and construed against him. The cases thus cited do not, in our opinion, support the contention of the learned counsel; and, for the reasons given, the verdict and sentence appealed from are

Affirmed.

(124 La.)

No. 17,985.

TURNER v. WOODS.

In re TURNER.

(Supreme Court of Louisiana. Nov. 29, 1909.)  
JUSTICES OF THE PEACE (§ 44\*)—JURISDICTION—INTEREST.

Where the only demand is for interest, the sum claimed necessarily constitutes the amount in dispute. Interest is excluded when it is a mere incident to a principal demand. Const. arts. 85, 98, 109, 126.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 44.\*]

(Syllabus by the Court.)

Action by W. D. Turner against R. P. Woods. Judgment for plaintiff before a justice was reversed in the district court, and W. D. Turner applies for writs of certiorari and mandamus. Application dismissed.

Clifton Mathews, for relator.

LAND, J. Plaintiff sued out an attachment in a justice of the peace court on a claim for \$286.69, for alleged unpaid interest on a note for \$1,000. Relator admits that the defendant made sundry payments on the note, aggregating the sum of \$1,000, but contends that said partial payments extinguished the principal debt, leaving \$286.69 due as interest.

The curator ad hoc appointed to represent the defendant excepted to the jurisdiction of the justice of the peace court *ratione materiae*. This exception was overruled, and there was judgment for plaintiff.

The curator ad hoc appealed to the district court, and the judge reversed the judgment, on the ground of want of jurisdiction in the justice of the peace court.

Relator has applied to this court for writs of certiorari and mandamus.

A justice of the peace has no jurisdiction where the amount in dispute exceeds \$100. It is true that, under the Constitution of 1898, interest is excluded in determining the jurisdiction of a justice of the peace court. Article 126. But this rule assumes that some amount is in dispute exclusive of interest, or in other words, that the demand is for a principal sum and interest thereon; but, where the only demand is for interest, the sum claimed is the amount in dispute. Otherwise, there would be no amount in dispute.

It is therefore ordered that the application of relator be dismissed, with costs.

(124 La.)

No. 17,752.

BASILE v. TARANTO.

(Supreme Court of Louisiana. Nov. 15, 1909.)

APPEAL AND ERROR (§ 1010\*)—REVIEW—WEIGHT OF EVIDENCE.

The judgment of a district court, which is appealed from, is presumed to be correct. The party appealing must show error, to justify its reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3979; Dec. Dig. § 1010.\*]  
(Syllabus by the Court.)

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; Prentice E. Edrington, Judge.

Action by Rosalie Basile, wife of Phillip Taranto, against Phillip Taranto. Judgment for plaintiff. Defendant appeals. Affirmed.

Frederick A. Middleton, for appellant.  
Phillip Patorno, for appellee.

NICHOLLS, J. Plaintiff alleged that she was married in Italy to her said husband about 37 years ago; that there are six children born of the marriage with her said husband, five of whom are of age, and the last one, James Taranto, a minor 17 years of age; that she had conducted herself properly, had given her husband no cause for illtreatment, and had done everything in her power to make his home happy and comfortable; that for about two years past her husband had continually illtreated her at their residence in this parish, continually insulting, assaulting, and beating her, charging her with infidelity, and making her life insupportable, and finally driving her from the matrimonial domicile, compelling her to seek protection at her son's home, Joe Taranto, on the Metairie Ridge; that under the circumstances petitioner decided

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to obtain a decree of separation from bed and board from her husband.

That there was some property, both movable and immovable, consisting of certain parcels of ground, which she described. She declared that said property was acquired during the community between herself and her husband; that she feared that her husband would dispose of the same to her prejudice during the pendency of this suit; that an inventory and appraisement of the said property should be made in the manner and form prescribed by law; and that an injunction restraining her husband from disposing of any part of said property in any manner was necessary for the protection of her rights in the premises.

She prayed that she be authorized to institute and prosecute the action; that the residence of her son Joseph, where she was then residing, be assigned to her as her domicile during the pendency of the suit; that an inventory and appraisement of all the property belonging to the community be taken; that a writ of injunction issue, restraining the defendant from disposing in any manner of any part of said property; that her husband be cited; and that she have judgment decreeing a separation of bed and board between herself and husband and maintaining the injunction.

An injunction issued as prayed for under order of court.

Defendant excepted to the petition on the ground that it was too vague and indefinite to admit of a proper answer and defense, in that it did not disclose the time and place at which plaintiff charged that he had assaulted and beaten plaintiff, that he had charged her with infidelity, and had driven her from the matrimonial domicile. He prayed that the exception be maintained, and plaintiff compelled to make certain the allegations complained of, and on default so to do the suit be dismissed and the injunction dissolved.

The exception was overruled, and defendant reserved a bill.

Under reservation of his exception, defendant answered. After pleading a general denial, he averred that he had at all times properly cared for and well-treated his wife, but that she, on the contrary, had been guilty of gross cruelty and illtreatment; that his wife had repeatedly and in public accused him of infidelity, and cursed and abused him in such manner as to make life insupportable; that his said wife, without cause on part of respondent, left the matrimonial domicile to make her home with her son, Joseph Taranto, on Metairie Ridge; that all of said acts constitute in law cruel treatment, such as to render living together insupportable, and her absence from home constitutes abandonment within the meaning of the law; and now, assuming the char-

acter of plaintiff in reconvention, defendant desires a separation from bed and board from his said wife.

He prayed that the petition of plaintiff be dismissed, at her cost; and, now assuming the character of plaintiff in reconvention, respondent prayed that he have judgment against his said wife, decreeing a separation from bed and board against his said wife, and for costs, and for general relief.

The district court rendered judgment decreeing a separation from bed and board between plaintiff and defendant. It further perpetuated the injunction and ordered the defendant to pay costs.

Defendant has appealed.

The district judge, in rendering judgment, declared that plaintiff had made a sufficiently strong showing to justify a judgment in her favor as prayed for. There is evidence in the record, which, if true, supports that statement. We cannot say that the court erred.

The judgment appealed from is therefore affirmed.

(124 La.)

No. 17,693.

**WILLIAM FRANTZ & CO. v. J. S. WINEHILL & CO. et al.**

In re **WILLIAM FRANTZ & CO.**

(Supreme Court of Louisiana. Oct. 18, 1909.

Rehearing Denied Nov. 29, 1909.)

**PAWNBROKERS (§ 5\*)—TITLE OF PLEDGE—VALIDITY OF PLEDGE.**

Where a person intrusts to another an article of merchandise, upon the representation that it is to be exhibited to a third person with a view of selling it, and authorizes the sale to be made at a certain price, the person receiving the article to retain as his compensation any amount paid by the purchaser in excess of the price fixed by the owner, such person receiving does not thereby acquire the right to pawn the property for his own benefit, and the party to whom it may be delivered in pawn acquires no right thereby to hold it as against the owner.

[Ed. Note.—For other cases, see Pawnbrokers, Cent. Dig. § 4; Dec. Dig. § 5.\*]

(Syllabus by the Court.)

Action by William Frantz & Co. against J. S. Winehill & Co. and another. Judgment for plaintiffs was reversed by the Court of Appeal, and plaintiffs apply for certiorari or writ of review. Judgment of Court of Appeal reversed, and of district court affirmed.

J. Zach Spearing, for applicants. W. S. Parkerson and Bernard Bruenn, for respondents.

**MONROE, J.** Plaintiff obtained judgment in the district court against defendants, in solido, for a diamond stud and a diamond heart, and, in default of delivery, for \$810.94 (as the value of those articles), with interest.

Moss had made no defense and took no ap-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

peal. Winehill & Co. appealed, and the judgment, as to them, was reversed by the Court of Appeal. Plaintiffs are before this court praying for a review and reversal of the ruling last mentioned.

The facts, as disclosed by the record, are as follows:

The defendant Moss is a mechanic (jeweler, as we take it), who worked, at times, for plaintiff, and who was, on one or two occasions, intrusted with articles of jewelry to sell, with the understanding that the articles were to bring a certain price, and that he might retain, as his commission, whatever he could get, over and above the price.

On March 28, 1908, he represented to plaintiffs that he had a customer who wanted a diamond stud, and he was intrusted with the stud here claimed, on the condition that he sell it and return a certain amount as the proceeds, or else return the stud. It appears, however, that Moss had made the acquaintance of a young Roumanian named Reichstadt, who had been in this country but a month or two, and that he had led Reichstadt to believe that he (Moss) would assist him in getting a position. When, therefore, he came into the possession of plaintiff's diamond stud, having really no customer for it and having obtained it with the intention of appropriating it to his own use, he easily obtained Reichstadt's consent to pawn it for him, and he went with Reichstadt to the pawnshop of the defendants Winehill & Co., but remained outside whilst Reichstadt went in and effected the pawn, using for that purpose the name "M. Wiseman," for the reason (as he testified) that, having so recently arrived in this country, he did not wish to appear as having been engaged in a transaction of that kind. The money that he obtained, and the pawn ticket, he delivered to Moss, who was waiting for him on the banquette, and he received no compensation for his service; the whole thing, so far as he was concerned, having been done in good faith as a matter of favor, which he hoped would be requited in kind.

On April 2d, following, Moss obtained from plaintiffs the "diamond heart" which is here claimed, on like conditions, and disposed of it in the same way. A few days later, failing to account for either of the articles mentioned or the proceeds (but, upon demand being made, representing that he had been "held up" and robbed), he was arrested, and soon made a confession whereby plaintiffs and the police were informed as to the disposition that he had made of the jewelry. One of the plaintiffs thereupon, accompanied by a detective, visited the shop of Winehill & Co., and they were shown the articles in question, which were then and there identified as the plaintiffs' property; Winehill & Co. being notified of that fact and of the circumstances under which the property had been obtained from plaintiffs. In the meanwhile Moss, about the time of his arrest, borrowed \$100

from Reichstadt (being all that the latter had), on the pretense that he was in great trouble. And somewhat later one Fink, a pawnbroker, proposed to Reichstadt that they should get the pawn tickets from Moss, that he (Fink) would redeem the property, and that he would also pay the \$100 due to Reichstadt; and it was so done, save that Fink, after getting the property, paid Reichstadt only \$75, instead of the \$100 that he had promised him.

The counsel employed by plaintiffs, in view of the fact that it was then growing late in the season, did not bring this suit until the courts opened in October, and on the trial (in May, 1908) it was shown that Moss had been convicted and sent to the penitentiary for his share in the business, and, having been pardoned, after serving part of his sentence, was present in court, though not called on to testify.

From the opinion of the Court of Appeal, it appears that plaintiffs brought another suit, similar to this, in which Fink was made defendant, and this case was decided for the reasons given in the Fink Case. The record does not show what these reasons were; but it appears, from the brief of counsel, that it was found as a fact that the property involved in the Fink Case had been sold by Moss to Fink. However that may be, we are of opinion that, in the instant case, our learned Brethren of the Court of Appeal have fallen into error. Moss was not the owner of the property here in question; for there has been no attempt to contradict the testimony of the plaintiff Frantz to the effect that he did not sell it to him, but merely intrusted him with it, in order that he might show it to his (pretended) customer, and we find nothing in any of the testimony to warrant the belief that plaintiffs would have sold to Moss property of the value of that in question wholly on credit. It is true that Moss was authorized to sell the property upon certain conditions with reference to his compensation for that service, but that gave him no more right to pawn it for his own benefit than if he had been an ordinary salesman employed in plaintiffs' store.

"Though a factor may sell and bind his principal, he cannot pledge the goods as a security for his own debt." *Lallande v. His Creditors*, 42 La. Ann. 705, 7 South. 895; *Holton v. Hubbard & Co. et al.*, 49 La. Ann. 716, 22 South. 338.

See, also, as sustaining the principle involved, *McBurney v. Flagg*, 11 La. 333; *Perryman v. Demaret*, 11 La. 347; *Campbell v. Nichols*, 11 Rob. 16; *Moore v. Lambeth*, 5 La. Ann. 66; *Russell v. Kunemann*, 19 La. Ann. 517; *Stern Brothers v. Germania Nat. Bank*, 34 La. Ann. 1119.

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeal, here made the subject of review, be set aside and annulled, and that the judgment of the district court (reversed by the Court of

Appeal) be affirmed; the defendants and appellants to pay the costs of the appeal and of this proceeding.

(124 La.)

No. 17,828.

ROACH v. CRAIG.

In re ROACH.

(Supreme Court of Louisiana. Nov. 2, 1909.  
Rehearing Denied Nov. 29, 1909.)

JUDGMENT (§ 682\*) — CONCLUSIVENESS — RES JUDICATA.

Where A. transferred the same timber by successive deeds to B. and C., and in a subsequent litigation between the two purchasers it was decreed that B. was the owner of the timber, *held*, that such judgment was *res judicata* against A., repurchasing the same timber from C. after rendition of said judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1203-1205; Dec. Dig. § 682.\*]

(Syllabus by the Court.)

Action by A. Y. Roach against J. H. Craig. Judgment for defendant was affirmed by the Court of Appeal, and plaintiff applies for certiorari or writ of review. Affirmed.

Alexander & Wilkinson, C. W. Elam, and J. B. Lee, for applicant. Webb & Mabry, W. C. Peques, R. D. Webb, K. R. Crary, and J. W. Parsons, for respondent.

LAND, J. In the year 1905 the plaintiff executed and delivered to the defendant an instrument as follows, to wit:

"State of Louisiana, Parish of De Soto.

"Be it known that A. Y. Roach, a resident of said parish and state, has this day sold and delivered, and do by these presents transfer, sell, and deliver, with full guaranty of title, unto J. H. Craig, a resident of said parish and state, his heirs and assigns, all the merchantable pine timber measuring ten inches and upwards at the stump on my lands situated in said parish and state, containing one hundred acres, more or less.

"This sale and transfer is made for the consideration of the price of fifty cents per thousand for all the timber cut and sawed, and which price is to be paid in thirty days as the timber is removed from the lands. This sale carries with it the right and privileges of going upon said land for the purpose of cutting and removing said timber. The said timber, when cut, is to be measured by Doyle's rule.

"Done and signed in the presence of the undersigned witnesses on this the 28th day of March, 1905. [Signed] A. Y. Roach.

"Attest: L. C. Patterson."

The defendant a few months later caused this document to be duly recorded in the parish of De Soto, and within the year entered upon the premises and commenced the cutting of the timber. Plaintiff thereupon objected, and ejected the cutters.

On August 27, 1906, the plaintiff sold the same timber to one C. E. Jenkins. Shortly after the sale just mentioned the defendant attempted to cut the timber, and thereupon, the said Jenkins, claiming as owner, enjoined the said Craig from entering on said

premises and cutting and removing said pine timber.

Craig answered the injunction suit, pleading his ownership under the contract of March 28, 1905, and urging that Jenkins had purchased in bad faith.

There was judgment in the district court in favor of Craig, recognizing him as owner and dissolving the injunction. Jenkins appealed to the Court of Appeal, which in due course affirmed the judgment in favor of Craig.

Shortly after the said judgment became final and executory, Jenkins reconveyed the timber to Roach, who instituted the suit now before us on a writ of review.

The petition alleges the ownership and possession in Roach; that he was induced to sign the document of date March 28, 1905, through fraud and misrepresentation; that said document is absolutely null and void, because it contains a protestive condition, dependent entirely on the will of Craig, and also for want of mutuality, and, at most, is not a sale of said timber. Roach further alleged that no part of the timber had been cut, and that the document, in any event, is but an option, revocable at will, and that the same had been revoked by the petitioner.

Defendant pleaded as follows:

(1) That the petition disclosed no cause of action.

(2) That the judgment in *Jenkins v. Craig* was *res judicata* as to defendant's title to said timber.

(3) If the alleged causes and grounds of nullity and rescission ever existed, they ceased to exist by the sale to Jenkins, and did not revive upon the retransfer by Jenkins to Roach.

(4) That, if any causes of nullity ever existed, Roach is estopped to set up the same by reason of his ratification of the contract.

These pleas and exceptions having been referred to the merits without prejudice, the defendant answered, pleading title and possession under the agreement of date March 28, 1905.

On trial in the district court the plea of *res judicata* was sustained, and upon appeal the judgment was affirmed by the Court of Appeal.

The Court of Appeal in its original opinion refers to its opinion in another case decided by the same court as decisive of the plea of *res judicata*. The clerk below certifies that such opinion has been lost or mislaid. But we find in the record the reasons of the Court of Appeal for refusing the plaintiff's application for a rehearing, which are, in part, as follows:

"As we held in this case, Jenkins having been interposed by Roach and Fair for the purpose of bringing the action to prevent Craig from exercising under the contract the right to cut and remove the timber, and the suit



having resulted in a definitive judgment against him recognizing the asserted rights of Craig, the judgment is as conclusive against the plaintiff herein as though he had been the plaintiff in the suit instead of Jenkins.

"If he had instituted the suit in the first instance, and asserted the objections to the contract which have been modified from time to time as the litigation has progressed, it may be that he would have succeeded in having the contract declared void, as revoked and without legal effect. But, without ignoring the force of the thing adjudged, he cannot now be permitted, when he has interposed a person for the purpose of instituting the action, to escape from the judgment rendered against such person. He cannot thus institute an action, and, when the judgment is against him, come into court and say that the contract sustained by such judgment had, in fact, been revoked prior to the institution of the suit, either expressly or by the ostensible sale of the timber, which was the method employed to interpose the vendee or otherwise."

On the question of *res judicata*, we make the following excerpts from the brief of the plaintiff:

"But it is pleaded that the final judgment in the case of *Jenkins v. Craig* is *res judicata* of all issues here. It will be seen that in that case Jenkins, who purchased the timber from Roach, endeavored to have the court hold the instrument in question invalid for the reasons now urged (except lesion). The arguments which have been here directed against the document under discussion were pressed by Mr. Wilkinson with greater force than we can hope to present them. But the Court of Appeal expressly refused to consider them, and waived them aside with the statement that they were personal to Roach and could not be considered in a suit in which he was no party. The Court of Appeal now holds that the document is not a sale, but a license revocable at will. They hold that revocation is not a matter covered by the plea of *res judicata*, but that, nevertheless, the right of Roach to revoke it terminated upon the decision of the *Jenkins* Case. This is predicated upon the theory that in the former suit *Jenkins* was a party interposed, and that Roach was a real party to that suit, and concluded by the judgment."

Counsel for defendant argue that the Court of Appeal in the former suit held that the defects and nullities urged were personal to Roach, not a party to the suit and in the case at bar held that Roach was a party to the suit through a person interposed.

The question presented by the plea of *res judicata* must be determined by the decree rendered, its finality as between the immediate parties, and its legal effect against the plaintiff herein. It is not disputed that the judgment pleaded as an estoppel, whether right or wrong, is final and conclusive against Jenkins on the question of title to the timber in controversy. Roach first transferred the timber to Craig, and afterwards deeded the same property to Jenkins, and stood by while his two vendees litigated over the title. The Court of Appeal found as a fact that Jenkins was merely interposed for Roach. The plaintiff does not in his brief challenge the correctness of this finding by reference to

the evidence, but contents himself with charging the Court of Appeal with inconsistent positions in the two cases.

Whether the plaintiff be considered as a privy to the *Jenkins* suit, therein appearing through Jenkins as a party interposed, or as the vendee or assignee of Jenkins subsequent to the judgment rendered against the apparent owner, the result is the same.

In *Johnson v. Weld*, 8 La. Ann. 126, the court, in a well-considered opinion supported by the citation of civil-law authorities, said:

"There may be a physical difference of parties to suits, but at the same time a legal identity. If, without figuring as a party to the record, I am represented by a party to it, the law considers both as one person, and the judgment rendered is obligatory on both."

In the same case the court also said:

"The effect of the *res judicata* is consequently held to extend to the successors or the ayans cause, the assignees of the parties, and to all who claim through them. \* \* \*

"Toullier, in speaking of the principle that the possessor is presumed to be the owner, says: 'It results from this principle that judgments rendered without collusion against the apparent owner, relating to the thing of which he is possessed, acquire the force of *res judicata* against the true owner when he is restored to his right, and also the judgments in favor of the possessor inure to his benefit. It cannot be said that a judgment of this kind is *res inter alios acta*. It is always the same moral person, which passes from one individual to another, as is the case with all those succeeding under a particular title. The true owner must take the consequence of letting his rights remain in the name of another person, who is clothed with the apparent ownership.'

In *Hargrave v. Mouton*, 109 La. 536, 33 South. 591, this court said:

"Successors to, or ayans cause of, the parties to the original suit, are considered in law as having been parties themselves, when their titles have been acquired since the institution of the action in which the original judgment was rendered."

This is a principle of universal jurisprudence, founded on the doctrine of privity in estate. 23 Cyc. 1253-1257.

Plaintiff, in alleging that he sold the property to Jenkins "for a full price," necessarily admits that he divested himself of his former title, and stands on the title acquired from Jenkins after the rendition of the judgment decreeing that Jenkins had no title as against Craig.

The present suit is an indirect attempt to reopen the case of *Jenkins v. Craig*, on the theory that certain questions therein raised were not decided by the Court of Appeal. Admitting the premises, it remains that all such questions are concluded by the judgment, and cannot be reopened, either by Jenkins or his successors in title.

It is therefore ordered that the judgment of the Court of Appeal be affirmed.

(124 La.)

No. 17,633.

**MILNER v. TUTWILER.**

(Supreme Court of Louisiana. Nov. 15, 1909.)

**DIVORCE (§ 129\*)—EVIDENCE—ADULTERY.**

The judgment in this case was in plaintiff's favor, dissolving the bonds of matrimony between herself and her husband. On appeal that judgment is affirmed.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 411-441; Dec. Dig. § 129.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by M. C. M. Milner, wife of Alexander S. Tutwiler, against A. S. Tutwiler. Judgment for plaintiff, and defendant appeals. Affirmed.

Hubert M. Ansley and E. C. Ansley, for appellant. T. M. & J. D. Miller and James E. Zuntz, for appellee.

**NICHOLLS, J.** This is a suit by a wife against her husband for an absolute divorce, or, in the alternative, for a separation from bed and board, for a division of the community property, and for the permanent custody of two infant girls, issue of the marriage. Under proper pleadings, plaintiff prayed for an injunction restraining the husband from disposing of the community property.

The demand for an absolute divorce was based upon allegations that the husband had frequented houses of ill fame and had been guilty of adultery therein at divers times and places; that on the afternoon of October 1, 1908, he entered a house for immoral purposes, being No. 1017 Common street (or Tulane avenue), in the city of New Orleans, and then and there committed adultery with one of the inmates of said house, known as Edith Woodgard.

The prayer for the alternative relief of a separation from bed and board was based upon allegations that the defendant, in violation of his moral, legal, and conventional obligations to petitioner, had been for some time past addicted to the excessive use of alcoholic stimulants and guilty of habitual intemperance; that he had neglected her when she was ill, and cruelly and shamefully abused and illtreated her, to such an extent that it would be unendurable for her to live with him any longer as his wife; that she had patiently borne with and shielded the said misconduct of defendant in the hope of reformation, but without avail, until her patience had been exhausted, her peace of mind and happiness destroyed, and her health endangered; that the manner of life pursued by defendant had been shameful and revolting to her, and had caused her great mental anguish and suffering; that he had frequently returned to the matrimonial domicile greatly intoxicated, in which

condition he had committed gross excesses in her presence.

The district court rendered judgment in plaintiff's favor and against defendant, decreeing an absolute divorce, and dissolving the bonds of matrimony existing between them. It further adjudged and decreed that the plaintiff should be given the care, custody, and control of the two minor children, issue of her marriage with defendant.

It further decreed that an inventory be taken of the commercial, dotal, and paraphernal property. It further decreed plaintiff to be the owner of one-half of the community property and all of her separate and dotal property, and referred the parties to a notary public to effect a partition. It perpetuated the injunction, which had issued, and decreed that defendant pay the costs.

In the opinion accompanying the judgment, the district judge used the following language:

"The charge made by the plaintiff against her husband, that he has been guilty of adultery, is proved beyond the shadow of a doubt. The bad character of the house defendant was in, the bad character of the woman he was with, the committal of the act of adultery with her, and the time of the day are all proved.

"Indeed, defendant's counsel admitted that defendant was in the house, in the room, and on the bed where the crime was committed."

In reference to the charges made in that part of the petition in which the alternative prayer for a separation from bed and board was founded, the judge said:

"The evidence in this case shows that on all occasions, whether he had been drinking with his friends and acquaintances or had not been drinking, he was in his house a good husband and father. \* \* \* He never, when with them, said one unkind word or committed an unkind act. As to the defendant being an habitual drunkard, there is not a scintilla of proof in the record."

The case comes before this court with a transcript covering 1,500 pages of testimony. The greater part of that testimony is directed to the issues involved upon the demand for a separation from bed and board. The evidence in regard to the charge of adultery is found in comparatively few pages, through testimony given by seven or eight witnesses.

If the charge of adultery has been clearly established by evidence, that is an end of the case. The testimony on the second branch of plaintiff's demand would be utilized only as a makeweight in determining a doubtful issue. We have examined the testimony with the special care which the importance of the issues involved demands.

We discover no error in the judgment appealed from. We do not see how, on the evidence adduced, the district court could have arrived at a conclusion different from that which it did. The law entitles either spouse, on proof of adultery on the part of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the other, to a judgment of divorce. Proof of a single act of adultery carries with it as an unavoidable legal result a decree dissolving the bonds of matrimony between the parties. The trial judge has no discretion in the matter. He has no right to bring to bear, in defendant's favor, general good conduct and kindness on his part in other respects as an offset to a violation by him, even on a single occasion, of his obligation of fidelity to his wife.

The defendant relies in this case almost exclusively upon the claim that the charge of adultery rests upon the testimony of three detectives. Counsel urge that we should disregard their testimony, when opposed by counter testimony which has not been impeached.

The testimony of the detectives in this case has been strongly corroborated by defendant's own witnesses and undisputed facts. We have given, as we think the district judge also did, due weight to the advice thrown out from time to time by different courts that caution should be observed in acting upon testimony drawn from witnesses following that occupation. With that advice pressed upon us by counsel, we none the less adhere to the conviction that the testimony given by the detectives must be held to be true, and, if true, that the judgment appealed from is sustained by proper and sufficient proof.

Defendant urges that we should guard and protect his right (in spite of the decree of divorce) to see his children. We have no reason to suppose that plaintiff will seek to deprive him of that right in that regard. Our decree is intended to leave, and does leave, defendant's rights in that respect open.

We do not think that any good would be subserved by reciting and analyzing the testimony in the case.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment, appealed from be, and the same is, hereby affirmed.

(124 La.)

No. 17,733.

WEIL v. BONART.

In re WEIL.

(Supreme Court of Louisiana, Nov. 2, 1909.  
Rehearing Denied Nov. 29, 1909.)

LANDLORD AND TENANT (§ 150\*)—REPAIRS TO BUILDING—LIABILITY OF LANDLORD.

Plaintiff leased from defendant for a retail clothing store a building on Rampart street. The front of the lower story on Rampart street was made of plate glass. The plate glass was broken at night by burglars. The lessee notified Bonart of that fact, and called on him to replace the front. On his refusal to do so, Weil replaced the front at what is conceded to have been a reasonable sum. He then brought suit against his lessor for reimbursement of the

amount so expended. The lower court rendered judgment in his favor, but the Court of Appeal on appeal reversed the judgment.

*Held*, that the judgment of the Court of Appeal was erroneous, and that of the lower court was correct.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 553; Dec. Dig. § 150.\*]

(Syllabus by the Court.)

Action by Isaac L. Weil against Sam Bonart. Judgment for plaintiff was reversed by the Court of Appeal, and plaintiff applies for certiorari or writ of review. Judgment of Court of Appeal reversed, and judgment of city court affirmed.

Benjamin Rice Forman, for applicant. Edgar M. Cahn, for respondent.

NICHOLLS, J. In plaintiff's application for this writ of review, the plaintiff alleged that the defendant, Bonart, had leased to him the store, 614 and 616 South Rampart street, for the purpose of having a clothing store, and that at the time that the lease was made the front on Rampart street was made of plate glass, and said plate glass was necessary to be maintained in order that the premises might be used for the purposes for which it was leased; that on 23d of August, 1908, and during the term of the lease, the plate glass front was broken in the nighttime through no fault of the tenant or his agent, but by burglars; that the plaintiff immediately notified the lessor in writing to replace the glass front, which he refused to do; that the plaintiff then had it replaced at a cost of \$50, which was a reasonable sum; that he then brought suit against Bonart, claiming reimbursement of that amount; that the court rendered judgment in his favor against Bonart, condemning him to pay the said sum; that the defendant appealed the case to the Court of Appeal, and that court reversed the judgment; that he unsuccessfully applied for a rehearing.

On application the case has been ordered up, and is now before the court for review.

The facts of the case are conceded. Resistance to Weil's claim to reimbursement for the amount paid by him for replacing the plate glass front is based upon the provisions of articles 2693-2699 and 2716 of the Revised Civil Code, which read as follows: Article 2716:

"The repairs which must be made at the expense of the tenant are those which, during the lease, it becomes necessary to make. To the hearth, to the back of chimneys and chimney casing; to the plastering of the lower part of interior walls; to the pavement of rooms when it is but partially broken, but not when it is in state of decay; for replacing window glass, when broken accidentally, but not when broken either in whole or in their greatest part by a hail storm or by any other inevitable accident; to windows, shutters, partitions, shop windows, locks and hinges, and everything of that kind, according to the custom of the place."

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**Article 2693 reads:**

"The lessor is bound to deliver the thing in good condition, and free from any repairs. He ought to make during the continuance of the lease, all the repairs which may accidentally become necessary, except those which the tenant is bound to make as hereafter directed."

**Article 2699:**

"If, without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded, as if by a neighbor, by raising his walls, shall intercept the light of a house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity."

Well, on the other hand, relies upon article 2692 and article 2694 of the same Code:

"The lessor is bound from the very nature of the contract and without any clause to that effect:

- "1. To deliver the thing leased to the lessee.
- "2. To maintain the thing in a condition such as to serve for the use for which it is hired.
- "3. To cause the lessee to be in a peaceable possession of thing during the continuance of the lease." Article 2692.

"If the lessor do not make the necessary repairs (those required in article 2693) the lessee may himself cause them to be made and deduct the price from the rent due, on proving that the repairs were indispensable, and that the price which he has paid was just and reasonable." Article 2694.

We are of the opinion that article 2716 of the Revised Civil Code, in dealing with the repairs which a lessee is required to make at his own expense, has no reference to the breaking of the plate glass front of a building leased for the purpose of carrying on a retail clothing store. It cannot be supposed that either the lawmakers or the parties to a contract of lease would contemplate that a breakage of so extended a character, involving so large an expenditure of money, and carrying with it necessarily such serious consequences to the owner, as well as the tenant, should have been placed at the risk of the tenant, and that the latter should be made to bear the expense of replacing a portion of the framework of the building, for such the plate glass front is. This he would be forced practically to do, if defendant be correct. No one constructing a house to be leased either as a store or occupied as a residence would think of offering it for leasing with the front of the lower story still open. Such a building would be incomplete and unfit for occupancy for either residential or store purposes; and as the completion of the building at the beginning of a lease would be expected and required of the owner, so the obligation of the lessor is to see that the building should remain a completed one until the termination of the lease. The plate glass front of a retail store is not constructed (as defendant urges) for the exclusive benefit and profit of a particular tenant, in order to enable him more readily to expose his wares to public view and promote his

sales. That particular character of front is intended to be permanent, and to result in the interest of the owner in obtaining, by reason of the same, higher rent from future as well as the present tenant. No good ground exists for making a tenant occupying premises at a particular date for a limited time to expend in the interest of the owner his own money in order to remedy injuries to the property arising from outside causes through no fault of his.

The plaintiff is not claiming herein anything for damage suffered by himself. He is simply asking reimbursement to him of a reasonable amount, which he was compelled to pay in order to replace the building in the condition in which he had the right to insist that it should be placed, in order that he could carry on his business with security. If the lessee were claiming damages from his lessor for loss to himself for the breaking of the glass front, a very different question would be presented.

We are of the opinion that the judgment of the Court of Appeal, brought up herein for review, is erroneous, and that the judgment of the city court, which the Court of Appeal reversed on appeal to that court, was correct.

For the reasons assigned herein, the judgment of the Court of Appeal for the Parish of Orleans, herein brought up for review, is hereby annulled, avoided, reversed, and set aside. It is further ordered, adjudged, and decreed that the judgment of the city court, which the judgment of the Court of Appeal, herein annulled and set aside, itself reversed on appeal, be and the same is hereby affirmed; the defendant paying costs in all the courts.

(124 La.)

No. 17,503.

WALSHE v. ENDOM.

(Supreme Court of Louisiana. Nov. 15, 1909.)

**1. SPECIFIC PERFORMANCE (§ 13\*) — WHEN GRANTED.**

Specific performance is not a remedy which can be demanded as of right in every case of violation of contract. The party aggrieved by such violation is in ordinary cases entitled only to damages. Specific performance is a character of relief which should be granted only where under the circumstances the thing ordered to be done is within the legal capacity of the party ordered to do it and the rights of parties not before the court are not involved.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 30-32; Dec. Dig. § 13.\*]

**2. SPECIFIC PERFORMANCE (§ 13\*) — WHEN GRANTED.**

Courts should not order a party to do that which legally he is not entitled to do.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 30-32; Dec. Dig. § 13.\*]

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; J. P. Madison, Judge.

Action by Edward Walshe against Fred Endom. Judgment for plaintiff, and defendant appeals. Reversed.

Lamkin & Millsaps, for appellant. John M. Munholland, for appellee.

Statement of the Case.

NICHOLLS, J. In plaintiff's petition, filed November 23, 1904, he alleged: That on or about the 29th of May, 1903, he leased from the defendant a certain described lot and building. That in addition to the said contract of lease, and incorporated therein, defendant obligated himself as follows, to wit:

"It is further agreed and understood that the lessee shall have the right and the option to purchase said building and lot at a price not to exceed sixty-five hundred (\$6,500.00) dollars at any time between July 1, 1903, and July 1, 1904, which said purchase, if perfected, shall terminate this lease; but, in the event the lessee should not wish to purchase the said property, this purchase clause shall in no way conflict with or disturb any feature of this lease. Should the lessee decide to buy the said property, the lessor hereby agrees and binds himself to make over to the lessee an acceptable title to the same, all of which will more fully appear by reference to the said option and contract of lease, a copy of which is annexed hereto, and made a part of this petition, and marked 'A.'"

That the said Endom by the said agreement obligated and bound himself to sell to your petitioner the property herein described at any time between July 1, 1903, and July 1, 1904, for \$6,500, and that the defendant further obligated himself to make to petitioner an acceptable legal title to the said property. That on or about the 15th day of May, 1904, petitioner informed the said Endom that he, your petitioner, was ready and willing to pay to the said Endom \$6,500, stipulated in the said option, and demanded of the said Endom that he make over to your petitioner an acceptable legal title to the said property free from incumbrances. Petitioner shows that the defendant expressed his desire and willingness to make the title to petitioner, but averred and reiterated that there were other parties interested in the property whose consent he would have to obtain, and that after making use of any and all delays that he could, and your petitioner believing that he was not desirous of completing this sale, on or about the 15th day of June, 1904, in the office of the defendant at his livery stable in the city of Monroe, La., and in the presence of two legal and competent witnesses, petitioner put defendant in default by tendering to the defendant in legal tender money of the United States \$6,500 in cash, and demanded of him that he make an acceptable legal deed of the said property from himself to petitioner, which the defendant refused, and that at various and sundry times, both before and after said time, the defendant has refused

to deed the said property to your petitioner.

Petitioner further shows that he is entitled to specific performance of the said contract, and that the defendant, instead of performing his said contract, and with a view of making it arduous and difficult to perform the same, since the execution of the agreement to sell, and while promising petitioner that he would make an acceptable legal title of the said property to petitioner, incumbered the said property to the Monroe Building & Loan Association to secure money borrowed from the said Monroe Building & Loan Association, and that it is the duty and obligation of the defendant to free the said property from all incumbrances that exist thereon before or after the 29th day of May, A. D. 1904. That the value of the said property has enhanced and is constantly enhancing, and that petitioner has to pay rent thereon for his business, and that by the said failure and refusal of the defendant to make over to petitioner a legal and acceptable title to the said property he has damaged and is damaging your petitioner in the sum of \$3,000.

That from and since the 15th day of May, 1904, and particularly from the date of his putting the defendant in default, he has at all times been ready and willing to accept a good and sufficient title to the said property and pay therefor the stipulated price.

In view of the premises, he prayed that defendant be cited, and that there be judgment in his favor and against defendant, ordering and decreeing a specific performance of the promises made by the defendant in document marked "Exhibit A" and attached to this petition, and that the defendant be ordered within a time, to be fixed by your honorable court, to execute and deliver to petitioner a formal deed to the property herein described; and if, in the alternative, your honor should decree that the petitioner is not entitled to a specific performance of his said contract by the execution of a deed by the defendant to the said property, or the defendant can avoid a specific performance of the said contract by the payment of the damages, then and in that event petitioner prayed that he have judgment against the defendant in the sum of \$3,000, for the violations of his said contract and failure to comply with and carry out the same, together with legal interest from judicial demand; for all necessary proceeds for costs and general relief.

Defendant excepted:

(1) That all necessary parties have not been joined together in this suit.

(2) That the agreement alleged on and annexed to plaintiff's petition was made and entered into with another person, other than plaintiff herein, and that plaintiff is a stranger to said agreement or contract, and is without the right or authority to institute this suit, or the capacity to stand in judg-

ment for Ouachita Gun & Bicycle Company.

Defendant prayed that this his exception be sustained, and plaintiff's suit dismissed, at his costs.

On June 20, 1905, the court sustained the exception and dismissed the suit. On the same day plaintiff, alleging that the judgment dismissing his suit on exception was contrary to the law and the evidence, prayed that he be granted a new trial. The motion was not taken up and argued until June 13, 1908. At that time a new judge had taken his seat on the district bench. On the 26th of June, 1908, a new trial was granted. On October 2, 1908, defendant's exceptions were taken up, tried and overruled. On October 20, 1908, defendant, under reservation of his exceptions, answered. He admitted the execution of the contract and agreement annexed to the petition, but generally and specifically denied all the allegations of the petition. Further answering, he averred: That the lease, contract, and agreement was made and entered into by him with the Ouachita Gun & Bicycle Company, a commercial partnership domiciled in Monroe, La., composed of Edward Walshe and Frank Manasco, and not with the plaintiff, as alleged.

That at the time of the execution of said contract, as well as on June 15, 1904, the date of the alleged tender by plaintiff of the purchase price, the Ouachita Gun & Bicycle Company, lessee, as well as Edward Walshe, plaintiff, well knew that the property described in plaintiff's petition was owned in indivision by respondent and Aloise H. Endom, Louis C. Endom, Fred. C. Endom, and Kate Endom, the three last mentioned being then minors and all children of Katharine Endom, deceased, and respondent, and that he was without the right or authority to sell their one-half interest therein. Petitioner further averred that the property in controversy was leased at a nominal price from July 1, 1904, to June 30, 1908, to the Ouachita Gun & Bicycle Company, and that no consideration whatever was promised or given respondent for the pretended agreement to sell said property to the Ouachita Gun & Bicycle Company, or any one else, and therefore the so-called agreement to sell was null and void.

In the alternative, respondent averred that, in event this honorable court should hold that the contract or agreement to sell was legally binding and had a valid and adequate consideration (but which was denied), then he showed that said plaintiff was equitably and legally estopped from enforcing a specific performance of said agreement or from recovering damages thereunder for its alleged breach, because he, either as proprietor of the Ouachita Gun & Bicycle Company or as president of the Ouachita-Monroe Gun & Bicycle Company, Limited, had occupied the leased premises continuously since and prior to June 15, 1904, the date of the alleged ten-

der of the purchase price, under the lease contract made between respondent and the Ouachita Gun & Bicycle Company, and had paid the rent promptly at the expiration of each and every month to June 30, 1908, the date of the expiration, and that by so doing, either as proprietor or as president of the Ouachita Gun & Bicycle Company and the Ouachita-Monroe Gun & Bicycle Company, Limited, respectively, he had renounced and waived all rights which he or the Ouachita Gun & Bicycle Company may have had for a specific performance of the contract or for the recovery of damages for its alleged violation, and had in addition by his said conduct equitably and legally estopped himself and the Ouachita Gun & Bicycle Company from asserting any right thereunder.

He prayed that plaintiff's demand be rejected, and for equitable and general relief.

On November 23, 1908, the plaintiff filed what he styled a plea of estoppel, in which he alleged that: Defendant contracted with and collected and received rent of plaintiff under the contract of lease and options as stipulated therein; that at the termination of the lease defendant notified plaintiff in writing as lessee that the lease had expired by limitation and demanded possession of the property; that by said acts defendant was estopped from denying that plaintiff was lessee or owner of the option sued on. He prayed that the plea of estoppel be sustained, and that defendant be estopped from denying that plaintiff was lessee or owner of the option to buy in the lease contract.

On February 6, 1909, the district court rendered judgment ordering, adjudging, and decreeing that defendant, within 30 days from date of the judgment, execute and deliver to the plaintiff, Edward Walshe, a lawful deed conveying and transferring to him, free of all privileges and mortgages, including any claims due for taxes to July 1, 1908, and that certain tutor's legal mortgage executed by Fred Endom, Sr., tutor, for \$16,554.28 in favor of the judge of Fifth judicial district court for the parish of Ouachita, state of Louisiana, recorded in Mortgage Book 27, at page 122, and free of all lawful claims to the title by his children, Josephine, Gustave, Louis, Aloise, Louise, Frederick, and Kate Endom, as heirs of defendant's deceased spouse, Mrs. Katharine Endom, to the following described property: [Describing it.] It further ordered, adjudged, and decreed that, upon execution of deed and transfer of title as herein directed, the \$6,500 judicially deposited by the plaintiff shall be paid over to the defendant in full satisfaction of the purchase price of said property; that, in the event of default or failure of defendant to execute and deliver to plaintiff a lawful deed and title to the property as herein directed, this judgment shall itself become title of plaintiff to said property, and the \$6,500 shall remain judicially deposited

until the cancellation of the said tutor's legal mortgage recorded in Mortgage Record 27, at page 122, of the parish of Ouachita, La., in so far as it affects or incumbers said property, and the release and extinguishment of all lawful claims to the title by the children of defendant, namely, Josephine, Gustave, Louis, Aloise, Louise, Frederick, and Kate Endom, and the cancellation of any privilege due on said property for taxes; that upon the cancellation of said tutor's mortgage, and the production of tax receipts showing the payment of all taxes lawfully due against said property to July 1, 1906, and the release or extinguishment of the lawful claims of the aforesaid children of defendant to any interest they may have in the said property, it is ordered that the \$6,500 judicially deposited by plaintiff be paid over to the defendant or his order. It was further ordered that defendant pay all costs of this suit.

Defendant applied for and obtained an order for appeal from the judgment. The transcript of appeal has been duly filed, and the case is before the court for decision on appeal.

Plaintiff has answered the appeal, praying that the judgment appealed from be affirmed; but, should the court not decree a specific performance, then plaintiff in the alternative prayed for judgment against defendant for the sum of \$3,000, for damages, with interest from judicial demand, and costs in both courts.

#### Opinion.

The evidence discloses that on the day of the lease and up to the present time the property leased in the act of May 29, 1903, did not belong to the defendant in its entirety, but belonged to the community of acquets and gains which had existed between himself and his deceased wife, that he owned one undivided half as owner, and the other half as usufructuary of the wife's share in the community, and that his share in the property was struck by a legal mortgage in favor of his children for about \$17,000 to secure their rights as heirs of their mother. Under such circumstances it was impossible for defendant to have sold the property to the lessee, however much he might have desired to do so, under a satisfactory or acceptable legal title. The plaintiff, Walshe, being on the stand as a witness in his own behalf, being asked the question, "You heard Mr. John Munholland [the attorney who drew up the act of lease] state that he knew that Mr. Endom's children owned an interest in the property?" replied that he never knew anything about it until about the time the tender was made. He heard about it a little before or a little after. Being asked, "After you found out that the children owned a half interest in this property, did you demand them, or any one of them, to sign a deed to the property?" he

replied: "Before I made the tender, a few days, I do not remember just now how long, I passed by there, and I called to Mr. Endom. I told him that I would be ready for the deed in a few days. His answer was: 'I positively refuse to do it'"—as it was purely optional on his part, and nothing put up on his (witness') part. After the tender he had never shown any willingness to make the title.

Being asked, "What was the property which was the subject of this suit worth?" he answered, "Between \$10,000 and \$12,000." Being asked on what he based his alternative demand for \$3,000 damages, he answered: "By not becoming the owner of the property for the purchase price at that time, and what the property is worth now; in other words, from the time I should have come in possession of it to the present time." Being asked what it was worth on June 15, 1904, he answered, "That is a hard question to answer correctly," but he considered that it was worth more than at the time he made the lease. Witness understood that the property had enhanced in value for the last five years. Being asked, "What was the property worth on May 29, 1903, when the contract of lease was made?" he replied that he considered he was paying a good price for it at that time. Witness said he was not able to say what it was worth on June 15, 1904, but the property was increasing in value; that it was hard for him to say what it was worth at the dates he was testifying; that he did not know. Plaintiff placed Mr. Easterling, a real estate broker, on the stand to prove the value of the property. He testified that he knew the property in contest; that in his opinion a fair valuation of it was \$300 a front foot—that is, that was the value of the naked lot. He did not know what the value of the improvements was; that the building on the property covered the entire lot. The evidence above referred to was the only evidence introduced by the plaintiff as to the value of the property in contest or the subject of damages.

A question arose in this case in the trial court as to who was the lessee under the act of May 29, 1903.

Was it the Ouachita Gun & Bicycle Company, or was it Edward Walshe, who in the act of lease was referred to as the proprietor of that company. An examination of the evidence discloses that the Ouachita Gun & Bicycle Company was only organized after the date of the contract of lease was executed, and that plaintiff was the only party in interest in the business then conducted under the name of that title. There was no assignment by plaintiff of his rights under the contract of lease to the corporation subsequently formed.

The testimony shows that the lessee took possession of the property leased at the date of the commencement and paid to defendant

regularly the installments of rent as they fell due up to the expiration of the term of the lease as fixed in the contract of lease. Defendant argues from that fact that, even if plaintiff had had any right to a specific performance under the contract, he abandoned or renounced it. He cites in support of that position volume 18 of the American & English Encyclopedia of Law, p. 632, and the case of Knowles v. Murphy, 107 Cal. 107, 40 Pac. 111. He refers to Hanson v. Allen, 37 La. Ann. 732, in support of the proposition that, pending a lease, the lessee cannot dispute the title of his lessor. We are of the opinion that the judgment of the district court is erroneous, and should be reversed. It is impossible for the defendant to vest in the plaintiff ownership of the property referred to in the petition. It is not his to sell. The court should not have ordered him to do what he had no legal right to do. We do not think the case is one where specific performance could or should be ordered. It is not a remedy which can be demanded of right. It is a character of relief which is to be granted only where, under the circumstances of the case, the thing ordered to be done is within the legal capacity of the party to do, and the rights of parties not before the court are not involved. In cases of violations of a contract, the party aggrieved is in ordinary cases entitled only to damages. Appellant, in his answer to plaintiff's appeal, prays that, should the court refuse to affirm the judgment as rendered, we should award him damages.

We are of the opinion that, under the circumstances of this case, that prayer should not be granted, but that the right of the plaintiff to damages should be left open for future examination and decision. For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be and the same is hereby annulled, avoided, and reversed. It is further ordered, adjudged, and decreed that plaintiff's demand, in his answer to the present appeal to have judgment in his favor against defendant, be not granted, but that his right to damages be left open for future examination and decision. Plaintiff's suit is dismissed without prejudice, and he is decreed to pay the costs of both courts.

BREAUX, C. J. I concur in the decree.

MONROE and LAND, JJ., concur in the decree.

PROVOSTY, J., concurs in the decision, in so far as the demand for specific performance is rejected, and dissents in so far as the demand for damages is dismissed, holding that damages ought to be awarded, at least to an amount equal to the rents paid, less interest on the unpaid price of the sale.

(124 La.)

No. 17,790.

STATE v. WASHINGTON.

(Supreme Court of Louisiana. Nov. 15, 1909.)

1. CRIMINAL LAW (§ 1158\*)—CONTINUANCE—PREJUDICE.

The affidavit of the accused in a criminal prosecution in support of a motion for continuance, based upon the ground that the inflamed condition of the public mind would operate to his prejudice, cannot outweigh the opinion to the contrary of the trial judge, who acts under the obligation of his oath of office, and who, unlike the accused, is without interest.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1158.\*]

2. CRIMINAL LAW (§ 1055\*)—APPEAL—REVIEW—ARGUMENT OF PROSECUTING ATTORNEY.

The complaint that the prosecuting officer, in arguing to the jury, denounced the accused as a brute and a beast, will not be reviewed in this court, where no proper bill of exception was taken at the time. The use of denunciatory language is ordinarily objectionable, but it may be justified by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2666, 2667; Dec. Dig. § 1055.\*]

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas M. Burns, Judge.

Dan Washington was convicted of assault with intent to commit crime, and appeals. Affirmed.

Prentiss B. Carter and Frederick J. Heintz, Jr., for appellant. Walter Gulon, Atty. Gen., and Lewis L. Morgan, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

Statement of the Case.

MONROE, J. Defendant was charged, by information filed by the district attorney on June 25, 1907, with having assaulted a girl, under the age of 12 years, with intention of committing a rape. The case was set down for trial on July 1, 1909, and upon that day the accused, through his counsel, moved for a continuance, on the grounds that, in view of the character of the charge, he was entitled to be tried at a time when the public mind would be in normal condition; "that, owing to the unfortunate occurrence in the town of Covington on yesterday evening, when one of his race is charged with having made a violent and brutal assault upon a girl of the Caucasian race, the public mind is inflamed and prejudiced, and passion is naturally aroused, so that, in the opinion of your mover, a fair and impartial trial, such as is guaranteed by the Constitution and laws of this state, is impossible at this time; that in the issues of the daily papers, published at New Orleans and in the town of Covington, and which circulate in said town and are read by the citizens who compose the jury, in large headlines, they are informed that a mob of citizens are searching for a black brute,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



all of which is prejudicial to this defendant, and renders it highly improbable that he should obtain a fair trial; that he makes this application, not for delay but, in order to obtain substantial justice."

#### Opinion.

1. The allegations contained in the motion were sworn to by the accused, and, the motion having been overruled, a bill was reserved. No testimony appears to have been adduced in support of the motion, and we are bound to assume that the trial judge knew as much about the state of the public mind as the accused. He acted under the obligation of his oath of office, and, unlike the accused, was without interest. His refusal to grant the continuance, because he did not believe the affidavit of the accused, presents no question of law, and is not reviewable in this court. *State v. Lindsey*, 14 La. Ann. 42.

2. In what purports to be bill of exceptions No. 2, it is recited that the district attorney, in his closing argument, pointed to the defendant and remarked "that there was the black brute in human form who had committed this diabolical crime"; that, on objection, the court instructed the jury to disregard the statement of the district attorney; that the district attorney, a few moments later, again pointing to the accused, cried loudly, "there is the black beast that committed the crime," to which counsel for accused objected, "and asked to have the statement taken down by the stenographer, which was done, and he thereupon reserved to said statement a bill of exceptions, making the statement, as taken down by the stenographer, the basis of the bill." The statement per curiam, annexed to the instrument thus quoted, reads:

"There was no note of evidence made, nor was there any formal bill of exceptions taken. I remember the counsel for accused interrupting the district attorney, and my instructing the district attorney to confine himself to the record; but there was no proper bill taken."

The stenographic report, to which reference is made by counsel for the accused, does not appear in the transcript, and the bill itself bears date July 6th, five days after that of the trial. Beyond that, whilst the use of denunciatory language is ordinarily objectionable, it may be so far sustained by the evidence as to render it innocuous so far as the accused is concerned. Thus it has been held by this court that, if the evidence showed the guilt of the accused, charged with incest with his own daughter, the remark of the prosecuting officer that the evidence showed that the accused was a "monster" was fully justified. *State v. Spurling*, 115 La. 789, 40 South. 167.

3. The remaining bill was taken to the ruling of the court in refusing a new trial, prayed for upon the ground relied on for the continuance; that is to say, that the inflamed condition of the public mind operated to the

prejudice of the accused. To this the judge says:

"This party, accused, had a fair and impartial trial. There was no reason whatever to give him a new trial."

This court is not in a position to review the ruling complained of. It may be here remarked that the accused has not been represented here. We have, however, given to the points presented in the transcript our careful consideration, and we find no ground for reversing the judgment, which is accordingly affirmed.

(124 La.)

No. 17,729.

#### STATE v. VARNADO et al.

(Supreme Court of Louisiana. Nov. 15, 1909.)

**CRIMINAL LAW (§ 184\*)—FORMER JEOPARDY—DISCHARGE OF JURY BECAUSE OF ILLNESS OF JUDGE—EFFECT.**

The discharge of the jury without verdict, after the reading of the indictment in a capital case, on the ground of the illness of the judge, and the likelihood of his inability for several days to hold court, is from necessity, under the rule that there is no jeopardy when the discharge of the jury is from necessity.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 333; Dec. Dig. § 184.\*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Will Varnado and another were tried for a capital offense, and the jury was discharged without verdict. From a judgment denying a motion to discharge defendants on the ground that they had been placed in jeopardy, they appeal. Affirmed.

Thomas P. Sims and J. B. Webb, for appellants. Walter Guion, Atty. Gen., Wm. H. McClendon, Dist. Atty., Reid, Purser & Reid, and Thomas M. Bankston (R. G. Pleasant, of counsel), for the State.

**PROVOSTY, J.** After the jury had been impaneled and sworn, and the indictment read to them, they were discharged without verdict rendered, owing to the judge being ill and not likely to be well enough for several days to hold court. Defendants now claim that they were put in jeopardy by said mistrial, and cannot be put in jeopardy a second time, and should be discharged. It is well recognized that there has been no jeopardy when the discharge of the jury has been from necessity. *State v. Robinson*, 46 La. Ann. 773, 15 South. 148. And it is clear that there is such necessity when, as in the present case, the trial being for a capital offense, the jury cannot be allowed to separate, and would have to be kept together indefinitely to await the recovery of the judge. 12 Cyc. 271; *People v. Hunckeler*, 48 Cal.

334. No provision has been made by our law for some one else to take the place of the judge in such a case.

Judgment affirmed.

(124 La.)

No. 17,499.

**VOINCHE v. TOWN OF MARKSVILLE.**

(Supreme Court of Louisiana. Nov. 15, 1909.)

**1. DEDICATION (§ 64\*)—REVOCATION OF DONATION—ABANDONMENT OF USE.**

Where a lot was donated to a town for the sole purpose of the establishment of a public market, and the corporation, after erecting a market house on the lot and establishing a public market thereon, abandoned the premises and converted a portion of the same into a public street, *held*, that there was legal cause for revocation for nonperformance of the charges or obligations imposed on the donee.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 107-111; Dec. Dig. § 64.\*]

(Syllabus by the Court.)

**2. GIFTS (§ 41\*)—REVOCATION AND RESCISSION—STATUTES—CONSTRUCTION—"CONDITIONS."**

The word "conditions," as used in Civ. Code, art. 1559, providing for the revocation of donations for nonfulfillment of eventual conditions, is synonymous with the word "charges"; and when a donation contains charges, it is considered as made under the condition that it may be dissolved, or revoked, if they are not executed.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 41.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1394-1400.]

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; G. H. Couvillon, Judge.

Action by Robert P. Voinche against the Town of Marksville. Judgment for defendant, and plaintiff appeals. Reversed.

Coco, Couvillon & Coco, for appellant. William H. Peterman and T. H. Couvillon, for appellee.

**LAND, J.** This is a suit to revoke a donation *inter vivos*, made in the year 1858 by Auguste Voinche, deceased, to the town of Marksville, of a certain lot of ground for the alleged permanent establishment thereon of a market house and for no other purpose. It was alleged that the act of donation, which was annexed to the petition, contained a condition that, if said market house was not established in conformity with the wishes of the donee, the donation should be null, and the lot of ground should revert back to the donor.

It was further alleged that the defendant, pretending to conform with the stipulations set forth in the act of donation, did erect a building on said lot, and did at odd times use the said building as a market house, but that the defendant has long since abandoned the use of said building for said purpose, and has totally failed to maintain a market on

said lot, as was stipulated in said act of donation.

It was further alleged that for many years said building and lot have not been used for a market, and that in the year 1902 a street was laid out on said property, for which purpose the defendant has taken and used 35 feet or more of the front of said lot by the entire depth of said property, and has thereby dedicated the same to other uses than that stipulated in the act of donation.

The act is written in the French language. It is unnecessary to recite the act in full and we translate such portions as we deem necessary for the decision of the issues before us.

The donor—

"declared that, desiring the establishment of a market for the town of Marksville aforesaid, he does make a donation, from this day and forever, to the corporation of the town of Marksville aforesaid, and solely to build a market, which will remain the property of said corporation, of a certain town lot," etc.

The act concludes with the following paragraph, to wit:

"After the conclusion of the present act it was agreed and understood between the said Mr. Voinche and the said Messrs. Barbin and Delavallade and Waddill, committee authorized to accept said donation, that, should it happen that said market be not built, the said act of donation will be null, and the said town lot shall, by that fact, belong to the said Voinche."

In the court below the suit was dismissed on an exception of no cause of action, and the plaintiff has appealed.

The declared purpose of the donor was the establishment of a market for the town of Marksville, and the donation was made "solely to build a market," and it was stipulated that, if it should "happen that said market be not built," the donation should be null.

Our learned Brother below says:

"Now, while it is true that the act provides for the establishment of a market house only, and that the last paragraph contains the clause that, if it is not established, the property shall remain in the donor, yet we find that the act also contains the following expression:

"That the donor gives and donates to the corporation of Marksville 'from to-day and forever' the lot of ground.

"If the property itself was donated with a condition, and that condition has been complied with by the donee, such compliance has forever destroyed the remaining right of ownership that was retained by the vendee.

"As far as the expression used by the donor to the effect that the property was donated for a market house only, in my opinion, this cannot have the effect of annulling the act of donation, not being imposed as a condition in the act. Besides a donor, like a seller, cannot limit the uses of property when he parts with the ownership."

The judge held, in effect, that the construction of the market house on the lot fulfilled the only express condition in the act of donation, and that the declared purpose of the donor and the express limitation on the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

use of the property were not conditions affecting the title conveyed in perpetuity to the donee.

In endeavoring to arrive at the intention of the parties, all the recitals in the act of donation should be construed together.

The granting clause sets forth the purpose of the donor to establish a market for the town of Marksville, and the donation itself was made to the corporation solely for the purpose of building a market. The last paragraph stipulates that, if it should happen that the market should not be built, the act of donation should be null.

Was the purpose of the donation the mere erection of a market house, or the permanent establishment of a public market for the benefit of the people of the town of Marksville? Our learned Brother below seems to have reached the conclusion that the condition of the donation was fulfilled by the mere erection of the building on the lot in question. We cannot approve a construction which eliminates the declared purpose of the donor to establish a public market for the benefit of himself and the people of the town of Marksville. The mere erection of a market house would in itself have accomplished no beneficial purpose. It is not pretended that the building was intended as a monument to the donor or as an ornament to the town. The fact that the grant was in perpetuity does not exclude the particular purpose of the donation, as a perpetual use is perfectly consistent with a perpetual grant.

No analogy between a sale and a donation of property exists as to charges and conditions that may be imposed by the grantor. The donor may impose on the donee any charges or conditions he pleases, provided they contain nothing contrary to law or good morals. Civ. Code, art. 1527. Donations *inter vivos* are liable to be revoked or dissolved on account of the nonperformance of the conditions imposed on the donee. *Id.* art. 1559. The word "conditions," as used in this article, is synonymous with the word "charges"; and when a donation contains charges it is considered as made under the condition that it may be dissolved or revoked if they are not executed. Mourlon, *Examen Du Code Napoleon*, vol. 2, p. 366. "Conditions" means charges or obligations of the donee. Dalloz, *Repertoire de Legislation*, Supplement 5, No. 404, p. 149. Hence, if the town of Marksville was charged or obliged by the act of donation with the duty of establishing and maintaining a public market on the lot donated, a clear case of nonperformance is alleged in the petition.

The case of *De Pontalba v. New Orleans*, 3 La. Ann. 660, is not in point, as the donation was made under the Spanish law for pious uses, and under that system was irrevocable, in the absence of an express stipulation of the right of return, for the nonper-

formance of the mode, charge, or condition imposed on the donee.

In *Arnauld v. Delachaise*, 4 La. Ann. 109 certain conditions in an act of sale were held not to be reservations in favor of the donor, but regulations as to the use of the property among the purchasers.

It is a principle of civil-law jurisprudence that the donee is bound to execute the charges or obligations imposed on him by the act of donation in the same manner and to the same extent as the debtor in any ordinary contract.

If the allegations of the petition be true, the town of Marksville has not only failed and neglected for years to comply with its obligation to maintain a public market on the premises in question, but has dedicated a part of the lot to uses not contemplated by the parties at the time of the donation.

We therefore conclude that the allegations of the petition disclose a cause of action.

It is therefore ordered that the judgment below be reversed, and it is now ordered that the exception of no cause of action be overruled, and that this cause be remanded for further proceedings according to law, and, finally, that the defendant and appellee pay the costs of this appeal.

(124 La.)

No. 17,919.

SAXON v. CITY OF NEW ORLEANS  
et al.

(Supreme Court of Louisiana. Nov. 15, 1909.)

1. MUNICIPAL CORPORATIONS (§ 993\*) — INVALID CONTRACT—ACTION BY TAXPAYER.

A taxpayer has the right to come into court to enjoin the execution of a paving contract, which has been adjudicated without affording opportunity for competition, unless the property holders, by their petition, fix the price for a patented pavement, or a pavement containing a proprietary ingredient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2158-2161; Dec. Dig. § 993.\*]

2. MUNICIPAL CORPORATIONS (§ 330\*)—CONTRACTS—COMPETITIVE BIDDING.

There can be no competition in the bidding on a paving contract, where the specifications require that the material of which the pavement is to be made, in whole or in part, composed, shall be that manufactured by a named company, which is left at liberty to bid, and which does not bind itself to sell its products at a fixed price to any and all bidders.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 855; Dec. Dig. § 330.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Lyle Saxon against the City of New Orleans and another. Judgment for defendants. Plaintiff appeals. Reversed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Lyle Saxon, in pro. per. I. D. Moore, City Atty., and John J. Reilly, Asst. City Atty., for appellee City of New Orleans. Saunders, Dufour & Dufour, for appellee Metropolitan Const. Co.

#### Statement of the Case.

MONROE, J. Plaintiff applied to the district court for a writ of injunction to restrain the city of New Orleans and the Metropolitan Construction Company (of Kansas City) from further proceeding in the matter of the paving by that company of City Park avenue, from Bayou St. John to Canal street, with "mineral rubber asphaltic cement, known as 'Sarco road compound,'" and manufactured by the Standard Asphalt Rubber Company, of Chicago. After hearing, on rule nisi, the writ was denied, and plaintiff has appealed. He brings the suit as a citizen of New Orleans, a property holder, and a taxpayer, and alleges that the mayor, authorized by an ordinance to that effect, is about to sign a contract for the paving in question, and that the contractor is about to take possession of the street and proceed with the work; but it was shown, on the trial of the rule, that the contract had been signed on the day preceding that upon which the application was made, though no work had actually been done up to the time of the trial. Plaintiff further alleges, in substance, that the "Sarco road compound, manufactured by the Standard Asphalt Rubber Company, of Chicago," called for by the specifications, is the subject of a trade-mark, and is manufactured and controlled exclusively by the Standard Asphalt Rubber Company; that no one could bid upon a contract requiring the use of that material without the consent of that company; that there could, therefore, be no competition in the bidding, and, in fact, that there was no competition, the defendant the Metropolitan Construction Company having been the only bidder; and that the proceedings leading up to the contract were violative of the city charter, as amended, and of Act No. 59, p. 66, of 1908, which contemplates that, where a patented pavement is to be laid, the proprietor shall file a written stipulation with the city to sell the right to lay the same to any contractor for a stipulated royalty. The city, for answer to the rule, alleges that the pavement in question was petitioned for and advertised, agreeably to the provisions of Act No. 59 of 1908, and that no protest was filed, pending the advertisement; that the Metropolitan Construction Company submitted the only bid, and the contract was awarded to it; that its bid compares favorably with the bids of other contractors for similar work; that plaintiff owns no property on the street to be paved, and that his interest in the contract, as a general taxpayer, is too small to entitle him to consideration; that the Sarco road compound is not a patented article, and, though manufactured exclusively by the Standard

Asphalt Rubber Company, of Chicago, may be purchased by any contractor, in open market, without discrimination; that it will constitute but 8 per cent. of the pavement to be laid; and that the requirement that said material should be used was not inserted in the specifications in order to stifle competition, but (1) to insure the use of a standard, high-grade asphalt cement and (2) to notify the public that such cement was manufactured by the Standard Asphalt Rubber Company, of Chicago, so that any person, firm, or corporation, desiring to bid for the work, could be advised where the said cement could be purchased, and could—

"at once communicate with the said company and purchase the material \* \* \* in the open market, without discrimination as to time, place, or price, thus placing all prospective bidders on an equal footing," etc.

It was admitted on the trial of the rule:

"That plaintiff is a general taxpayer \* \* \* for the amount set forth on said [assessment] roll, and that he is not an abutting proprietor, nor has he any interest, direct or indirect, in any property situated along the street where the contemplated paving is to be made, and, therefore, cannot be called on to contribute directly to the assessment for said paving."

Being called to the stand, by defendant, as a witness, plaintiff was asked:

"Are you aware of the fact that the assessment rolls show that the extent of your interest in this contract is \$2.78?"

To which he replied:

"I am, sir. I will object to any questions along that line, on the ground that, as a general taxpayer, I have a right to come into court and protect my interest, irrespective of the amount of taxes I am paying to the city."

The court appears to have made no ruling on this objection, nor was any requested; and counsel for defendants made no objection, reserved no bill, and asked no further questions. The contract entered into between the city and its codefendant purports to be a contract for paving with mineral rubber Sarco asphalt, and calls for "mineral rubber asphaltic wearing surface, employing concrete foundation six inches in thickness." The specifications read, in part, as follows:

Mineral Sarco Asphaltic Wearing Surface.

"(82) Asphaltic Cement. Mineral rubber asphaltic cement shall be Sarco compound, manufactured by the Standard Asphalt & Rubber Company, of Chicago, Ill.

"(83) Wearing Surface. (a) The wearing surface shall be formed of a binder course of asphaltic cement and mineral rubber asphaltic concrete, composed of the foregoing described asphaltic cement and carefully selected, sound, hard, cracked stone, sand, and mineral dust, furnished with a squeegee course of pure asphaltic cement, surfaced with hot torpedo sand. \* \* \*

It is alleged in the petition that the contract will call for an expenditure of about \$200,000, and, as the "principal assistant city engineer" estimates the proportion of the cost which is to be borne by the city at \$155,000, it is probable that plaintiff's allegation is not far astray. The same officer, being

asked: "You are not prepared to say that there are not other asphalts of similar nature as the Sarco road compound?" replied, "I am not." And he further testifies as follows:

"Q. You say it is not a patent asphalt? A. The pavement is not. Q. It is a trade-mark named asphalt? A. Well, if you want to call—yes, it is a trade-name. Q. As I understand, Sarco, as I infer from the book, means the initials of the Standard Asphalt & Rubber Company—that would spell Sarco? A. Well, if the book says so."

Stanton Palmer, the president of the Metropolitan Construction Company, being asked: "Is any member or any officer of the Metropolitan Construction Company directly or indirectly interested in the other company?" replied, "No stockholder in the Metropolitan Construction Company is, as far as I know, a stockholder in the Standard Asphalt & Rubber Company." He further testified that, before the contract in question was awarded to his company, he had no agreement or understanding with the Standard Asphalt & Rubber Company, which would give to his company any preference or advantage in the purchasing of material, and, in fact, that he had not, up to the time of giving his testimony, conferred with the Standard Company in regard to such purchase. Being asked: "What is the Sarco cement?" he replied: "It is used in the making of mineral rubber pavement, so called. That is simply the name of the form of paving." And he is further questioned and answers as follows:

"Q. Now, Mr. Palmer, in what does this mineral rubber pavement differ from the ordinary asphalt pavement? A. Both in the character of the mineral aggregate and in the character of the binder used. Q. Can that dissimilar result, different from other pavement, be acquired by the use of any other cement but the Sarco mineral cement? A. No, sir. \* \* \* Q. Now, in this letter [referring to a letter which had been addressed to the city by another paving company, protesting against the letting of the contract in question under the specifications as drawn, on the ground that they prevented competition and shut out other cements equally as good as, or superior to, the Sarco] they speak of the 'Obispo,' 'Pioneer,' 'Hydrolene,' and 'Pittsburgh.' Do you know anything about these cements? A. I know all of them, from experience. Q. Can any of them be used, 'equally as good as, or superior to,' the cement in question? A. Well, they might be employed for the making of the pavement. I want to qualify the answer that way. They could not be employed for the making of the mineral rubber pavement. \* \* \*

"Q. But this particular cement is the only cement that could be employed in making this particular character of pavement? A. Yes, sir; and to make it as good as we want to make it. \* \* \* Q. You know, as a fact, that this cement is an open market product—can be bought by anybody, for any purpose, don't you? A. I know that as an absolute fact; yes, sir. \* \* \* Q. They [referring to the Standard Asphalt & Rubber Company] are the only people who manufacture and sell it? A. As far as I know, they are. Q. If there were others, would you know it? A. I think I would; yes, sir."

He further testifies that the ingredients of the Sarco may be purchased in open mar-

ket, but that the Standard Company has a method of manufacture which, he presumes, is "as well guarded as the secrets that control the grade of the product of any factory." He further testifies that the Sarco road compound will constitute about 8 per cent., or 9 per cent., of the whole pavement. We may add here that we infer, from the testimony of the witness, that, when he says that the Sarco road compound is an "open market product" and can be bought by anybody, he means to say that the Standard Company, which manufactures and controls it, will sell it to anybody, but he does not mean to say that it is kept in stock by dealers in cement generally, or that contractors or others who need it in quantities can buy it from any one else than the Standard Company, or that any one else has the power to fix the price. It otherwise appears that, prior to the awarding of the contract here in question, a protest was filed by another paving company (as heretofore stated), which was followed by a protest, on similar grounds, from the plaintiff, in his capacity as citizen and taxpayer, but there is nothing which connects the plaintiff with the protesting paving company.

#### Opinion.

On the face of the record, we should be obliged to hold that plaintiff is in court to represent his own interest, and not as an interposed person. Moreover (being his own attorney), he says in his brief:

"The fact that the California Asphalt Company filed a protest with the mayor and city council against the letting of this contract to the Metropolitan Construction Company, on the ground that it violated the city charter, should not be construed against the plaintiff, on the supposition that he is representing this company; for, in truth and in fact, plaintiff denies most emphatically that he had anything whatsoever to do with this corporation, and that he appears in court as a taxpayer for the purpose of contesting the letting of this contract and any work thereunder on the ground that it is violative of the city charter and calculated to stifle competition and create a monopoly in favor of the Standard Asphalt & Rubber Company, of Chicago, Ill."

#### He also says:

"It is urged that none of the property owners along City Park avenue are complaining; hence plaintiff, a single taxpayer, should not be allowed to tie up a great public improvement. The court will note, from the record, that the city of New Orleans owns more of the property along the street than all the property owners put together. Therefore, if there was ever a case wherein a taxpayer should complain, this is one, because the city will pay the largest proportion for the pavement of this street, which will, necessarily, fall upon the taxpayers in general, and their interest is to see that there should be competition in the letting of this contract, as well as all public contracts affecting the city."

Whatever, therefore, might be the conclusion, if it were shown that plaintiff had been employed by a possible competitor of the Metropolitan Construction Company to bring this suit in its interest (conceding, arguendo, that evidence to that effect would be admis-

sible), we find nothing in the case as presented upon which to base the assumption that he has come before the court to represent any other interest than his own. The fact that his specific pecuniary interest in the matter to be determined amounts to only \$2.78 (or \$2.87, as the case may be) does not affect the question of his right to appear and stand in judgment; the amount involved in the contract of which he complains being far in excess of that required to give jurisdiction to the district court and to this court.

"In this country," says Judge Dillon, "the right of property holders, or taxable inhabitants, to resort to equity to restrain municipal corporations from transcending their lawful powers, or violating their legal duties, in any mode which will injuriously affect the taxpayer, \* \* \* has, without the aid of statutory provisions to that effect, been affirmed, or recognized, in numerous cases in many of the states. It is the prevailing, we may now add, almost universal, doctrine on this subject." 2 Dillon's Mun. Corp. (4th Ed.) p. 1106, § 914 (731); *Handy et al. v. New Orleans et al.*, 39 La. Ann. 107, 1 South. 593; *Conery v. Waterworks Co.*, 39 La. Ann. 770, 2 South. 555.

That the letting of a contract for public work, where there can be no opportunity for free competition (as where the pavement is to be laid with a patented or proprietary article) by a municipality whose charter requires that such contracts shall be adjudicated to the lowest bidder, is unlawful, and that the carrying out of such a contract may be enjoined by a property taxpayer, are propositions which have, more than once, been decided by this court. *Burgess, Bennett et al. v. City of Jefferson et al.*, 21 La. Ann. 143; *Asphalt Co. v. Gogreve*, 41 La. Ann. 251, 5 South. 848; *Redersheimer v. Mayor et al.*, 52 La. Ann. 2089, 28 South. 299; *Bacas v. Adler*, 112 La. 813, 36 South. 739; *Lacoste v. City of New Orleans et al.*, 119 La. 469, 44 South. 267. All the cases thus cited, save the first, refer to the charter of the city of New Orleans, and we do not find that it has been changed (with respect to the matter under consideration) save in the following particular, to wit: In amending and reenacting section 104 of the charter (Act No. 45, p. 77, of 1896) the lawmaker has added the proviso:

"Provided, further, that the city, whether by petition or otherwise, can lay any patented pavement, provided that the owner of the patent will file a written stipulation with the city to sell the patent rights to any contractor, for a stipulated royalty, or, the property holders petition for said patented pavement, and provide, in the petition, that said pavement shall not exceed a certain stipulated amount per square yard, said price, set forth in the petition, may be rejected by the council."

It is not pretended, in this case, either that the Standard Asphalt Rubber Company, of Chicago, has filed with the city the stipulation contemplated by the foregoing proviso, or that the petitioning property holders have set any limit upon the price of the pavement. Conceding that the Sarco road compound is not, technically speaking, patented, it is

nevertheless a proprietary article, which, under that name, can be, and is, manufactured by no one else than the Standard Asphalt & Rubber Company. Moreover, the specifications provide that mineral rubber asphaltic cement (to be used for the purposes of the contract) "shall be Sarco road compound, manufactured by the Standard Asphalt Rubber Company, of Chicago, Ill.," so that, even if as good, or better, cement for the purpose, or a cement identical in all respects, could be furnished by some one else, it would not meet the demand of the specifications that the cement furnished shall be that manufactured by the Standard Asphalt Company, of Chicago; and, that being the case, it is evident that the Standard Asphalt Company, of Chicago, is about the only person, natural or judicial, who is in position to bid on the contract. It is true that the Standard Asphalt Company put in no bid; but it is also true that no one else did, save the Municipal Construction Company, now before the court, and we have no means of knowing how many bidders were deterred from competition by the apparent odds, which did not discourage the Municipal Construction Company. The president of the company last named seems to be satisfied that he can get the "Sarco compound" when he needs it and on satisfactory terms, and he gives it as his opinion that any other bidder might do the same thing; but we are unable to understand how, being, as he says, a stranger in interest to the Standard Asphalt Company, he can speak so confidently as to what that company will do, and the other possible bidders on the contract in question do not seem to have had the same assurance which the president of the defendant company gives to the court. They had, so far as they knew, the prospect of bidding against either the Standard Asphalt \* \* \* Company itself, or against some concern representing that company or very friendly with it, and so they did not bid, and there was no competition. It appears, however, from testimony offered on behalf of defendants (which we omitted to notice in the statement which proceeds this opinion), that in the matter of the paving of Carrollton avenue (quite a recent affair) the contract was the largest of the kind ever offered by the city, and was adjudicated at the lowest price (save in one instance). It also appears that it was open to free competition, and that there were a number of competitors, and we cannot help thinking that, if the contract now under consideration had also been open to free competition, there would also have been a number of bidders. As the matter stands, we are of the opinion that the adjudication to the defendant company should be set aside. If the property owners still desire to have the "mineral rubber, etc., pavement," with the "Sarco road compound," they, and the city, can get it by complying with the proviso (to which we have referred) contained in Act

No. 59 of 1908, and it is not easy to understand why they did not pursue that course originally.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment perpetually enjoining and restraining the defendants from proceeding with the execution of the contract entered into between them for the paving of City Park avenue from Bayou St. John to Canal street. It is further decreed that defendants pay all the costs of this suit.

PROVOSTY, J., concurs, but not in any intimation that may be understood to be contained in the opinion to the effect that a litigant who has a cause of action may be questioned as to his motives in exercising it, or, in other words, may be catechised for discovering whether, in vindicating his own good cause of action, he is acting for himself or for somebody else.

(124 La.)

No. 17,829.

#### STATE v. BERLIN.

(Supreme Court of Louisiana. Nov. 15, 1909.)

#### 1. CRIMINAL LAW (§ 1144\*)—RIGHT TO APPEAL—PRESUMPTION.

Where an information does not refer to the particular statute on which the prosecution is based, and that fact is in doubt, the Supreme Court will throw the benefit of the doubt in favor of the defendant's being prosecuted under a statute entitling him to an appeal to that court, rather than to his prosecution under a statute which does not do so.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1144.\*]

#### 2. BAIL (§ 79\*)—FORFEITURE—SETTING ASIDE.

The continuance of a case on motion of the district attorney prior to the expiration of the five days allowed to defendant in a criminal case to make a voluntary appearance in court and have the forfeiture of his appearance bond set aside cannot be made to the prejudice of an accused, who voluntarily appears within the time allowed him and prays to have such a judgment set aside and have case tried.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 350-369; Dec. Dig. § 79.\*]

(Syllabus by the Court.)

Appeal from Eighth Judicial District Court, Parish of Catahoula; David Newton Thompson, Judge.

Buster Berlin was indicted for willfully cutting down trees, and appeals. From an order forfeiting the bond, he appeals. Reversed.

M. C. Thompson, S. R. Holstein, and W. H. Thompson, for appellant. Walter Gulon, Atty. Gen., and Riley J. Wilson, Dist. Atty. (R. G. Pleasant, of counsel), for State.

#### Statement of the Case.

NICHOLLS, J. On March 27, 1909, Buster Berlin was by information charged with hav-

ing in the parish of Catahoula, on or about the 20th of March, 1909, willfully cut down and removed 400 cottonwood trees, of the value of \$1,000, the said trees being and growing on the lands upon certain described lands in the parish of Catahoula, said lands being owned by and in the legal possession of the Tensas Land Company, Limited, and against the consent of said owner and possessor of said lands.

On March 30th the accused was arrested. On the same day he was released on a bond of \$200. On April 15th the accused was arraigned and pleaded not guilty, and the case was fixed for April 27th. On that day defendant announced himself ready for trial, but the case was continued to June 7th.

On that day his case was called up for trial, and, the defendant failing to appear, the bond which he had given was declared forfeited.

On June 10th the defendant with his counsel appeared in open court and asked to try his case or have the same fixed for some future date at the same term of court. This request was repeated on July 11th; but the court declined it for reasons stated. On June 10th a motion to set aside the forfeiture of the bond was filed by defendant, which was answered by the state. An amended motion to set aside the forfeiture was filed by the defendant and answered by the state.

The motion to set aside the judgment of forfeiture was then tried and overruled, and judgment rendered in favor of the state. The defendant, Berlin, has appealed.

The state has moved to dismiss the appeal, on the grounds: That this court is without jurisdiction *ratione materię*. That under article 85 of the Constitution of 1898 appellate jurisdiction of this court extends to two classes of criminal cases—the one where the punishment of death or imprisonment at hard labor may be inflicted; the other where a fine exceeding \$300 or imprisonment exceeding six months is actually imposed.

That the case at bar belongs to the latter class, the charge being for willful trespass by cutting and removing timber from the lands of another, without the consent of the owner, under section 817 of the Revised Statutes, which fixes the penalty at not more than \$500, and that no trial has been had and no penalty imposed, and hence, as held by the court in *State v. Cox*, 114 La. 568, 38 South. 456, this honorable court is without jurisdiction, and the appeal should be dismissed.

Defendant appeals from the judgment of the district court to set aside a judgment rendered against him and his surety on an appearance bond for \$200 furnished by him.

The condition of the bond reads that:

"Whereas, Buster Berlin stands charged with trespass: Now, if the said Buster Berlin shall be and appear in the Eighth district court of

said state at the next regular term for the parish of Catahoula, if said court shall then sit, if not then at the next regular sitting thereafter, to answer said charge, and shall not depart therefrom until discharged by said court, this obligation to be null and void; otherwise, to remain in full force and effect."

In defendant's first motion to set aside the judgment of forfeiture he averred that he was a resident of the parish of Avoyelles, living at quite a distance from the town of Harrisonburg (the parish seat of the parish of Catahoula); that it takes about a day and a half for a person to make the trip from the parish of Avoyelles to the town of Harrisonburg; that as soon as mover heard of his case having been called for trial, and which knowledge came to him through a telegram sent to him by his counsel, mover then being engaged in his usual occupation of floating and rafting timber, he immediately quit work and left for Harrisonburg; that mover was laboring under an erroneous impression as to the day on which his case would be called; that mover thought the case would be called some time in June, but did not know that the same would be called for trial on the first Monday thereof; that mover has pending in this court a civil case in which the Tensas Delta Land Company, Limited, is plaintiff, and mover one of the defendants, and that he was informed that this case would be called for trial during the June term of court, specific day to be made known to him later; and that this fact brought about confusion in his mind as to the dates of the trial of these cases, and which was responsible for his not being in court on the 7th of June, 1909.

Mover shows: That it was not his intention or desire to willfully and deliberately absent himself from this court, or to in any way defeat the ends of justice, or to disobey any mandate of this court, but that his failure to appear on June 7th can only be attributed to the confusion in his mind of the dates and to the fact that he thought he would be notified by the court to be on hand for trial.

That he has twice presented himself in open court for trial of his case, and that in both instances his case was continued upon motion of the state, and to his injury financially and physically. That he has always been ready for trial, and would have been ready on June 7th, had he known or been informed that he should have been present on the said date.

That he now voluntarily comes into open court and respectfully asks the court to set his case down for trial at once; that he is ready for same, and so announces. Mover asks that the former continuance granted by this court upon the motion of the state, and which was made in a very few minutes after the forfeiture of the bond, and which was unauthorized, be set aside and recalled, and that his case be set down for trial.

That he appears within five days after

the rendition of the judgment forfeiting the bond herein; that in fact he presents himself in three days; that he voluntarily comes into open court and asks for trial, and announces ready for trial; that his case can be tried; that it is within the power of the court to grant him a trial; that mover has not by his acts rendered it impossible for the court to grant him a trial; and that for these reasons mover asks that the former continuance be recalled, that his case be set down for trial, that he be granted a trial by this court, and that the alias warrant heretofore issued be recalled and ordered not executed; that the order requiring mover to give a new bond in the amount of \$500 be recalled and set aside, and that the judgment forfeiting the bond for the nonappearance of mover on June 7, 1909, when his case was called for trial, be quashed and set aside, and be decreed to be of no force and effect.

Also prayed for all necessary and equitable orders and for general relief.

The state answered the motion of the defendant to set aside the judgment forfeiting the bond. It denied that defendant was entitled to the relief asked, for the reason that the bond was regularly forfeited, the judgment nisi rendered, proof adduced, and the judgment made final according to law, upon the day on which the said case was fixed for trial, and on account of the nonappearance of the said defendant, and on account of the failure of his surety to produce him as required by law, which was the condition of said bond; that the defendant and the surety upon his official appearance bond have failed to comply with the said bond and meet the conditions thereof; that at the last term of this honorable court this case was fixed for trial in open court in the presence of the defendant and his counsel for Monday, the 7th day of June, 1909, and upon that date the case was called for trial. The defendant having failed to appear, his bond was forfeited, and judgment rendered against him and his surety after due proof. An alias warrant was issued upon the order of court, and a new bond fixed at the sum of \$500, whereupon in open court, in presence of the counsel for the accused, and without protest or reservation of rights, the case was reassigned and refixed for trial on October 11, 1909, and all witnesses discharged till that date; that the witnesses in this case live, some in Avoyelles parish and some in Catahoula parish, some 60 miles from the courthouse, and that making this court vacate its order fixing this cause for October and ordering a trial at present, to be completed within five days as required by law, is asking a vain and useless thing to be done by the court, to which neither the defendant nor his surety are entitled.

The state of Louisiana further averred that when this bond was forfeited the defendant and principal was out of the jurisdiction of the court, in violation of the terms



of the bond, and that neither defendant nor his surety have complied with the terms and conditions of this bond, and that his motion to set aside this forfeiture cannot be considered until after the defendant and the sureties shall have complied with the conditions of the bond.

And the state respectfully asks that the consideration of this motion be deferred till the conditions of the bond have been met or the legal delays have expired for meeting such conditions; that, if said conditions are not met within the legal delays, the forfeiture and judgment become final, and the motion be overruled, and the order of the court in this case stand and be confirmed. The state further prayed that said forfeiture and said judgment be maintained, that said alias warrant be served in accordance with the orders of the court, and prayed for necessary orders and general relief, etc.

On the next day, June 11th, the defendant moved to amend and supplement the motion made by him the day before, urging that the bond given by him on the 30th of March was an illegal and unauthorized one, and that the sheriff of the parish of Catahoula was without authority on the said 30th day of March, 1909, to take and approve the said bond and release said mover on bail in the amount named in the said bond; that the sheriff of the parish of Catahoula had no order of the court authorizing him to release your mover on a bond in the amount named; and that said act was and is illegal; and the said bond is not a legal one, and is of no force and effect.

Adopting all the allegations of his original motion, he prayed that the forfeiture be set aside, and that the said bond entered into given by your said mover on the said 30th day of March, 1909, be declared illegal, and to have been taken by the said sheriff of the parish of Catahoula without authority, for all necessary orders, general relief, etc.

On the same day he filed a second amended motion to set aside the forfeiture. In this second amended motion he averred that the information presented against him by the district attorney for the said Eighth judicial district charged or alleged no offense known to the law of the state of Louisiana, that the first statute describing and denouncing the offense of trespass was Act No. 120, p. 133, of 1855, which was subsequently repealed by Act No. 103, p. 156, of 1902, which was subsequently declared to be unconstitutional by the Supreme Court of this state. *State v. Peterman*, 121 La. 620, 46 South. 672. Now your mover averred and showed that, if the court holds that there is a law in force denouncing and defining the crime of trespass, it is the Act No. 137, p. 177, of 1890, which makes the offense of trespass a felony, and the case is not triable before the judge, but must be tried before a jury of five; that the judge of this court has no jurisdiction to herein determine this

cause and to pass on the guilt or innocence of your mover; and that the case cannot be tried during this term of court, it not being a jury term, and that the forfeiture of the bond on June 7th should be set aside.

He prayed that the court decree that there was no law in the state denouncing and defining the crime of trespass, and that he did not stand charged with any crime known to the laws of Louisiana, and that the bill of information of the state of Louisiana herein presented against him be declared defective and of no force and effect, that he be declared not to have entered into a legal bond for his appearance to answer a legal charge, and that the judgment of forfeiture of the bond heretofore rendered be set aside and declared void, and that he be released from custody; but if this court holds that there is a law denouncing and defining the crime of trespass, and that your mover stands charged with said crime, your mover in the alternative, and in that event only, prayed that this court hold that the only law in force is that of Act No. 137 of 1890, and which made the said offense of trespass a felony, and triable before a jury of five, and not a misdemeanor, triable before the judge of the court, for all necessary orders, general relief, etc.

On the same day defendant moved to quash and set aside the information which had been filed against him, on the ground that that information charged and alleged no offense or crime known to the laws of Louisiana to have been committed by him.

The District Court refused to set aside the judgment of forfeiture, and defendant appealed from that judgment.

It refused to quash the information. The charge against defendant has not yet been acted on.

The court, in refusing to set aside the judgment of forfeiture, used the following language:

"At the April term of court the case of *State v. Buster Berlin et al.*, charged with trespass, was fixed for trial for Monday, June 7, 1909; the accused, Buster Berlin, and his counsel being present in open court. On Monday, June 7, 1909, the accused failing to appear when his case was called, he and the surety on his official bond were legally called, and, failing to answer, his bond was declared forfeited. The case was continued, and the witnesses discharged until the October term of court.

"The accused reached Harrisonburg late Wednesday evening, after court had adjourned for the day, and on Thursday morning, June 10, 1909, in open court, the accused and his counsel appeared and asked the court to try his case, or to set it down for trial at some future date of the present term of court. This demand was repeated on Friday morning, June 11, 1909. The court declined to order the trial of the case or to fix the same for a particular day, for the reason that the case had been continued and the witnesses discharged, and owing to the great distance of the residence of the witnesses from the courthouse, some residing in Catahoula and some in Avoyelles parish, the court was of opinion that the case could not be tried and finally disposed of within the five days from the forfeiture of the bond, which in the opinion of the

court was required under the law in order to relieve the defendant and his surety from such forfeiture."

The court declined to fix the case for trial at the present term or to force the state to a showing as to why the case should not be tried at this term, for the reason that the case had been continued till another term and all the witnesses discharged, after the forfeiture of the appearance bond on Monday, June 7th, the date for which the case was originally fixed for trial. The court was of the opinion that the reasons in asking for a trial of the case was to relieve the forfeiture of the appearance bond, and the court further considered it would be doing a vain and useless thing to attempt to get the witnesses to court within the five days from the date of the forfeiture of the appearance bond, in view of the great distance the witnesses resided from the courthouse, and in view of the fact that two days of the time had already elapsed. These reasons are intended to apply to all the bills of exception taken in relation to the denial of the motion for trial at this term of court, as well as the overruling of the motion to set aside the forfeiture as well as rendering final judgment thereon.

#### On Motion to Dismiss.

The motion to dismiss is urged upon the theory that defendant is prosecuted under section 817 of the Revised Statutes. The information makes no reference to that section. We have reason to believe that the prosecution is based upon Act No. 137 of 1890.

The first statute making the cutting or carrying away of trees growing on the land of another without the consent of the owner of the same was Act No. 120 of 1855 which is embodied in section 817 of the Revised Statutes. The statute does not make use of the words "willfully and feloniously."

That act was followed by Act No. 137 of 1890, the title of which discloses it to be:

"An act making it a crime to willfully and feloniously cut, pull down, burn, destroy, kill or deaden, carry or float away any tree, wood or timber growing or lying on the land of another or lying on the water or the land of another or cause the same to be done without the consent of the owner and fixing the penalty therefor."

The information in this case charges defendant with having willfully cut down and removed 400 cottonwood trees growing on the land of another, against the consent of the owner. The penalty for a violation of this act is a fine not less than \$50 nor more than \$500, or imprisonment in the penitentiary or otherwise for not more than two years, at the discretion of the court. The liability of a party indicted for a violation of that statute, in case of conviction, to be imprisoned in the penitentiary, places that crime among those which are appealable to the Supreme Court. It is claimed that this last

statute has had the effect of repealing section 817 of the Revised Statutes. Be that as it may, and assuming that section 817 of the Revised Statutes is still in force, we would, in case of doubt as to which of the two statutes defendant is charged with having violated, throw the benefit of the doubt in favor of its having been the statute which gives to the accused the right of an appeal to the Supreme Court.

The motion to dismiss is therefore denied, and the appeal is maintained.

#### On the Merits.

Act No. 17, p. 23, of 1900, declares:

"That it shall be the duty of the Attorney General and the several district attorneys in their respective districts (the parish of Orleans excepted) on the convening of district courts, leave of the court being first obtained, which leave shall always be presumed, to call any or all persons who may have entered into any bond, recognizance or obligation whatsoever in any criminal case, for their appearance at court, and also to call on the sureties on such bond, recognizance or obligation to produce instant in open court such defendant or party accused, and upon failure to comply therewith, on motion of the attorney representing the state, the court shall forthwith enter up judgment against such principal and securities in solido for the full amount of such bond, recognizance or obligation.

"The judgment so rendered may at any time within five days thereof be set aside upon the appearance and trial and conviction or acquittal, or upon a continuance after such appearance granted upon motion of the attorney representing the state.

"Such judgment shall not be rendered in case it shall be made to appear to the satisfaction of the court that the defendant or party accused is prevented from attending by some physical disability."

The district attorney in this case followed the directions of the statute; but, on the failure of the defendant to appear on being called, the case was immediately continued on motion of the district attorney. Within five days of the judgment of the forfeiture of the bond, defendant made a voluntary appearance in court and prayed to have his case tried and the judgment of forfeiture set aside.

The court declined to set aside the judgment of forfeiture. We are of opinion that, the case having been continued on motion of the district attorney before the five days had elapsed within which defendant had the legal right to appear and have the judgment of forfeiture set aside, the court erred in refusing to set the judgment of forfeiture aside. The continuance of the case by the district attorney prior to the expiration of the five days allowed to the accused to make a voluntary appearance in court cannot be made to prejudice the right of an accused, who voluntarily appears in court, within five days after the rendition of a judgment forfeiting an appearance bond, to have said judgment set aside and move to have his case tried.

For the reason herein assigned, it is hereby ordered, adjudged, and decreed that the

action of the district court in refusing to set aside the judgment of forfeiture of plaintiff's bond be and the same is hereby annulled, avoided, and reversed, and it is ordered, adjudged, and decreed that said judgment of forfeiture be and the same is hereby set aside.

(124 La.)

No. 17,732.

STATE v. WOODS.

(Supreme Court of Louisiana. Nov. 15, 1900.)

1. JUDGES (§ 53\*)—RECUSATION—RIGHT TO REVISE ORDER.

A district judge, having recused himself and appointed a judge ad hoc to try the case, retains jurisdiction to review and revise the order of appointment, on the suggestion of the accused that the judge ad hoc was disqualified to sit in the case.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 235; Dec. Dig. § 58.\*]

2. JUDGES (§§ 49, 51\*)—RECUSATION—GROUNDS—REFERENCE OF MOTION TO ANOTHER JUDGE.

The fact that a judge may have formed and expressed an opinion on the merits of a cause furnished no ground for his recusation. Such a suggestion is frivolous, and may be disregarded, without the formality of a reference to another judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188, 227; Dec. Dig. §§ 49, 51.\*]

3. CRIMINAL LAW (§ 1158\*)—REVIEW—FOUNDATION FOR CONFESSION.

Whether a sufficient basis was laid for the admission of an alleged voluntary confession of the accused is a question of fact, on which the ruling of the trial judge will not be disturbed, unless clearly against the preponderance of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3066; Dec. Dig. § 1158.\*]

(Syllabus by the Court.)

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Phillip S. Pugh, Judge ad hoc.

Armas Woods was convicted of murder, and he appeals. Affirmed.

Howard E. Bruner and James A. Gremillion, for appellant. Walter Gulon, Atty. Gen., John J. Robira, Dist. Atty., and R. G. Pleasant, for the State.

LAND, J. The accused was indicted for the murder of one Mansur Nacer, was tried and found guilty as charged, and sentenced to death. The verdict and sentence were set aside on appeal, and the case remanded for a new trial. See *State v. Wood*, 122 La. 1014, 48 South. 438, 20 L. R. A. (N. S.) 392.

The accused was again tried, convicted, and sentenced to be hanged. He has appealed from the verdict and sentence.

The first bill of exception is directed against the appointment of the judge ad hoc who presided at the trial of the case.

It appears that the presiding judge, having participated as district attorney in the

first trial, recused himself and appointed Judge Phillip S. Pugh as judge ad hoc to try the case, and he was accordingly sworn in, and on motion of the district attorney the cause was fixed for trial. Whereupon counsel for the accused filed a motion objecting to the appointment of Judge Pugh, on the ground that he had openly and publicly expressed his belief in the guilt of the accused. The motion was taken up, submitted on the evidence adduced, and was overruled. The accused excepted. The bill recites that the motion was overruled, because the evidence clearly showed that there was nothing in the motion. The accused made no objection to the recusation of Judge Campbell, or to the appointment of Judge Pugh as judge ad hoc, but after the latter was sworn in, and the case fixed for trial, filed a motion to set aside the appointment on the special ground already stated. The accused did not object to the trial of the motion before Judge Campbell, or except to his capacity to hear and decide the motion. On appeal, however, counsel for the accused assigns as error:

The incapacity of Judge Campbell, who had previously recused himself, to pass upon the objection to the appointment of the judge ad hoc.

As the motion was to vacate an order made by Judge Campbell on the ground that he had appointed a disqualified person as judge ad hoc, it would seem that the judge making the order was the only judge competent to revoke it.

Jurisdiction to make an order necessarily carries with it the power of revision, and of revocation when the order has been granted improvidently. If the inferior court discovers that an order given by it is erroneous, it may itself set it aside. *Hennen's Dig.* vol. 1, p. 330, No. 403. It is in the sound discretion of the district judges to rescind their interlocutory orders. *Elder v. Rogers*, 11 La. Ann. 606. Even if the order appointing the judge ad hoc be considered a judgment, the judge had the power ex officio to direct a new trial within the legal delays. *Code Prac.* art. 547. The motion to revoke was filed and decided within three days after the granting of the order.

The authorities cited by counsel for the accused apply only to cases where the judge has refused to recuse himself.

No evidence is annexed to the bill of exception, and on the facts we have merely the statement of the judge that there was nothing in the motion. The judge might well have overruled the motion on its face, as setting forth no legal grounds for the disqualification of the judge ad hoc. In *State v. Blount*, 124 La. 202, 50 South. 12, the court said:

"Defendant at the same time moved the trial judge to recuse himself on the ground that he had formed and expressed an opinion concerning

the matter in question adverse to the defendant."

"The motion set forth no legal cause for recusation, and was properly treated by the trial judge as frivolous. Where a motion assigns no legal grounds for recusation, it may be overruled without reference to another judge. *State v. Chantlain*, 42 La. Ann. 718, 7 South. 669."

The second bill of exception was reserved to the reception of evidence tending to show a confession of the crime charged, made by the accused after the remanding of the cause by this court for a new trial. 122 La. 1014, 48 South. 438, 20 L. R. A. (N. S.) 392.

On the former hearing this court found that the first confession made to the sheriff was induced by promises of assistance held out by that official, and that the second confession, being made in the presence of the same sheriff, must be regarded as tainted with the same improper influence.

After the case was remanded, the district attorney went to the jail and told the accused that the Supreme Court had granted him a new trial, on the ground that the former confessions should not have been used against him, because induced by promises of reward on the part of the sheriff. The district attorney then warned and cautioned the accused that he need not expect any clemency or hope of reward, or be afraid that any one would do him bodily harm, if he made a confession.

The district attorney further told the accused that he was bound to be hung for the crime, and that the prosecution had sufficient evidence to convict him without any confession, and wound up by saying:

"Now, why do you not tell and save your soul?"

The accused replied that he did not commit the murder. Later the district attorney caused another negro, an acquaintance of the accused, to be incarcerated in the same cell on a pretended charge of homicide, with the view of inducing a confession from the accused. The district attorney and a deputy sheriff concealed themselves near the cell in order to hear what was said. The new prisoner talked freely about the supposed crime and admitted its commission. The accused thereupon unbosomed himself, and told how he had murdered and robbed the deceased in his store when no other person was present.

The accused objected to the admissibility of evidence tending to show the confession was made to his fellow prisoner, on the ground that the same was not free and voluntary, because the accused had made the statements well knowing that the district attorney was present, and honestly and truly believing that the other party with the district attorney at the time was the sheriff, who had previously held out promises of clemency and immunity to the accused in

order to induce him to confess, and defendant had as a matter of fact confessed to the said sheriff in the hope of securing said promises of immunity and clemency, and said statements were made simply for the purpose of reaping the benefits of said promises made to him by said sheriff.

These objections were overruled by the court, and evidence of the last confession was admitted. The accused excepted to the ruling.

The trial judge says:

"That the confession on the face of it shows that it was made to a friend of the accused, a supposed criminal, charged with a similar offense, and everything points to the fact that this confession was freely and voluntarily made to his supposed friend, and in utter ignorance of the presence of the district attorney and of Richard, the deputy sheriff. His statement to his friend to swear that promises of immunity had been held out to him, if he had made a confession, and not to tell the sheriff anything if he had not done so, as he could not be forced to do so, showed that he realized and appreciated the points made by his attorneys on the former trial."

This finding of the judge is abundantly supported by the evidence for the prosecution, and we are not prepared to say that he erred in not giving credit to the very improbable testimony of the accused.

That the accused made the last confession is not seriously disputed.

The accused filed a motion for a new trial on the grounds already considered, and others, to wit:

Because the verdict was contrary to the law and the evidence.

Because one of the principal witnesses for the state had talked to one of the jurors during the trial of the case.

Because said juror, the foreman, had prior to the trial of the case publicly expressed his belief in the guilt of the accused, and stated that the accused should be executed.

The first ground is not assignable as error.

The alleged talk between the juror and the witness was confined to a simple request that the latter, a deputy sheriff, phone the wife of the juror that he would not be at home that night.

As to the alleged statement made by the same juror before the trial, there is a conflict to some extent between the testimony of the juror and that of a witness called in behalf of the accused. The trial judge believed the statements of the juror, and we are not prepared to say that he erred in his finding.

A motion in arrest, based on the grounds covered by the first bill of exception, was filed and overruled.

Finding no prejudicial error in the proceedings below, it is ordered that the verdict and sentence be affirmed.

**PENSACOLA ELECTRIC CO. v. ALEXANDER et al.**

(Supreme Court of Florida, Division A. Nov. 20, 1909.)

**1. CARRIERS (§ 320\*)—INJURY TO PASSENGER—QUESTION FOR JURY.**

Evidence that a passenger was injured by the sudden starting of an electric car, while alighting, with others, who were frightened by flashes of electricity, and that such flashes were caused by the carelessness or inexperience of the motorman, makes a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118-1325; Dec. Dig. § 320.\*]

**2. CARRIERS (§ 318\*)—INJURY TO PASSENGER—EVIDENCE.**

When it is in evidence that the motorman was new at the business and may have used the brake improperly, whereby the injury was caused, the railway company has not made it appear that it used even ordinary care and caution.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

**3. CARRIERS (§ 321\*)—INJURY TO PASSENGER—BURDEN OF PROOF—INSTRUCTION.**

An instruction that "the burden of proof is upon the plaintiff to show that the cause of the accident was due to the negligence of the defendant, and, if you are not satisfied by a preponderance of evidence that the plaintiff's injury was the result of negligence of the defendant, or its employes, you will find for the defendant," is properly refused, when the plaintiff was injured by the operation of an electric car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1334; Dec. Dig. § 321.\*]

(Syllabus by the Court.)

Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Action by John H. Alexander and another against the Pensacola Electric Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Blount, Blount & Carter, for plaintiff in error. Jones & Pasco, for defendants in error.

**COCKRELL, J.** This is an action for personal injuries, occasioned by the alleged negligence of the Pensacola Electric Company in the operation of its street car.

There was evidence from which the jury could find that Mrs. Alexander, a passenger, was injured by the negligence of the employes of the company in starting suddenly the car while many passengers were in the act of alighting therefrom, being frightened by flashes of electricity, and, further, that these flashes were unnecessarily caused by the carelessness or inexperience of the motorman. These acts were sufficient to make a case for the jury on the question of negligence, and therefore the affirmative instruction to find the defendant not guilty was properly refused.

It is argued that no negligence was shown, in that the present knowledge of electricity cannot prevent absolutely these flashes and burning of fuses, even when the greatest

care is used. We need not now dwell on the availability of this defense, as it does not appear here that even ordinary care and caution was used. The chief eyewitness for the defense, the conductor on the car, testified the motorman was a new man, and may have caused the trouble by improper use of the brake. The motorman was not a witness, and no proof was offered as to his skill, habits, or experience.

The court refused to instruct the jury, as requested by the defendant, as follows: "The burden of proof is upon plaintiff to show that the cause of the accident was due to the negligence of defendant, and if you are not satisfied by a preponderance of evidence that the plaintiff's injury was the result of negligence of the defendant, or its employes, you will find for the defendant." The statute makes the fact of injury by the running of the car prima facie evidence of negligence in its operation, thus shifting the former burden of proof, and casting it upon the party most likely to possess the knowledge of the real cause of the injury. It is not founded wholly, if at all, as argued by the plaintiff in error, upon the idea of "res ipsa loquitur," upon which the cases cited are based, and to have given the charge would have been to ignore the statute and numerous decisions of this court construing it. See *Seaboard Air Line Ry. Co. v. Smith*, 53 Fla. 375, text 388, 43 South. 225, and cases there cited.

The various counts in the declaration sufficiently apprised the defendant of the manner of the accident to prevent a charge of variance between allegation and proof.

The judgment is affirmed.

**WHITFIELD, C. J., and SHACKLEFORD, J.,** concur.

**TAYLOR, HOCKER, and PARKHILL, JJ.,** concur in the opinion.

**MOCK et al. v. THOMPSON.**

(Supreme Court of Florida, Division A. Nov. 23, 1909.)

**1. APPEAL AND ERROR (§ 1009\*)—REVIEW—FINDINGS OF CHANCELLOR.**

While the findings and conclusions of a chancellor, where the testimony is not taken before him, but before an examiner or master, and the chancellor is not afforded the opportunity of seeing and hearing the witnesses, are not entitled to the same weight as the verdict of a jury, and are not so conclusive, yet even in that case they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

**2. APPEAL AND ERROR (§ 1009\*)—REVIEW—DECREE IN EQUITY.**

In equity, as at law, every presumption is in favor of the correctness of the ruling of the trial judge, and a decree based largely or solely upon questions of fact will not be reversed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

unless the evidence clearly shows that it was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Washington County; J. E. Wolfe, Judge.

Bill by Green B. Thompson against H. H. Mock and others. Decree for complainant, and defendants appeal. Affirmed.

Liddon & Carter, for appellants. W. B. Farley, for appellee.

SHACKLEFORD, J. The appellee, as complainant, filed his bill in equity against the appellants, as defendants, in which he sought the cancellation of two certain deeds of conveyance, purporting to have been executed by the complainant to Mrs. L. E. Mock, one of the appellants, as well as the cancellation of a certain deed of conveyance from Mrs. L. E. Mock and her husband, H. H. Mock, to Ira A. Hutchinson, their codefendant, an injunction, and general relief. A joint answer was filed by H. H. Mock and L. E. Mock, and a separate answer by Ira A. Hutchinson, denying practically all the material allegations in the bill. The two Mocks also filed a cross-bill, to which the complainant filed an answer, general replications were filed, and an order was made appointing a special master to take the testimony of the respective parties. Temporary injunctions or restraining orders were issued, both against the defendants and the complainant. Voluminous testimony was taken before such special master, and the cause came on for final hearing upon the pleadings and such testimony, at which hearing a final decree was rendered to the effect that all the equities were with the complainant, that he was entitled to the relief prayed, and that the defendants were not entitled to the relief sought by their cross-bill. The temporary injunction against the complainant was dissolved, and the temporary injunction against the defendants was made perpetual. The specific relief prayed by the complainant was granted, and the costs ordered taxed against the defendants. Four errors are assigned, all of which are based upon and question the correctness of the final decree. The pleadings are quite lengthy, and, as we have already said, the testimony taken is voluminous. We have carefully read the transcript of the record, as well as the briefs of the respective counsel, and are of the opinion that no error has been made to appear to us. Practically no questions of law are presented to us. There is considerable conflict in the testimony; but the court below found in favor of the complainant, and, we think, was amply warranted by the testimony in so doing. Following the established practice in this court, we must

refuse to disturb his findings. See *Lucas v. Wade*, 43 Fla. 419, 31 South. 231. We see no useful purpose to be accomplished by undertaking to set forth a synopsis of the pleading or the testimony.

Decree affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### OWENS v. WILSON et al.

(Supreme Court of Florida, Division A. Nov. 23, 1909.)

#### 1. APPEAL AND ERROR (§ 867\*) — REVIEW — GRANT OF NEW TRIAL.

Upon writ of error to an order granting new trial, the only questions to be considered are those involved in such order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.\*]

#### 2. NEW TRIAL (§ 2\*) — DISTRESS PROCEEDINGS.

New trials may be granted in distress proceedings.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 2.\*]

#### 3. LANDLORD AND TENANT (§ 265\*) — DISTRESS PROCEEDINGS—CESSATION OF RELATION.

The cessation of the relationship of landlord and tenant does not destroy the statutory remedy by distress as to rent theretofore accrued.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1063; Dec. Dig. § 265.\*]

(Syllabus by the Court.)

Error to Circuit Court, Hernando County; William S. Bullock, Judge.

Action by Chancey S. Wilson and William A. Fulton against Samuel L. Owens, administrator. Verdict for defendant. From an order granting a new trial, he brings error. Affirmed.

Davant & Davant, for plaintiff in error. F. B. Coogler, for defendants in error.

COCKRELL, J. This is a writ of error addressed to the grant of a new trial upon verdict for the defendant in a distress proceeding. Upon such a writ, unlike one directed to a final judgment, the only questions to be considered are those involved in the order granting the new trial. *Jones v. Jacksonville Electric Co.*, 56 Fla. 452, 47 South. 1.

It is insisted that distress proceedings are entirely regulated by statute, and as the statute provides for appeals, and is silent as to motions for new trials, such procedure is forbidden by implication. There may be authority for this position in some Code states; but we see no occasion for adopting such construction here. Our statute pro-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date & Reporter Indexes

vides merely the manner and time within which such motions are to be made, and does not prescribe or limit the class of actions where permitted. It is a wholesome and ancient method of correcting promptly and inexpensively errors that may creep into the rulings of the court or findings of the jury, and the silence of the statute does not inhibit its use.

A plea was interposed to the distress affidavit, which serves the office of a declaration, to the effect that the relation of landlord and tenant did not exist when the proceedings were commenced. Issue was joined upon this plea, and was submitted to the jury, upon evidence in its support.

We think this plea tendered an immaterial issue, thus calling for a new trial. Jones v. Shomaker, 41 Fla. 232, 26 South. 191.

While at the common law it would seem that with the expiration of the landlord's title the right to distress ceased, yet in many respects writs of distress have been modified by statute, and in this respect the right has been enlarged. The statute (Gen. St. 1906, § 2240) gives the writ to "any person to whom any rent or money for advances may be due." Again, a lien is given to "every person to whom rent may be due \* \* \* upon all property of the defendant." Gen. St. 1906, § 2237. The question is whether the relation of landlord and tenant existed at the time the right of action accrued, not at the time the action began. It has been held under similar statutes, in Georgia and Texas, that the cessation of the relationship did not destroy the right to the writ. Tynes v. Slappey, 74 Ga. 364; Meyer, Wels & Co. v. Oliver, 61 Tex. 584.

It follows that the order be affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

# TILLMAN v. STATE.

(Supreme Court of Florida, Division A. Nov. 9, 1909. Rehearing Denied Dec. 15, 1909.)

## 1. CRIMINAL LAW (§ 1035\*)—APPEAL—OBJECTION BELOW—NECESSITY—QUALIFICATIONS OF JUDGE.

Assuming that the defendant in a prosecution against him for crime could by appropriate action in the trial court in the way of pleas, objections, or otherwise have raised the question as to the authority and jurisdiction of the judge of the criminal court of record for another county to preside over the court in the trial of such case, where such judge is acting under an order of the Governor, based upon section 3871 of the General Statutes of 1906, where no objections to the authority or jurisdiction of such judge were made in the trial court, and no action of any kind taken by the defendant toward raising such question, he will be deemed to have waived by his silence any such privilege or right

he may have had, and will not be permitted to raise such question for the first time in the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2633; Dec. Dig. § 1035.\*]

## 2. BRIBERY (§ 6\*) — INFORMATION — SUFFICIENCY.

No error is made to appear in overruling a motion to quash certain counts in an information, based upon section 3476 of the General Statutes of 1906, charging the defendant with the crime of bribery of a judicial officer, when such information substantially complied with the requirements of such statute. Such information is not fatally defective when it distinctly alleges that the defendant offered the bribe to the judge of a designated court for the purpose of and in order to influence him "to modify and reduce the sentence" imposed upon a certain named defendant on a prior day of the same term of court, because it does not affirmatively allege that the prosecution against such convicted defendant was still pending in such court at the time such bribe was offered.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 5-8; Dec. Dig. § 6.\*]

## 3. CRIMINAL LAW (§ 951\*)—NEW TRIAL—TIME TO MOVE.

The right of a defendant to make a motion for a new trial within the time provided by law is not forfeited by the fact that sentence had been pronounced upon the defendant prior to the making of such motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2350; Dec. Dig. § 951.\*]

## 4. CRIMINAL LAW (§ 993\*)—SENTENCE—MODIFICATION.

During the same term of court at which the sentence is imposed, before the defendant had begun serving such sentence, the trial judge has the power to modify such sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2531; Dec. Dig. § 993.\*]

## 5. INDICTMENT AND INFORMATION (§ 55\*)—DEFECTS—MATERIALITY.

It is the declared policy of the Legislature, as well as of this court, to uphold indictments and informations whenever there has been a substantial compliance therein with the statutory requirements.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 53.\*]

## 6. CRIMINAL LAW (§ 1178\*)—APPEAL—WAIVER OF ERROR.

It is not sufficient merely to repeat an assignment of error and submit that error was committed by the trial court. Unless the error complained of is so glaring or patent that no argument is needed to demonstrate it, counsel must call the attention of the appellate court to the specific points upon which he relies to show error, otherwise such assignment will be treated as abandoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3012; Dec. Dig. § 1178.\*]

(Syllabus by the Court.)

Error to Criminal Court of Record, Duval County; J. S. Maxwell, Judge.

G. H. Tillman was convicted of bribery, and he brings error. Affirmed.

J. N. Stripling and T. W. Butler, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

SHACKLEFORD, J. An information, based upon section 3476 of the General Statutes

of 1906 of Florida, was filed against the plaintiff in error, upon which he was tried, convicted, and sentenced to confinement at hard labor in the state prison for a term of four years. A review of this judgment and sentence is sought here by writ of error. The information contained three counts, but only the last two are before us for consideration; the first having been quashed on motion of the defendant. In substance, the crime charged against the defendant was that during a term of the criminal court of record for Suwanee county, at which one Margarete Stanley had been tried and convicted of the unlawful sale of liquors, the defendant, "then and there well knowing the official capacity of him the said H. E. Carter, and with the purpose and intent of fraudulently influencing the act, opinion, decision, and judgment of the said H. E. Carter, a judicial officer, and then and there the judge of said criminal court of record, on a certain matter and question, to wit, the matter and question of modifying and reducing the sentence theretofore imposed upon the said Margarete Stanley as aforesaid, and with the intent to fraudulently induce the said H. E. Carter in his official capacity as judge of said court to reconsider and modify and reduce the sentence and judgment theretofore imposed upon the said Margarete Stanley as aforesaid, he, the said G. H. Tillman, did then and there, on the said 16th day of February, 1909, aforesaid, corruptly offer to the said H. E. Carter as judge of said court as aforesaid, a gift and gratuity, to wit, a bank check of the value of \$10, which said bank check was and is in the words and figures following, to wit:

"No ———. Live Oak, Fla. 2/16 1909.

"The Citizens' Bank of Live Oak.

"Pay to the order of ——— Cash ———  
\$10.00 ——— Ten & 00/100 ——— Dollars.

"G. H. Tillman, Baker."

—"contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Florida."

The honorable H. E. Carter, judge of such court, filed with the clerk a suggestion of his disqualification in such cause under section 3871 of the General Statutes of Florida, reciting therein that he was a witness in such cause on behalf of the state. The clerk notified the Governor, in accordance with the provisions of such statute, who issued an order assigning the honorable John S. Maxwell, judge of the criminal court of record for Duval county, to try such cause. All of such proceedings affirmatively appear in the transcript.

The first two assignments are as follows:

"First Assignment of Error. It does not appear from the suggestion of disqualification filed by Hon. H. E. Carter, judge of the criminal court of record of Suwanee county, Florida, that he as judge of said court

was disqualified from presiding at the trial of said cause.

"Second Assignment of Error. The honorable John S. Maxwell, judge of the criminal court of record of Duval county, Florida, was without jurisdiction to preside in said cause."

Even if we assume that the defendant could by appropriate action in the trial court in the way of pleas, objections, or otherwise have raised the question as to the authority and jurisdiction of Judge Maxwell to preside over the court in the trial of such cause, no such action was taken. Consequently we are not called upon to decide that question. See *Coyle v. Commonwealth*, 104 Pa. 117; *Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 9 L. R. A. 59, 37 Am. St. Rep. 478, and authorities therein cited; *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105; *Orme v. Commonwealth*, 21 Ky. Law Rep. 1412, 55 S. W. 195; *Butler v. Phillips*, 38 Colo. 378, 88 Pac. 480, 12 Am. & Eng. Ann. Cas. 204. The decided weight of authority is to the effect that, where no objection to the authority or jurisdiction of the judge is made in the trial court and no action of any kind taken by the defendant toward raising such question, he will be deemed to have waived such privilege or right by his silence, and will not be permitted to raise such question for the first time in the appellate court. See *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; *State v. Anone*, 2 Nott & McC. (S. C.) 27; *State v. Lowe*, 21 W. Va. 782, 45 Am. Rep. 570; *Schlunger v. State*, 113 Ind. 293, 15 N. E. 269; *People v. Mellon*, 40 Cal. 648; *State v. Gilmore*, 110 Mo. 1, 19 S. W. 218; *Roberts v. State*, 126 Ala. 74, 28 South. 741, 30 South. 554; *Slone v. Slone*, 2 Metc. (Ky.) 339; *Ripley v. Mutual Home & Savings Ass'n*, 154 Ind. 155, 56 N. E. 89; *Crawford v. Lawrence*, 154 Ind. 288, 56 N. E. 673; *Hunter v. Ferguson*, 13 Kan. 402; *Missouri Pac. Ry. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050; *Perry v. Pernet*, 165 Ind. 67, 74 N. E. 609, 6 Am. & Eng. Ann. Cas. 533. Also see 23 Cyc. 616-618, and authorities cited in notes, and 11 Ency. of Pl. & Pr. 793. We see no occasion for any extended discussion of the matter or pointing out the distinctions which exist in the cited cases. We have no intention of committing ourselves to all that is said therein, but they will be found to throw light upon the point under consideration. We would also refer to *Finley v. Chamberlin*, 46 Fla. 581, 35 South. 1, for a discussion of the distinction between a direct and collateral attack and a review of the earlier Florida cases upon the subject. These two assignments, which are the principal ones relied upon, need not longer detain us. It is sufficient to say that they have not been sustained.

The third assignment is based upon the overruling of the motion to quash the information as to the second and third counts.



It is earnestly contended that such counts are fatally defective because it does not affirmatively appear therein that the prosecution against Margaret Stanley was still pending in such court at the time of the alleged commission of the crime charged herein. It is urged that, inasmuch as it is alleged therein that sentence had already been pronounced upon such defendant, this constituted a final judgment, and divested the trial judge of any further jurisdiction therein. This contention is not borne out by the information, and is untenable for several reasons. The statute under which the defendant was informed against is very comprehensive and sweeping in its scope, as an inspection thereof will disclose. It is also distinctly alleged in the information that the defendant offered the alleged bribe to the judge of such court for the purpose of and in order to induce him "to modify and reduce the sentence" theretofore imposed upon such defendant. The authorities cited by the defendant are not in point, and do not sustain his contention. This court has decided that the right of a defendant to make a motion for a new trial within the time provided by law is not forfeited by the fact that sentence had been passed upon the defendant prior to his making such motion. *Massey v. State*, 50 Fla. 109, 39 South. 790. So, too, during the same term of court at which the sentence is imposed, before the defendant has begun serving such sentence, the trial judge has the power to modify such sentence. In this case it does not affirmatively appear that such defendant had begun serving her sentence. If the defendant in the instant case conceived that the information did not sufficiently apprise him of the crime with which he was charged, he should have moved the court for a bill of particulars. See *Mathis v. State*, 45 Fla. 46, 34 South. 287. It is the declared policy of the Legislature as well as of this court to uphold indictments and informations whenever there has been a substantial compliance with the statutory requirements therein. See sections 3961 and 3962 of the General Statutes of 1906 of Florida; *Barber v. State*, 52 Fla. 5, 42 South. 86; *Douglass v. State*, 53 Fla. 27, 43 South. 424; *Lewis v. State*, 55 Fla. 54, 45 South. 998. We have given the two counts of the information a careful reading, and are of the opinion that they are not "so vague, indistinct, and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offence." This assignment must fail.

The fourth assignment is based upon the admitting in evidence, over the objections of the defendant, an envelope and check. This assignment can hardly be said to be argued before us and might be treated as abandon-

ed. As we have repeatedly held, it is not sufficient merely to repeat the error assigned, and submit that error was committed by the trial court. Unless the error complained of is so glaring or patent that no argument is needed to demonstrate it, counsel must call the attention of the court to the specific points upon which he relies to show error, otherwise the court will feel warranted in treating such assignment as abandoned. See *Hoodless v. Jernigan*, 46 Fla. 213, 35 South. 656, and authorities there cited, and *Phoenix Insurance Co. v. Bryan* (decided here at the present term) 50 South. 576. We have examined the bill of exceptions with reference to this assignment, and are clear that no error was committed in overruling the grounds of objection urged. What we have said in disposing of this assignment applies with about equal force to the sixth, seventh, tenth, twelfth, and fourteenth assignments, the only other assignments even mentioned in the brief; the other assignments being tacitly abandoned. We do not feel called upon to discuss these assignments, nor do we see any useful purpose to be accomplished in so doing. Suffice it to say that we have examined them all and no reversible error is made to appear to us.

It follows that the judgment must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

## ROBERTSON v. SILVER SPRINGS & W. R. CO.

(Supreme Court of Florida, Division A. Nov. 16, 1909.)

### APPEAL AND ERROR (§ 1022\*)—DISMISSAL OF BILL—AFFIRMANCE.

In a case of disputed possession of land, where, upon a consideration of the evidence, it does not appear that the finding of the master, approved by the chancellor, is erroneous, a decree dismissing the bill of complaint without prejudice will be affirmed, when no errors of law appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015, 4016; Dec. Dig. § 1022.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Marion County; W. S. Bullock, Judge.

Bill by John D. Robertson against the Silver Springs & Western Railroad Company. Decree for defendant, and complainant appeals. Affirmed.

Davis & Martin, for appellant. H. M. Hampton, for appellee.

WHITFIELD, C. J. The appellant, as complainant, filed a bill in equity in the cir-

cult court for Marion county, seeking to have certain deeds canceled as a cloud upon his title to designated lands, which complainant alleged he owned and was in possession of. A plea was filed, challenging the jurisdiction of the court, and denying that the complainant at the commencement of the suit was in possession of the lands. A replication was filed, and testimony was taken before a master, who found against the complainant. The court approved the finding, and dismissed the bill of complaint "without prejudice to the right of the complainant to bring such action as he may be advised."

Upon a consideration of the testimony, the decree of the court dismissing the bill of complaint without prejudice must be affirmed, since the finding of the master, approved by the chancellor, that the defendant, and not the complainant, was in possession of the land when this suit was begun, cannot, on the evidence, be held to be erroneous. The other assignments of error are rendered immaterial by the conclusion reached, or they do not appear to be well taken upon the record brought here.

Let the decree be affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR and PARKHILL, JJ., concur in the opinion.

HOCKER, J., took no part.

#### ROBERTS v. CYPRESS LAKE NAVAL STORES CO. et al.

(Supreme Court of Florida, Division A. Nov. 16, 1909.)

##### EQUITY (§ 232\*)—DEMURRER TO BILL.

Where a demurrer is interposed to the whole bill, it should be overruled as an entirety, if the bill states any case for relief in a court of equity. It is error to sustain such a demurrer in part.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 508; Dec. Dig. § 232.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Columbia County; B. H. Palmer, Judge.

Bill by W. G. H. Roberts against the Cypress Lake Naval Stores Company and others. Demurrer to bill overruled in part, and plaintiff appeals. Reversed.

A. J. Henry, for appellant. F. P. Cone, for appellees.

SHACKLEFORD, J. The appellant filed a bill in chancery against the appellees, wherein he sought to enforce a lien for labor alleged to have been performed by him for some of the appellees, by subjecting to sale the turpentine distillery, fixtures, and

appurtenances of the appellees, together with the tract of land upon which such property was situated. The appellees interposed a demurrer to the bill, consisting of several grounds; but it is necessary to consider only the third ground thereof, which is as follows:

"Third. Because said services alleged to have been performed by the complainant, as alleged in his bill of complaint, were not the services of a laborer, but, as alleged in said bill of complaint, were services performed as foreman or superintendent of other laborers, and are not such services as would create a lien in behalf of the person performing same under the laws of the state of Florida."

Upon this demurrer the court made the following order:

"This cause was brought on for hearing upon the demurrer of the defendants to the bill of complaint, and was argued by solicitors for both parties; and upon consideration thereof, the court being advised in the premises, it is ordered that grounds 1, 2, 4, and 5, of said demurrer be overruled. It is further ordered that ground 3 of said demurrer be sustained as to all parts of said labor claimed to have been performed, except such as is claimed to have been performed 'in keeping check of rosin brought in from the woods to said distillery, and of distilled turpentine and manufactured naval stores sent away therefrom to the market, \* \* \* and doing other and general work as directed in and around and about the work of the said distillery as directed by said employers,' and overruled as to such excepted parts of said bill. Done and ordered this 15th day of July, 1909."

This is the order from which the appellant has entered his appeal to this court.

The portion of the bill containing the allegations concerning the performance of the labor for which the alleged lien is claimed is as follows:

"That in the conducting of the said business the said company had your orator employed as a laborer, and that beginning on the 28th day of April, 1908, and continuing to the 31st day of December, 1908, and covering the whole period between the said dates, the said employment of your said orator with the said company and said labor performed for them continued; that under his said employment for the said business your orator gave his whole time as such laborer at the agreed wages of \$40 per month; that his labor consisted of the general work and labor of said turpentine distillery, such as riding the woods, looking after the employes by the said company, in chipping boxes, scraping trees, keeping said hands or employes supplied with barrels and other materials to enable them to keep at work in chipping such timber and gath-

ering crude turpentine to be distilled at the said distillery, keeping check of rosin brought in from the woods to said distillery, and of distilled turpentine and manufactured naval stores sent away therefrom to the market, working in the commissary kept at the said distillery, and doing other and general work as directed in and around and about the work of the said distillery as directed by his said employers."

The appellant bases his lien upon section 2191 of the General Statutes of Florida of 1906, which reads as follows:

"2191. (1727.) For labor on railroads, telegraphs, etc. In favor of any person performing by himself or others any labor upon any railroad, canal, telegraph or telephone line, wharf, mill, distillery or other manufactory, whether in the construction, operation or repair thereof, upon such line, wharf, mill, distillery or other manufactory, any and all franchises, machinery and equipments connected therewith or thereon and on the land upon which they stand."

The demurrer was interposed to the whole bill. In the order thereon, which we have copied above, it was held, and we think properly, that the complainant was entitled to a part at least of the relief prayed. This being true, the whole demurrer should have been overruled, since a demurrer to the whole bill is bad, where the complainant is entitled to any part of the relief sought. See *Durham v. Stephenson*, 41 Fla. 112, 25 South. 284; *Futch v. Adams*, 47 Fla. 257, 36 South. 575; *Lindsley v. McIver*, 51 Fla. 463, 40 South. 619; 6 Ency. of Pl. & Pr. 418, and authorities cited in notes. It necessarily follows that the interlocutory order appealed from must be reversed, and the case remanded, with directions to overrule the demurrer.

Having reached this conclusion, we do not feel called upon to attempt any construction of the statute upon which the alleged lien is based. The extent of such lien and the property subject thereto must necessarily rest largely upon the facts and circumstances of each particular case.

Interlocutory order reversed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### WEFEL v. WILLIAMS & PRITCHETT.

(Supreme Court of Florida, Division A. Nov. 3, 1909. On Rehearing, Dec. 15, 1909.)

#### 1. LOGS AND LOGGING (§ 3\*)—SALE OF TIMBER—RESERVATION OF TURPENTINE RIGHTS.

Under a deed conveying the timber, but reserving and excepting therefrom all turpentine rights, the grantors surrender and abandon

the lands to the grantees for the purposes of the grant at certain periods, the right to turpentine continues until the grantees begin the cutting, and an injunction against turpentine will not be granted the millman, where it is not alleged that the grantors are interfering with his right to enter upon the lands and cut the trees under the terms of the contract.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.\*]

#### 2. INJUNCTION (§ 23\*)—DENIAL—PROTECTION OF DEFENDANT.

When both complainants and defendants have large equities, an injunction may be refused, unless there be an offer to protect the defendants.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 22; Dec. Dig. § 23.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Calhoun County; J. W. Malone, Judge.

Bill by H. H. Wefel, Jr., in his own right and as trustee, against Williams & Pritchett. Decree for defendants, and complainant appeals. Affirmed.

Fred T. Myers, for appellant. W. H. Price and Calhoun & Campbell, for appellees.

COCKRELL, J. This appeal involves the proper construction of a timber lease executed in 1903 by Carr & Meadows to the Loxley Lumber Company; the interest of the latter being now represented by the appellant, while that of the former has passed to the appellees.

By deed Carr & Meadows sold to the lumber company "all the timber of whatsoever kind standing or being upon described lands in Calhoun county, except 400 cypress logs now deadened, together with full right of entry for eight years; all timber remaining upon the lands thereafter to revert to Carr & Meadows, or assigns. The said grantors reserve and except for themselves, their heirs and assigns, the right to turpentine the pine timber trees upon said land, and to do all things necessary and convenient for the operation of a turpentine business thereon, or for the removal of the turpentine products therefrom; but it is understood that the said grantors shall surrender and abandon to the grantee, its successors and assigns, the said lands for the purposes of this grant, at the rate of three thousand (3,000) acres upon the delivery of this deed, two thousand (2,000) acres on January 1, 1904, three thousand (3,000) acres on January 1, 1905, three thousand (3,000) acres on January 1, 1906, and the balance, about one thousand acres, on January 1, 1907.

"It is understood that the grantee, having once begun to cut the pine trees upon a quarter section, shall cut down and remove all the saw logs on said quarter section before going upon another, and the failure so to do shall give the grantors a right to stop further

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cutting until this provision is complied with."

The Loxley Lumber Company, after paying the consideration and cutting but little timber, became embarrassed and finally bankrupt; and the appellant, having purchased its assets, including this lease, in 1907, demanded that the appellees cease turpentine the lands, claiming that on January 1, 1907, the reserved right to turpentine ceased; that the turpentine lessened materially the value of the timber. The bill prayed for an accounting, an injunction, and other relief. The injunction was denied, and the bill dismissed, upon demurrer sustained.

The question presented is not free from difficulty. The bill does not allege any obstruction upon the part of the owners of the land to the full enjoyment of the lessees to enter upon the land and to cut the trees as the lease provides, or complain of any other act than the boxing and scraping of the pine trees. In the paragraph containing the reservation or exception as to turpentine rights and privileges, it is "understood" that from time to time there should be a surrender and abandonment, for the purpose of the grant, of certain numbers of acres, not otherwise designated, the whole, however, to be so surrendered and abandoned for such purposes by January, 1907; and in the succeeding paragraph it is again understood that the cutting should be, not general, but quarter section by quarter section.

It is possible that the grantors intended only to protect the right to scrape the boxes already cut; but we can gather no such restrictive intent from the language of the instrument, and the allegations of the bill do not aid us to this construction. On the contrary, it would seem that the full turpentine privilege was excepted from the grant, subject only to be defeated when, under the terms of the lease, the axe be in fact laid upon the tree. The owner of the land and the turpentine privilege runs the risk of losing the full fruits of his boxes, should the conditional owner of the timber comply with the condition; but, until that is done, he is not liable to the lessee, in the absence of a showing of waste or destruction outside his privilege.

The limitations of time do not appear to be upon the right to turpentine, but a period before which the right to enter and cut for milling purposes does not begin. The words "surrender and abandon," while strong, are yet restricted by the qualifying words, "for the purposes of this grant"; that is, to the extent only of enabling the grantee to enjoy the privilege for a limited time of entering and cutting the timber, provided it be done according to the conditions of the contract.

In placing this construction upon the contract, we do not feel that we are violating the canon that private grants are construed against the grantor. The inference in behalf

of the grantee from the language used is too straight and strained to justify the application of the rule.

Should, however, we be mistaken as to this construction, there yet remain difficulties in the bill. Should the doubt so predominate as to favor the grantee, there would be still large equities in the grantor. The probabilities of large reversionary interests in the owner of the soil from failure of the millman to cut a considerable portion of the trees upon the vast tract within the now very limited life of the contract, and the absence from the bill of any showing that the complaining grantee contemplated within any definite time the cutting of the trees, or an offer to protect them from dangers from fire, should they be entirely abandoned in their present state of exuding turpentine, might well make a court of equity hesitate to grant the relief prayed.

Upon the whole case, we cannot say that the court erred, and the decree is affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### On Rehearing.

COCKRELL, J. Upon petition for rehearing it is suggested that the bill prays for specific performance as to delivery of the land and that an unconditional affirmance might be res adjudicata against that right. As stated in the main opinion we do not so read the bill. On the contrary, we understand from it that the owners will yield possession of any and every portion wherein the appellant is prepared to begin cutting.

Out of abundant caution, however, the affirmance will be modified so as to read "without prejudice to the assertion by the appellant in any other legal or equitable proceeding, of his right to cut and remove the timber from said land under the terms of the contract;" and upon such modification, the rehearing is denied.

#### STEARNS & CULVER LUMBER CO. v. FOWLER.

(Supreme Court of Florida, Division A. Nov. 9, 1909.)

1. MASTER AND SERVANT (§§ 85, 203\*)—INJURIES TO EMPLOYE—LIABILITY OF EMPLOYER—ASSUMPTION OF RISK—EMPLOYER'S NEGLIGENCE.

One who employs others is liable in damages for injuries to employees caused by the negligence of the employer or of those who sustain to such employees the relation of employer by discharging duties properly belonging only to the employer, where the party injured has not contributed to the injury complained of. Risks re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

sulting from the master's negligence are not assumed by the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 140, 538; Dec. Dig. §§ 85, 203.\*]

**2. MASTER AND SERVANT (§ 177\*)—INJURY BY FELLOW SERVANT—LIABILITY OF MASTER.**

A master is not bound to indemnify one servant for injuries caused by the negligence of another servant in the same common employment as himself, unless the negligent servant was the master's representative.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 352, 353; Dec. Dig. § 177.\*]

**3. MASTER AND SERVANT (§ 177\*)—INJURY BY FELLOW SERVANT—LIABILITY OF MASTER.**

An employer, who exercises proper care in selecting employés and in providing for employés reasonably safe places in which to work and suitable implements to work with, and performs other duties due from the employer to the employé, is, in general, not liable for injuries to an employé caused by the negligence of fellow servants engaged in the same service where the employer does not contribute to the injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 352, 353; Dec. Dig. § 177.\*]

**4. MASTER AND SERVANT (§ 196\*)—"FELLOW SERVANTS"—WHO ARE.**

To render an employer not liable to those in his employ for injuries caused by the negligence of a fellow servant, it is not necessary that the servant who causes and the one who suffers the injury should be at the time of the injury engaged together in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common enterprise, and both are employed to perform duties tending to accomplish the same general purpose, where such duties are not peculiar to the master as such.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 375-378, 486-488; Dec. Dig. § 196.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

**5. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—ACTION—QUESTION FOR JURY.**

Where the duty negligently performed does not appear as a matter of law to be a duty devolving upon the master, or the conceded facts relating thereto are not such that an inference of law may be drawn therefrom by the court, the question whether the duty negligently performed did devolve upon the master in the particular case is for the jury to determine from all the facts and circumstances of the employment in evidence under proper instructions from the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001-1010; Dec. Dig. § 286.\*]

**6. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—ACTIONS—BURDEN OF PROOF.**

In an action by an employé to recover from the master damages for an injury caused by the negligence of another employé, the burden is upon the plaintiff to show that the negligence causing the injury was done while performing a duty cast upon the defendant master as such.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 891; Dec. Dig. § 265.\*]

**7. MASTER AND SERVANT (§ 216\*)—ASSUMPTION OF RISK.**

A master assumes the duty towards his servant of exercising reasonable care and dili-

gence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and, when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employés.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. § 216.\*]

**8. MASTER AND SERVANT (§ 187\*)—DELEGATION OF DUTIES—"VICE PRINCIPAL."**

At common law, whenever the master delegates to any officer, servant, agent, or employé, high or low, the performance of any of the duties which really devolve upon the master himself, then such officer, servant, agent, or employé stands in the place of the master, as to such delegated duties, and becomes a substitute for the master, a vice principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 422-426; Dec. Dig. § 187.\*]

**9. MASTER AND SERVANT (§ 177\*)—INJURY BY FELLOW SERVANT—LIABILITY OF MASTER.**

At common law, where the master himself has performed his duty, he is not liable to any one of his servants for the acts or negligence of any mere fellow servant or co-employé of such servant, where the fellow servant or co-employé does not sustain a representative relation to the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 352-353; Dec. Dig. § 177.\*]

**10. MASTER AND SERVANT (§ 85\*)—INJURIES TO EMPLOYÉ—LIABILITY OF EMPLOYER.**

An employer is liable in damages for injuries to employés caused by the negligent performance or nonperformance of any duty to the employés devolving upon the employer by virtue of the express or implied requirements of the employment, whether such duty is performed or neglected by the employer or one acting for the employer. The particular duties imposed upon the employer with reference to the employés may depend to some extent at least upon the circumstances of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 136, 139, 140; Dec. Dig. § 85.\*]

**11. MASTER AND SERVANT (§ 185\*)—VICE PRINCIPAL—DUTY PERFORMED.**

In determining whether a particular agent or servant represents the master, the duty required to be performed, rather than the title by which the servant is known or called, is to be considered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 383-421; Dec. Dig. § 185.\*]

**12. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—LIABILITY OF MASTER.**

In order to recover, the plaintiff should make it appear that the negligence causing the injury was in the performance of a duty or an act imposed upon the master as such by law or by the express or implied requirements of the employment. It is immaterial who performed the act, if it was one properly devolving upon

the employer as such in view of the circumstances of the employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 906; Dec. Dig. § 265.\*]

**13. MASTER AND SERVANT (§ 259\*)—INJURIES TO SERVANT—ACTION—DECLARATION—SUFFICIENCY.**

In this action for damages for negligent injuries, brought by an employé against the employer, where the question whether the negligence was in the performance of a duty properly devolving upon the employer as such may be largely one of evidence, the declaration using general language is held not to be so framed as to wholly fail to state a cause of action.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 339; Dec. Dig. § 259.\*]

**14. MASTER AND SERVANT (§ 190\*)—VICE PRINCIPAL—CONDUCTOR OF LOG TRAIN.**

Whatever may be the true rule as to the status of a conductor on a train of a railroad system, the conductor, or "boss," or "foreman" of a log train belonging to and used solely by a sawmill company only for its own mill purposes, who has no authority to employ or discharge an employé, and who is in authority subordinate to others engaged in the same business, is not in law necessarily the representative of the master discharging a duty peculiarly devolving upon the master while signaling the movements of a machine used in loading the log train, so as to give a right of action against the master by an employé who is injured by the moving of the loading machine because of alleged negligence of the conductor or boss in signaling, where no negligence is shown in the performance of duties cast properly upon the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 449-474; Dec. Dig. § 190.\*]

(Syllabus by the Court.)

Error to Circuit Court, Walton County; J. E. Wolfe, Judge.

Action by Richard Fowler against the Stearns & Culver Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

Blount & Blount & Carter, for plaintiff in error. S. K. Gillis, for defendant in error.

WHITFIELD, C. J. The defendant in error recovered a judgment against the Stearns & Culver Lumber Company for personal injuries received by the plaintiff below in the moving of a loading machine on a log train as a result of the negligence of the "foreman or boss, who was the agent and employé of the defendant," who is alleged to have "carelessly, negligently, and wrongfully caused said loading machine to be put in motion by then and there having it moved forward" on the track upon the log car on which was the plaintiff, an employé, thereby causing the injury. The declaration alleges, and there is evidence, that the plaintiff was "under the supervision and control of the said foreman or boss, who was the agent and employé of the defendant."

On writ of error the defendant below contends that no recovery should be had be-

cause the alleged negligence appears to have been that of a fellow servant, and not of the employer defendant.

One who employs others is liable in damages for injuries to employés caused by the negligence of the employer or of those who sustain to such employés the relation of employer by discharging duties properly belonging only to the employer, where the party injured has not contributed to the injury complained of. Risks resulting from the master's negligence are not assumed by the servant. 1 Labatt on *Master & Servant*, § 2 et seq. A master is not bound to indemnify one servant for injuries caused by the negligence of another servant in the same common employment as himself, unless the negligent servant was the master's representative. 2 Labatt on *Master & Servant*, § 470.

An employer, who exercises proper care in selecting employés and in providing for employés reasonably safe places in which to work and suitable implements to work with, and performs other duties due from the employer to the employé, is, in general, not liable for injuries to an employé caused by the negligence of fellow servants engaged in the same service, where the employer does not contribute to the injuries. This rule was established by the courts, based largely upon public policy for the mutual protection of servants, and upon the theory that by implication of law an employé assumes the risk of injury resulting from the negligence of fellow servants with whom the employé may or may not engage to work at his own volition. Though the rule when applicable has the force of law, it furnishes no property right or vested interest to any one, and there is no special constitutional provision in this state relating to it. Like all rules relating to rights and remedies, it may in whole or in part be regulated, changed, or modified by a duly enacted statute when constitutional guarantees are not violated. The Legislature may exercise a wide lawmaking discretion as to regulating employments and the liabilities and remedies incident thereto, where the classifications adopted for legislative regulation or change are not purely arbitrary and are made with reference to real and practical differences in employments, and not merely to different employers. See: *Florida East Coast Ry. v. Lassiter* (Fla.) 50 South. 428; *Kiley v. Chicago, M. & St. P. Ry. Co.* (Wis.) 119 N. W. 369; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. Ed. 322; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. 175, 118 Am. St. Rep. 95; *Vindicator Consolidated Gold Mining Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313, 10 Am. & Eng. Ann. Cas. 1108, and notes; *Farwell v. Boston & Worcester Railroad Corporation*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339:

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

*Murray v. S. C. R. Co.*, 1 McM. (S. C.) 335, 36 Am. Dec. 268; 2 Labatt on Master & Servant, § 472 et seq; Buswell on Personal Injuries (2d Ed.) § 213 et seq. It is not contended that the statute of this state modifying the rule as to employer's liability in certain employments in the operation of railroads is applicable to the facts of this case. See *Bradford Const. Co. v. Heflin*, 88 Miss. 314, 42 South 174, 12 L. R. A. (N. S.) 1040, 8 Am. & Eng. Ann. Cas. 1077, and notes.

To render an employer not liable to those in his employ for injuries caused by the negligence of a fellow servant, it is not necessary that the servant who causes and the one who suffers the injury should be at the time of the injury engaged together in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common enterprise, and both are employed to perform duties tending to accomplish the same general purpose, where such duties are not peculiar to the master as such. See: *South Florida R. Co. v. Weese*, 32 Fla. 212, 13 South. 436; *South Florida R. Co. v. Price*, 32 Fla. 46, 13 South. 638; *Parrish v. Pensacola & Atlantic R. Co.*, 28 Fla. 251, 9 South. 696; *Camp v. Hall*, 39 Fla. 535, 22 South. 792.

No questions of inexperience or directions to incur extra hazards or lack of warning as to risks and dangers are presented in this case. See: *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740; *Camp v. Hall*, 39 Fla. 535, 22 South. 792.

Where the duty negligently performed does not appear as a matter of law to be a duty devolving upon the master, or the conceded facts relating thereto are not such that an inference of law may be drawn therefrom by the court, the question whether the duty negligently performed did devolve upon the master in the particular case is for the jury to determine from all the facts and circumstances of the employment in evidence under proper instructions from the court. 2 Labatt on Master & Servant, § 564a; *Donnelly v. Booth Brothers & Hurricane Isle Granite Co.*, 90 Me. 110, 37 Atl. 874; *Wilson v. Charleston & Savannah Ry.*, 51 S. C. 79, 28 S. E. 91. The burden is upon the plaintiff to show that the negligence causing the injury was in performing a duty cast upon the defendant master.

A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and, when the master has properly discharged these duties, then, at common law, the servant assumes all the risks

and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employees; and at common law, whenever the master delegates to any officer, servant, agent, or employé, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employé stands in the place of the master, as to such delegated duties, and becomes a substitute for the master, a vice principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of his servants for the acts or negligence of any mere fellow servant or co-employé of such servant, where the fellow servant or co-employé does not sustain this representative relation to the master. *Atchison, Topeka, etc., Railroad v. Moore*, 29 Kan. 632, text 644; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. The above enumeration of the master's duties towards his employés is not exhaustive or complete, but is merely illustrative. *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S. E. 839, 10 L. R. A. (N. S.) 772.

An employer is liable in damages for injuries to employés caused by the negligent performance or nonperformance of any duty to the employés devolving upon the employer by virtue of the express or implied requirements of the employment, whether such duty is performed or neglected by the employer or by one acting for the employer. The particular duties imposed upon the employer with reference to the employés may depend to some extent at least upon the circumstances of the employment.

The business of the defendant employer does not appear to have been of such character or magnitude as to contemplate its division into separate departments under the control and management of agents, officers, or servants to whom had been delegated duties belonging to the defendant employer. It appears that the negligent person and the plaintiff were engaged together in the same particular work, as well as in the same common enterprise within the rule of the Florida cases, *supra*.

The allegations of the declaration are not very full and definite; but as the question whether the negligence complained of was in the performance of a duty properly devolving upon the employer, as such, may be one largely of evidence, the declaration as framed does not wholly fail to state a cause of action. Upon a consideration of all the allegations of the declaration, it may not be said as matter of law that the

negligence was not in the performance of a duty devolving upon the master as such. The question is properly determined on a consideration of the evidence.

In determining whether a particular agent or servant represents the master, the duty required to be performed, rather than the title by which the servant is known or called, is to be considered.

It is alleged that the negligence causing the injury was in signaling or ordering the engineer to move the loading machine. This duty is not shown to be peculiar to or cast upon the master in his capacity as such; but it rather appears that it was properly to be performed by a fellow servant.

It appears that the plaintiff was not employed by the person whose negligence is complained of, but by one higher in authority engaged in the same business, and it is not shown that the negligent person had the right to discharge the plaintiff or any employé.

Whatever may be the true rule as to the status of a conductor on a train of a railroad system, the conductor, or "boss," or "foreman" of a log train belonging to and used solely by a sawmill company only for its own mill purposes, who has no authority to employ or discharge an employé, and who is in authority subordinate to others engaged in the same business, is not in law necessarily the representative of the master discharging a duty peculiarly devolving upon the master while signaling the movements of a machine used in loading the log train, so as to give a right of action against the master by an employé who is injured by the moving of the loading machine because of alleged negligence of the conductor or boss in signaling, where no negligence is shown in the performance of duties cast properly upon the master. See *McCosker v. L. I. Ry.*, 84 N. Y. 77; *Shank v. Edison El. Co. (Pa.)* 74 Atl. 210.

The place where the employé was when injured was apparently not per se dangerous, and the injured person was not inexperienced, but was accustomed to the work. The injury was caused by the moving of the loading machine before the plaintiff got out of its way. Even if the plaintiff was not negligent in being where he was when injured, he was not placed in an extrahazardous place by the defendant or by any one properly acting for it. The plaintiff was directed by the "boss" or "foreman" to fix the ropes, after which he was to return to a place of safety before the machine was moved.

The negligence alleged is in giving a signal for moving the loading machine on a flat car. This is no more of an act peculiarly devolving upon the employer than was the direction given to the plaintiff to mount the car and fix the ropes of the loading machine. Fixing the ropes was apparently in the line of the plaintiff's employment, and it is not shown to involve inexperience on the part

of the plaintiff, or the assignment of a new and hazardous duty to the plaintiff. The giving of a signal to move the loading machine does not appear to be a duty cast by law or by the circumstances of the employment upon the employer. It does not involve the furnishing of suitable materials, implements, or places for the work, or the employment of proper fellow servants, or the giving of general or special directions for accomplishing the purpose of the employment, or the assignment to new or hazardous duties, or any other act that pertains to the employer under the circumstances of the employment. This being so, the verdict on this showing should have been for the defendant.

In order to recover the plaintiff should make it appear that the negligence causing the injury was in the performance of a duty or an act imposed upon the master as such by law or by the express or implied requirements of the employment. It is immaterial who performed the act, if it was one properly devolving upon the employer as such in view of the circumstances of the employment.

If, because of the negligence in giving the signal or order to move the loading machine, it was so negligently moved as to injure the plaintiff before he could reasonably have gotten out of its reach, the signal or order was given by a co-employé, who in doing so was not discharging a duty cast upon the defendant as the employer, so far as appears by this record.

If on another trial it is shown that as a matter of fact the negligent party was discharging a duty cast by law or by the circumstances of the employment upon the employer, as such, in view of the business engaged in and the relation the parties sustained towards each other at the time of the injury complained of here, and that such negligence caused the injury, a case for recovery against the employé may appear. Contributory negligence on the part of the plaintiff is a matter of defense.

In order to render the master liable, it must appear that the injury was caused by negligence in the performance of a duty cast upon the master as such, whether it was in fact performed by the master, or by another in his stead, and the plaintiff must not have by his own negligence contributed proximately to the injury.

It is not shown that the giving of the signal as alleged is an act devolving upon the employer as such, or that it is not an act of ordinary routine in the business engaged in that may properly be performed by a fellow servant.

The judgment is reversed, and a new trial awarded.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.



**Ex parte BEVILLE.**

(Supreme Court of Florida. Nov. 23, 1909.)

**1. COMMON LAW (§ 17\*)—BINDING EFFECT.**

The English decisions rendered prior to the War of the Revolution are evidence of what the common law is; but, in order to be binding here, these decisions must be clear and unequivocal.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. §§ 13, 17; Dec. Dig. § 17.\*]

**2. WITNESSES (§ 52\*)—HUSBAND AND WIFE.**

At the common law neither the husband nor wife could be witnesses for or against each other, except in case of necessity, as where the offense is directly against the person of the wife.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124-136; Dec. Dig. § 52.\*]

**3. WITNESSES (§ 52\*)—COMPETENCY—HUSBAND AND WIFE.**

The common law made no distinction between the incompetency of one spouse to testify for or against the other as a matter of disability and incompetency as a matter of privilege.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124-136; Dec. Dig. § 52.\*]

**4. WITNESSES (§ 53\*)—COMPETENCY—HUSBAND AND WIFE.**

By statutes in this state the husband and the wife are made competent and compellable witnesses for or against each other in both civil and criminal cases.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 137-141; Dec. Dig. § 53.\*]

**5. WITNESSES (§ 188\*)—HUSBAND AND WIFE—COMPETENCY—MARITAL COMMUNICATIONS.**

The change of the common-law rule by making one spouse a competent witness against the other does not affect the rule against disclosure of marital communications.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 734; Dec. Dig. § 188.\*]

**6. CONTEMPT (§ 30\*)—PUNISHMENT—GROUNDS.**

Having given the offending party an opportunity to be heard, the court has an inherent right to punish, as for a contempt, the violation of an order lawfully made to maintain its dignity, authority, and efficiency in the administration of the law.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 91, 93, 94; Dec. Dig. § 30.\*]

Whitfield, C. J., and Shackleford, J., dissenting.

(Syllabus by the Court.)

In Banc. Application of Margaret Beville for a writ of habeas corpus. Petitioner remanded.

Thomas Palmer, J. C. B. Koonce, J. B. Johnson, and J. H. Jones, for petitioner. Park Trammell, Atty. Gen., for the State.

**PARKHILL, J.** Upon petition to one of the justices, a writ of habeas corpus was granted returnable before this court.

The petitioner was adjudged guilty of contempt of court by the judge of the Fifth judicial circuit for refusing to obey an order of that court to testify before the grand jury of Sumter county against her husband, who was charged with the murder of Bruno P. Harder and Francis Harder, as to matters not involving marital confidence and as to a crime not committed upon her person.

In such a case, at common law, the wife could not be a witness for or against her husband. *McGill v. McGill*, 19 Fla. 341; *Storrs v. Storrs*, 23 Fla. 274, 2 South. 368; *Schnabel v. Betts*, 23 Fla. 178, 1 South. 602; *Moore v. State*, 45 Tex. Cr. R. 234, 75 S. W. 497, 67 L. R. A. 499, 108 Am. St. Rep. 952, 2 Am. & Eng. Ann. Cas. 878, note 881.

Let us see, then, whether and to what extent this common-law rule has been altered by statute here.

In 1874 the Legislature enacted chapter 1983, providing that no person offered as a witness shall be excluded by reason of his interest in the event of the proceeding or because he is a party thereto. Laws 1874, p. 39, c. 1983. This act has remained in force to this day, becoming known as section 24, p. 518, McClellan's Dig., then section 1095, Rev. St. 1892, and now known as section 1505, Gen. St. 1906. It went to the competency of witnesses as affected by interest, and, under its provisions, if a husband was a party he was not disqualified from testifying as to his own interest, even though his wife were a party; but he could not testify as to her interest if she was a party or interested in the result; and if a wife was a party interested in the result she could testify as to her own interest, but it did not extend to her any competency in excess of that given to a husband. *Williams v. Jacksonville, T. & K. W. Ry. Co.*, 26 Fla. 533, 8 South. 446; *Haworth v. Norris*, 28 Fla. 763, 10 South. 18. In other words, this statute did not change or alter the common-law rule of incompetency of the husband or wife to testify for or against each other, as this court decided in *McGill v. McGill*, 19 Fla. 341, because, as there said, this exclusion was not on the ground of pecuniary or property interest solely, but upon grounds of public policy for the protection of the marriage relation; or, as it was later expressed in *Everett v. State*, 33 Fla. 661, text 673, 15 South. 543, the relation of husband and wife was always an additional disability to testify for or against each other in any case, and the removal of the disability of interest would not of itself permit them to testify for or against each other. So later on, in 1879 (Laws 1879, p. 65, c. 3124), the law-making power of this state provided that in the trial of civil actions in this state married women shall not be excluded as witnesses in cases wherein their husbands are parties and allowed to testify. "The act of 1879, however," said this court, in *Haworth v. Norris*, supra, "did extend to her additional competency. It says that whenever the husband is a party and allowed to testify the wife shall not be excluded as a witness. The purpose of this act was to remove the common-law disability as wife which at the time of its enactment remained unaffected by prior legislation; so wherever the husband

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was a party to a suit, and its character was such that his interest therein or connection with the suit would, under the act of 1874, not disqualify him from testifying as to his interest, his wife ceased, by virtue of the act of 1879, to be disqualified as wife, on the ground of public policy, from testifying as to his interests. \* \* \* The act of 1879 does not in any manner affect the competency or incompetency of the husband as a witness." The court cited *Schnabel v. Betts*, supra, where it was said, the evidence of the husband in favor of his wife was properly excluded because, while the statute authorized the wife to be a witness in a case where her husband was a party, it did not change the common-law rule which denied to the husband the right to testify for or against his wife in a civil suit against her.

So, then, after this court had said that the act of 1879 did not in any manner affect the competency or incompetency of the husband as a witness, the Legislature amended that act by chapter 4029, p. 56, Acts 1891, to read as follows: "That in trials of civil actions in this state neither the husband nor the wife shall be excluded as witnesses, where either the said husband or wife is an interested party to the suit pending"—this provision becoming known as section 1502 of the General Statutes of 1906. And this court, in *Everett v. State*, 33 Fla. 661, 15 South. 543, declared that "the act of 1891, chapter 4029, removes the disability of husband and wife to testify in civil cases to an extent far beyond both the act of 1879 and the provisions of section 1094 of the Revised Statutes as adopted. They shall not be excluded under the act mentioned, as witnesses in civil actions, where either is an interested party to the suit pending, and the right to testify here given is not dependent upon the fact that either does testify or is allowed to testify, but where either is a party to the suit pending."

At last, after what would seem to be a patient, persistent, and intelligent effort to correct the omissions and defects pointed out each time by this court in the legislation on this subject, the Legislature accomplished its purpose to alter the common-law rule prevailing in civil cases, whereby, upon grounds of public policy, not on the ground of interest in the suit, the husband and the wife could not be witnesses for or against each other.

In 1892, as section 2863 of the Revised Statutes, the Legislature further enacted: "The provisions of law relating to the competency of witnesses in civil cases shall obtain also in criminal cases." And this court, in *Everett v. State*, supra, construed these statutory provisions and said: "The rule as to competency of husband and wife to testify for or against each other in civil cases, as well as to the competency of witnesses in other civil cases, will apply also to criminal trials." "From this," the court said, "it follows that

the circuit judge did not err in permitting Mrs. Everett to testify in the case. It may be observed that the relation of husband and wife was always an additional disability to testify for or against each other in any case, and that the removal of the disability of interest would not of itself permit them to testify for or against each other." Mrs. Everett was the wife of the defendant who was on trial for murder, and we find, on page 664 of 33 Fla., and on page 544 of 15 South.: "After the testimony for the state in chief had been introduced, and the defendants had made voluntary statements in their behalf to the jury, Mrs. Ellen Everett, wife of the defendant, William H. Everett, was called as a witness on the part of the state to testify in rebuttal of the statement made by her husband. An objection was made by defendant that she was not a competent witness, and this objection being overruled, an exception was duly noted."

In *Walker and Walker v. State*, 34 Fla. 167, 16 South. 80, 43 Am. St. Rep. 186, the third assignment of error referred to the ruling of the court excluding testimony of Phyllis Walker, offered by the defendants. They were indicted for murder. The witness was the wife of the defendant Kenneth Walker. The state attorney this time objected and the court excluded her testimony. "In so doing," said this court, speaking through the Chief Justice, "it clearly acted upon the presumption that a wife in a criminal case cannot testify for or against her husband. According to a recent decision of this court (*Everett v. State*, 33 Fla. 661, 15 South. 543), this was error, and she should have been permitted to testify."

In *Mercer v. State*, 40 Fla. 216, 24 South. 154, 74 Am. St. Rep. 135, this court again affirmed the previous construction placed upon chapter 4029, p. 56, Acts 1891, and section 2863, Rev. St. 1892, now section 3919, Gen. St. 1906, saying, through the Chief Justice: "In construing these statutes and their bearing upon each other, this court, in the case of *Everett v. State*, 33 Fla. 661, 15 South. 543, and again in *Walker v. State*, 34 Fla. 167, 16 South. 80, 43 Am. St. Rep. 186, held, in substance, that their joint effect was to abrogate the old common-law rule as to the competency of witnesses that forbade either the husband or wife to testify at all in any case, either civil or criminal, where either of them was an interested party; that they made both the husband and wife competent witnesses to testify for or against each other in all cases, civil or criminal, where either of them was an interested party." See, also, *Adams v. State*, 23 Fla. 511, 10 South. 106. We think these cases disposed of this proceeding in *habeas corpus* adversely to the petitioner herein. Such has been the holding in this state since the decision in the *Everett Case* at the January term of this court in 1892. This rule has prevailed here unchanged, in civil as well

as criminal cases, for about 15 years, although 8 sessions of the Legislature have convened within that period of time.

Although we regard this question as no longer an open one in this state, we will consider the argument made now in support of the contention that the petitioner may not be compelled to testify against her husband.

It is contended that at common law there was a privilege of husband and wife of not testifying against each other, as distinguished from the disqualification to testify for each other, and that the effect of our statute is to abolish the disqualification only, and the privilege still remains. This contention finds strong support in the statement of Mr. Wigmore, in section 2227, vol. 3, of his great work on Evidence, that the privilege existed before the disqualification, citing *Bent v. Allot*, Cary, 135, decided in 1580, as the first explicit ruling, and saying that the privilege was recognized more than once in the next century. In the year 1784, however, Lord Mansfield declared, in *Bentley v. Cooke*, 3 Doug. (Eng.) 322: "There never has been an instance in a civil or criminal case where the husband or wife has been permitted to be a witness for or against each other, except in case of necessity, and that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury." In *Windhams v. Chetwynd*, 1 Burr. 424, Lord Mansfield again said: "In matter of evidence, husband and wife are considered as one, and cannot be witnesses, the one for the other."

In 1 Blackstone, 443, speaking of the competency of husband and wife as witnesses at common law, the great commentator says: "In trials of any sort, they are not allowed to be evidence for or against each other; partly because it is impossible their testimony should be indifferent; but principally because of the union of the person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of the law, *nemo in propria causa testis esse debet*; and, if against each other, they would contradict another maxim, *nemo tenetur seipsum accusare*. But where the offense is directly against the person of the wife, this rule has usually been dispensed with."

And so the editors of that great work, Ency. of Ev. vol. 6, pp. 849, 850, state that the common law made no apparent distinction between the incompetency of one spouse to testify for or against the other as a matter of disability and the incompetency as a matter of privilege, citing *Bentley v. Cooke*, supra, but that many of the statutes, though perhaps not in so many words, do in effect make such a distinction. With these statutes and the cases arising under them we have no concern. The

common law as it existed in England prior to 1776 is in force in this state by statute.

It may be that a few early decisions seem to recognize the privilege; but, in order to be binding upon us as evidence of what the common law is, the English decisions rendered prior to the War of the Revolution must be clear and unequivocal. *Myers v. Hodges*, 53 Fla. 197, text 205, 44 South. 357; 6 Amer. & Eng. Ency. Law (2d Ed.) 279.

The well-recognized common-law rule that neither husband nor wife could be a witness for or against each other would seem to be inconsistent with the idea that the wife's testimony on her husband's behalf is treated as receivable, while it is his privilege to keep her from testifying against him, and hers to refrain from doing so. How could the common law regard the testimony of husband or wife criminating the other consort as detrimental to the public welfare, excluding such testimony as being disqualified or incompetent, and at the same time regard such testimony as detrimental to the parties only and exempt it as being privileged, thereby making it optional with the spouse to divulge it? Is there not a clear inconsistency in the idea that this testimony may be detrimental to the public welfare and incompetent, and the other idea that this testimony may be detrimental to the parties and privileged to be divulged? We think so.

It may be that, in the formative period of this doctrine, the testimony of husband or wife against the other was considered detrimental to the parties only and exempt as privileged; but certain it is the common law finally came to regard such testimony as detrimental to the public welfare also, and excluded it as being incompetent and disqualified. Then the privilege disappeared or became merged in the doctrine of disqualification, giving rise to the well-recognized rule of the common law that neither husband nor wife can testify for or against the other, with certain exceptions not important here. The privilege then, becoming merged in the doctrine of disqualification, the statute that removed the disqualification removed the privilege also.

However that may be, assuming that the common-law rule of exclusion was based both upon the idea of privilege and the idea of disqualification also, and that it were possible for them to travel together, it is perfectly clear that both the privilege and the disqualification have been abolished in this state by statute.

We must consider how this has been brought about in civil cases, for section 3919 of the General Statutes of 1906 provides: "The provisions of law relating to the competency of witnesses and evidence in civil cases shall obtain also in criminal cases, except in cases otherwise provided by law."

The statute removing interest as a dis-

qualification does not remove the objections on the ground of public policy to a wife's testifying against her husband when he is a party, as we have seen in *Haworth v. Norris*, supra, and *Everett v. State*, supra. The provisions of chapter 4029, p. 56, Acts 1891 (section 1502, Gen. St. 1906), however, go to the objections to a spouse testifying for or against the other on the ground of public policy and abolish both the privilege, if it existed, and the disqualification, of the husband and wife to testify for or against the other in the following words: "That in trials of civil actions in this state, neither the husband nor the wife shall be excluded as witnesses, where either the said husband or wife is an interested party to the suit pending."

Why was the word "excluded" used by the lawmakers in the enactment of this statute? Clearly, it was because that word appears in the statement of the common-law rule, thus: "The common law excluded the husband and wife as witnesses in any case, civil or criminal, in which either was a party." And so, when the Legislature determined to change this common-law rule in civil cases, it provided: "That in trials of civil actions in this state, neither the husband nor the wife shall be excluded as witnesses, where either the said husband or wife is an interested party to the suit pending."

Next, what is the meaning of the word "excluded," or what does the statute mean by providing that neither the husband nor the wife shall be excluded as witnesses?

Assuming that, at common law, in addition to the disqualification of husband and wife to testify for each other, their testimony against each other was privileged, the effect of this statute upon the disqualification or privilege of husband and wife as witnesses in civil cases would be this: Suppose in a civil suit against the husband the wife to be called as a witness for her husband. If the plaintiff object on the ground that at common law she was disqualified and excluded, the statute answers that she cannot now be excluded, and the wife is permitted to testify. If, on the other hand, the wife is called as a witness against her husband, and he and she object and ask that she be excluded as a witness because at common law it was her privilege not to testify against her husband, the statute again answers that she cannot be excluded on that ground, there being nothing in the statute to restrict the exclusion on any particular ground, and, under our compulsory process for witnesses, she may be compelled to testify against her husband. In other words, our statute applies both to the privilege, if there be one, and to the disqualification, because it provides broadly that neither the husband nor the wife shall be excluded as witnesses. It does not provide that neither the husband nor the wife shall be disqualified as witnesses. It is not thus directed at the dis-

qualification of husband and wife as distinguished from a privilege, and the effect of the statute is not to exclude husband and wife as witnesses upon any ground, whether called privilege or disqualification; but it places them upon the same footing as other witnesses, and, as the provisions of law relative to the competency of witnesses and evidence in civil cases are made to obtain also in criminal cases (section 3919, Gen. St. 1906), the husband and wife may testify and may be compelled to testify for or against the other, in criminal and civil cases, to any fact the knowledge of which was acquired by them independently of their marriage relation. *Mercer v. State*, 40 Fla. 216, 24 South. 154, 74 Am. St. Rep. 135; case note, *State v. Woodrow*, 58 W. Va. 527, 52 S. E. 545, 2 L. R. A. (N. S.) 862, 112 Am. St. Rep. 1001; 3 Wigmore on Ev. § 2245, p. 3067.

The disqualification or privilege, so called, of husband and wife as witnesses at common law, must not be confounded with the doctrine of confidential or marital communications. Our statute is aimed at objections to husband and wife as witnesses, not to the matter of their testimony, and the change of the common-law rule by making one spouse a competent witness against the other does not affect the rule against disclosure of marital communications. 10 Ency. of Ev. p. 168; *Gee v. Scott*, 48 Tex. 510, 28 Am. Rep. 331; *Robinson v. Chadwick*, 22 Ohio St. 527; Wigmore, Ev. § 2334 (2).

The progress of legislation on this subject in New Hampshire and the judicial construction thereof will be found very much in point.

In *Clements v. Marston*, 52 N. H. 31, text 36, the court said: "At common law, a party to a cause could not testify, on the ground that he was interested. Any person not a party, if interested in the result of the suit, was excluded as a witness on the ground of interest. Wives were excluded: (1) On the ground of interest, they being interested wherever their husbands were; and (2) upon the ground of public policy, that it was not expedient to place husband and wife in a position that might lead to dissensions and strife between them, or that might encourage perjury. Hence wives were not allowed to testify for or against their husbands when they were parties to civil proceedings, and for the same reason both were excluded when either was a party in a criminal case." Then, pointing out the first inroad made upon this system in the state, the court traces the legislative changes therein, saying that:

"In Acts 1869, p. 282, c. 23, respondents were allowed to testify. By Acts 1871, p. 535, c. 38, the disqualification of infamy is removed, and the wife is made a competent witness in all criminal cases where the respondent is allowed to testify; and this act is applied to pending suits, and made to take effect from its passage. In criminal cases, then, it would seem that the wife is made

a competent witness in all cases, for it is not in those cases where the husband, being respondent, requests or elects to testify, that she is made competent, but in all cases where he is allowed to testify, which, by the act of 1869, is in all cases; and, the wife being made a competent witness in all criminal cases, she may be called to testify for or against her husband in all cases where he is accused of crime.

"Thus it appears that the present policy of our legislation on this subject is to make the husband and wife competent witnesses for or against each other, just as though they were strangers, in no way connected, except in the single case where the court can see that such testimony would lead to a violation of marital confidence. Applying that principle, and there would seem to be no good reason why the wife should not have testified in the case before us.

"They are to be allowed or compelled to testify for or against each other in all cases, just like persons in no way related to each other, with this single exception; and this violation of marital confidence must be something confided by one to the other, simply and specially as husband or wife, and not what would be communicated to any other person under the same circumstances."

The case of *State v. McCord*, 8 Kan. 232, 12 Am. Rep. 469, is instructive. There the defendant was indicted for murder, and the court, speaking through Kingman, C. J., said:

"On the trial Sarah McCord, the wife of appellant, was offered as a witness on the part of the state, and avowed her willingness to testify on the trial. The appellant objected to her as an incompetent witness. The objection was overruled, and the witness permitted to testify. The propriety of this ruling must be determined by the late statute on this subject. Laws 1871, p. 280, c. 118, § 1. This section provides that no person shall be incompetent to testify in a criminal case 'by reason of being the husband or wife of the accused,' and contains this proviso: 'That no person on trial or examination, nor wife or husband of such person, shall be required to testify, except as a witness on behalf of the person on trial or examination.'

"The body of the section makes the husband or wife of the accused a competent witness in all cases. The proviso is a limitation, not on the competency of the witness, but on the power of the court to compel such witness to testify. When by the body of the section the witness was made competent, then, if that stood alone, all the measures that the law gives to courts could be resorted to to enforce the witness to testify. By the proviso, this power is limited; and this is all the proviso attempts to do. \* \* \*

"The sanctity and inviolability of the marriage relation is appealed to, and to preserve them the court is urged to give the statute a construction which we have seen

it will not bear. The argument is one addressed more properly to the Legislature than the court. If the law is open to the objections urged, it should be repealed; but this should be done by the Legislature, and not by judicial construction." Remembering that our statute does not contain the proviso to be found in the Kansas statute, the applicability of the court's holding is apparent.

It follows that the order whereby the petitioner was required to testify herein was a lawful one, and that the court may resort to all measures given by the law to compel obedience thereto. Having given petitioner an opportunity to be heard, the court had the inherent right to punish, as for a contempt, a violation of its order to maintain its dignity, authority, and efficiency in the proper administration of the law. *Ex parte Edwards*, 11 Fla. 174; *Ex parte Ed. Senior, Jr.*, 37 Fla. 1, 19 South. 652, 32 L. R. A. 133.

The petitioner will be remanded to the custody of the sheriff of Sumter county.

Order to be entered accordingly.

TAYLOR, COCKRELL, and HOCKER, JJ., concur.

WHITFIELD, C. J. (dissenting). The petitioner was adjudged guilty of contempt of court by the judge of the Fifth judicial circuit of Florida for refusing to obey an order of the court to, in effect, testify against her husband by testifying for the state before the grand jury of Sumter county in a proceeding wherein her husband was accused of a crime not affecting her personally. On habeas corpus she contends that the judgment and commitment are totally illegal because it is her lawful right to refuse to testify criminating her husband in a judicial proceeding.

The right to punish as a contempt of court a violation of a lawful judicial order is inherent in courts of justice to preserve their dignity and usefulness in administering the law. When a court has jurisdiction and has given a party charged with contempt an opportunity to be heard, and the act charged is such that it may be a violation of the lawful order of the court, a judgment imposing a reasonable fine or imprisonment for the contempt will not in general be reviewed by an appellate court for mere errors of procedure, at least in the absence of controlling statutes upon the subject. See: *Ex parte Edwards*, 11 Fla. 174; *Caro v. Maxwell*, Judge, 20 Fla. 17; *Sanchez v. Sanchez*, 21 Fla. 346; *Palmer v. Palmer*, 28 Fla. 295, 9 South. 657; *Florida Cent. & P. R. Co., v. Williams*, 45 Fla. 295, 33 South. 991; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *Hurley v. Commonwealth*, 188 Mass. 443, 74 N. E. 677, 3 Am. & Eng. Ann. Cas. 757, and notes; *State ex rel. Chicago, B. & Q. R. Co., v. Bland*, 189 Mo. 197, 88 S. W. 28, 3 Am. & Eng. Ann. Cas. 1044; *Menuet v. Grimes Candy Co.*, 77 Ohio St. 386, 83 N. E. 82, 11 Am. & Eng. Ann.

Cas. 1037, and notes; *Ex parte Tillinghast*, 4 Pet. 108, 7 L. Ed. 798; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117.

Where a person has been committed to the custody of an officer for contempt of court in violating an order of court, such person may by habeas corpus secure a determination as to the jurisdiction of the court in ordering the commitment and also as to whether the conduct charged constituted delinquency or misbehavior. If it be adjudged that the court had no jurisdiction, or that the conduct was not such as may constitute a contempt of court, or that it was the exercise of a legal right, and that the order of commitment is not merely erroneous or irregular, but is illegal or made without authority of law, the person will be entitled to a discharge from custody in order to make effective the judicial determination of innocence and to preserve the constitutional right of all persons not to be deprived of liberty without due process of law. See *Ex parte Ed. Senior, Jr.*, 37 Fla. 1, 19 South. 652, 32 L. R. A. 133; *Bronk v. State*, 43 Fla. 461, 31 South. 248, 99 Am. St. Rep. 119. See, also: *Jackson v. State*, 33 Fla. 620, 15 South. 250; *State v. Lewis*, 55 Fla. 570, 46 South. 630; *Hardee v. Brown*, 56 Fla. 377, 47 South. 834; *Ex parte Knight*, 52 Fla. 144, 41 South. 786; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117.

As shown by the record, the purpose of the order of the court which the petitioner declined to obey was not to require her to become a witness in the case, or to testify for her husband as to matters not involving marital confidence, or to testify against her husband on a charge that he had committed a crime upon her person. The purpose of the order of the court was to compel the petitioner to testify against her husband on an accusation that he has committed a crime upon another person. There is no contention that the wife may not be compelled to testify for or against her husband when the testimony does not incriminate him.

The petitioner refused to testify against her husband before the grand jury upon the ground that it was her right to so refuse. Even if under the statutes of this state she is not disqualified to testify in the case, and is therefore a competent witness to give testimony that is not incompetent or privileged, yet if it is her privilege to refuse to testify against her husband when he is charged with a crime upon another person, and it does not appear that he has waived the privilege, such refusal is but an assertion of the privilege which is her right; and, if it does not appear that the circumstances of this case are such that the law renders her testimony criminating her husband competent and not privileged, the order committing the petitioner for refusing to testify against her husband is without authority of law, and the petitioner is entitled to be discharged. The husband against whom the or-

der of the court required the wife to testify is not accused of crime upon the person of the wife. The refusal negatives waiver on the part of the wife, and a waiver on the part of the husband is not shown even if, in view of the interest of the public in the exclusion of testimony by the wife against the husband, the privilege can be waived by either or both parties.

At common law all persons were, in general, disqualified to testify in judicial proceedings in which they were parties or were interested, largely upon the theory that interested testimony is, in general, not reliable, and that temptation to perjury should be avoided; therefore, as a matter of public policy, parties to the action and those interested therein were not permitted to testify as witnesses in cases. And the husband or wife was likewise disqualified to testify in cases where the other consort was a party or interested, chiefly perhaps on the ground of unity of interest; the husband and wife being in law regarded as one person. Whether husband and wife are civilly one or not, each has a substantial interest in common with the other. The disqualifications of all persons as witnesses where they are parties or are interested, and of husband and wife where the other spouse is a party or interested, have been modified by statutes. See sections 1502, 1505, 3919, Gen. St. 1906.

In addition to the disqualification of the husband and wife to testify because of interest or unity of interest, the testimony of husband and wife criminating each other was by the common law privileged as being primarily detrimental to the parties; and such testimony was also excluded as incompetent since it was regarded as detrimental to the public welfare because it would impair marital unity and harmony and because of the natural repugnance to unseemly conflicts between husband and wife. See *Kent's Com.* 179; *Wigmore's Ev.* § 2227 et seq. That a privilege existed at common law as to criminating consort testimony, see: 1 *Brownlow & Goldesborough's*, 47; *Pedley v. Wellesley*, 3 C. & P. 557; *Wigmore's Ev.* § 2227 et seq.; *State v. Kodat*, 158 Mo. 125, 59 S. W. 73, 51 L. R. A. 509, 81 Am. St. Rep. 292; *Wharton's Cr. Ev.* §§ 396, 402, 463; *State v. Briggs*, 9 R. I. 361, 11 Am. Rep. 270; 3 *Taylor's Ev.* §§ 1369, 1453; *Rex v. All Saints*, 6 M. & S. 194; *State v. Woodrow*, 58 W. Va. 527, 52 S. E. 545, 2 L. R. A. (N. S.) 862, and notes, 112 Am. St. Rep. 1001, 6 Am. & Eng. Ann. Cas. 180; *Wharton's Ev.* § 425; *Cartwright v. Green*, 8 Ves. Jr. 405a; *Phillips on Ev.* (4th Am. Ed.) p. 80.

In 1 *Blackstone's Commentaries*, 443, in stating the common law of England as to the relation of husband and wife, it is said: "In trials of any sort, they are not allowed to be evidence for or against each other; partly because it is impossible their testimony should be indifferent; but principally

because of the union of the person. And therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of the law, *nemo in propria causa testis esse debet*; and, if against each other, they would contradict another maxim, *nemo tenetur seipsum accusare*. But where the offense is directly against the person of the wife, this rule has usually been dispensed with."

The principle of the maxim above given that "no man shall be compelled to criminate himself" is also expressed in the statement of the law that "a man is competent to prove his own crime, though not compellable." *Undal v. Walton*, 14 M. & W. 255. Upon the theory that at the common law the husband and wife are civilly one, and that in the interest of the general public welfare the exemption from self-accusation could be extended to the wife as being in law one with the husband, the provision of section 12 of the Declaration of Rights in the state Constitution, that "no person shall be \* \* \* compelled in any criminal case to be a witness against herself," may be regarded as at least a declaration of a public policy that would preserve the privilege of not testifying against each other in criminal prosecutions accorded to the husband and wife at common law.

Where the law permits testimony to be withheld because it is detrimental to the public welfare, the testimony is excluded as being incompetent. Where the law permits testimony to be withheld because it is detrimental to the parties, the testimony is exempted as being privileged. Interested testimony is not ordinarily detrimental to the parties to an action; but, as it gives opportunity for perjury, the common law regarded it as detrimental to the public welfare and excluded it as being incompetent. Testimony of the husband or wife criminating the other consort or divulging marital confidences is directly detrimental to the parties primarily, and the common law exempted it as being privileged.

The common law also regarded the testimony of husband or wife criminating the other consort or revealing marital confidences as detrimental to the public welfare, and excluded such testimony as being incompetent. See 1 Greenleaf on Ev. § 340.

To abrogate a rule excluding testimony because incompetent does not affect a rule exempting the same testimony because it is privileged, in the absence of such an intent expressed or implied. The purpose of the statutes modifying the common-law rules as to testimony of parties to a suit and those interested in the event of the suit and the husband or wife of such parties or persons is to remove the rule excluding, as being incompetent, testimony that was regarded as detrimental to the public welfare; and there is no expressed or implied purpose to abrogate the rule of the common law exempting

as privileged testimony of the husband or wife directly incriminating the other consort or disclosing marital confidences, though the same character of testimony was also excluded as incompetent at common law.

In the case of *Mercer v. State*, 40 Fla. 216, 24 South. 154, 74 Am. St. Rep. 135, it was held the statutes that are now sections 1502 and 3919, Gen. St. 1906, "removed the incompetency as witnesses of husband and wife because of the interest of either in both civil and criminal cases, do not have the effect of empowering either of them, when they become witnesses to give illegal or incompetent testimony by detailing or exposing those confidential transactions or communications that have passed between them in consequence of their marriage relation, that the law privileges and shields from exposure by either of the parties to the communication; and this to preserve a wholesome public policy." This decision is in line with the authorities and is correct in principle.

If the statutes of this state removing the disqualifications of husband or wife to testify in cases where the other spouse is a party or is interested does not remove the common-law privilege as to confidential communications between husband and wife that exist only because of the marital relation, it is not perceived how they remove other common-law privileges that exist solely because of the marriage relation and are also founded upon a sound public policy. If at common law there was a privilege accorded to the husband and wife of not being forced to directly accuse the other consort of crime, that privilege related to the testimony to be given and was for the benefit of the accused and of the marital relation in the interest of the general welfare. It is true testimony against the consort accused of crime may not be confined to confidential communications between the husband and wife; but, if there is a basis in public welfare for the sacredness of confidential communications between husband and wife, there is a basis of equal, if not superior, merit for the privilege that each consort had at common law of not being forced to accuse the other spouse of a criminal offense.

Experience has shown that, for practical purposes in the administration of justice, the truthfulness of interested testimony may in general be sufficiently tested by cross-examination and impeachment of witnesses; and the disqualification of persons to testify in cases because of being parties, or because of interest therein, or because the husband or wife is a party or interested therein, have been removed or modified by statutes in this state. Neither cross-examination nor impeachment nor any other expedient now known can avoid the evil consequences of a husband or wife testifying against the other consort in criminal cases, and, whether the rule is called a disqualification or a privilege, the Legislature has shown no intent to

change it. The modifying statutes specifically refer to the disqualification and exclusion of persons as witnesses because of interest, and, though the exclusion as witnesses is modified, the language used is not broad enough to abrogate the privilege of the testimony of husband or wife against the other spouse allowed by law as a privilege against self-accusation and exposure of marital confidences or to prevent the exclusion of such testimony as being inadmissible on grounds affecting, not interest or mere public policy, but the public welfare.

It is stated that the privilege against adverse testimony of the consort antedated the rule excluding such adverse testimony in the ancient common law. If the rule as to incompetency and absolute exclusion of adverse marital testimony had the effect to supersede and render somewhat obsolete the rule of marital privilege of exemption from consort accusation, yet, if the rule as to incompetency and exclusion is modified by statute, the privilege remains, unless a contrary legislative intent clearly appears. *Wigmore's Ev.* § 2245.

The testimony of husband and wife against each other is competent and not privileged when necessary to protect one from the other's wrongdoing, or when justice demands it. See: *Lord Audley Trial*, 3 St. Tr. 401, 414; *Storrs v. Storrs*, 23 Fla. 274, text 277, 2 South. 368; *McGill v. McGill*, 19 Fla. 341; *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. 105, 34 L. Ed. 762; 1 Greenl. on Ev. 343; *Wigmore on Ev.* § 2239; *Schouler on Husband & Wife*, § 84; *Turner v. State*, 60 Miss. 351, 45 Am. Rep. 412; *Johnson v. State*, 94 Ala. 53, 10 South. 427; *State v. Davidson*, 77 N. C. 522; *Whipp v. State*, 34 Ohio St. 87, 32 Am. Rep. 359; *State v. Harris*, 5 Pennewill (Del.) 145, 58 Atl. 1042; *Bishop's New Crim. Proc.* § 1153; 2 L. R. A. (N. S.) 862, and notes; *Chamberlayne's Best on Ev.* §§ 175, 176; 2 Am. & Eng. Ann. Cas. 881, and notes.

The principles above stated are mere rules of evidence formulated by the courts for the administration of justice. In establishing and enforcing rules of procedure the courts are guided by the experiences of the past, and have regard for public policy and the general welfare, as well as for the rights of individuals. Public policy and rules of procedure may be determined and established by the lawmaking power acting within its authority. Legislative enactments are presumed to be for the general public good. There is no vested right or interest in any mere rule of judicial procedure existing at common law or otherwise provided. Rules of evidence relate to judicial procedure, and are subject to legislative action within constitutional limitations securing private rights. See: *Stearns & Culver Lumber Co. v. Fowler* (decided at this term) 50 South. 680; *McGehee. Due Pro-*

*cess of Law*, 18) et seq., and authorities cited. *Campbell et al. v. Skinner Mfg. Co.*, 53 Fla. 632, 43 South. 874.

Experience has demonstrated the wisdom of the rules respecting the testimony of husband and wife against each other that are so firmly embedded in, and safely guarded by that great protector of human rights, known as the English common law, which is the law of this state, except where it has been expressly or impliedly abrogated or modified by the lawmaking power. Section 59, Gen. St. 1906.

The statutes of this state provide that: "No person in any court or before any officer acting judicially, shall be excluded from testifying as a witness by reason of his interest in the event of the action or proceeding, or because he is a party thereto"—with an exception not pertinent here. Section 1505 (Acts 1874).

"In the trial of civil actions in this state neither the husband nor the wife shall be excluded as witnesses where either the said husband or wife is an interested party to the suit pending." Section 1502 (Act of 1891).

"The provisions of law relative to the competency of witnesses and evidence in civil cases shall obtain also in criminal cases, except in cases otherwise provided by law." Section 3919, Gen. St. 1906.

If it be conceded that the above statutes completely remove all disqualifications of husband or wife as witnesses, thereby making them competent to testify, the statutes do not remove the privilege or authorize the giving of incompetent testimony as recognized by the rules of the common law. *Mercer v. State*, supra. It would seem, however, that the above statutes only remove such disqualifications as depended upon interest; and, whether the exemption from adverse testimony of husband or wife is regarded as a disqualification or as a privilege, such exemption is not affected by the statutes, but it remains as at common law. In the cases of *Everett v. State*, 33 Fla. 661, 15 South. 543, and *Walker v. State*, 34 Fla. 167, 16 South. 80, 43 Am. St. Rep. 186, the objection was not specifically upon the ground that the wife was privileged not to testify against her husband. In neither case was the privilege claimed as such. The precise point presented here does not appear to have been considered by this court in any other case.

Where statutes modify the rules of the common law disqualifying witnesses on account of interest or identity of interest, such statutes do not affect the rules of law relating to incompetent testimony or to privileged testimony, unless an intent to do so clearly appears. See: *Underhill's Crim. Ev.* § 185; *Wigmore on Ev.* § 2245; *Mercer v. State*, supra.

The common-law rules giving to husband and wife the privilege of not testifying against each other in judicial proceedings and rendering such testimony incompetent in the interest of the public, being based upon considerations involving the welfare of human so-

<sup>1</sup> *State v. Woodrow*, 58 W. Va. 527, 53 S. E. 545, 112 Am. St. Rep. 1001.

<sup>2</sup> *Moore v. State*, 46 Tex. Cr. R. 234, 75 S. W. 497, 108 Am. St. Rep. 952.



ciety, legislative enactments modifying the rules should be so clear and explicit as to prevent reasonable doubt as to the intent and as to the limits of the change. *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762; *Underhill's Crim. Ev.* § 185; *Byrd v. State*, 57 Miss. 243, 34 Am. Rep. 440; *Lucas v. Brooks*, 18 Wall. 436, text 453, 21 L. Ed. 779; *State v. Willis*, 119 Mo. 485, 24 S. W. 1008.

The purpose of the above statutes was to remove the disqualifications of witnesses to testify. As the statutes are in derogation of the common law and are enabling in their nature, they should not be extended further than is warranted by a fair consideration of their terms, taken in the light of the object desired to be accomplished. See: *Hainlin v. Budge*, 56 Fla. 342, 47 South. 825; *Bryan v. Dennis*, 4 Fla. 445; *Morrison v. McKinnon*, 12 Fla. 552; *People of State of New York ex rel. Metropolitan St. R. Co. v. New York State Board of Tax Com'rs*, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65; *Williams v. Jacksonville, T. & K. W. Ry. Co.*, 26 Fla. 533, 8 South. 446; *Jacksonville Electric Co. v. Bowden*, 54 Fla. 461, 45 South. 755, 15 L. R. A. (N. S.) 451; 30 Am. & Ency. Law (2d Ed.) 958.

The petitioner, being a wife, has the privilege accorded to her at common law, and not taken from her by statute, of not testifying against her husband when charged with a crime upon the person of another. This privilege is a legal right given for the benefit of the parties and of the marriage relation and for the public good, and even if, in view of the public interest in the exclusion of such testimony, the law permits the privilege to be waived, it is a right that may be asserted and should be regarded as sacred. In refusing to obey the order of the court to testify for the state in a prosecution of her husband for a crime not upon her person, she in my judgment merely asserted a legal right, and by doing so did not violate, but observed, the law.

SHACKLEFORD, J., concurs in this dissent.

SHANNON et al. v. SUMMERS et al. (No. 18,726.)

(Supreme Court of Mississippi. Dec. 20, 1909.)  
EJECTMENT (§ 114\*)—RIGHT OF ACTION—TITLE.

In ejectment, in which plaintiffs claimed as heirs, and defendants claimed under a sale by the administrator of plaintiffs' ancestor, it was error not to adjudge plaintiffs entitled to the homestead; it having been specially excepted from the sale through which defendants claim.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 114.\*]

Appeal from Circuit Court, Yalobusha County; Sam C. Cook, Judge.

Action by J. M. Shannon and others against Thomas Summers and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

This is a suit in ejectment, brought by Shannon and others, heirs of one McCameron, against the appellees herein; Summers being the tenant, and Edwin Newberger admitted to defend as landlord. Defendants deraigned title under a sale by McCameron's administrator. There was a judgment for defendants below, and this case was appealed and reversed. See *Shannon v. Summers*, 86 Miss. 619, 38 South. 345. The facts are fully stated in the former report. Upon a second hearing there was a judgment by default for plaintiffs, and on appeal the case was reversed a second time. See *Newburger v. Shannon*, 40 South. 1039. A third trial resulted in a judgment for defendants, and this appeal is prosecuted. On the first appeal the judgment below specially excepted part of the tract set aside as a homestead, and the reversal by this court was upon the ground that the administrator's sale, under which appellees claim title, was not made in good faith, and was therefore void. The judgment in the instant case did not except the homestead, but was a general verdict for defendants.

Ed D. Stone and I. T. Blount, for appellants. Kimmons & Kimmons, for appellees.

WHITFIELD, C. J. It is too plain for discussion that there was manifest error in the judgment in the court below, judging a plaintiff not entitled even to the homestead which had been expressly reserved from sale in the chancery decree under which the land had been originally sold. Since this homestead exemption never had been sold at all, manifestly the verdict and judgment in the court below should have at least ascertained the plaintiffs to be entitled to that part of the land at all events. In the former trial of this case, recorded in 86 Miss. 619, 627, 38 South. 345 the lower court took pains to provide in its judgment that the homestead exemption should be recovered by the plaintiffs. There is not even this protective recitation in this judgment. But, besides this, we think it is manifest, on the testimony in this record, looking to this record alone, that the burden of showing that the purchase money was paid, in accordance with the well-settled rules on this subject, was not met. See *Gibson v. Currier*, 83 Miss. 255, 35 South. 315, 102 Am. St. Rep. 442. It will never do to hold, on testimony so scant, meager, and unsatisfactory, as that in this record, that there has been such a showing of actual payment of the purchase money as the law requires.

We notice at this time no other errors than the two indicated.

Reversed and remanded.

**HARDING v. STATE.** (No. 13,629.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

**CRIMINAL LAW (§ 1131\*)—ESCAPE PENDING APPEAL—FELONY CASES.**

While, in view of Code 1906, § 1495, permitting the trial of one charged with a misdemeanor in his absence, an appeal from a conviction for a misdemeanor will be dismissed, where accused abandons the appeal by escaping pending appeal, an appeal from a felony conviction will not be dismissed or acted upon because of accused's escape pending appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2975; Dec. Dig. § 1131.\*]

Appeal from Circuit Court, Monroe County; E. O. Sykes, Judge.

L. Charles Harding was convicted of obtaining money under false pretenses, and he appeals. On motion to dismiss the appeal. Motion denied.

Geo. Butler, Asst. Atty. Gen., for the motion.

**MAYES, J.** At the September term of the circuit court of Monroe county, 1908, L. Charles Harding was convicted of obtaining money under false pretenses and given a three-year sentence in the penitentiary. After the conviction an appeal was prosecuted therefrom to the Supreme Court, and the record filed here on the 2d day of February, 1909. Subsequently, on motion of the Assistant Attorney General, it was made to appear to the court that while this appeal was pending the appellant had made his escape from custody, and on motion of the Assistant Attorney General the case was taken from the active calendar of the court and passed to the files to await the re-arrest of appellant. Motion was made to this effect in February, 1909, and the order taken on the 11th of February, same year. On October 13, 1909, a second motion was made by the Assistant Attorney General, asking this court to reinstate the case on the active calendar, and dismiss same, because of the fact that the appellant had escaped, and therefore, under the contention of the Attorney General, abandoned his appeal.

We may say, in the outset, that almost the unanimous authority of the various courts of the Union, as shown by the adjudicated cases where this question has arisen, is in support of the position taken by the Assistant Attorney General, and if we were to follow authority from outside states we would be bound to sustain the motion. Many of the adjudicated cases, however, find their predicate in statutes requiring the court to dismiss in cases like this; but we think that this whole matter is merely a rule of practice, which, in the absence of a statute on the subject, each court may adopt for its own government. We therefore decline to adopt the rule followed by any other state, but adhere to our own prac-

tice, which has prevailed uniformly heretofore, and refuse to either act upon or dismiss an appeal, where it is shown that appellant has escaped, in all cases where it is an appeal from a felony. If an appeal be prosecuted for any offense less than felony, pursuing the policy outlined in section 1495, Code 1906, which permits the trial of a party on a misdemeanor charge in his absence, we will dismiss any case less than felony, where it is made to appear that the party has abandoned his appeal or escaped from custody pending the appeal. We think this is a safer and more just rule of practice, and shall adhere to it until the Legislature sees fit to change it. A very instructive case on this subject is to be found in 94 N. C. 945, in the case of *State v. McMillan*. We are aware of the fact that the court rendering this opinion afterwards overruled it; but it was not until after the Legislature had passed an act requiring it so to do.

Let the case remain on file. Motion overruled.

**BURRELL v. STATE.** (No. 13,864.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

**CRIMINAL LAW (§ 1166½\*)—APPEAL—PREJUDICIAL ERROR—FORCING TO TRIAL IN VIOLATION OF AGREEMENT.**

Counsel for the state agreed with accused's leading counsel, in consideration of the withdrawal of a motion for a special venire, that the trial should not be forced until Thursday afternoon; the announcement being made without objection in the hearing of the court. In the absence of accused's leading counsel, accused was forced to trial Thursday morning, and the entire jury was passed upon and impaneled, so far as the state was concerned, and so far as the exercise of any challenge to jurors for cause by accused was concerned. *Held* reversible error, especially as the issue involved a death sentence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1166½.\*]

Appeal from Circuit Court, Prentiss County; E. O. Sykes, Judge.

Sam Burrell was convicted of murder, and he appeals. Reversed and remanded.

Sharpe & McIntyre, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**WHITFIELD, C. J.** This case is a very peculiar one in some of its aspects. The appellant is a negro, who was about 15 years of age when he killed the deceased, another negro, who was then about 17 years of age. There are a number of irregularities in the case, which are made grounds for assignment of error; but we will notice at this time but one.

The record shows, in the testimony of Judge Cox, that an agreement was entered into between the counsel for the state and the counsel for the defense, Mr. Sharpe, who is called the leading counsel for the defense.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

being present and himself making the agreement, that the defendant "would waive a special venire, with the understanding that they would get ready for trial, if they could, by Thursday morning, but that they were not to be pressed into a trial before Thursday afternoon," and that this announcement was made without objection in the hearing of the court. Mr. Sharpe went off on some other business, leaving Mr. McIntyre, his partner, as it seems, in charge of the case. On Thursday morning the defendant was forced to trial, and the entire jury was passed upon and impaneled, so far as the state was concerned, and so far as the exercise of any challenge to jurors for cause was concerned by defendant; all this being done in the forenoon of Thursday, and in the absence of Mr. Sharpe.

There were some very nice questions in the case as to whether or not the juror Hargett, challenged for cause, should not have been excused for cause. The learned Assistant Attorney General admits that, perhaps, it would have been better to have done so. But, passing by this assignment as to this juror, it is enough to say that in the record there is sufficient showing that he was prejudiced in his trial, by reason of having been forced into trial, in the absence of Mr. Sharpe, in the forenoon of Thursday, in contravention of the agreement set out. Having made this arrangement with Mr. Sharpe as the basis for the withdrawal of a motion for a special venire, and the trial having been proceeded with without a special venire, the agreement should have been carried out, and the trial not have been proceeded with until Thursday afternoon, especially where the issue was so grave as the one here, involving a death sentence.

For this error, the judgment is reversed, and the cause remanded.

### BATESVILLE GIN CO. v. WHITTEN. (No. 14,225.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

#### **BAILEMENT (§§ 14, 31\*)—LIABILITY OF BAILEE—NEGLIGENCE.**

A bale of cotton, after being ginned and tagged, was placed in the company's yard, as was customary, and the owner, whose wagon was then there, was told that the bale was ready to be removed; but, when he called for it the next morning, it could not be found. Notices were posted about the gin yard, stating that the company would not be liable for cotton left in the yard after it was baled. *Held* that, while the owner had a reasonable time in which to remove the cotton, the company was not liable for its loss after being placed in the yard, in absence of negligence; mere delivery to the company and failure to receive it being insufficient to make out a prima facie liability under the facts.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45-56, 131; Dec. Dig. §§ 14, 31\*]

Appeal from Circuit Court, Panola County; W. A. Roane, Judge.

Action by W. W. Whitten against the Batesville Gin Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The bale could not be found the next morning after it was tagged and placed in the company's yard.

P. H. Lowrey, for appellant. Pearson, Echols & Caruthers, for appellee.

MAYES, J. This case has been before the court twice. The first report of the case is on page 616 of 48 Southern. In the report of the first case it is shown that the reversal was because of a peremptory instruction given for appellees. When the case was first reversed, we did not think that we should direct a peremptory instruction in favor of the gin company, because we did not know what facts a new trial might develop, and therefore we left the case to be tried in the lower court just as though there had never been any former trial. It was our view then, on the facts of the case as they then appeared, that if there was no change on the second trial a peremptory instruction ought to be given for the gin company. The case is returned to this court on confessedly the same facts, and it is our view that no liability is shown on the part of the gin company, and the case must again be reversed.

Before there can be any liability to appellee on the part of the gin company, it was necessary for the appellee, plaintiff below, to show some breach of duty on the part of appellant to him, whereby, because of this breach of duty, some injury has been occasioned; and this appellee utterly fails to establish. The burden was upon the plaintiff below, appellee here, to establish this breach of duty, and appellee has failed. It was not sufficient, under the facts of this case, to show delivery of the cotton and failure to return, in order to make out a prima facie case against the gin company; but it was the duty of appellee to further show that the failure was because of some negligent act on the part of the gin company. There is no such proof in this record. To begin with, it is conclusively shown that before the cotton was lost it had been ginned, baled, and tagged in the customary way, and placed on the yard. This was the way all the cotton was handled by this company. The appellee's wagon was there at the time, and the fact that the cotton was ready to be hauled away was made known to him. The gin company had the following notice posted in many places in the gin, viz.: "Notice. Not responsible for cotton left on our yard after it is baled. Batesville Gin Company." In short, after ginning and packing,

the cotton was held at the risk of the party to whom it belonged, and all parties were so notified.

Of course, even in this condition of affairs, it was the duty of the gin company not to cause loss to the party who brought the cotton there by reason of negligence; but it is not shown in this case that the loss was occasioned by any want of ordinary care on the part of the gin company. It is true that, when cotton is left with ginners for the purpose of being ginned, the party to whom it belongs must have a reasonable time in which to move it; but, because he must have this time within which to remove his cotton, it imposed no special duty on the part of this gin company, under the facts of this case, beyond that of exercising ordinary care. In the absence of any special custom or agreement to the contrary, it is the duty of parties taking cotton to a gin to take it away from the gin as soon as the work that is intended to be done on the cotton has been performed, and if they fail to do so they can only hold the gin company liable where its negligence produces the loss.

Reversed and remanded.

#### WESTERN UNION TELEGRAPH CO. v. WILLIAM RHETT & CO: (No. 13,916.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

#### TELEGRAPHS AND TELEPHONES (§ 60\*)—DELAY OF MESSAGE—RIGHT OF ACTION OF SENDER.

Plaintiffs cabled their acceptance of an offer for cotton from dealers in France; but the message was delayed three days in delivery, during which time the price declined, and the French dealers refused to accept at the price named, stating, "We confirm what has been done, but claim against cable" for decline in price. Plaintiffs thereupon shipped the cotton, and drew upon their correspondent for the purchase price, less the loss. *Held*, that plaintiff could not recover the loss, by decline in price, from the telegraph company.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 49; Dec. Dig. § 60.\*]

Appeal from Circuit Court, Lowndes County; John L. Buckley, Judge.

Action by William Rhett & Co. against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

The appellees who were cotton merchants in Columbus, Miss., received a cable from dealers in France making them an offer on 200 bales of cotton. Appellees cabled their acceptance of the offer; but this message was delayed three days in delivery. In the meantime the cotton had declined in price  $1\frac{3}{100}$  pence. Upon receipt of the delayed message, the French dealers wired that the market had declined, and that they could not accept the cotton at the price named. Appellees were insistent, and finally the French

dealers cabled as follows: "We confirm what has been done, but claim against cable  $1\frac{3}{100}$  pence." Appellees thereupon shipped the cotton and drew upon their correspondent for the purchase price, less the loss, and brought suit against the telegraph company for \$260, the difference of  $1\frac{3}{100}$  pence on the 200 bales. There was a judgment for appellees for the amount claimed, and the telegraph company appeals. Their contention on appeal is that, if there is any liability at all, it is to the French dealers, and not to the appellees, who admitted that they lost nothing, but were simply suing for the difference in price which they had voluntarily deducted from the amount due them under their contract.

Harris & Willing and Z. P. Landrum, for appellant. Betts & Sturdivant, for appellees.

SMITH, J. This case is controlled by the decision of this court in cases of *Postal Tel. Co. v. Willis*, 47 South. 380, and *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 18 South. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604, and the refusal of the peremptory instruction requested by appellant was therefore error.

Reversed and remanded.

#### STANSEL et al. v. HAHN et al. (No. 14,301.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

#### 1. EXECUTION (§ 41\*)—PROPERTY SUBJECT—TRUST ESTATES—ACTIVE TRUSTS.

Where testamentary trustees were to hold the trust property, sell any part thereof, and reinvest it, collect rents, pay taxes and insurance, etc., and pay the net income to the beneficiaries, or their heirs, the trust was active, so that Code 1906, § 2779, making the beneficiaries' interest in estates held in trust subject to sale under execution, would not authorize a sale of the beneficiaries' interest; it not applying to active trusts.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 49, 89-94; Dec. Dig. § 41.\*]

#### 2. EQUITY (§ 195\*)—PLEADING—CROSS-BILL—MATTERS NOT GERMANE.

In a suit to enjoin the sale of a beneficiary's interest in a trust under execution, a cross-bill, alleging that the income due the beneficiary from the estate was sufficient to support him and pay all his debts, and praying that the trustee be required to account, and ordered to discharge cross-complainants' judgments against the beneficiary, introduced new matter not germane to the bill, so that a demurrer thereto on that ground was properly sustained.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 447; Dec. Dig. § 195.\*]

Appeal from Chancery Court, Lowndes County; J. F. McCool, Chancellor.

Action by Sam J. Hahn and another, trustees, against J. W. Stansel and others, to enjoin the sale of property under execution, in which defendants filed a cross-bill. From a judgment sustaining a demurrer to the cross-bill, and overruling a demurrer to the com-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaint, defendants appeal. Affirmed, and remanded for further proceedings.

James T. Harrison, for appellants. William Baldwin, for appellees.

SMITH, J. S. J. Hahn, by his last will and testament, devised certain property to appellees, in trust for his two sons, Moses A. Hahn and Aaron M. Hahn, share and share alike. Item 4 of this will is as follows: "The property hereinbefore devised and bequeathed to Rosa Hahn and Samuel J. Hahn as trustees for Moses A. Hahn and Aaron M. Hahn, said trustees are to hold, manage and dispose of, collecting the rents and incomes, changing the investments, selling, and conveying the whole or any portion thereof from time to time, and doing any and all things necessary for the prudent management of said property, and for the carrying out of the terms of said trust. Said trustees shall not be answerable to any court for the manner in which they discharge their duties as trustees, nor shall they give bond or security as such trustees. Said trust shall continue for ten years after the death of my wife, provided that said trust shall terminate at all events at the expiration of twenty years after my death. The net income of said property, after paying taxes, insurance, repairs and other expenses of keeping up the property, and the expenses of administering the trust, shall from year to year be paid, share and share alike per stirpes, to Moses A. Hahn or his heirs and Aaron M. Hahn or his heirs. At the time fixed for the termination of said trust the trustee shall settle the trust giving to each beneficiary his portion of the property. Should the trustees deem it for the best interest of said Moses A. Hahn and Aaron M. Hahn, said trustees may turn over to said Moses A. Hahn and Aaron M. Hahn a portion of the corpus of the trust property before the time arrives for the termination of the trust. Thereafter said trustees shall make their or his annual and final settlement with the beneficiaries of said trust in proportion to their interests in the corpus of the trust property."

Afterwards, Aaron M. Hahn becoming indebted to appellants, they sued at law and obtained judgments against him. Executions were issued on these judgments, and the sheriff of Lowndes county was proceeding to sell the interest of Aaron in certain property devised to appellees in trust as aforesaid. Thereupon appellees filed their bill in the court below, alleging that this property was not subject to sale under execution, and praying that same be enjoined. Appellants demurred thereto, which demurrer was overruled. Appellants then filed an answer and cross-bill, alleging that the income due said Aaron from said estate was sufficient to support him and pay all of his debts, and pray-

ing that appellees be decreed to give a full account of their management thereof, and they be ordered to pay off and discharge said judgments. This cross-bill was demurred to on the ground that it presented new matter not germane to the original bill, and the demurrer was sustained. The chancellor thereupon granted an appeal to this court to settle the principles of the cause.

The decree of the chancellor was correct in both instances. Section 2779 of the Code of 1906, which subjects equitable assets to sale under execution at law, has no application to an active, as distinguished from a dry and passive, trust. *Leigh v. Harrison*, 69 Miss. 936, 11 South. 604, 18 L. R. A. 49. Under the will quite a number of duties, with some discretion relative to a portion thereof, devolved upon the trustees. They were to hold and manage the property, collect the rents, sell any portion thereof, and change the form of the investment when necessary, and pay taxes, insurance, and the expense of repair and keeping up the property. "Amongst the active trusts had always been classed that to receive and pay over the profits to another, in which case the land must remain in the trustee to enable him to perform the trust. So where it is the testator's intention, or where it is necessary for the accomplishment of any object of his will, that the legal estate or possession of the land should remain in the trustee for the purpose of administering the trust. So, also, where the trustee is to dispose of the property, or pay the rents over to the cestui que trust, or apply them to his maintenance, or to make repairs, or to pay annuities, or to manage with the estate as he should think most for the interest of the cestui que trust, or to pay the rents to a married woman, or suffer her to receive them." *Barnett's Appeal*, 46 Pa. 392, 86 Am. Dec. 502. Aaron's interest in this property, therefore, was not subject to sale under execution.

The cross-bill introduced entirely new matter, neither necessary for appellant's defense nor in any way germane to the only matter involved in the original bill, to wit, the enjoining of the sale of this property under execution.

Affirmed, and remanded for further proceedings.

#### HUNNICUTT v. ALABAMA GREAT SOUTHERN R. CO. (No. 14,157.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

TRIAL (§ 252\*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an action against the company for the death of a telegraph operator, who was found by the track dead after a passenger train had stopped at the station in the nighttime, where there were no witnesses to his death and no evi-

dence as to how the accident happened, it was error to instruct on the theory that decedent went to sleep on the edge of the platform, so near the track as to be struck by the train.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

Appeal from Circuit Court, Lauderdale County; John L. Buckley, Judge.

Action by Z. W. Hunnicutt against the Alabama Great Southern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The appellant brought suit against the appellee for the death of his son, alleged to have been due to the negligent operation of the locomotive of the appellee. Deceased was a telegraph operator in the employ of the appellee at a small station on its line, and was on duty at night at the time of his death. There were no witnesses to the killing. The passenger train, with an electric headlight came into the station at a rapid rate of speed, and the deceased was found in a dying condition by the side of the track. The engineer and fireman testify that they did not see him on the track, and the manner of his death is a matter of conjecture. The case went to a jury under instructions of the court; instruction No. 7 being based upon the contributory negligence of deceased, on the theory that he had fallen asleep near the track and was struck by the approaching train. There was no proof on this point, or on any other point, tending to show how he met his death, as he was unconscious when discovered. There was a verdict for defendant, and from a judgment thereon an appeal was taken.

Ethridge & Ethridge, for appellant. Catchings & Catchings and Bozeman & Fewell, for appellee.

MAYES, J. The giving of the seventh instruction for defendant was error. There was no proof in the record that deceased, "for his own comfort or convenience, sat down or laid down on the edge of the depot platform, so close to the railroad track as to be struck by a passenger train, and remained in that position, by reason of being asleep or otherwise, until he was struck by the train." See case of Easley v. A. G. S. R. Co., 50 South. 491. We forbear further discussion of this case, in view of the fact that it must be again tried.

Reversed and remanded.

HOLMES v. FURTICK. (No. 14,195.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

Appeal from Chancery Court, Alcorn County; J. Q. Robbins, Chancellor.

Action between Anna Holmes, administratrix of the estate of B. W. Holmes, and J. D. Fur-

tick. From the judgment, Anna Holmes appeals. Affirmed.

Candler & Candler, for appellant. Lamb & Johnston, for appellee.

PER CURIAM. Affirmed.

SUTTON v. RAGAN et al. (No. 14,211.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

Appeal from Chancery Court, Warren County; J. L. Hicks, Chancellor.

Action by E. P. Sutton against S. C. Ragan and others. From the judgment, Sutton appeals. Affirmed.

Anderson, Voller & Foster, for appellant. Catchings & Catchings, for appellees.

PER CURIAM. Affirmed.

SIMON LOEB & BRO. v. FOSTER (No. 14,019.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

Appeal from Circuit Court, Lowndes County; J. L. Buckley, Judge.

Action between Simon Loeb & Bro. and Thomas R. Foster. From the judgment, Simon Loeb & Bro. appeal. Affirmed.

Wm. Baldwin, for appellants. James T. Harrison, for appellee.

PER CURIAM. Affirmed.

PATTON v. COCKE, Sheriff, et al. (No. 13,876.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

Appeal from Chancery Court, Tate County; I. T. Blount, Chancellor.

Action between W. L. Patton and W. G. Cocke, Sheriff, and others. From the judgment, Patton appeals. Affirmed.

Phil A. Rush, for appellant. J. F. Dean, for appellees.

PER CURIAM. Affirmed.

ELLIS v. MERIDIAN STAR PUB. CO. (No. 14,199.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between M. G. Ellis and the Meridian Star Publishing Company. From the judgment, Ellis appeals. Affirmed.

Bourdeaux & Venable, Amis & Dunn, and C. B. Cameron, for appellant. Ethridge & Ethridge and Witherspoon & Witherspoon, for appellee.

PER CURIAM. Affirmed.

FLETCHER v. HARRIS et al. (No. 14,219.)

(Supreme Court of Mississippi. Dec. 20, 1909.)

Appeal from Chancery Court, Sunflower County; M. E. Denton, Chancellor.

Action between E. C. Fletcher and W. D. Harris and E. A. Harris. From the judgment, Fletcher appeals. Affirmed.

Hugh C. Watson, for appellant. Percy, Moody & Percy, for appellees.

PER CURIAM. Affirmed.

**YAZOO & M. V. R. CO. v. CHRISTIAN (No. 14,182.)**

(Supreme Court of Mississippi. Dec. 20, 1909.)

Appeal from Circuit Court, Bolivar County; H. C. Watson, Special Judge.

Action by Earl D. Christian against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. L. Sivley, C. N. Burch, and Mayes & Longstreet, for appellant. R. B. Campbell, for appellee.

PER CURIAM. Affirmed.

**GUTHRIE v. YAZOO & M. V. R. CO. (No. 13,975.)**

(Supreme Court of Mississippi. Dec. 20, 1909.)

Appeal from Circuit Court, Leflore County; Sydney Smith, Judge.

Action by J. B. Guthrie against the Yazoo & Mississippi Valley Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

M. B. Grace, for appellant. Mayes & Longstreet, for appellee.

PER CURIAM. Affirmed.

(124 La.)

No. 17,709.

**STATE v. CHARLES.**

(Supreme Court of Louisiana. Nov. 15, 1909.)

**1. CRIMINAL LAW (§ 625\*)—PRESENT INSANITY—PROCEDURE.**

Where a plea of present insanity is made on behalf of the accused, the judge may appoint a commission of experts to inquire into the mental condition of the defendant, or may refer the issue to a jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1392-1398; Dec. Dig. § 625.\*]

**2. CRIMINAL LAW (§ 625\*) — INSANITY AT TRIAL—SEPARATE ISSUE—TRIAL—EFFECT.**

The arraignment of the accused and the fixing of the case for trial, after the appointment of such a commission, will not be set aside, where it appears that the commission subsequently reported that the accused was not insane.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 625.\*]

**3. CRIMINAL LAW (§ 421\*)—INSANITY—EVIDENCE.**

The insanity of a person whose mental condition is at issue cannot be proved by reputation in the family or by general reputation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 976; Dec. Dig. § 421.\*]

**4. CRIMINAL LAW (§ 825\*)—OBJECTIONS TO INSTRUCTIONS—REQUEST FOR SPECIAL INSTRUCTION.**

A general objection to a charge on the subject of insanity, accompanied by no request for special instruction, will not avail.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Neill, Judge.

Norbert Charles was convicted of murder, and appeals. Affirmed.

James R. Parkerson, for appellant. Walter Gulon, Atty. Gen., and T. M. Milling, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

LAND, J. The defendant, indicted for murder, was found guilty without capital punishment, and has appealed from a sentence of imprisonment at hard labor for life.

We note that defendant's counsel below has made no appearance in this court, and that the case has been submitted without argument on the brief filed in behalf of the prosecution.

After the indictment was found, the defendant by his attorney presented a petition to the court, representing that the accused was laboring under mental delusions and was absolutely irresponsible for his actions, and praying for the appointment of a "lunacy commission" to examine the accused and to report its findings to the court. The judge thereupon appointed a commission de lunatico inquirendo, composed of five practicing physicians.

The accused objected to an arraignment before the report of the commission had been made. This objection being overruled, the accused was arraigned, and pleaded not guilty. The accused also objected to the fixing of the case for trial on the same ground, but his objection was overruled.

Counsel for defendant excepted to the above rulings of the court and reserved a bill of exception.

Before the day fixed for the trial, three out of the four physicians serving on the commission reported that the accused was sane. The fourth member reported that the accused was insane.

The only defense urged before the jury was that the accused was insane at the time of commission of the homicide.

The judge in his per curiam says that the appointment of the commission was for the purpose of enabling its members to be fully prepared and qualified to testify before the jury upon the defense of insanity, and that counsel for the accused was informed of that purpose, and told by the court that the question of insanity vel non would be submitted to the jury.

As the commission reported that the accused was sane, he was not prejudiced by the rulings complained of in the bill of exception.

Insanity as a means of defense must be urged before the jury on the trial of the merits of the case. Insanity arising after the commission of crime merely operates a stay of proceedings. The court may have the issue of present insanity tried before a jury, or may appoint a commission of experts to examine into, determine, and report the mental condition of the accused. *State ex rel. Chandler v. Judge*, 45 La. Ann. 696, 12 South. 884; *State ex rel. Armstrong v. Judge*, 48 La. Ann. 503, 19 South. 475. If present insanity be suggested during the progress of the trial, the court may let the trial proceed and submit the question of present insanity, with that of guilt or innocence, together to the jury. *State v. Reed*, 41 La. Ann. 583, 7 South. 132.

In the case at bar the report of the commission disposed of the plea of present insanity. Insanity as a defense was urged before the jury, and the experts and other witnesses were examined as to the mental condition of the accused.

The appointment of the commission did not stay further proceedings in the case. The judge might have disposed of the suggestion of present insanity by referring that issue to the jury.

The exception to the overruling of defendant's motion for a continuance to enable his counsel to prepare the case and summon witnesses is without merit. Six days intervened between the day of setting the cause and the day of trial. The only defense was a plea of insanity, and on the trial 22 witnesses, doctors and laymen, testified on behalf of the defendant.

A witness on the stand was asked whether or not the accused was generally represented or notoriously regarded as an insane person, or a weak-minded or idiotic negro. This question was objected to by the prosecution, and the objection was sustained. Defendant excepted to the ruling of the court.

The ruling was correct. It seems to be well settled that the insanity of a person whose mental condition is at issue cannot be proved by reputation in the family or by general reputation. 16 Am. & Eng. Ency. Law (2d Ed.) p. 612. In the language of the Supreme Court of Georgia:

"By this kind of evidence a fool may be proved a wise man, and a philosopher a fool." *Foster v. Brooks*, 6 Ga. 292.

A doctor was asked whether, in his opinion, "the authorities of the insane asylum would detain him [defendant] in the insane asylum as an insane person."

This question was objected to as immaterial, and the court sustained the objection, but

allowed the witness to express his opinion "whether the accused is or is not a proper subject to be kept in an insane asylum." The defendant excepted. We see no error in the ruling of the court.

Defendant excepted to the charge on the subject of insanity, but did not object to any particular portions thereof, or request any special instructions. A general objection of this kind to a charge purporting to cover the whole law applicable to the defense of insanity cannot avail. *Marr's Criminal Jurisprudence of La.* p. 799.

We have considered all the bills of exception in the record, and find no reversible error in any of them.

It is therefore ordered that the verdict and sentence below be affirmed.

(124 La.)

No. 17,720.

### STATE v. LABRY.

(Supreme Court of Louisiana. Nov. 15, 1909.)

#### 1. HOMICIDE (§ 166\*)—EVIDENCE—MOTIVE.

Evidence to show the motive of the deceased in going to the place where the homicide occurred, and that he went there on a peaceable mission, and not to seek a difficulty, was admissible. Facts necessary to be known to explain a relevant fact, or which support an inference arising from that fact, are admissible. *State v. Rideau*, 116 La. 246, 40 South. 691.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

#### 2. CRIMINAL LAW (§ 695\*)—OBJECTIONS TO EVIDENCE—IRRELEVANCY.

An objection of irrelevancy is a very weak objection. *State v. Fontenot*, 48 La. Ann. 307, 19 South. 111; *State v. Primeaux*, 104 La. 365, 29 South. 110.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1633-1638; Dec. Dig. § 695.\*]

#### 3. CRIMINAL LAW (§ 957\*)—VERDICT—IMPEACHMENT BY JURY.

A jurymen, who testified on his voir dire that he was a resident of the parish where the case was tried, cannot be called on to impeach the verdict of the jury of which he was a member by testifying subsequently that he was not a resident. *State v. Nash*, 45 La. Ann. 1141, 13 South. 732, 734; *State v. Comeau*, 48 La. Ann. 249, 19 South. 130.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.\*]

(Syllabus by the Court.)

Appeal from Twenty-First Judicial District Court, Parish of Pointe Coupee; Louis B. Claiborne, Judge.

James Labry was convicted of manslaughter, and appeals. Affirmed.

Albin Provosty, Hewitt Bouanchaud, and George Ross Kearney, for appellant. Walter Gulon, Atty. Gen., Hubert N. Wax, Acting Dist. Atty., and Ferd C. Claiborne (R. G. Pleasant, of counsel), for the State.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



## Statement of the Case.

NICHOLLS, J. The case was before this court under circumstances which will be found stated in the printed report of the same in 120 La. 434, 45 South. 382. By judgment of this court the action of the trial court, after it had granted a new trial, in permitting the defendant, who had been convicted of murder, to withdraw his plea of "not guilty" and enter a plea of "guilty of manslaughter," and on said plea sentencing him to serve six years at hard labor in the penitentiary, was set aside, and also the verdict and sentence, and the cause remanded for further proceedings according to law.

The cause having been reinstated in the district court, defendant was placed on trial again. The second trial resulted in the jury returning a verdict of guilty of manslaughter. The court thereupon sentenced him to imprisonment in the state penitentiary for five years.

Defendant appeals from the verdict of the jury and the judgment of the court thereon.

We find three bills of exceptions in the record. The third is to the refusal of the court to grant a new trial. The grounds upon which the new trial was asked for were:

"(1) That the verdict was contrary to the law and the evidence.

"(2) That, pending its deliberations, the jury was permitted to read newspapers containing accounts and reports of the trial, and of the evidence adduced, which accounts and reports of the trial and of the evidence adduced were inaccurate and prejudicial to the accused.

"(3) That one of the jurors who tried defendant was incompetent to serve on the jury by reason of nonresidence."

The bill recites: That on the 26th day of the month of May, 1909, the said motion for a new trial was tried, and all the testimony introduced on the trial thereof was reduced to writing, and a certified copy thereof is attached hereto and made a part of this bill of exceptions.

That the court overruled the said motion for a new trial, and to the court's ruling counsel for defendant excepted, and now tenders this bill of exceptions for signature.

The court, in signing the bill, stated that his reasons for refusing the new trial were set forth at the foot of the stenographer's report of the testimony taken on the trial of the motion for a new trial annexed.

In the second bill, after reciting that defendant had applied for a new trial and stating the ground thereof, and that it had been overruled, defendant averred that on the trial of said motion S. P. Lacour, the juror whose incompetency to serve was made one of the grounds for a new trial, was placed on the stand as a witness by defendant in support of the allegation that, when selected on the jury, he had not previously been a resident for one year in the parish of Pointe Coupee, as required by law; that S. P. Lacour was the only witness obtainable by whom defendant could prove the exact date

of his removal to and acquisition of a domicile in the parish of Pointe Coupee; that, if allowed to testify, said Lacour would have sworn that for several years he had resided in the parish of Avoyelles, at the town of Plaquemine, where he was engaged in business as a merchant; that on April 20, 1908, he had visited the parish of Pointe Coupee, with the view of making arrangements to locate at the town of Batchelor, in said parish; but that he did not permanently locate in the parish of Pointe Coupee and acquire a domicile there until the month of July, 1909.

That, when placed upon the stand, said S. P. Lacour was asked the following question by counsel for defendant:

"When did you bring your family to Pointe Coupee? You lived in Avoyelles, prior to moving to Pointe Coupee, didn't you?"

To this question the district attorney objected. The court sustained the objection. To the court's ruling counsel for defendant excepted and tendered his bill of exception to the court.

The judge signed the bill of exception, assigning as reasons for his ruling that the juror, S. P. Lacour, when examined on his voir dire, had testified positively that he had been a resident of the parish of Pointe Coupee from the 20th day of April, 1909, and that he could not now be heard to contradict said testimony, and that as a juror he could not be heard to give testimony which would tend to impeach the verdict of the jury on which he had served.

The first bill of exception recites that on the trial of the case the state placed on the stand Dr. E. W. Singletary, who testified that, four or five days previous to the killing of the deceased, Bouis, he had sent a message to said Bouis by Mary Jane Bradford, a negro woman, telling said Bouis to call and see him, and Mary Jane Bradford having testified that she had delivered said message to said Bouis on a Saturday, and that said Bouis had come to Morganza, the scene of the killing, on the Monday following; the purpose of said evidence as announced by the state being to show that said Bouis had come to Morganza on a peaceful mission.

R. M. Scott, a witness for the state, who was at that time agent of the railroad at Morganza, was asked the following questions, to which he made the following answers:

"Q. You remember the day Bouis was killed?

"A. Well, I don't remember the exact date. I remember about the time, about 2½ years ago.

"Q. It is alleged in the indictment in March, 1907?

"A. Something like that.

"Q. You were in charge of the depot at Morganza then?

"A. Yes, sir.

"Q. Wish you would state whether or not you saw George Bouis on that day?

"A. Yes, sir; some time in the afternoon, down around 4 or 5 o'clock, he came into the

office and delivered a package for shipment by express.

"Q. Do you know who the package was being expressed to?"

To which question the defense objected, on the ground that the testimony sought to be adduced was immaterial and irrelevant, and could have no bearing on the question of whether or not Bouis' mission in Morganza was peaceful, the state having already shown by several witnesses that he had come there in obedience to a summons by Dr. Singletary; further, that the question asked and the answer sought to be elicited were damaging to the accused, being calculated to prejudice the minds of the jury against him; that the contents of the package and the purpose for which it was being expressed, the person to whom and the person by whom said package was being expressed, could possibly have no bearing on the real issue involved in the case.

Which objection was overruled by the court, and the question permitted to be answered.

To which ruling of the court defendant excepted, and now tenders the present bill of exception for signature. This bill was submitted to the acting district attorney, who adds the following statement before signing:

"The evidence of witness R. M. Scott, like that of witness Dr. E. W. Singletary, was extremely material and relevant, and had a very important bearing of the case; both showing that the deceased, Bouis, came to the town of Morganza, and the scene of the killing on business errands and a peaceful mission—to the depot at Morganza, a few hundred feet from where he was killed, and where R. M. Scott was agent, to deliver an express package for the wife of his employer, after which he immediately drove to Dr. Singletary's drug store (where he was killed) in response to the message delivered him by Mary Jane Bradford from Dr. Singletary to call to see him on business.

"The prosecution has no recollection that the inquiry of witness Scott touched on the contents of the express package, nor the purpose for which it was expressed, nor does the note of testimony recited in the bill disclose such testimony; but, as we know outside the record that the package contained dry goods which were being returned by Mrs. Chas. Dawson, the wife of the employer of deceased, to a dry goods establishment in Baton Rouge, we fail to see how the contents of the package, or to who it was being expressed, or the purpose for which it was expressed, could damage defendant, or in any way prejudice the jury against him. The object of the inquiry was limited to show, and it showed, this and nothing else: That deceased was in Morganza, at the depot, on a business mission for those who employed him, and a few moments later was in front of Dr. Singletary's drug store (where he was killed by defendant) in response to a message from that gentleman to call at his place of business, as he wanted to see him."

#### Opinion.

There is no force in the complaint made in the first bill of exception. We fail to see wherein defendant was injured by the action of the court. The sole object of the question was to show that at the time of the homi-

cide deceased was not seeking a difficulty, but was on a peaceful mission to Morganza, and to account for his being at that place. In *State v. Rideau*, 116 La. 246, 40 South. 691, it was held that evidence to show the motive with which deceased was entering the room where he was shot was admissible, and that facts necessary to be known to explain a relevant fact, or which support an inference raised by such fact, were admissible. An objection of irrelevancy is regarded as the weakest of all objections. *State v. Fontenot*, 48 La. Ann. 307, 19 South. 111; *State v. Primeaux*, 104 La. 365, 29 South. 110.

The second and third bills can be disposed of together.

The first complaint made in the motion for a new trial was that the verdict was contrary to the law and the evidence. That ground of complaint calls for no particular discussion. *Marr's Criminal Jurisprudence*, p. 843; *State v. Nelson*, 3 La. Ann. 497; *State v. Crawford*, 32 La. Ann. 526; *State v. Hauser*, 112 La. 313, 36 South. 396; *State v. Apfel*, 124 La. 649, 50 South. 613.

The second ground, that the jury was permitted to read newspapers containing accounts and reports of the trial and of the evidence adduced which were inaccurate and prejudicial to the accused, is not only not sustained, but is disproved, by the evidence. The third ground, that Lacour, one of the jury, was incompetent by reason of non-residence, is also not sustained by the evidence. The defense placed Lacour himself on the stand to establish that fact; but the court refused to allow him to give evidence on the subject. The judge declares with reference to the incompetency of this juror:

"That Mr. Lacour was examined on his voir dire, and ample opportunity was given to the defense. After the court questioned him, he could have been examined further by either side. The court would have granted the fullest investigation. It was to the knowledge of the judge himself that Mr. Lacour had been an old resident of Pointe Coupee; that he moved from Pointe Coupee to Avozelles. Mr. Lacour testified he had come back some time in April. When pushed to fix the time, he fixed it definitely on the 20th of April—not later than the 20th of April. He came back to Pointe Coupee with the intention of remaining there. No testimony was adduced to disprove that fact. The testimony of Mr. Landau and others did not disprove that fact."

The testimony referred to by the judge went no further than testifying as to when they had seen him at the particular place in Pointe Coupee where his store was opened. The court committed no error in refusing to permit Mr. Lacour to testify.

The objections urged to his doing so were well grounded. Jurymen are not permitted to impeach their own verdict. *State v. Comeau*, 48 La. Ann. 249, 19 South. 130; *State v. Richmond*, 42 La. Ann. 299, 7 South. 459; *State v. Price*, 37 La. Ann. 218; *State v. McCarthy*, 44 La. Ann. 323, 10 South. 673; *State*

v. Nash, 45 La. Ann. 1141, 1145, 13 South. 732, 734.

We find no reason for setting aside the verdict and judgment. They are hereby affirmed.

PROVOSTY, J., recused.

(124 La.)

No. 17,727.

### Succession of MORGAN.

(Supreme Court of Louisiana. Nov. 2, 1909.  
Rehearing Denied Nov. 29, 1909.)

#### NOTARIES (§ 3\*)—COMPENSATION—TAKING INVENTORY IN SUCCESSION.

Act No. 101, p. 161, of 1870, fixing the fees of notaries public throughout the state of Louisiana, was not repealed by Act No. 203, p. 485, of 1898, and is still in force. It follows that the charge by a notary of a round sum for taking an inventory in a succession is clearly illegal and contrary to the fee bill.

[Ed. Note.—For other cases, see *Notaries*, Dec. Dig. § 3.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

The administrator of the succession of Maria Louis Morgan, widow of the late Charles A. Whitney, filed an account, in which he allowed and proposed to pay W. Morgan Gurley, a notary public, a certain fee for taking an inventory. Gurley opposed the account on the ground that the allowance was inadequate, and, his opposition having been dismissed, he appeals. Affirmed.

McCloskey & Benedict, for appellant. Hall & Monroe, for appellee.

#### On Opposition of W. M. Gurley to Account of Administrator.

LAND, J. The administrator of the succession of Mrs. Whitney filed an account, in which he allowed and proposed to pay "W. Morgan Gurley, notary public, for inventory, \$500."

Mr. Gurley opposed the account on the ground that the allowance of \$500 was wholly inadequate for the services rendered by him as notary in a succession involving approximately \$1,500,000, and averred that a fair, reasonable, and just compensation for the services rendered was \$2,250, and prayed that the account be amended by placing him thereon as a privileged creditor in said sum.

Judgment was rendered, dismissing the opposition and homologating the account as rendered. The opponent has appealed.

By Act No. 101, p. 161, of 1870, the General Assembly fixed the fees of clerks, sheriffs, recorders, and notaries public throughout the state of Louisiana, and provided forfeiture and penalties for overcharging or failure to

perform their duties. Section 10 of said act fixed the fees of recorders and notaries, and declared:

"That they shall not be entitled to charge for any other services they may perform or be required to perform as recorders and notaries public."

The fees fixed for inventories are as follows:

"For making inventories of successions or other property out of office, fifty cents per hour, provided that no more than twelve hours per day shall be charged, together with twenty cents per hundred words for the procès verbal of the inventory and recording it, and twenty-five cents for the certificates and seal thereon; for making inventories in office there shall only be charged twenty cents for every hundred words for taking and recording the same and twenty-five cents for the certificate and seal."

Opponent, however, contends that Act No. 101, p. 161, of 1870, was repealed by Act No. 203, p. 485, of 1898, entitled:

"An act to provide a general fee bill or bill of costs regulating and fixing the fees and compensation allowed sheriffs, clerks, and recorders, justices of the peace, constables and coroners in all civil matters, and to provide for the collection of the same throughout the state of Louisiana (the parish of Orleans excepted) as required by article 129 of the Constitution of 1898, and fixing the fees and compensation of sheriffs throughout the state (the parish of Orleans excepted) in criminal matters."

Article 129 of the Constitution of 1898 reads as follows:

"Art. 129. The General Assembly, at its first session after this Constitution is adopted, shall provide a general fee bill or bill of costs, regulating and fixing the fees and compensation allowed sheriffs, clerks and recorders, justices of the peace, constables, and coroners, in all civil matters."

Act No. 203, p. 485, of 1898 is wholly silent as to the fees of notaries, both in the title and in the body of the statute, and the parish of Orleans is excepted, not only in the title, but in every section fixing fees and costs.

Section 12 of Act No. 203, p. 494, of 1898, reads as follows:

"Sec. 12. Be it further enacted, etc., that all other laws (not embraced in this act) on the same subject-matter be and the same are hereby repealed, and this act shall take effect from and after its passage."

The first question is whether this clause repealed all other laws of the state on the subject-matter of fees and costs. If the title had read, "to provide a general fee bill or bill of costs," it might be well argued that the subject-matter covered all fees and costs. But the title restricts the scope of the statute to a fee bill or bill of costs "regulating and fixing the fees and compensation allowed" sheriffs, clerks and recorders, justices of the peace, constables and coroners, out-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

side of the parish of Orleans. Hence the act, on its face does not embrace all officers entitled to fees under the laws of the state, and has no application to officers of any kind in the parish of Orleans.

In State ex rel. Barrow v. Ogden, Clerk, 50 La. Ann. 982, 24 South. 593, this court held that Act No. 104, p. 133, of 1884, relating to the fees of shorthand reporters, was not repealed by Act No. 203, p. 485, of 1898. This decision was based on the theory that the subject-matter of the statutes was not a general fixing of fees and costs, but the compensation of particular officers.

The act contains no reference to notaries public, district attorneys, and some other officers in the country parishes. Did the Legislature intend to starve such officials out of office by depriving them of all fees and emoluments? Such an intent is hardly presumable under any circumstances that can be imagined.

We concur with the learned counsel for the opponent in the view that Act No. 101, p. 161, of 1870, is antiquated and defective in many respects.

But the remedy for such defects in the statute must be applied by the legislative department of the government.

While counsel for defendant argues, or rather intimates, that Act No. 101, p. 161, of 1870, was never intended to apply to the parish of Orleans, the statute reads "throughout the state," and there is but one construction that can be placed on such plain English.

The act of 1870 was enforced in Succession of Caballero, 25 La. Ann. 646, and in Succession of Harris, 29 La. Ann. 743. In Printing Co. v. Furniture Concern, 108 La. 262, 32 South. 469, the act was not cited as bearing on the issues.

A charge for a round sum in a notary's account for taking an inventory is illegal and contrary to the tariff in succession matters. Robouam's Heirs v. Robouam's Ex'r, 12 La. 73. See, also, Walton v. Creditors, 3 Rob. (La.) 438; State v. Atchafalaya Co., 7 Rob. (La.) 198; Hawford v. Adler, 12 La. Ann. 241.

We are informed by the record that the statute in question has been uniformly disregarded by notaries public of the parish of Orleans, and that two of our learned Brothers of the civil district court have held that it is no longer in force.

We are not able to concur in this view, and think that the best way to hasten the modification or repeal of a defective law is to enforce it strictly.

The administrator has not prayed for an amendment of the judgment, and we are therefore relieved of the task of calculating to what extent (if any) the amount allowed exceeds the fee bill.

Judgment affirmed.

(124 La.)

No. 17,501.

**UNION FERRY CO. v. SOUTHERN IMPROVEMENT & FERRY CO.**

(Supreme Court of Louisiana. Oct. 18, 1909.  
Rehearing Denied Nov. 29, 1909.)

**1. CONTRACTS (§ 162\*)—CONSTRUCTION OF CONFLICTING SENTENCES.**

Where, in a stipulation contained in a contract, there are two sentences which in some respects appear to conflict, they should be construed together and with reference to the stipulation as a whole, and that interpretation should be placed on them which does least violence to the rules and presumptions which are ordinarily applied with respect to conduct of individuals dealing with each other.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 744; Dec. Dig. § 162.\*]

**2. CONTRACTS (§ 162\*)—CONSTRUCTION—CONFLICTING SENTENCES.**

The city of New Orleans having bound itself to provide for the payment to the retiring lessee of the Canal Street ferry for certain improvements, and having made a new lease containing a stipulation that the new lessee should indemnify the retiring lessee in accordance with the terms of his lease, a subsequent sentence in the same stipulation, specifying certain things to be paid for, is held not to impose upon the new lessee the obligation of paying the retiring lessee for a sidewalk and pavement laid in a public place, and not included among those things for which the retiring lessee was entitled to be paid under his lease.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 744; Dec. Dig. § 162.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George H. Thèard, Judge.

Action by the Union Ferry Company against the Southern Improvement & Ferry Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

James C. Henriques, for appellant. Frank E. Rainold, for appellee.

**Statement of the Case.**

MONROE, J. Plaintiff sues for the recovery of the sum of \$4,350, alleged to be due by defendant as the value of a certain Shillinger (or artificial stone) sidewalk, extending from the depot of the Louisville & Nashville Railroad Company to the Canal Street ferry landing, and certain square block paving, adjacent to the ferry house at said landing, under a contract whereby defendant acquired from the city of New Orleans the franchise of the Canal Street ferry for a period of 15 years from January 1, 1907. The defense is, in substance, that no obligation to pay for said sidewalk and paving is imposed upon defendant by the contract relied on.

It appears that Thomas Pickles was the lessee of the Canal Street ferry for a term of 10 years, ending December 31, 1886, and that the lease was again adjudicated to him for a like term ending December 31, 1896,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

under an ordinance which contained the following, among other, provisions, to wit:

"Art. 10. That the lessee or his assigns shall pave, within nine months after the promulgation of this ordinance, with square granite block paving, the prolongation of Canal Street from the present pavement of the depot of the Louisville & Nashville Railroad to the ferry landing, the width (including pathways) to be not less than 30 feet, and all of which to be done according to plans and specifications to be furnished by the city surveyor; the said lessee, or his assigns, also binding himself to keep said pavement in perfect repair during the continuance of this privilege.

"Art. 11. That said Thomas Pickles, his successors and assigns, shall and will, on the last day of the term of his present leases, respectively, or of the additional time or lease hereby granted, peaceably and quietly, leave, surrender and yield up the said ferries and the premises and the ferry property and boats, respectively, with the rights, privileges and appurtenances thereto belonging, with the bulkheads, piers, docks, floats, bridges and other fixtures and improvements which may have been erected for the use of said ferries, in good order and condition, into the possession of said city, its successors or assigns, without delay; and said city does, for itself, its successors and assigns, covenant and agree to and with said Pickles, his successors and assigns, and upon the surrender and yielding up of said premises, as hereinbefore provided, said city shall purchase, or cause to be purchased by the next lessee or lessees, of said Pickles, his successors or assigns, at a fair appraised valuation, the boats, buildings and improvements, wharves, docks, bridges and floats, and other property of said Pickles, his successors or assigns, used upon, or for, said ferries, respectively, and actually necessary for the purposes of said respective ferries, said valuation to be fixed by two appraisers, one to be appointed by said Pickles and one by the city, or the next lessee or lessees; and, in case of disagreement of said two appraisers, they, said appraisers, shall appoint an umpire, who shall decide between them; and the provisions and rights in this section set out, stipulated, or granted shall be substituted and taken as repealing, annulling and avoiding all conditions, terms and stipulations in the said existing leases, or contained in any ordinance or resolution of the city council on the subject-matter of the destination or disposition of the improvements, boats, buildings, wharves, bridges, floats and property of said Pickles, his assigns and successors, connected with said ferries, or any of them."

During the term of the lease under this ordinance, to wit, in 1892, the city passed an ordinance (No. 6,610, C. S.), which, after various recitals, proceeds as follows:

"That permission is hereby granted to Capt. Thomas Pickles to move, at his own expense, the ferry landing from its present position to the prolongation of the north side of Canal street, using the same ground at this point as the present ferry lease embraces. \* \* \* That the said Thomas Pickles, his heirs or assigns, shall make this change at once, \* \* \* and that he shall, at his own expense, construct a new, two-story, ferry house, \* \* \* and take up the present paved roadway leading to the ferry, and lay it between the new ferry landing and the roadway built by the wharf lessees at the head of Canal street, \* \* \* and that the said Thomas Pickles shall also, in addition to the above, remove the present banquette, leading to the present ferry landing, and shall make a banquette, 18 feet wide, on the prolongation of the north side of Canal street, all the way from the depot of the Louisville & Nashville Railroad to the said ferry house, the banquette to

be paved, throughout its entire length, with Shillinger. \* \* \* That the entire expense of the improvement proposed shall be paid by the lessee of the Canal Street ferry."

The city engineer, under date May 18, 1893, certified that, with certain exceptions, the work required by the ordinance thus quoted had been done; his certificate, so far as the paving and banqueting were concerned, reading as follows:

"The old roadway leading to the ferry landing has been removed, and the stone from this portion relaid in front of the ferry house, according to the directions of this department. There has been laid in front of the new ferry house more pavement than was contained in the old roadway. There has been laid a Shillinger banquette, 18 feet wide, from the Louisville & Nashville Railroad depot to the rock road on the levee, with a substantial curbing on either side, all according to the direction of this department."

Some time before the expiration of the lease last above mentioned the ferry privilege was again adjudicated to Capt. Pickles for a term of ten years, ending December 31, 1906, and a lease was entered into which contained the following stipulation, viz.:

"The purchaser of this franchise shall, on the last day of this lease, or at the termination of any extended time, peaceably leave, surrender and yield the said ferries, as also the ferry property and boats and improvements, with all the rights, privileges and appurtenances thereto belonging, and other fixtures and improvements which may have been erected for the use of said ferries and the proper maintaining of same in good order and condition, into the possession of the city of New Orleans, or to such party or parties to whom may be adjudicated the privilege of continuing the ferries; shall purchase all betterments and improvements, wharves, docks, floats, pavements, ferry houses and other property of the retiring lessee, which was used upon and for ferries and actually necessary for the purpose of operating said ferries, at a fair appraised valuation, to be fixed by two appraisers, one to be appointed by the said lessee and one to be appointed by the lessor. In case of disagreement of said two appraisers, the said appraisers shall appoint an umpire, who shall decide between them, and the finding of the majority of said board of appraisers shall be binding."

At some time prior to the expiration of the lease thus referred to, Capt. Pickles died, and the defendant now before the court became the assignee of the lease, and at a later date, in view of its prospective expiration, the city advertised a new lease, to begin January 1, 1907; the advertisement containing the following stipulation, which, defendant having become the lessee, was incorporated in, and forms part of, the contract under which it (defendant) now operates the ferry, to wit:

"The purchaser shall purchase from the Union Ferry Company all such property and improvements as are now in use for the purpose of operating such ferry system, and shall indemnify said company, in accordance with the terms of the lease between the city of New Orleans and Thomas Pickles and his assigns, the Union Ferry Company, at a valuation to be fixed by the appraisers, as provided for in the

existing lease. Said appraisers shall be appointed immediately after the acceptance of the bid by the leasing corporation, and they shall complete their appraisal within five (5) days, and the accepted bidder shall pay, in cash, to the Union Ferry Company the valuation fixed by said appraisers upon the boats, buildings, landings, approaches, improvements, docks, bridges, gangways, piling, pontoons, pavements, and all other improvements and betterments constructed by said Thomas Pickles, or his assigns, the Union Ferry Company.

"This cash payment to be made upon delivery by the Union Ferry Company to said accepted purchaser, and said accepted purchaser shall not be entitled to said delivery until he shall have made said cash payment, and not until the expiration of the present lease—viz., December 31, 1906."

An appraisal was made, in accordance with the foregoing stipulation, and thereafter, by notarial contract, the Union Ferry Company sold to defendant the following described property, to wit:

"(1) The steam ferryboat Thomas Pickles, her tackle and apparel.

"(2) The steam ferryboat A. M. Halliday, her tackle and apparel.

"(3) The steam ferryboat Josie, her tackle and apparel. \* \* \*

"(4) The Canal Street ferry house, situated at the head of Canal street, with the wagon and passenger gangways, the Canal Street ferry landings, pilings, and bulkheads, pontoon, and all the appurtenances of said bridges and landings.

"(5) The Algiers ferry house, situated at the head of Morgan street, or thereabouts, together with the wagon and passenger gangways, pilings, and pontoons, the betterment of the batture, including the pavement, and the two ramps connected with said ferry landings, all appurtenances of the wagon and passenger gangways of both ferry landings, including the hoists, screws, and chains are included in this sale."

The consideration of the sale of the property described was \$109,000 cash, and the act of sale contains the following recitals and agreements concerning the property thus described and sold and that here in dispute, to wit:

"This sale includes everything contained in detail list, excepting the pavement on Canal street side, which list was signed by Warren Johnson, umpire, and dated 31st December, 1906, a copy whereof, duly paraphrased by me, notary, is annexed for reference. This sale does not, however, include pavement and curbing on Canal street side, which are made the subject of further stipulation hereafter. \* \* \*

"The appraisalment of the Canal Street ferry property embraces, besides the property connected with the Canal Street ferry system, included in this sale, the following described pavements, to wit:

"(1) The cement walk, reaching from the Louisville & Nashville depot to the ferry house at the head of Canal street.

"(2) The granite block pavement in front of said ferry house and the pavement leading from the Louisville & Nashville depot, parallel with the cement walk, and the curbing now existing in connection with the curbing and the said walk.

"The appraisalment of said pavement, as made by said board of appraisers, is the sum of \$4,350. Now, whereas, it is contended by the Union Ferry Company that the Southern Improvement & Ferry Company is under obliga-

tion to purchase said pavements from the Union Ferry Company under the terms of the contracts under which the Union Ferry Company now holds as owner and under the terms of the contract between the city of New Orleans and the Southern Improvement & Ferry Company; \* \* \* and whereas, the Southern Improvement & Ferry Company contends that it is under no obligation whatsoever to purchase said pavements: Therefore it is agreed between the parties that the amount of the appraised value of said pavements, viz., the sum of \$4,350, shall be deposited in the Commercial Germania Trust & Savings Bank, or any other bank paying interest, there to remain until the question between the said parties can be determined by judicial proceedings, neither party to this contract waiving any of its rights by virtue of this agreement."

There was some little oral testimony adduced, from which it appears that the Shillinger "banquette" here in question is, in effect, a continuation of the banquette of Canal street, across the levee (which is a public landing) to the river, or, rather, to that portion of the levee, on the river bank, which is adjacent to the ferry house, and which is covered with the square block pavement, also in controversy.

#### Opinion.

If the stipulation in the present lease between the city of New Orleans and defendant in unambiguous terms required defendant to pay plaintiff for the sidewalk and pavement here in dispute, it might very well be argued (as, in fact, it is argued) that it is a matter of no concern to defendant whether or not the city was bound, under the preceding lease, to provide for such payment. But, whatever may be the first impression, a careful consideration of the language used in the stipulation in question excites a serious doubt whether it was the intention that the city should make any further provision with respect to the reimbursement of the preceding lessee than was absolutely demanded by the terms of the preceding lease.

The stipulation (in so far as it bears upon the question at issue) is composed of two sentences, the first of which reads:

"The purchaser shall purchase from the Union Ferry Company all such property and improvements as are now in use for the purpose of operating such ferry system, and shall indemnify said company, in accordance with the terms of the lease between the city of New Orleans and Thomas Pickles, and his assigns, the Union Ferry Company, at a valuation to be fixed by the appraisers, as provided for in the existing lease."

This sentence, according to our understanding of the language, means that the purchaser of the new lease is to purchase the property belonging to the old lessee and used for the purpose of operating the ferry, and that he shall indemnify the old lessee in accordance with the terms of the then existing lease. The remaining sentence reads:

"Said appraisers shall be appointed immediately after the acceptance of the bid by the leasing corporation, and they shall complete

their appraisement within five days, and the accepted bidder shall pay, in cash, to the Union Ferry Company the valuation fixed by said appraisers upon the boats, buildings, landings, approaches, improvements, docks, bridges, gangways, pilings, pontoons, pavements and all other improvements and betterments constructed by said Thomas Pickles, or his assigns, the Union Ferry Company."

Considering this sentence merely as part of the lease, but without reference to the sentence which precedes it, and it appears to us to mean that the "purchaser" (defendant) is to pay to the Union Ferry Company the valuation placed by the appraisers upon the different items specified, including improvements which had been constructed by the preceding lessee, in his capacity as such, for the use or improvement of the ferry; and this, whether such payment was provided for by the preceding lease or not, with the exception, however, that we do not think it can, reasonably, be held to include any work or improvements of which the city may have become the absolute owner, under a contract with Pickles antedating the preceding lease and not made in connection therewith for the purposes thereof.

But the first and second sentences are parts of the same stipulation, in the same contract, and, in order to arrive at the meaning of the stipulation as a whole, we must consider the sentences together, and in their relation to the contract. Bearing this in mind, we are bound to assume that the city was aware of the fact that there would, necessarily, be deducted from the price, inuring to it from the sale of the new lease, whatever amount might be due to the lessee under the then existing lease and according to the terms of that contract. We are also bound to assume that the city knew that it was under no obligation to sell the new lease on terms which would diminish the proportion of the price inuring to it beyond the requirements of the then existing lease; in other words, that it was not called on to provide for the payment, to the retiring lessee, from the price of the new lease, of anything more than his contract called for, and that, just in proportion as such provision might be made, the amount inuring to it would be reduced. We then ask ourselves the question whether, after distinctly providing, in the first sentence of the stipulation now under consideration, that the retiring lessee should be paid, according to his contract, it was the intention, by the second sentence, to make provision for a further payment, thereby making him a donation of an amount which, in the end is deducted from that which the city would otherwise receive? And we are constrained to answer the question in the negative, and to hold that the specification contained in the second sentence of the stipulation must be construed with reference to the general limitation contained in the first sentence, whereby the retiring lessee is to be paid

for his property and improvements in accordance with the terms of his contract, and not otherwise. Referring to that contract, we find that it was therein provided that the purchaser of the succeeding lease should purchase all betterments and improvements, wharves, docks, floats, pavements, ferry houses, and other property of the retiring lessee which were used upon and for ferries, and actually necessary for the purpose of operating such ferries, and the question is whether, under such provision, the city was bound to provide for the reimbursement of the cost of the sidewalk and pavement here in question, which had been laid under pre-existing contracts and before the then existing lease was entered into. It is true that they were laid by Capt. Pickles, the holder of the then existing lease; but they were not laid under that lease, and it does not follow that, because he laid them (under other contracts) they thereby became "his property," or that they were "actually necessary for the purpose of operating said ferries."

The fact that, under his lease, he was entitled to be paid for such improvements as were his property and were used upon and for ferries, and actually necessary for the purposes of operating said ferries, carries with it the limitation that he was not entitled to be paid for improvements which were not his property, were not used upon and for the ferry, and were not actually necessary for the operation of the same.

It would be a very unusual situation which would authorize the maintenance of the view that a sidewalk or pavement, laid in a public street or place, under a contract with a municipality, remained, under any circumstances, the property of the contractor by whom laid, and we do not find the situation resulting from the original lease to Pickles (beginning in 1886) and from the modification of that lease, as authorized by Ordinance 6,610, C. S. (of August, 1892), to be of that character. Under the original lease, Pickles was required to pave "the prolongation of Canal street, from the \* \* \* depot to the ferry landing, the width (including pathways) to be not less than 30 feet"; and it is to be presumed that he did so. And it was provided that, upon the surrender of the ferry at the expiration of the lease, the city should purchase, or cause to be purchased, "the boats, buildings and improvements, wharves, docks, bridges, and floats, and other property of said Pickles, \* \* \* used upon and for said ferries, respectively" (he being the lessee of several ferries), "and actually necessary for the purpose of said ferries."

Under Ordinance 6,610, C. S., "permission" was given to the lessee to remove the ferry landing from the position then occupied by it "to the prolongation of the north side of Canal street." And in that connection it was provided:

"That the said Thomas Pickles \* \* \* shall, at his own expense, construct a new, two-story ferry house \* \* \* and take up the present paved roadway, leading to the ferry, and lay it between the new ferry landing and the roadway being built by the wharf lessee at the head of Canal street, or the prolongation on the north side of Canal street, and that the said Thomas Pickles shall also \* \* \* remove the present banquette, leading to the present ferry landing, and shall make a banquette, 18 feet wide, on the prolongation of the north side of Canal street, all the way from the depot \* \* \* to the said ferry house; \* \* \* that the entire expense shall be paid by the lessee of the Canal Street ferry."

Neither the lease nor the ordinance, as it seems to us, contemplated that the pavement and banquette required to be laid should be regarded as thereafter belonging to Capt. Pickles; nor can it be said that either of them was, or is, actually necessary for the operation of the ferry. The distance from the depot to the ferry house is said to be some 400 feet; and the paving (other than that of the sidewalk) is adjacent to the ferry house. The sidewalk, no doubt, affords a more convenient way whereby pedestrians can reach the ferry than did the dirt, or shelled, surface of the levee or landing, and the pavement, about the ferry house, no doubt, affords a more stable resting place for horses and vehicles; but the ferry can be, and, up to the time when the sidewalk and pavement were laid, was, operated without the aid of either, and there are many ferries, the approaches to and surroundings of which are not paved with either Shillinger or square granite blocks. Our conclusion, therefore, is that the sidewalk and pavement here in question, not having been the property of plaintiff's assignor and not being necessary to the operation of the ferry, were not among those things for which it was intended that he should be paid upon the expiration of his lease, and hence that they are not included among the things for which plaintiff is entitled to be paid under the lease which last expired.

It is accordingly ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment rejecting plaintiff's demand and dismissing this suit, at its costs.

(124 La.)

No. 17,509.

VON EYE v. BYRNES.

(Supreme Court of Louisiana. Oct. 18, 1909.  
Rehearing Denied Nov. 29, 1909.)

1. EVIDENCE (§ 586\*)—WEIGHT AND SUFFICIENCY—POSITIVE AND NEGATIVE.

Where the plaintiff and four unimpeached witnesses swore positively that the slanderous words were uttered by the defendant, and his denial under oath is supported by the testimony of three witnesses to the effect that they heard

words used by the parties to the altercation, but did not hear the alleged slanderous words, *held*, that such evidence is negative and noncorroborative, in the absence of proof that such words could not have been uttered without having been heard by such witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2423-2435; Dec. Dig. § 586.\*]

2. APPEAL AND ERROR (§ 1012\*)—REVIEW—QUESTIONS OF FACT—PREPONDERANCE OF EVIDENCE.

The constitutional jurisdiction of this court over the facts imposes the correlative duty of reversing verdicts and judgments when manifestly contrary to the preponderance of the evidence, and of rendering such judgment in the case as should have been rendered in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Mrs. A. B. Von Eye against Patrick Byrnes. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

George B. Smart, for appellant. John J. McCloskey, for appellee.

LAND, J. The plaintiff, a widow over 70 years old, sued the defendant for damages for alleged public defamation of the vilest character. Defendant pleaded the general issue.

The case was tried before the judge, who rendered judgment in favor of the defendant. The plaintiff has appealed.

The issues before us being purely of fact, we give a condensed statement of the material evidence adduced in the court below.

It appears that the defendant had for four or five years claimed that the fence of the plaintiff encroached five inches on his premises, and had notified the plaintiff to remove the same. Plaintiff failed or refused to do so, but the defendant took no legal steps to compel the removal.

On Saturday, June 22, 1907, according to the testimony of the plaintiff and her son, the defendant came to their gate and said that he would chop the fence down if it was not removed by the Monday following. An altercation ensued.

Defendant was quarrelsome and belligerent, inviting the plaintiff's son to come out and fight. The disturbance naturally attracted the attention of the neighbors. As to the abusive language used by the plaintiff on that occasion it was confined to the inquiry, "Why don't you come like a gentleman?" or, at most, to a statement to the defendant that he was "no gentleman."

Plaintiff testified that the defendant called her a "whore" and another vile name. As to both epithets, the plaintiff's statement is directly and positively corroborated by Mrs. Moss, who lived in the next house, by Mrs. Stubbs, who lived right across the very nar-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



row street, by Mrs. Regnier, who lived next door to Mrs. Stubbs, and by Mrs. Anderson, who lived right across the street from Mrs. Von Eye's. Several of these witnesses corroborate the plaintiff as to the language used by him on that occasion.

Defendant denies positively that he used the vile epithets mentioned by the plaintiff and her four witnesses.

The corroborative evidence in favor of the defendant may be briefly stated as follows:

Charles Hoy, who was standing in his yard about 40 feet away, did not hear the defendant make use of the vile epithets in question. He did not hear Mrs. Von Eye say anything, and the only words he heard the defendant say were:

"Send your son out. I don't want to talk to you about it."

Mrs. Von Eye, daughter-in-law of the plaintiff and not on speaking terms with her, on account of a former grievance, deposed that she lived in a house "the distance of two double cottages," and on the evening in question, when at or near her own gate, heard loud talking and "Mr. Byrnes ask Mrs. Von Eye to move the fence, and she said she wouldn't do it," and "he told her to send her son out and he would talk to him; he wouldn't talk to her." And the witness did not hear Mr. Byrnes abuse Mrs. Von Eye. As Hoy lived at the distance of one double house from Mrs. Von Eye's, and the witness lived at the distance of two double houses, she must have been twice as far away from the house of the plaintiff as Hoy was, and he heard only a portion of the altercation.

Mrs. Hoy, wife of Charles Hoy, and the sister of Mrs. Von Eye, daughter-in-law of the plaintiff, deposed that on the occasion in question she was standing inside the blinds of her husband's house, and heard Mr. Byrnes come to Mrs. Von Eye and ask her would she please move the fence, and she said, "No," she did not intend to move it, as it had been there so many years; and she told him he was no gentleman by the way he approached her, and he said:

"Old lady, I don't seem to understand you; but, if you will send your son out, I will explain matters to him."

The son did not make his appearance; and the witness did not hear Mr. Byrnes abuse Mrs. Von Eye. The witness, when asked if she did not hear all the conversation, replied:

"Yes, sir; I heard Mr. Byrnes ask about the fence, and she positively refused to move it."

This witness had a personal grievance of ancient date against the Von Eyes.

Aloys Von Eye, the youngest son of the plaintiff, lived with his mother, and on the Saturday evening in question was on a veranda about 40 feet from their front gate.

On account of the heat, the young man was in his night shirt and was barefooted. He deposed that the defendant called his mother out, and said that the fence would have to be moved or he would chop it down by Monday; that the defendant invited him out to receive a spanking, and refused to come in and talk the matter over in a reasonable manner, but continued to abuse his mother, and insisted on having a "scrap" with him; that he heard the defendant call his mother something, but did not catch the words, but Mrs. Moss told him; and that defendant on that occasion appeared to be drunk.

On the face of the record before us, the preponderance of the evidence is clearly in favor of the plaintiff.

Her positive statement that the defendant called her the vile names mentioned is supported by the equally positive testimony of four witnesses; and the only positive testimony in favor of the defendant is his own denial that he uttered the words as charged.

Plaintiff's witnesses were not impeached.

The so-called corroborative evidence in favor of the defendant is purely negative, as it is not shown that the abusive words could not have been uttered without being heard by the witnesses for the defendant, who, at most, heard only a part of the altercation.

We do not agree with the district judge that this is a case of the "interchange of opprobrious epithets and mutual vituperation and abuse," as in *Goldberg v. Dobberton*, 46 La. Ann. 1303, 16 South. 192, 28 L. R. A. 721. On the contrary, the defendant was in the wrong from the beginning to the end. He went to plaintiff's premises and raised a disturbance that attracted the attention of the whole neighborhood. He threatened violence to plaintiff's son, and wound up by calling plaintiff vile names. Plaintiff's remark that the defendant did not come like a gentleman, or act like a gentleman, was justified by his conduct on that occasion. The opprobrious epithets were all on one side.

Our appellate jurisdiction over the facts of the case compels us to reverse verdicts and judgments when they are clearly against the preponderance of the evidence.

The same jurisdiction and the mandate of the Code of Practice compel us to render such judgment as should have been rendered below. Considering all the facts and circumstances of the case, we fix the damages in the sum of \$250.

It is therefore ordered that the judgment below be reversed; and it is now ordered that the plaintiff, Mrs. A. B. Von Eye, do have and recover of the defendant, Patrick Byrnes, the sum of \$250, with legal interest from the date of this decree, and costs in both courts.

PROVOSTY, J., takes no part, not having heard the argument.

(124 La.)

No. 17,731.

**BURKE v. TRICALLI.**

(Supreme Court of Louisiana. Nov. 15, 1909.)

**1. STATEMENT OF FACTS.**

The defendant is charged by plaintiff with having, contrary to law, placed a wooden gutter or drain, uncovered, across the sidewalk in front of his property, with sides extending sufficiently above the level bricks of the sidewalk to catch the feet of passing pedestrians. It is alleged that plaintiff's foot struck the gutter, causing her to fall and seriously injure herself. She sues defendant for damages. The evidence showed that the gutter was not placed across the sidewalk by defendant, but by a former owner of the abutting property. The district court rendered judgment in favor of the defendant, and on appeal that judgment is affirmed.

**2. MUNICIPAL CORPORATIONS (§ 803\*)—DRAIN ACROSS SIDEWALK—DUTY OF PEDESTRIAN TO GUARD AGAINST.**

It is incumbent upon passengers on the streets to use at least ordinary care to guard against the existence and danger of drains across the sidewalks. The necessity for such drains has been recognized for many years, and their general existence commonly known. Plaintiffs in this case lived in the immediate neighborhood of this sidewalk, and had passed and repassed it almost daily for a long while. The accident occurred at 9 o'clock in the morning. No one had ever complained of the gutter, or its condition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1673, 1682; Dec. Dig. § 803.\*]

**3. EVIDENCE (§ 32\*)—JUDICIAL NOTICE—CITY ORDINANCES.**

There is evidence in the record of its having been made by ordinance the duty of the owners of property abutting upon the streets to keep the sidewalks in front of the same in repair. The Supreme Court does not take judicial notice of city ordinances.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 42; Dec. Dig. § 32; \* *Appeal and Error*, Cent. Dig. § 2959.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Mary Burke against Genaro Tricalli. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank McGloin, for appellant. H. N. Gauthier and Hyman Mithoff, for appellee.

**NICHOLLS, J.** The plaintiff alleged that defendant owed her \$5,000 in damages, with legal interest from date of judgment, for this: That defendant owned, on and before December 13, 1906, the real property in this city, corner of Laurel and Arabella streets, in the square bounded by the streets named Nashville avenue and Annunciation street; that, prior to the date mentioned, defendant laid a wooden gutter or drain, uncovered, from his said property across the public sidewalk on Arabella street to the public gutter on said street, and this for the purpose of draining his property; that said private drain

or gutter was built of wood, weatherworn and stained, and inconspicuous, with its sides, however, extending above the level of the bricks sufficiently to catch the feet of passing pedestrians and constituting a dangerous trap; that said drain was so placed by defendant contrary to law and to the ordinances of this city of New Orleans, particularly Flynn's Digest, § 342; that as, on the date above mentioned, petitioner was walking along the Arabella front of defendant's aforesaid property, upon the public sidewalk or banquette, her foot was caught upon or by one of the sides of defendant's private gutter or drain aforesaid, and she was tripped and thrown violently to the ground, and injured seriously, striking upon the bricks with both her knees, and with both of her hands and her arms, very badly bruising and injuring her knees, particularly the left one; that as a consequence of her injuries petitioner was confined to her bed during two months, suffering intense physical and mental pain; that after leaving her bed she continued to suffer for some time great pain as the result of said injury, and was still suffering and inconvenienced, and expects to continue so suffering for some time in the future, how long she is unable now to say; that she has, as a result of said injury, been put to expense in physician's bill, drugs, etc., in the sum of, say, \$100.

That the laying of the said private drain or gutter by defendant across the banquette or sidewalk aforesaid in the manner stated was a gross and willful negligence on the part of defendant, and an illegal act, rendering him liable to petitioner for the damages, actual and punitive, occasioned her by her fall aforesaid, in the full sum of \$5,000—\$4,000 for physical and mental suffering, \$100 for expenses incurred, and \$900 for punitive damages; and it was further alleged that petitioner was not herself negligent. She prayed that defendant be cited, and that he be condemned to pay his \$5,000 and interest as damages.

Defendant excepted that the petition disclosed no cause of action. The exception was overruled.

Defendant, under reservation of the exception, answered. Further answering, he averred that he was in no way liable to plaintiff. He denied that he placed any obstruction on said sidewalk, or that the same was dangerously out of repair, or dangerously defective, or that he was in duty bound to any individual by cause of the condition of said banquette. He alleged that said sidewalk was, at the date of the alleged accident, in no worse condition than it had been for a very long time previous to his acquiring the ownership of the abutting property, and alleged that if the plaintiff suffered any damages at all, which he denied, it was the immediate consequence of her own carelessness

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and negligence; that she was not entitled to recovery or compensation thereof specially from defendant; that, should there be any liability attached by cause of the condition of said walk, which was denied, such liability was on the part of the city, and not on respondent. He prayed that there be judgment herein in his favor and against plaintiff, together with all costs, and for all general and special relief.

The district court rendered judgment in favor of the defendant, and plaintiff has appealed.

The district judge accompanied the judgment with the following written opinion:

"When the exception of no cause of action was overruled, it was because of the allegation that defendant had himself built the drain across the sidewalk, and had done so negligently, and the theory upon which this suit was filed and the petition sustained by the court was that whoever places an obstruction upon a public highway is liable for the damages occasioned thereby. But the proof does not sustain the allegation; on the contrary, it is shown that the gutter was in the same condition at the time defendant bought the property as it was when plaintiff was injured.

"Hence defendant is liable, if at all, only on account of his failure to keep the sidewalk in front of his premises in good condition. But there is no public law of this state which obliges the owner of a lot in an incorporated city to keep in repair any part of the public street in front of his property. There may, perhaps, be city ordinances to that effect (Act No. 45, p. 54, of 1896, § 15, No. 6); but no such ordinance has been introduced in evidence. There will therefore be judgment for defendant."

Plaintiff's charge that defendant illegally and unlawfully placed an obstruction on the sidewalk upon Arabella street, by making or placing across said sidewalk a drain in which was inserted a wooden gutter so made and placed as to subject the passers on the street to bodily harm, is not borne out by the record. The evidence shows that the drain and wooden gutter were placed through and across the sidewalk before defendant purchased the property, by some former owner of the same. The accident occurred to plaintiff at 9 o'clock in the morning. She had lived in the immediate neighborhood for a long while, and passed and used the sidewalk in the condition in which it was at the time of the accident almost daily, and must have known the precise situation. Neither she nor any one else had complained of it to the tenant or the owner of the property, nor notified the one or the other to remove or repair it. Drains across the sidewalks of the city, for the purpose of carrying off surface water from the lots abutting upon the same, or draining them, have existed for many years and have been recognized as a well-known necessity. *Tisot v. Telegraph Company*, 39 La. Ann. 1001, 3 South. 261, 4 Am. St. Rep. 248. Some of these drains have been covered, and many uncovered. In view of that condition and situation, it is incumbent upon passengers

upon the streets to use ordinary care, at least, in guarding against the existence and danger of such gutters and drains. *Tatje v. Frawley*, 52 La. Ann. 884, 27 South. 339; *Peetz v. Railroad Co.*, 42 La. Ann. 546, 7 South. 688; *Moore v. Shreveport*, 3 La. Ann. 645; *Koch v. Village of Edgewater*, 14 Hun, 544, 546.

If this case were one involving the question as to whether it was the duty of the defendant to have kept the sidewalk in front of his property "in repair," there would be no evidence in the record going to show that such duty had in fact been imposed upon him by law. No ordinance to that effect was introduced in evidence. We do not take judicial notice of city ordinances. *City v. Cremonini*, 35 La. Ann. 366; *City v. Labatt*, 33 La. Ann. 107. We are not called on to decide what the rights and obligations of the parties would have been, had such an ordinance been shown to have been adopted. *Betz v. Limingi*, 46 La. Ann. 1113, 15 South. 385, 49 Am. St. Rep. 344.

The judgment appealed from is in our opinion correct, and it is hereby affirmed.

(124 La.)

No. 17,321.

#### STATE v. WILLIAMS.

(Supreme Court of Louisiana. Nov. 15, 1909.)

#### 1. CRIMINAL LAW (§ 706\*)—NEW TRIAL—THREAT OF PERJURY PROSECUTION.

Although one or more witnesses were told that the district attorney had said that he would prosecute witnesses in the case for perjury if they perjured themselves, it will not be considered as a threat, affording ground to set aside a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.\*]

#### 2. CRIMINAL LAW (§ 658\*)—NEW TRIAL—ARREST OF WITNESS FOR PERJURY.

The witness arrested on the trial for perjury, after he had testified, was not arrested in presence of the jury; nor was it proven that the witnesses were aware of his arrest before they testified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1534½; Dec. Dig. § 658.\*]

#### 3. CRIMINAL LAW (§ 957\*)—VERDICT—IMPEACHMENT BY JURORS.

Jurors cannot be heard to impeach their own verdict, particularly when it is a fair inference that the evidence of other witnesses might have been offered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.\*]

#### 4. CRIMINAL LAW (§§ 1037, 1154\*)—REMARKS OF DISTRICT ATTORNEY—TIME FOR OBJECTION—PREJUDICIAL EFFECT.

It is not evident that the remarks of the district attorney in argument before the jury, to which objection was urged only on the motion for a new trial, were prejudicial. If they were, the objection was not timely urged.

The court restrains counsel when their remarks are intemperate and go beyond the bounds of propriety. It is a matter largely of discipline,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

generally affording no grounds of complaint on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645, 3059; Dec. Dig. §§ 1037, 1154.\*]

(Syllabus by the Court.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Alex Williams was convicted of murder, and he appeals. Affirmed.

Taylor & Smitherman, for appellant. Walter Gulon, Atty. Gen., Hubert N. Wax, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

BREAUX, C. J. This is an appeal from a sentence and judgment of the district court condemning the defendant to suffer the extreme penalty of the law on the charge, set out in the indictment, of having murdered Walker McMichael on the 23d day of May, 1909.

The motion for new trial presents the grounds of defense.

These grounds are:

First, that the verdict was contrary to the law and the evidence.

We will dispose of that ground with the statement that this general allegation has never been held sufficient, on appeal, to set aside a verdict.

The second ground of defense is that the district attorney intimidated witnesses by threatening to have them arrested for perjury if they did not tell the truth, and that one of defendant's witnesses, George Williams, was arrested for that offense at the instance of the district attorney, at the moment he was discharged, in the presence of the jury and to their knowledge, as well as to the knowledge of other witnesses who had not yet testified; that the witness thus arrested had not committed the crime for which he was arrested.

The next ground of the motion for a new trial was that in the argument the prosecuting officer expressed the belief that the accused was guilty and asked the jury to convict him.

Still another ground brought up on the motion for a new trial is that the jurors were improperly influenced in the room of deliberation by the statement of one of the jurors about the accused carrying arms to attack a white man named.

The district attorney filed a written motion to dismiss the application for a new trial on different grounds—among them, that the application was not sustained by the affidavit of the defendant, nor by the affidavit of any of the witnesses.

However well grounded this motion is in some respects, we decline to sustain it as a whole. In *favorem vitæ* technical objections

are passed, to consider other points made in defense of the accused. And to ascertain if the defense presents grounds for reversing the verdict and judgment, we, as just stated, pass that motion; in other words, we decline to grant the motion to dismiss.

Recurring to the second ground for discussion, to wit, the intimidation of witnesses by an assertion of the district attorney, made before the trial, that he would have witnesses arrested for perjury if they did not tell the truth, there is no evidence upon the subject except the statement of the district attorney, who says that he had heard of contemplated impropriety in that respect, which prompted him to make the remark.

There is nothing serious in this point.

The further ground alleged by the defendant is that one of his witnesses, George Williams, was arrested for perjury at the instance of the state, through the prosecuting officer, in the presence of the jury, before verdict.

The arrest of a witness in the presence of and to the knowledge of the jury is cause sufficient to reverse a verdict.

It does not appear that the facts are entirely as stated by the defense.

A number of witnesses were examined to sustain the defendant on this point.

The first witness for the defendant was the district attorney, who said that he did not have the witness Williams arrested in the presence of the jury; that, while it is true that he had him arrested on the charge of perjury, he told the arresting officer in a low tone of voice to have an eye to the witness; that he was careful not to let the jury know of the intended arrest.

The officer by whom the arrest was made testified that the witness George Williams was about 18 or 20 feet from the jury at the time; that the jury was being retired to the jury room when the district attorney directed him to place the witness in prison; no demonstration was made; witness was quietly told to follow him. This witness further stated that he had been requested by counsel for defendant to keep all knowledge of the arrest from the other witnesses of the accused, and to make the arrest quietly, and that he complied with this request.

We can only say, in regard to this point, that it does not appear that the jury had knowledge of the arrest. Every precaution was taken to keep the matter quiet.

We have noted that counsel for the accused knew that the witness George Williams would be arrested. He contented himself with directing the deputy sheriff not to let it be known.

The evidence before us does not admit of the conclusion that anything was done by either of the officers to improperly influence the jury or intimidate the witnesses.

Verdicts, sentences, and judgments would

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

become very uncertain, if the reviewing court upon the evidence before us were to annul them.

The evidence must be positive, and give rise to a reasonably certain state of facts, in order to sustain the point urged.

We pass to the next point urged, to wit, that the testimony of certain jurors offered by defendant to be sworn was admissible to prove that the jurors knew of the arrest before the verdict had been rendered.

We have noted that the application to have this testimony admitted was not sustained by the oath of the accused, nor was affidavit produced to sustain the fact alleged. It was not evident that the proposed evidence could not have been discovered before the motion for a new trial was filed. It is not stated when the defense was made aware of the irregularity charged.

Under the circumstances of this case, the evidence was not admissible.

There were witnesses present, who could have testified as to this extraneous fact, if it be as alleged. They were not called upon to testify; but defendant chose to single out a few of the jurors, without making an affidavit to base the allegation for a new trial.

But, without regard to facts stated above, jurors could not be heard to impeach their own verdict. It was not an extraneous fact exclusively within their knowledge in regard to which testimony could be heard.

Courts have been extremely slow in admitting testimony of jurors themselves to impeach their own verdict. They are not heard as to the reasons which lead to the finding of a verdict.

It must be presumed, to a reasonable extent, at least, that the district judge would have been aware of any impropriety in this respect, and he would have interposed his authority to put an end to it, to prevent the least attempt in the direction of in any way influencing the jurors or witnesses.

His statement does not lead to the inference that the facts are as alleged by the defendant.

In order to give strength and vitality to that point, it would have required other evidence than was produced.

The verdict cannot be set aside, and the case remanded; it not being reasonably certain that any of the jurors knew anything about the arrest, or that the witnesses were at all intimidated.

The further contention is presented on the part of the accused, upon a point somewhat similar, that during the course of the deliberations of the jury, before they agreed upon a verdict, one of the jurors told the other members of the jury that some months ago the accused had carried a gun for the purpose of inflicting bodily harm upon a white man, naming him.

If this complaint is sustained by the facts, it involves a matter which took place with-

in the room of deliberation and while the jury was deliberating.

This statement was clearly not admissible. It could not be proved, even if as alleged by a juror.

The defendant not having sustained his application under proper oath, the testimony was not admissible. The authorities are very clear upon the subject. It is settled by many decisions. See *State v. Corcoran*, 50 La. Ann. 453, 23 South. 511; *State v. Bates*, 38 La. Ann. 491; *State v. Price*, 37 La. Ann. 215; *State v. Beatty*, 30 La. Ann. 1266; *State v. Fruge*, 28 La. Ann. 657.

The next complaint of the defendant is that the district attorney, in addressing the jury, added to the force of his own evidence on the trial by stating that he believed the accused guilty.

The foregoing is the complaint set out in the motion for a new trial; but the bill of exceptions taken to the court's ruling overruling the motion contains no reference to this objection.

Be this as it may, it does not appear, even by the allegations of the motion for a new trial, that any objection was made at the time to the remarks of the district attorney. The judge was not called upon to check his line of argument. The objection was raised the first time on the hearing of the motion for a new trial, really too late to have the motion considered.

It is not to be assumed that the remarks were prejudicial. Counsel for the defendant would not have permitted them to remain unobjected to.

Learned counsel, in support of this point, confidently quotes from *Marr's Digest*, p. 764.

The text does not impress us as it has learned counsel. The subject is treated by it as an impropriety, not as cause sufficient to set aside a conviction.

We have examined the decisions which give support to the text. They do not sustain defendant's contention.

The first of these decisions in date is *State v. Johnson and Butler*, in which the court, while mildly disapproving of the remarks made by the prosecuting officer, declined to set aside the verdict.

In *State v. Forbes*, 111 La. 476, 35 South. 710, the syllabus correctly lays down the rule, to wit, that intemperate utterances of counsel should have been restrained, and that failure to restrain the counsel does not have the effect of vitiating the verdict.

In *State v. Thompson*, 100 La. 298, 33 South. 820, the views expressed were substantially similar.

In *State v. Fourchy*, 51 La. Ann. 228, 25 South. 100, the court said that the objection was not ground for reversal, although the remarks were improper.

In *State v. Meche*, 114 La. 231, 38 South. 152, the court approvingly quotes from *State v. Johnson*, 48 La. Ann. 87, 19 South.

213, and again, although the remarks of the district attorney were not what they should have been, the court declined to set aside the verdict.

In *State v. Clayton*, 113 La. 782, 37 South. 754, the improper remarks of the district attorney were again referred to by the defense as ground to set aside the verdict, and again the court, while not approving the remarks, held that they were not ground for setting aside the verdict.

The ruling was similar in *State v. Young*, 114 La. 686, 38 South. 517.

To resume: The witnesses were not intimidated. The arrest was not made in the presence of, nor to the knowledge of, the jury before verdict.

The testimony of jurors is not admissible to prove extraneous facts, in the absence of the least evidence going to show that there was no other evidence to be had than that of the jurors themselves.

The remarks of the district attorney afford no ground to set aside the verdict.

For these reasons we are constrained to the conclusion that we would not be warranted in disturbing the verdict.

For the reasons assigned, the verdict, sentence, and judgment are affirmed.

(124 La.)

No. 17,547.

CASANAS et al. v. AUDUBON HOTEL CO., Limited, et al.

(Supreme Court of Louisiana. Oct. 18, 1909. Rehearing Denied Nov. 29, 1909.)

# 1. COMMITTEE PLACED IN CHARGE OF BUSINESS.

The debtor was embarrassed financially. He placed a committee in charge of his business, to be conducted by this committee for the benefit of his creditors.

# 2. KNOWLEDGE OF CREDITORS.

All the creditors consented, except a few, who did not. They had knowledge of the meeting held and of the agreement made between the debtor and nearly all of the creditors.

# 3. PARTIES (§ 5\*)—ACTION ON BEHALF OF ANOTHER.

It does not appear by the terms of the agreement, nor by the minutes of the proceedings which authorized the agreement, that the debtor transferred the right plaintiffs claim.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 5; Dec. Dig. § 5.\*]

# 4. PURPOSE OF SUIT.

The plaintiffs instituted this suit to annul and set aside the subscription to stock taken by their debtor in a corporation, known as the "Audubon Hotel Company, Limited."

# 5. CORPORATIONS (§ 38\*) — AMENDMENT OF CHARTER—CONSENT BY STOCKHOLDER — ESTOPPEL.

The debtor, Fabacher, is estopped, and plaintiffs as well.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 38.\*]

# 6. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 268\*)—AGREEMENTS AMONG CREDITORS—EFFECT ON CREDITORS NOT PARTIES—THIRD PERSONS.

If the creditors, who took part in the meeting which resulted in an agreement, are concluded, it does not bind the defendants, who did not take part in the meeting.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 268.\*]

# 7. CORPORATIONS (§ 84\*) — AMENDMENT OF CHARTER—CHANGE OF PURPOSE.

The change or amendment made to the original charter, to which the debtor consented, was not a radical change having the effect of releasing the debtor from his contract as a subscriber to shares of defendant company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 298; Dec. Dig. § 84.\*]

# 8. OTHER POINTS NOT DECIDED.

Other grounds of defense are not decided, as the issues are disposed of without having to decide them.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by B. C. Casanas and others against the Audubon Hotel Company, Limited, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. S. Parkerson and Bernard Bruenn, for appellants. Merrick & Lewis and Dart & Kernan, for appellees.

BREAUX, C. J. The purpose of plaintiff in instituting this suit was to obtain a judgment setting aside a sale of shares made to Anthony Fabacher by the defendant company.

In order to be able to buy these shares, he (Fabacher) borrowed \$25,000 from Mr. Fairfax, a broker. Plaintiffs allege that it was a loan by the Commercial-Germania Trust & Savings Bank, through their agent, Mr. Fairfax.

Fabacher afterward transferred the shares he bought from the Audubon Hotel Company to this bank as security for the amount which he had borrowed from Fairfax, agent.

They offered to return the shares on receiving the amount which he had paid for them, to wit, \$25,000.

The remainder due by Fabacher to the bank in this transaction is \$10,000.

He (Anthony Fabacher) on May 6, 1908, placed his property in the hands of his creditors, represented by plaintiffs as a committee appointed by the creditors to represent their interest.

Plaintiffs' allegation is that the creditors and Fabacher gave this committee the entire control of his (Fabacher's) business, and that after full control had been given, and in view of this control, the creditors extended the time of payment of his indebtedness to them.

Plaintiffs allege that the Commercial-Germania Trust & Savings Bank, creditor of Fabacher for \$10,000, is secured by shares of the Audubon Hotel Company, which shares they wish to return, as before mentioned, on

receipt of amount paid by their principal, Fabacher, to the hotel company.

On the 20th of November, 1905, Fabacher became the owner of 250 shares of the capital stock of the Audubon Hotel Company, Limited. For the security of the payment of the amount he had borrowed, he transferred at the time these 250 shares of stock as security to the Commercial-Germania Bank for the amount he borrowed to pay for the shares (in part at least), the par value of which, as set out in the charter, was \$100 per share.

The complaint of plaintiffs is, and this is the ground upon which they have sued: That the hotel company has entirely changed the object and purpose for which it was organized; that originally, as stated in the charter, the object and purpose was to build and furnish and operate and conduct a hotel; but that on the 1st day of October, 1908, those who had control of the management of the company, despite the protest of plaintiffs, departed radically from the purpose expressed in the original charter; that the character of the business was changed, other responsibilities added, and other business ventures proposed, with which they did not intend to have anything to do.

The complaint on part of plaintiffs further is: That on the date before mentioned the president of the Audubon Hotel Company directed the amendment of article 1 of the original charter so as to change the name from the Audubon Hotel Company, Limited, to another name indicative of the intention to change the nature of the business; that the object and controlling purpose of the original incorporation was the erection, furnishing, and operating of a hotel; but that the whole and sole object of the new corporation, under the amended charter, is the erection, furnishing, and operation of stores—a different purpose, as plaintiffs allege.

The plaintiffs claim that the departure from the original purpose of the company was sufficiently radical to release Fabacher from any further obligation, after having returned said shares, and that he has a right to the return of the money he has paid, and to a release from all indebtedness.

Petitioners specially allege and insist that they protested against any change from the original charter. They aver: That the officers, directors, and managers of the Commercial-Germania Trust & Savings Bank were the lenders to Fabacher, the balance of which loan amounts to the sum alleged; that the money was loaned by this bank through Fairfax to Fabacher for the purpose of paying the Audubon Hotel Company for the said stock which the Commercial-Germania Trust & Savings Bank held as collateral for said loan; that Fairfax was only the agent of the bank; and that, while it appeared that the loan was made by him, it was, as before stated, by the Commercial-Germania Trust & Sav-

ings Bank on account of the Audubon Hotel Company.

With reference to the change made in the original charter by its subsequent amendment, as before mentioned, the contention is that by it Fabacher is released from any obligations on his contract, and that petitioners, representing him as a committee, as above stated, are entitled to recover the money paid by him.

To this petition, the defendant excepted: First, on the ground that the petitioners disclosed no cause or right of action. In a supplemental exception defendant urged that it was entitled to oyer of power of attorney, agreement of contract referred to in the first paragraph of the petition; and, further, that it was entitled to more complete information as to the source of the authorization therein claimed. In the second place, that there had been misjoinder of parties. And, in the third place, plaintiffs had failed to make necessary parties to the suit, in that they had omitted to join Anthony Fabacher, who is a necessary party. Lastly, the exceptor pleaded estoppel by the conduct and the action of Fabacher, who was, it alleged, present at the meeting referred to in the petition, and voted for the amendment of the charter.

The exception was maintained, and plaintiffs' demand dismissed.

From that judgment, plaintiffs prosecute this appeal.

There was evidence introduced on the trial of the exception. No objection was urged to its admission. Besides, plaintiff complied with defendant's prayer for oyer and handed to him a copy of the proceedings of the meeting of the creditors of Fabacher, on May 6, 1908, which is before us.

The document signed has important bearing upon the issues. We therefore make note of it here in extenso.

By it the creditors of Fabacher agreed to extend the time of payment of their claims against him three years, "on condition," as expressed in the agreement, "that five of his creditors shall be elected to carry on, conduct, and control his business."

On his part, Fabacher agreed to turn over to this committee (the plaintiff) "full control of his business, and to receive a monthly allowance for himself, which shall be fixed by the said committee."

The committee agreed to pay cash for all business conducted by it, and, after having accumulated a sufficient amount, to prorate and pay the net profits to the creditors.

One member of the committee was to have active charge, and the amounts collected were to be paid in bank subject to check by the committee only.

This agreement was signed by Fabacher, the debtor, and 60-odd creditors consented to it.

It is charged in plaintiff's petition that

defendants were well aware of this agreement at the time that the amendment hereafter noted was made. Defendants were notified that a meeting of the creditors would be held on May 6, 1903. They did not attend the meeting.

After the meeting had been held, each creditor was notified of what had been done. It was stated in the notice to each creditor:

"A great majority of his creditors were present at the meeting, and the result was reached by a unanimous vote."

The creditors were notified to write out and forward their consent to the agreement made by the committee and plaintiffs with Fabacher.

The charter of the Audubon Hotel Company, Ltd., was annexed to and made part of the petition.

A notarial act, also made part of the petition, shows, as declared by Mr. W. Mason Smith, president of the company, that on the 1st day of October, following a general meeting of the stockholders, called for the purpose, decided to amend the charter, as made evident by a copy of the amendment before us. A meeting was held and authorized the president to sign all necessary proceedings in matter of this amendment.

The amendment changed the name of the corporation from Audubon Hotel Company, Ltd., to Audubon Building Company, Ltd.

Under the first charter the company was authorized to "purchase, lease or otherwise acquire for cash, or on terms of credit, real estate in New Orleans or elsewhere; to erect thereon a hotel or other buildings; to equip and furnish the same; to conduct, manage and operate or lease a hotel or hotels with furniture and appliances thereon, restaurants, cafés, barrooms, theaters, places of amusement and entertainment, and generally to do and perform any and all things pertinent and germane to the power herein granted."

While the amendment, before noted, provides that the authority of the corporation is to buy, lease real estate, and erect thereon stores, office buildings, hotels, or other buildings, to equip and furnish the same, to conduct, manage, and operate, or to lease stores, office buildings, and hotels, or hotels with furniture and appliances thereon, restaurants, cafés, barrooms, theaters, places of amusement or entertainment, and generally to do and perform all things pertinent and germane to the powers herein granted.

The contention of plaintiff at this point is that the purpose of the corporation, as set out in the amendment, is different from the purpose expressed in the original charter, and that as the agreement was a contract between the shareholders and the company, and that as the contract has been radically changed, they (plaintiffs), representing the creditors, are not bound by the purchase made by Fabacher of these shares, and that conditions

should be reinstated to the extent possible, and the shares returned to the company, and the payments made by Fabacher should be set aside, and the defendant company condemned to pay the amount received.

Fabacher, the debtor, who, by the way, was not made a party defendant in this suit, attended the meeting before mentioned, held to amend the charter of the Audubon Hotel Company, Limited. He was, as before stated, a shareholder of that company, and in that capacity he was present and took part in the proceedings, even to the extent of moving the adoption of the amendment. The amendment received his unqualified and expressed approval in open meeting. The charter contains provisions that the transfer of shares is not binding before registry of stock in books of company.

We have stated substantially that the issues are before us on an exception. The facts before noted are taken as correct for the decision.

No question but that the charter was amended as contended for by plaintiff committee. The effect of that amendment is a very important issue of the case.

If the issues were limited to the one question—whether the amendment consisted of such a change that it had the effect of releasing the shareholders who did not consent to the change—the issues would be much less complicated; but there are other questions which present themselves for decision.

In the first place, the contention is that Fabacher, the debtor, consented to the amendment, and that he is concluded by his consent.

From that point of view, considered in the light that he did consent to the amendment, he is unquestionably bound and cannot now be heard to raise the objection that the amendment was a radical change.

One must be held bound by his own deliberate act. A stockholder who actively engages in organizing a corporation takes part in particular proceedings, and cannot question their regularity. Noyes on Intercorporate Relations, § 45.

He openly acted, as we have before stated, and is barred from urging the objection here urged. Purdy's Beach on Corporations, vol. 1, § 94.

Further, the following is the expression of Cook on Corporations (5th Ed.) vol. 2, § 502:

"A stockholder may be estopped from objecting to an amendment if he actively favors it and takes part in having it adopted."

But the committee (the plaintiffs) urge that they are not bound by Fabacher's approval of the amendment; that, after having placed them in possession of his property, he was without right to consent to the amendment of the Audubon Hotel charter.

That would have very great force and would be controlling were it not that it does not sufficiently appear that Fabacher trans-



ferred the shares in said hotel company with authority to institute the present suit.

The debtor, Fabacher, did not deliver the shares he owns in the Audubon Hotel Company, Ltd. He transferred his business in such terms as to lead, as we think, to the inference that he meant to transfer his restaurant business. On reading the written agreement, one infers that the business in which he was engaged was meant—that was the restaurant business.

The limited conditions, under which the committee took charge, as shown by the minutes of the meeting held, at which it was agreed that the committee would act for the creditors, and as shown by the written agreement subsequently signed, give rise to that opinion.

They were to make him a monthly allowance. Besides, they were to deal in cash in conducting the business, and they were to make payment to the creditors from the net proceeds.

This does not appear to include the shares of stock as transferred to the committee for it to institute suit.

The proceedings, which preceded the agreement, show that the creditors met to consider the financial condition of the business, and arranged for him (Fabacher) to turn over the right and control of the restaurant business to a committee of five. Under the circumstances, the proceedings of that meeting may be consulted and determine the extent of plaintiff's authority.

While the expressions of the agreement itself are not very specific, taken as a whole—the testimony, the proceedings and the agreement—we arrive at the conclusion that the important question was the management of the restaurant, and that at most the transfer made of the shares to the creditors affected only those who took part in the proceedings; and even as to these it does not appear that the committee was authorized to sue.

The defendants, we repeat, were not parties to the agreement authorizing plaintiffs to act for Fabacher, the common debtor.

The next proposition of learned counsel for plaintiffs is that the representatives of the Audubon Hotel Company are bound by their knowledge of the transfer made by the debtor, Fabacher, to his creditors, represented by the committee before mentioned.

That knowledge does not affect the issues.

The debtor not having specially transferred the shares, and not having authorized the creditors, through their committee, to bring the suit before us, the plaintiffs cannot stand in judgment.

The shares in question figure in the report of the expert employed to examine into and make report of the business as the resources upon which calculations were based, and they formed part of the consideration; but, in transferring these shares and placing them

in the control and management of the committee, there was nothing said about authority to institute the suit here instituted. No authority was given in that respect. The authority to sue is special and must be expressed.

Plaintiffs' learned counsel finds authority to sue and maintain this action in the similarity there is between a private agreement between a debtor and some of his creditors and those insolvency proceedings which may be taken in court when the debtor is greatly embarrassed in his finances.

The parallel is not entirely complete between the administration of a committee and a syndic. It does not extend as far as contended for by plaintiffs.

If Fabacher personally had authorized the committee to sue for the amount claimed and to dissolve and set aside the contractual relations existing between himself and the hotel company, Ltd., as a shareholder of the latter corporation, the right of the committee to stand in judgment would not exist. For reasons before stated, he is completely estopped. They, for those reasons, do not have the authority to exert the personal right of Fabacher to the shares he holds, being a committee with no further power than they have.

The syndic, who is the representative of the creditors, might, for he is authorized by statute. It is entirely different with him; but the committee does not have the authority of syndic. It therefore, as relates to said shares, cannot sue creditors who were not parties to the agreement in question. No transfer of the shares to affect them. The committee cannot sue and hold a creditor bound who never appeared nor took part in any of the proceedings, and never consented to the surrender of the property made by the principal.

These shares, it must be borne in mind, are still registered on the books of the company as owned by Anthony Fabacher. When he appeared at the meeting of the Audubon Hotel Company, he was the registered owner of these shares, and the Audubon Hotel Company could well presume that he was still the owner and had authority to act, despite the fact that he had arrived at an agreement with plaintiffs whereby his property was to be administered for the benefit of his creditors by them.

This view disposes of the case. Still, going a step further, we are of the opinion, it may be stated, that there was not a radical departure from the purpose of the original charter. A change in the name of the corporation, which we have noted in the statement of facts, is not material. The change in purpose is not indicative of an entirely new purpose. The purpose in the charter was not limited to the Audubon Hotel Company, Limited. It went further, and made provision for other buildings in such terms as

not to confine the purpose of the corporation exclusively to a hotel enterprise. The erection of other buildings was possible under the original charter. In the amendment of the original charter, the purpose has been extended, but not radically changed from the purpose expressed in the charter. Reading the two together—the power clause of the original charter and of the amendment—they are reconcilable and harmonized as being in nature germane. The amendment only enlarged the power somewhat. One power did not exclude the other, nor did the amendment have the effect of injecting into the enterprise a power entirely different and foreign from the first.

But going back to the first proposition, and without dwelling further upon the last, we have not found it possible for this committee to stand in judgment in this suit. The plaintiffs are concluded by the participation of the principal in the meeting which adopted the amendment.

We do not consider it necessary to decide other points presented. Those passed upon dispose of the case.

For reasons assigned, the judgment of the district court is affirmed.

PROVOSTY, J., concurs in the decree.

(124 La.)

No. 17,484.

**BANK OF MONROE v. OUACHITA VALLEY BANK et al.**

(Supreme Court of Louisiana. Nov. 15, 1909.)

**1. GARNISHMENT (§ 93\*)—PROCEDURE—NOTICE OF SEIZURE.**

Where, in an attempted garnishment, under *fi. fa.*, the plaintiff resorts to an independent proceeding, bearing a different title and number from the suit in which the judgment was rendered and the *fi. fa.* issued, a notice of seizure, bearing such title and number, and containing the recital, "by virtue of a writ of *fi. fa.* to me directed, in the above-entitled suit," means nothing, and plaintiff takes nothing by it.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 174; Dec. Dig. § 93.\*]

**2. CORPORATIONS (§ 509\*)—GARNISHMENT—CITATION—OFFICERS OF UNNAMED CORPORATION.**

A citation in garnishment addressed to "A. B. individually and as president," and to "C. D. individually and as cashier," is not effective as against the unnamed corporation in which A. B. and C. D. may hold positions. Citation in such case may be served upon the officer of the corporation designated to receive it; but it must be addressed to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1977; Dec. Dig. § 509.\*]

**3. GARNISHMENT (§ 120\*)—PROCEEDINGS IN GARNISHMENT—INJUNCTION—DISMISSAL.**

Where, in a garnishment proceeding under a separate title and number from the action against the debtor, an injunction pendente lite is issued to restrain the party sought to be made garnishee from parting with the property sought to be seized, and the plaintiff takes nothing by the attempted garnishment, the whole proceed-

ing collapses, and, with the injunction, is properly dismissed.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 242; Dec. Dig. § 120.\*]

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; J. P. Madison, Judge.

Action by the Bank of Monroe against E. C. Drew Investment Company and others. Judgment for plaintiff, and the bank brings garnishment proceedings against the Ouachita Valley Bank and others. Judgment for the garnishee bank, and plaintiff appeals. Affirmed.

Stubbs, Russell & Theus, for appellant. Allan Sholars, for appellee Ouachita Valley Bank.

**Statement of the Case.**

MONROE, J. The petition in this case (which, upon the docket of the district court, appears to bear the number 6,686) alleges: That, in the suit No. 6,496, plaintiff obtained judgment against E. C. Drew Investment Company, E. C. Drew, and others for \$28,941.99; that it has caused a writ of *fieri facias* to issue, which is in the hands of the sheriff; that it believes that the Ouachita Valley Bank, and certain individuals, who are named, have property belonging to the judgment debtor, E. C. Drew, or are indebted to him; that stock of the defendant bank has been issued in the names of said individuals, which was paid for by Drew; that it believes that such stock is in the possession of H. L. Gregg, president of said bank, and of G. M. Crook, its cashier, and fears that it will be delivered to Drew during the pendency of the suit. Wherefore it prays that the Ouachita Valley Bank and the individuals named be cited to answer the interrogatories annexed to the petition, and that a writ of injunction "issue to the said Ouachita Valley Bank, H. L. Gregg, and Green M. Crook, enjoining \* \* \* them and each of them from delivering to the said E. C. Drew any certificates of stock, or money or other property, now in its possession, belonging to the said E. C. Drew or issued in his name or the names of the above-named persons made garnishees." There were two sets of interrogatories annexed to the petition. One set, bearing the legend, "Interrogatories to be answered by all of said garnishees," relate to stock of the Ouachita Bank, supposed to have been issued to the individuals named, and which, it was conceded in the argument, were not intended to be answered by the bank. The other set bear the legend, "Interrogatories especially to be answered by H. L. Gregg, individually and as president, and Green M. Crook, individually and as cashier." Writs of injunction, as prayed for, bearing the title and number (in the district court) of this suit, were served on the Ou-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

chita Valley Bank and on H. L. Gregg and G. M. Crook. A notice of seizure was also served on the bank having the same title and number, and otherwise reading as follows:

"To Ouachita Valley Bank: You will please take notice that, by virtue of a writ of *fi. fa.* issued by the Honorable Sixth district court, in and for the parish of Ouachita, and to me directed, in the above-entitled suit, I have seized and taken in my possession the following described property, to wit: All property of every nature and kind in your possession or under your control belonging to H. C. Drew, including any and all indebtedness to him.

"This 19th day of Aug. 1909."

"[Signed] T. A. Grant, Dy. Sheriff."

"And you are further notified to be at my office, in the city of Monroe, on Saturday, the \_\_\_\_\_ day of \_\_\_\_\_, 190-, at 9 o'clock, to appoint an appraiser and appraise said property."

Another notice was served, also bearing the title and number of this proceeding, and otherwise reading, in part, as follows:

"To Ouachita Valley Bank, Garnishee:

"You are hereby cited to declare, on oath, what property, belonging to the defendant in this case, you have in your possession, or in what sum you are indebted to said defendant, and also to answer \* \* \* the interrogatories annexed to the petition of which a copy accompanies this citation," etc.

The return on the back of this notice (signed by the deputy sheriff) reads:

"Received this citation, together with a certified copy of same and a certified copy of the original petition, order, and interrogatories, in office, on the 18th day of August, 1908, and on the 18th day of August, 1908, I served notice of the seizure on the Ouachita Valley Bank by handing said notice of seizure to H. L. Gregg, president of said bank."

All of the individuals named as garnishees appear to have answered and to have been discharged. The Ouachita Valley Bank made no answer, and the minutes of the court of September 23, 1908, show the entry:

"Interrogatories on facts and articles taken as confessed, as against the Ouachita Valley Bank, and defendant bank excepts to ruling, on oral motion."

On the following day the bank moved to vacate the order of September 23d on the grounds: That the first set of interrogatories were not intended to be answered by it, and that nothing could result if they were taken for confessed. That the second set were not addressed to it, but were addressed to "H. L. Gregg, individually and as president; and to G. M. Crook, individually and as cashier." That, if it should be considered that interrogatories so addressed were propounded to the bank, then it should be held that the answers, made by the parties named, individually and officially, are the answers of the bank. And that there was no judgment in the suit in which the garnishment was attempted. The motion so made was sustained by judgment rendered September 29th, and the judgment taking the answers for confessed was set aside; but the minutes of October 1st show that the

judge, "on objection of counsel for defendant bank" (meaning, as we take it, the Bank of Monroe, defendant in the rule in which the judgment had been rendered), refused to sign the judgment. On the same day (October 1st) the defendant bank moved to dissolve the injunction which had been issued against it, on the grounds: That the garnishment proceeding was illegal and ineffective and had been dismissed; that the attempted seizure was illegal, because it purported to have been made under a writ of *fi. fa.* in the suit of Bank of Monroe v. Ouachita Valley Bank et al., when, in fact, there was no judgment rendered or writ issued in that case. On December 17th there was judgment dissolving the injunction, as prayed for, and also dismissing plaintiff's suit, which judgment was signed on the date mentioned, and from which plaintiff prosecutes this appeal.

The charter of the Ouachita Valley Bank was offered in evidence and was copied in the transcript. It provides for service of citation on the president and on other designated officers, in cases of absence or inability to act; otherwise no special duties are assigned to the president, and no duties are assigned to the cashier, save to act as custodian of the seal. The corporate powers are vested in the board of directors, "to be exercised by said board, or by such committees of officers as it may appoint, except those specially reserved by law and by the (this) charter, to the stockholders."

#### Opinion.

It will be seen, from the foregoing statement, that the plaintiff, alleging that, in a certain suit (No. 6,496 of the docket of the district court), it had obtained a judgment against H. C. Drew and others, instituted the present proceeding (No. 6,886 of the docket) against certain third persons with a view of obtaining a judgment, or judgments, against them (in execution of its judgment against Drew), by showing, by their answers to interrogatories to be propounded to them, that they were indebted to Drew, or had property in their possession or under their control belonging to him. Plaintiff, accordingly, undertook to levy upon such supposed indebtedness or property by garnishment, and, at the same time, to make use of the writ of injunction to hold matters in abeyance *pendente lite*, i. e., until, by means of the proceedings in garnishment, it could develop the existence of property and credits and cause the same to be turned over to the sheriff. When, however, the court reached the conclusion that it had taken nothing by the attempted garnishment, its judgment to that effect left nothing for the injunction to rest on, and the whole proceeding, having collapsed, was properly dismissed by a final judgment, in which was included the unsigned judgment of September 29th, which was evidently regarded as interlocutory, and

which therefore may be considered as having been brought up by the present appeal. It has been repeatedly decided that, in attachment proceedings, where the sheriff cannot actually lay hold of property in the hands of a third person, the only mode of procedure is to cite such person as garnishee, and that service of a mere notice on such person is no more effective than publication in a newspaper would be. *Woodworth v. Lemmerman*, 9 La. Ann. 524; *Ealer v. McAllister*, 14 La. Ann. 821; *Estate of Mille et al. v. Hebert et al.*, 19 La. Ann. 58; *McDonald v. Mechanics' & Traders' Ins. Co.*, 32 La. Ann. 594; *Levy, Loeb, Scheuer & Co. v. Acklen*, 37 La. Ann. 545. It has also been repeatedly decided that the act of 1839, authorizing garnishment proceedings, under writ of *fi. fa.*, did not abolish former modes of seizing incorporeal rights, and that valid seizure of such rights may be effected by service of notice of seizure upon the debtors thereof. *Rightor v. Slidell*, 9 La. Ann. 606; *Safford v. Maxwell, Sheriff*, 23 La. Ann. 345; *McDonald v. Insurance Co.*, 32 La. Ann. 594; *Levy, Loeb, Scheuer & Co. v. Acklen*, 37 La. Ann. 545. The law, however, seems to contemplate that the person sought to be made garnishee shall be made a party to, and proceeded against in, the suit in which the plaintiff is seeking to obtain, or has obtained, judgment against his debtor. Thus, Code Prac. art. 246, reads, in part:

"If a creditor knows or suspects that a third person has in his possession property belonging to his debtor, or that he is indebted to such debtor, he may make such a person a party to the suit, by having him cited to declare on oath what property, belonging to the defendant, he has in his possession. \* \* \* The person thus made a party to the suit is termed the garnishee. And, whenever a party, plaintiff in a cause, has applied for a writ of *fi. fa.* against the defendant and has reason to believe a third party has property or effects in his possession, or under his control, belonging to defendant, he may cause such third person to be cited to answer, under oath, such interrogatories as may be propounded to him touching such property and effects, or such indebtedness, in the same manner and with the same regulations as are provided in relation to garnishees in cases of attachment."

See, also, Code Prac. art. 642.

In the instant case, the notice of seizure (though emanating from the court in which

plaintiff had obtained its judgment against Drew, and from which the writ of *fi. fa.* (as had issued) bore the title and number of this independent proceeding, in which no judgment had been rendered and no *fi. fa.* issued, and it contained the recital:

"That by virtue of a writ of *fi. fa.* \* \* \* to me directed in the above-entitled suit," etc.

—which could mean, and did mean, nothing, since the sheriff had no such writ as that described. We therefore conclude that plaintiff took nothing by the notice in question. If, now, we assume that, in a proceeding of this character, in which it is sought to fasten the liability of a judgment debtor upon a third person, the plaintiff in the writ may safely depart from the Code of Practice, which provides that "he may make such a person a party to the suit," and also provides that "the person thus made a party to the suit is termed the garnishee," and that he may proceed against such person in a separate suit, and, without notice of seizure, we find that the plaintiff herein is confronted with the difficulties that the interrogatories which it sought to have taken as confessed, as against the Ouachita Valley Bank, were not addressed to that bank, or even to an officer of that bank, but were described as:

"Interrogatories especially to be answered by H. L. Gregg, individually and as president; and G. M. Crook, individually and as cashier."

If, however, they had been addressed to Gregg and Crook, as president and cashier, respectively, of the Ouachita Bank, the result, so far as the bank is concerned, would be the same, since, though a citation in such case, or in any case, may be served upon the officer of a corporation designated for that purpose, it must be addressed to the corporation. *State ex rel. Railroad v. Justice*, 48 La. Ann. 1417, 20 South. 911; *State ex rel. Telephone Exchange v. Voorhies*, Judge, 50 La. Ann. 671, 23 South. 871; *State ex rel. Watkins v. Land & Timber Co.*, 105 La. 379, 29 South. 910; *Gueble v. Town of Lafayette*, 118 La. 495, 43 South. 63.

We therefore conclude that there is no error in the judgment appealed from, and it is, accordingly, affirmed.

## ILLINOIS CENT. R. CO. v. DANIELS. (No. 14,029.)

(Supreme Court of Mississipp. Dec. 6, 1909.)

## 1. CARRIERS (§ 323\*)—CARRIAGE OF PASSENGERS—PROTECTION OF PASSENGERS.

A passenger may assume that the carrier has exercised the highest degree of care in providing for his safety, and whether a passenger, injured by the failure of the carrier to fulfill its duty is guilty of contributory negligence depends on the circumstances surrounding him at the time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1346; Dec. Dig. § 323.\*]

## 2. CARRIERS (§ 286\*)—CARRIAGE OF PASSENGERS—PROTECTION OF PASSENGERS.

A station must be made safe for a passenger coming to take a train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1152; Dec. Dig. § 286.\*]

## 3. CARRIERS (§ 347\*)—CARRIAGE OF PASSENGERS—PROTECTION OF PASSENGERS.

It is not negligence per se for a passenger to fail to stop, look, and listen while crossing a track in a depot to take passage on a train scheduled to stop there at the very time he crosses.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346-1366; Dec. Dig. § 347.\*]

## 4. CARRIERS (§ 327\*)—CARRIAGE OF PASSENGERS—PROTECTION OF PASSENGERS.

A passenger, while going to the depot to take passage on a train scheduled to stop there at the very instant, may assume that a train on a parallel track will not be running in excess of the maximum speed limit, and that the carrier will not run its trains over the parallel track in such a way as to subject him to unusual danger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1363-1366; Dec. Dig. § 327.\*]

## 5. CARRIERS (§ 327\*)—CARRIAGE OF PASSENGERS—PROTECTION OF PASSENGERS.

Whether a passenger, killed while running to a depot to catch a passenger train by being struck by a rapidly moving freight train arriving on a parallel track at the depot at the instant of the arrival of the passenger train, was guilty of contributory negligence, must be determined from the standpoint of whether he exercised ordinary precaution at the time, in view of the circumstances of the situation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1363-1366; Dec. Dig. § 327.\*]

## 6. CARRIERS (§ 347\*)—CARRIAGE OF PASSENGERS—PROTECTION OF PASSENGERS.

A carrier so arranged its schedule that a through freight running at the rate of 25 to 45 miles an hour reached the depot the very instant a passenger train was scheduled to arrive there. A passenger, desiring to board the passenger train, on hearing the whistle, ran toward the depot without stopping, looking, or listening before stepping on the track on which the freight ran, and the freight struck him. Persons who saw his danger undertook to warn him, but he did not understand. *Held*, that the question of his contributory negligence was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1363-1366; Dec. Dig. § 347.\*]

Whitfield, C. J., dissenting.

Appeal from Circuit Court, Lincoln County; M. H. Wilkinson, Judge.

Action by Julia H. Daniels against the

Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Mayes & Longstreet, for appellant. H. Cassidy, J. W. Cassidy, and J. N. Yawn, for appellee.

MAYES, J. Some time in July, 1908, Mrs. Julia H. Daniels brought suit against the Illinois Central Railroad Company for the negligent killing of her husband on the 4th day of the same month. The husband was killed in Bogue Chitto, an incorporated town, while going to the depot of the railroad company, intending to take passage on a passenger train which passed through the town of Brookhaven, in which place deceased resided. Some time later the cause came on for trial, resulting in a verdict in favor of Mrs. Daniels for the sum of \$20,000, and from this judgment the railroad company appeals. In the determination of this cause we do not deem it necessary to pursue all the various errors assigned by counsel for appellant, since under our view many of them are not involved in the decision of the case. There is no serious complaint as to the amount of the verdict; it seeming to be virtually conceded by the appealing parties that, if Mrs. Daniels is entitled to recover at all, the amount is not excessive. We shall not go at length into a statement of the facts, but a short review of the facts is necessary in order that the case may be thoroughly understood.

The case made by the record is substantially as follows, viz.: On the 4th day of July, 1908, the deceased purchased a round-trip ticket over the Illinois Central Railroad from Brookhaven to Bogue Chitto, and about 2 o'clock in the afternoon of the same day boarded a south-bound passenger train on appellant's line of railway, and proceeded to Bogue Chitto. The above town is a regular passenger station on the line of appellant's railway where all local passenger trains stop. Being a town within the meaning of section 4043 of the Code of 1906, it is unlawful under the statute for any train to run through same at a greater rate of speed than six miles an hour, the penalty for a violation of this section being that any railroad company which violates same shall be liable for any damage, or injury, which may be sustained by any one, whilst the train is running through the town at a greater rate than the statute allows. It is thus seen that, if this statute has any bearing on the question of the negligent act of the railroad in this case, the facts so circumstance it as to make it available to the party bringing this suit. After reaching Bogue Chitto, the deceased remained in the town until about 8:30 p. m., at which time he expected to take a local passenger train over the appellant's

line back to his home. A local passenger train going north to Brookhaven was scheduled to stop there at that hour. It appears that appellant's line is double tracked at Bogue Chitto; trains bound north traveling over the east track, and trains bound south traveling over the west track. To the north of the depot in Bogue Chitto there is a cut of 20 or 30 feet, by which the view in that direction is obstructed, unless one be actually on the track and looking north. The cut does not extend to the south of the depot, and one, though not on the track, can obtain an unobstructed view looking south. The deceased was on the west side, and a train coming into Bogue Chitto from the south may be seen for quite a distance in that direction by a person so situated, while a view could not be obtained by the same person looking north. As the time approached for the arrival of the train on which deceased intended to take passage for his return trip to Brookhaven, he was standing at the store of a Mr. Zwirm on the west side of the railway and about 160 feet from the depot, and at a point where he could not see a train approaching Bogue Chitto from the north and running south, but where he could see the passenger train then approaching the depot from the south. When the passenger train coming from the south blew its whistle for the station, deceased left Zwirm's store, and proceeded towards the depot in a trot, having his return trip ticket in his pocket, and intending to become a passenger on that train to Brookhaven. In order to reach the passenger train, it was necessary for deceased to cross the west track of the railway, on which ran all south-bound trains, in order to get across on the east track, on which east track was the north-bound passenger train. At the very instant that the passenger train was approaching the Bogue Chitto depot from the south on the east track, a freight train was also approaching the depot from the north on a parallel track on the west, running at the furious and reckless speed of from 25 to 45 miles per hour. Thus it is that the railroad company had so arranged its schedule as that at the very instant a passenger train was scheduled to stop at that depot for the purpose of loading and unloading its human freight another through freight train was scheduled to pass on a parallel track at the reckless speed of 25 to 45 miles per hour. Railroads are bound by those things which are matters of common knowledge, just like others, when the question at issue is one of negligence. It is common knowledge that, upon the approach of a passenger-train, persons intending to become passengers are hurrying from every direction to take the train, feeling secure in the belief that the railroad company will fulfill its duty to provide for their safety at that time, and not negligently allow to be done those things which virtually amount to the setting of a deathtrap. Pas-

sengers do rely, and under the law have a right to rely and act, upon the duty of the railroad company to exercise the highest degree of care in providing for their safety in going to take the train, in alighting from it, and while actually en route; and whether or not a passenger who is injured by the failure of the company to fulfill this duty is guilty of contributory negligence precluding a recovery for the injury always depends on the facts and circumstances surrounding him at the time. It is common knowledge that parties contemplating a business or pleasure trip linger until forced to the depot; business men to give the last direction about business; friends to say the last good-bye; and railroads in providing for the safety of their passengers must consider all these things. Thus, the deceased, standing at the store of Zwirm 160 feet from the depot, heard the passenger train whistle, and ran towards the depot for the purpose of catching this train, relying on the duty of the railroad at such time and such place to provide for his safety; not stopping, looking, or listening before going upon the west track, but, utterly unconscious of his danger, was caught by the south-bound freight on the parallel track, almost the instant that he reached same, and hurled to his death. Can the company which is so careless of the safety of its passengers as to arrange for a schedule that places a through freight, running at the rate of 25 to 45 miles an hour, at the depot at the very instant that a passenger train is scheduled to stop, find any rule of law that will absolve it from liability under these circumstances? It is attempted to be shown that one or two persons, seeing the danger of deceased, undertook to warn him of same and would not heed them, but it is manifest that the deceased did not understand them, and did not understand that they were trying to call his attention to the approaching freight train. It is again suggested that the deceased was drinking to some extent, but, even if this be so, it is certain that this was not the influential cause of his death.

The particular case presented by this record is not one which this court has been heretofore called on to decide. It is but fair to state that it can hardly be doubted, under the facts of this case, but that deceased failed to stop, look, or listen before going upon the track when he met his death, and it may also be stated that the facts show that, if he had stopped or looked, it would have averted the accident, as in either case he would have discovered the approaching freight. It is manifest, however, that deceased did not know of the danger that threatened from the approaching freight, and was not therefore taking his chances of successful escape from known risk. It is with these facts conceded that we shall discuss this case. While it is unquestionably true that even a passenger is not absolved from

all care, it is equally true that it is the duty of the railroad company to exercise the highest degree of care in providing for the safety of a passenger going to the depot for the purpose of boarding its trains. Therefore, as to what constitutes negligence on the part of a passenger must depend upon the facts and circumstances at the time of the injury. This duty of the railroad company is so imperative at the very time that a passenger train is scheduled to arrive that it justifies a passenger in assuming that this high duty will be faithfully performed. The duty of the company to protect its passengers is so imperative and may be so relied on as not to make an act done by a passenger negligent, although it might be negligence in one not holding the relation of passenger to the company. Arising out of this duty on the part of the company to its passengers, and this relation on the part of the passenger to the railroad company, there has grown up an important exception to what is familiarly known as the stop, look, and listen doctrine. A passenger has an invitation to come to the place of the stoppage of the trains, and, being so invited, that place must be made safe for him. Let it be remembered that in this case it was not 20 minutes before the train was due to arrive that deceased went upon the track, but it was at the very instant of the arrival of his train, and at a time above all others when the duty of the company to make the way safe for him was at its highest.

In the case of *Atchison, Topeka & Santa Fé R. R. Co. v. Mary M. Shean*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729, the facts showed that Thomas Shean, deceased, was a passenger on appellant's cars. While on the train as a passenger, the train arrived at a little eating station where it was customary for the railroad company to allow its passengers to get their meals. The train on which Shean was a passenger was running in two sections, and Shean was on the first. The eating house was on the opposite side of the track from that on which the train bearing Shean stopped, and, in order to reach the eating house, it was necessary for Shean to cross over the track. While passing diagonally over the track, the second section came in on another track, running at a rate of from six to ten miles per hour, and Shean was killed. It was shown that deceased did not stop, look, or listen before crossing the track when he was killed, but, if he had looked, he could have seen the train that killed him. It was contended, under these circumstances, that the railroad company was not liable because of the contributory negligence of the deceased, but the court sustained the liability of the company, and said: "It is settled that a passenger on a railroad, while passing from the cars to the depot is not required to exercise that degree of care in crossing a railroad track as is imposed upon other persons, and that he has the right to

assume that the company will discharge its duty in making the way safe; and, relying on this assumption, may neglect precautions that are ordinarily imposed upon a person not holding that relation; and this distinction is to be taken into consideration in determining the propriety of his conduct. Under all the facts shown in evidence and the circumstances surrounding the accident, whether the person injured was guilty of contributory negligence at the time is a question within the province of the jury to decide, and one that the court cannot rightfully take from them." In the case of *Pennsylvania Company v. Nellie Keane*, Admr., 41 Ill. App. 317, it was shown that the party killed rushed out of a little station near Thirty-Seventh street in Chicago for the purpose of taking a train on appellant's line. It was about 6 o'clock in the morning, and dark and rainy. In so doing it was necessary to cross a parallel track of the company's line upon which was running another train of the same company at a rate of speed variously estimated at from 10 to 20 miles an hour, and this train killed the party for whose death the suit for damages was instituted. It was not shown that deceased stopped, looked, or listened before going upon the parallel track, and the court said: "It is insisted by appellant that the deceased failed to look out or watch for the train coming from the south, and that this was such negligence upon his part as will preclude a recovery in this case. Undoubtedly, it is ordinarily the duty of a person about to cross a railroad track to watch for approaching trains; but a person about to take a train standing at a station waiting to receive passengers, and one alighting from a train that has just arrived, have a right to presume that the trains will be so run and the road so operated that such track may be passed in safety. A passenger under such circumstances is justified in assuming that the company has exercised such care and so regulated its trains that the road will be free and safe for him to pass over."

In the case of *Warner v. B. & O. R. R. Co.*, 168 U. S. 346, 18 Sup. Ct. 70, 42 L. Ed. 491, it is said: "The duty owing by a railroad company to a passenger, actually or constructively in its care, is of such a character that the rules of law regulating the conduct of a traveler upon the highway when about to cross and the trespasser who ventures upon the tracks of a railroad company are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the track of the railroad was guilty of contributory negligence. A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger under given conditions has a right to rely upon the exercise by the road of care, and the question of whether or not he is neg-

ligent under all circumstances must be determined on due consideration of the obligations of both the company and the passenger. \* \* \* Whilst it is true, as was said in *Terry v. Jewett*, supra (78 N. Y. 338), that such implied invitation would not absolve a passenger from the duty to exercise care and caution in avoiding danger, nevertheless it certainly would justify him in assuming that in holding out the invitation to board the train the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and caution. The railroad under such circumstances, in giving the invitation, must necessarily be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation, and the passenger, on the other hand, would have a right to presume that in giving the invitation the railroad itself had arranged for the operation of its trains with proper care. The doctrine finds a very clear expression in a passage in the opinion in the *Terry Case*, already referred to, where it was said (page 342): "It may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction where passenger trains stop at a station to receive and deliver passengers. Any other system would be dangerous to human life, and impose great risks upon those who might have occasion to travel on the railroad."

In the case of *Chicago, R. I. & P. Ry. Co. v. Stepp*, 164 Fed. 792, 90 C. C. A. 438, the court said: "It is now the settled rule of the federal courts that passengers using station premises for the purpose of taking or leaving trains have a right to assume that the place is one of safety, and to act upon that assumption. While they are not absolved from all care, they are not required to exercise that high degree of care which the law imposes upon travelers when approaching the intersection of a highway and a railroad. The traveler upon the highway has no right to assume that the railroad is a place of safety, or that trains will not be run over it while he is attempting to pass. On the contrary, the rule has been repeatedly declared that such a crossing is a place of danger, and that the traveler must approach it with the knowledge that the company may at any time be moving trains over its road. This is the ground of the difference between the rule as to a passenger while upon station grounds and a traveler upon the highway. The one has the right to believe that the place which he is using is one of safety, while the other is bound to know that the place which he is approaching is one of imminent danger. Upon the basis of this difference the rule is now firmly established that a passenger, before crossing a track while taking or leav-

ing a train, is not required, as a matter of law, to look and listen for approaching trains. He is simply required to exercise reasonable care in the light of all the circumstances existing at the time, and whether he exercises that care is a question of fact for the jury." To the same effect is the case of *Chesapeake & O. Ry. Co. v. King*, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102, and *Chattanooga Ry. Co. v. Downs*, 106 Fed. 641, 45 C. C. A. 511. The principle of law announced by the above authorities is just and logical, and we have no hesitancy in holding that it is not negligence per se for a passenger to fail to stop, look, and listen while going to the depot of a railroad company to take passage on one of its trains scheduled to stop at the station at the very instant that he goes there. In view of the law as stated above, let us see if the jury were properly instructed with reference to it. By the fourth instruction given for plaintiff, the jury are told that deceased had a right to assume that the train on the parallel track would not be running over six miles per hour past the depot at Bogue Chitto, and, further, that deceased had a right to presume that the railroad company would not run its trains over its parallel track in such way as to subject him to unusual hazard or danger at the station; that deceased was not required to stop, look, and listen before crossing the west track; that, if the jury believed from the evidence that deceased did not stop, look, and listen, this fact alone did not make him guilty of contributory negligence if the jury believed that under the circumstances deceased did act as an ordinarily prudent man would act in guarding himself against injury. The practical effect of the fifth instruction given for plaintiff is to tell the jury that they must determine whether deceased was guilty of contributory negligence or not from the standpoint of whether or not he was in the exercise of ordinary precaution at the time of his death, in view of the circumstance of his situation at the time. The sixth instruction is practically the same. After a most careful examination of all the instructions for plaintiff, we can find no error in any of them in so far as they relate to the application of the law to the facts of this case as bearing upon the question of negligence. The instructions are drawn with much care and skill. The instructions are a literal application of the law to the facts of this case, on the question of negligence, within the well-stated rule to be found in the case of *Terry v. Jewett*, which rule we can do no better than to restate here. Thus it is said in the *Terry v. Jewett Case*, supra: "There is a difference between the care and caution demanded in crossing a railroad track on a highway and in crossing while at a depot of a railroad company to reach the cars. No absolute rule can be laid down to govern the passenger in the latter case under all cir-



cumstances. While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care, prudence, and caution in avoiding danger. The degree of care and caution must be governed in all cases by the extent of the peril to be encountered and the circumstances attending the exposure."

In view of what we have said above, we do not deem it necessary to pursue the refused instruction of defendant at any great length. It was not error on the part of the court, under the facts of this case, to refuse instruction No. 6 asked for by defendant. It embodied the stop, look, and listen doctrine, which had been pressed to its fullest limit in instruction No. 14, given for defendant. If instruction No. 6 had simply told the jury that if they believed from the evidence that deceased was warned not to go upon the parallel track when he was killed because of the approaching freight train, and the danger incident thereto, and that he understood, or ought to have understood, and refused to heed that warning, he was guilty of contributory negligence, it would have been improper to refuse it; but the instruction makes the contributory negligence depend upon whether or not deceased stopped, looked, and listened before going upon the track without reference to anything else, and such is not the law. Counsel for appellant cite the case of *Railroad Co. v. Crockett*, 78 Miss. 407, 29 South. 162, in support of the contention that deceased was guilty of contributory negligence, but the facts of that case make a very different case from the one now on trial. In the *Crockett* Case it was shown that the party injured was a lad of over 14 years of age. There was a freight train approaching a switch which he saw and knew to be approaching; yet, with this knowledge, he walked upon the side track in front of the train and was injured. In a suit subsequently instituted against the railroad for the injury, it was attempted to be shown in justification of the act that it was the custom of the train to stop at this switch before entering same, but the court held that the boy was guilty of contributory negligence under the facts above stated. It was not shown in the above case that there was a depot at the place where the boy was injured; it is not shown that there was a passenger train then due at that point on which the injured party intended to take passage; it is not shown that the train by which he was injured was running at an unlawful rate of speed—and all these things do appear in the case now under consideration. The case on trial is not at all similar in its facts to the *Crockett* Case, *supra*. Again, counsel for appellant argue that be-

cause deceased did not stop, look, and listen he was guilty of contributory negligence under the rule announced in the cases of *Murdock v. Railroad Co.*, 77 Miss. 487, 29 South. 25, and *Jackson v. Railroad Co.*, 89 Miss. 32, 42 South. 236, but we have shown that the rule declared by the two above cases has no application to the case now before the court. Thus in the *Murdock* Case, 77 Miss. 487, 29 South. 25, the injured party was engaged in passing through an open railroad yard on some business of his own, and undertook to pass between two cars of a standing freight train already coupled together, and while an engine was approaching for the purpose of moving the train, and while so doing, was injured by reason of the fact that nine other cars had been rapidly and violently pushed against the cars that the injured party was attempting to pass over, and the court held that the injured party was guilty of contributory negligence. The *Jackson* Case, 89 Miss. 32, 42 South. 236, falls within the ordinary railroad crossing cases, and, as we have seen, has no application here. Under the facts, as shown by the declaration, one W. R. Jackson was driving home on a public highway which crossed the railroad track, and, without stopping, looking, or listening, went upon the railroad, and was killed by a passing train. It was shown that the track was perfectly straight for a mile and a half in the direction from which the train was coming, and that Jackson had an unobstructed view for about that distance. Had he stopped, looked, or listened, the accident could not have happened, and the court held in this case, under the facts there under consideration, that it was Jackson's duty to do one of the three things. Had Jackson stopped, the train would have passed harmlessly by; had he looked, he must have seen; had he listened, he must have heard.

If it be conceded that minor error was committed in the giving of the first instruction for plaintiff, the error is not sufficiently grave to warrant a reversal. The amount of the judgment is amply supported by the evidence, and, indeed, had the jury returned a larger verdict, it would not have been disturbed on the fact of this case.

Affirmed.

WHITFIELD, C. J. (dissenting). The fourth instruction given for the plaintiff is in the following words: "The court instructs the jury for the plaintiff that the plaintiff's husband had a right to presume that the freight train, if he had known it was coming, would not be running over six miles per hour, and that it would not run past the depot at Bogue Chitto on this occasion at a greater rate of speed than six miles per hour; and, further, that he had a right to presume that the defendant company would not by the running of its trains upon its parallel track subject him to un-

usual hazard or danger at said station, and the law did not require him to stop, look, and listen before crossing said west track, and, if he did not stop, look, and listen, he would not have been guilty of contributory negligence because of such failure alone. The question of fact to be determined by the jury, on the subject of contributory negligence, is: Did the deceased, under the circumstances, in view of the presumptions above enumerated, act as an ordinarily prudent man would act in guarding himself against injury?" The plain effect of this instruction was to charge the jury that, although the plaintiff might have known the train was coming, yet, because he was entitled under the law to assume that the train would not run in the town and past the depot more than six miles an hour, therefore he could neglect to stop, or look, or listen, and yet this failure to do one or all of these things would not alone constitute contributory negligence. There is no possible escape from the conclusion that this is the plain meaning of the plain language of this instruction. This is not the law. Running more than six miles an hour through an incorporated town does not itself alone entitle the plaintiff to recover in a case where only actual damages are sought, as here, but it must appear that such excessive speed was the proximate cause of the injury. This charge positively declares, as an absolute and universal rule of law, that merely because the plaintiff has the right abstractly and generally to presume that a train will not run more than six miles an hour through an incorporated town and past the depot thereof, therefore this presumption alone in all cases relieves the plaintiff from using the faculties of sight and hearing with which nature has endowed him by completely ignoring the reciprocal duties of the plaintiff and the defendant at the time and place of the injury. It is fundamentally erroneous, goes to the heart of the case, and must cause a reversal.

The sixth charge, refused to the defendant, is in the following words: "The court instructs the jury for the defendant that although they may believe the defendant was negligent in running two trains through the municipality of Bogus Ohitto so that they passed each other at the same time at the crossing at which deceased met his death, and although they may believe that the freight train was running at an unlawful rate of speed, and that its bell and whistle were not giving the proper signals, still it was incumbent upon the deceased to stop, look, or listen before going upon the tracks of the defendant, and, if he failed to do this and went upon the tracks after being told not to do so, defendant's negligence will not entitle the plaintiffs to recover, but they will find a verdict for the defendant." The witness Sauls had testified that he had accosted deceased, seized him by the arm, told

him to look out, and warned him of the approaching train. The deceased tore away from him, saying "Oh," and rushed on. It is true that the plaintiff introduced a witness to show that Sauls was not present at the scene of the accident at all, but it is also true that another witness for the defendant supported Sauls' statement that he was there, and the defendant was manifestly entitled to have its theory of the case, as bottomed on this testimony of Sauls, put to the jury on this instruction, and it was error, and fatal error, to refuse this instruction.

I have examined with great care every one of the authorities cited by learned counsel for appellee, many of which are referred to in the opinion in chief, laying down the doctrine which it is admitted is an exception to the general rule that wherever the relationship of passenger is established between one and a railroad company, and such passenger is endeavoring to reach his train, and embark thereon, or to debark therefrom at the arrival at a depot, there is no absolute rule of law that such passenger shall stop, or look, or listen. I will quote a few of the very cases cited by learned counsel, and from these citations the true rule on this subject will clearly appear. For example, in the case of *L. & N. R. Co. v. Crominarity*, 86 Miss. 464, 38 South. 633: "Many decisions and a multitude of authorities are cited to show that other courts have held that the mere failure to stop before driving on a railroad crossing constituted, as a matter of law, such negligence as forbids recovery for any injury inflicted by a passing train. We decline to adopt any such rigid rule. What constitutes negligence must depend always upon the surrounding conditions and the attendant circumstances of the particular instance. No hard and fast rule of action can be prescribed which will make the same course of conduct under any and all circumstances either wise or unwise, cautious, or reckless. The true rule is that it is incumbent on the traveler to use that degree of care and caution which is rendered necessary by a reasonable regard for his safety under the peculiar circumstances and conditions by which he is at the time confronted. It is the duty of a traveler in approaching a crossing to use all reasonable precaution to apprise himself of the approach of a train, but whether that reasonable precaution will demand that he shall stop and look and listen, or whether any lesser degree of care on his part will be sufficient, must generally, though not invariably, be a question of fact; and, being a question of fact, it should be submitted to the jury under proper instructions for their decision." In the case of *Warner v. B. & O. R. Co.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491, the court expressly stated that: "The implied invitation to such passenger does not absolve him from the duty of exercising care and

caution in avoiding danger; that is to say, from using the senses of sight and hearing." In the case of *Chicago, M. & St. P. R. R. Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 181, it is said: "A passenger in crossing a railroad track parallel to the one on which his train has arrived at a station, who does not look or listen for the train on the parallel track, is not guilty of contributory negligence, but it is a question for the jury." And the same doctrine is held in *Graven v. MacLeod*, 92 Fed. 846, 33 C. C. A. 47. In *V. & M. R. R. Co. v. McGowan*, 62 Miss. 682, 52 Am. Rep. 205, it is said: "It is not contributory negligence per se to be on a railroad track at a place where a person has no right to be. One may be guilty of contributory negligence at a crossing or where he has a right to be. The criterion is whether he observes due care, under the circumstances of his situation; whatever it may be, to avoid harm from the act complained of. He is not to be pronounced guilty of contributory negligence merely for being on the railroad, where he should not be, but inquiry is to be made as to the time, place, and circumstances, and as to his conduct in view of the negligence complained of, in order to determine whether he was wanting in that care the absence of which constitutes contributory negligence preventing recovery. What is reasonable care in any case depends upon the particular circumstances of that case."

In the case of *A. T. & S. F. R. R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729, the court expressly says: "Under all the facts shown in evidence and the circumstances surrounding the accident, whether the person injured was guilty of contributory negligence at the time is a question within the province of the jury to decide, and one that the court cannot rightfully take from them." In the case of *Terry v. Jewett*, cited in the opinion in chief, it is distinctly stated: "No absolute rule can be laid down to govern the passenger in the latter case (that is, whilst crossing the track to take his train) under all circumstances. While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care, prudence, and caution in avoiding danger." In short, the sum and substance of all that is laid down in the various cases cited by learned counsel for appellee on this particular point—this exception to the general rule—is this: That whenever the relationship of passenger is established between a railroad company and any person, and that person is attempting, at the regular depot of such a company, to cross the tracks to embark on his train, or is, after arriving at said depot, attempting to debark from his train, the railroad company owes such a passenger,

in such particular situation, so peculiarly circumstanced, a much higher degree of care than it would owe to one not a passenger, and consequently that it would not be proper for the court, as a mere matter of law, where nothing more was proved than that such passenger failed to stop, or look, or listen, to charge the jury that such failure was, as a mere matter of law, contributory negligence, and such contributory negligence as would bar his recovery; in other words, that in such precise case, whether or not the failure of a passenger to stop or look or listen is contributory negligence is a matter which the court has no right to take from the jury. That is the precise idea. It is not as a mere matter of law contributory negligence in such a case which the court may charge the jury bars recovery, even where the injured person is a passenger. In other words, all that I understand all these authorities to hold is simply that whether, in the case where a passenger is injured under circumstances such as I have set out, his failing to stop, or look, or listen is contributory negligence, is a matter which the court must leave to the jury, and that consequently the court itself cannot as a mere matter of law charge the jury that such failure was or was not contributory negligence. But the charges which I have criticised go far beyond this doctrine, exceptional as it is. The effect of the fourth charge, as I have pointed out, was to charge the jury that, although the plaintiff might have known the train was coming, yet, because he was entitled under the law to assume that the train would not run past the depot more than six miles an hour, therefore, because of this assumption that he knew this train was coming, he might, in the face of his knowledge, act on the assumption, and not be guilty of contributory negligence. Of course, the plaintiff, whether he is a passenger or not, but more especially if he be a passenger, has a right to assume in general that the defendant railroad company will comply with all the regulations which the law imposes upon it, whatever those regulations may be—as to the rate of speed, as to the safety of the depot, as to giving signals, etc. Certainly such assumptions may very properly be indulged in, and especially so by all passengers. But of what earthly pertinence is it to observe that such assumptions may be indulged by a passenger in a case in which the testimony shows, as it does here, that the injured party knew of the impending danger, knew of the approaching train and the peril to him therefrom? In the presence of knowledge of the existing conditions, assumptions as to whether they existed or not are idle. In the face of the plain fact that he was seized by the witness Sauls, and told that the train was coming and begged to "look out," and that from this testimony, if true, he was bound to have known of his

danger, it is worse than idle to talk about the abstract proposition of law that he might generally assume that the railroad would comply with the regulations which the law imposed upon it. I do not know how to make this proposition any clearer than to say that whilst it is true that a passenger has the right to assume that a depot is safe, the railroad will so arrange its schedules as to avoid collisions and injuries; that the railroad will give such warning signals of approaching trains and observe all other regulations that the law imposes as to rate of speed, etc.; nevertheless, if the passenger actually does know, in any particular case, of the peril which threatens him, then in any such case assumptions all vanish, and the case must be tried on the knowledge that the evidence shows he had; and whether he is guilty of contributory negligence barring his recovery must depend, in all cases, where his knowledge is shown upon that knowledge, and not upon any abstract right he may have to assume generally that the railroad company will observe the regulations which the law invokes.

In this case, as I have already pointed out, the sixth charge, which was refused to defendant, was drawn with special reference to the testimony of the witness Sauls, and most indubitably the defendant company was entitled to have its theory of the case, as bottomed on this testimony, given in charge to the jury.

#### ANGLIN v. STATE. (No. 14,168.)

(Supreme Court of Mississippi. Nov. 8, 1909.  
Suggestion of Error Overruled  
Dec. 20, 1909.)

#### INTOXICATING LIQUORS (§ 147\*)—ILLEGAL SALE—PLACE OF SALE.

The purchaser of liquor sought the seller for the purpose of buying whisky, met him out of the state, there contracted with him for the purchase, not of any particular whisky, but of nine bottles, to be afterwards set apart for and delivered to the purchaser, which delivery was made by the seller within the state; the price being paid at time of contract out of the state. *Held*, the sale was not completed till delivery, and so was made in the state, and was subject to its laws.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 161; Dec. Dig. § 147.\*]

On suggestion of error. Overruled.  
For former opinion, see 50 South. 492.

SMITH, J. We have very carefully reconsidered this cause, and must adhere to our former opinion. Appellant suggests that, as delivery only occurred in this state, the laws thereof were not violated; and he relies upon *Tate v. State*, 91 Miss. 382, 44 South. 836. Counsel has misconceived the ground of that decision. In that case the appellant did not himself sell any whisky. If guilty at all, it must have been as an ac-

cessory to an unlawful sale, thereby becoming a principal; the crime charged being a misdemeanor. The whisky was purchased in Canton, where it was lawful so to do, and there, in Canton, delivered by the seller to the agent of the purchaser. This, in contemplation of law, was delivery to the purchaser. The sale was therefore complete in territory where it was lawful to sell same.

In the case at bar, stating the facts more fully than in our former opinion, the purchaser sought the seller for the purpose of purchasing whisky from him, met him at his (the seller's) yard gate in Louisiana, a short distance from the Mississippi line, and contracted with him for the purchase, not of any particular whisky, but of nine bottles of whisky, to be afterwards set apart for and delivered to the purchaser. This delivery was made by the seller in Mississippi, a short distance from the Louisiana line. No property passed in any liquor by virtue of the executory contract made in Louisiana. It remained the property of the seller until it was set apart for and delivered to the purchaser. When this was done, the sale was complete, and, in contemplation of law, was made at the place of delivery. "The statutory offense of selling spirituous liquors without license is committed by the sale which passes the property, and not by the negotiations and bargains which precede the sale." *Banchor v. Warren*, 33 N. H. 183.

This whole matter was practically settled by the decision of this court in the case of *Pearson v. State*, 66 Miss. 510, 6 South. 243, 4 L. R. A. 835. In that case the offer to sell, the acceptance thereof, and the payment of the purchase money occurred in Mississippi; but the delivery was made in Memphis. This sale was held to be complete, not in Mississippi, but in the city of Memphis. The court, speaking through Judge Campbell, said: "The point is: Where was delivery made? If the seller was to deliver the whisky in Panola county, before any right accrued to him to claim pay for it, the sale was not complete until delivery at the place of its destination; but, if the delivery was in Memphis to the carrier as the agent of the buyer, the sale was then complete, and the law of Mississippi was not violated. A delivery to the carrier in the usual course of trade is deemed by law *prima facie* a delivery to the consignee, and according to the testimony that was the understanding of the parties in this case."

While the court referred to the time when the seller was entitled to demand payment, this was only by way of argument. The real question in the case, and the point on which the decision turned, was: "Where was delivery made?" A sale may be complete, and the title to the property pass, al-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

though the purchase price agreed on may never in fact be paid. Among the cases supporting the foregoing views are *Bancher v. Warren*, 33 N. H. 183; *Dunn v. State*, 82 Ga. 27, 8 S. E. 806, 3 L. R. A. 199; *City of Spring Valley v. Henning*, 42 Ill. App. 162; *Suit v. Woodhall*, 113 Mass. 391; *Northcutt v. State*, 35 Tex. Cr. R. 584, 34 S. W. 946; *Commonwealth v. Hugo*, 164 Mass. 157, 41 N. E. 123. See, also, 17 Am. & Eng. Ency. of Law, 301.

As this sale was made in Mississippi, appellant's guilt or innocence does not depend on section 1404 of the Code of 1906. It is not necessary, therefore, for us to respond to counsel's comments thereon.

Suggestion of error overruled.

**BACOT et al. v. PHENIX INS. CO. OF BROOKLYN. (No. 13,822.)**

(Supreme Court of Mississippi. Dec. 6, 1909.  
Suggestion of Error Overruled  
Dec. 13, 1909.)

**1. INSURANCE (§ 282\*) — FIRE INSURANCE — POLICY—SOLE AND UNCONDITIONAL OWNERSHIP.**

The clause in a fire policy making its validity depend upon the sole and unconditional ownership by insured is reasonable and valid, and a breach of such stipulation, unless waived by the company, will excuse it from liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 601-635; Dec. Dig. § 282.\*]

**2. INSURANCE (§ 282\*) — FIRE INSURANCE — POLICY—SOLE AND UNCONDITIONAL OWNERSHIP—NATURE OF PROVISION.**

An insurance ownership is sole when no one else has any interest in the property as owner, and is unconditional when the quality of the estate is not limited or affected by any condition; the clause "sole and unconditional ownership" contemplating beneficial and practical ownership, but not including mere rights that the husband may have in a homestead, unless the policy is so worded as to undertake to insure those rights.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 601-635; Dec. Dig. § 282.\*]

**3. INSURANCE (§ 282\*) — FIRE INSURANCE — SOLE AND UNCONDITIONAL OWNERSHIP.**

A husband cannot insure the homestead, title to which is in the wife, representing that he is the sole and unconditional owner, and, when the risk is destroyed, abandon the insurance contract and its conditions as to sole ownership, and collect the value of the policy, on the theory that he, though not the sole owner as represented, yet has an insurable interest in the property as a homestead.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 282.\*]

**4. INSURANCE (§ 282\*) — FIRE INSURANCE — MORTGAGE CLAUSE.**

Code 1906, § 2598, requires to be attached to each fire policy taken out by a mortgagor a clause that any loss or damage under the policy shall be payable to the mortgagee as his interest may appear, and that the insurance as to his interest shall not be invalidated by any act or neglect of the mortgagor or owner. *Held*, that the section automatically writes itself into every insurance contract, where the insurance company allows a mortgage clause to be inserted, and makes a new and independent

contract between the mortgagee and insurance company in no way dependent upon the original policy between the owner and insurer, which would not be invalid even if the original policy was void from its inception, and would be unaffected by any conditions which would invalidate the policy as to the mortgagor whether prior or subsequent to the insertion of the mortgage clause, and hence, where an original policy was void because taken by a husband in his own name on a homestead owned by the wife, he representing that he was the sole and unconditional owner, the validity of a contract between insurer and the subsequent mortgagee of the premises formed by attaching a mortgage clause to the policy was not affected thereby, and the mortgagee might recover as to his interest irrespective of conditions imposed upon the owner by the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 282.\*]

**5. DISMISSAL AND NONSUIT (§ 56\*)—DISPOSITION OF CAUSE—MISJOINDER OF PARTIES.**

Where, in an action to recover on a fire policy, containing a mortgage clause, the owner of the premises and her husband were improperly joined as complainants with the mortgagee, but the question whether they had an interest, and how they should assert it, was one to be litigated in the case, a decree of dismissal will not be affirmed because of the misjoinder; but the lower court may eliminate the improper parties on motion, or control the matter by instruction, and thus dismiss them from the case.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Dec. Dig. § 56.\*]

**6. INSURANCE (§ 624\*)—FIRE INSURANCE—ACTIONS—PARTIES—MORTGAGEE.**

Where the interest of a mortgagee is the only valid liability under a fire policy, all that is due thereunder being due to him, "as his interest may appear," he can sue thereon, though his interest is less than the face of the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 624.\*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

"To be officially reported."

Bill by E. M. Bacot and others against the Phenix Insurance Company of Brooklyn. Decree of dismissal, and complainants appeal. Reversed and remanded.

Mixon & Cassidy and Lotterhos & Hewitt, for appellants. McLaurin, Armistead & Brien and Price & Whitfield, for appellee.

**MAYES, J.** On the 4th day of August, 1908, a suit was commenced in the circuit court of Pike county against the Phenix Insurance Company to recover the sum of \$700; that being the face value of a certain insurance policy issued by the company in the name of Burton Bridges on a certain dwelling located in the town of Summit, insuring same against loss by fire. The suit was begun in the name of E. M. Bacot, Emily Bridges, and Burton Bridges, for the use of E. M. Bacot and Emily Bridges, and contains two counts. The substantial allegations of the first count are about as follows, viz.: That Burton Bridges is the husband of Emily Bridges, and on the 17th day of January, 1907, they were the owners of a home-

stead in the town of Summit, whereon was located a frame building used and occupied by them as their home and valued at more than \$700. On that date an insurance was effectuated with the insurance company covering this property and indemnifying against loss by fire, the policy being for the sum of \$700 and being less than the value of the house. We shall allude to the specific terms of this policy later on. On the date that this insurance was effectuated, a mortgage existed on the property in favor of E. M. Bacot for the sum of \$433, with interest at the rate of 6 per centum from December 1, 1906. The so-called mortgage was in reality a deed signed by Emily Bridges and Burton Bridges to E. M. Bacot, reciting as the consideration the sum of \$433; but there was a written agreement between the parties that upon the repayment to Bacot of the sum of \$433 on or before the 1st day of December, 1906, the property should be reconveyed by Bacot to them, and, since this case is here on demurrer, we deal with it as though there was a formal mortgage. Other indebtedness due by the Bridges to E. M. Bacot, which it is claimed was covered by this agreement, ran the total indebtedness up to the sum of \$512.91. It is shown in the declaration that the title to this property was in Emily Bridges, the wife of Burton Bridges, and it does not appear that Burton Bridges had any title, unless it can be said that because the property was a homestead and used and occupied by both as such constitutes title within the meaning of unconditional and sole ownership clause of the policy. The insurance policy contains, among many others, the following clauses, viz.: "The entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated," etc., etc. It further provides that: "This entire policy, unless otherwise provided by agreement indorsed hereon and added hereto, shall be void, etc., if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple." The policy further provides that: "This policy shall be canceled at any time at the request of the insured; or by this company giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company, by giving notice it shall retain only the pro rata premium."

On the day that this policy was issued to Burton Bridges, a mortgage clause was in-

serted in the face of the policy in writing, substantially, if not literally, in the language of section 2596 of the Code of 1906, which requires that such clause shall be attached to each fire insurance policy taken out by a mortgagor or grantor in a deed in trust, and providing what shall be contained in such clause. That part of the mortgage clause which it is material for us to notice is as follows, viz.: "Loss or damage, if any, under this policy, shall be payable to E. M. Bacot, McComb City, Miss., as mortgagees, or to their trustee, as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property," etc., etc. The mortgage clause also provides for the cancellation of the policy on the terms indicated by the policy; that is to say, it may be canceled by either party on compliance with certain conditions as to notice, specified in the policy and mortgage clause, and applying to all the parties to the policy in the manner therein indicated. The mortgage clause also provides, in keeping with the requirement of section 2596 of the Code of 1906, which was operative at the time the insurance contract was made, that: "Whenever this company shall pay the mortgagee, or trustee, any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thoroughly subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee or trustee the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage, and of all such other securities; but no subrogation shall impair the right of the mortgagee or trustee to recover the face amount of his claim."

We do not set out in full the other provisions of the mortgage clause, for the reason that the other provisions are not in any way involved in the decision of this case. Although Burton Bridges had no title to the property in question, it affirmatively appears that the interest acquired by Bacot in the property was under a valid deed signed by both Burton Bridges and his wife, Emily Bridges, containing, in a separate agreement, a defeasible clause; in other words, the interest of Bacot in the property at the date of the insertion of the mortgage clause is placed beyond question, and the mortgage clause, coupled with the written agreement to recover, all show conclusively that as between the parties the transaction was treated as a mortgage.

The policy of insurance covered a period of time beginning on January 17, 1907, and ending on January 17, 1908, and the mortgage

clause was coextensive in point of time with the original insurance policy. Some time in December, 1907, while the policy was in full force, the building covered by the policy was totally destroyed by fire. All the requirements of the policy as to notice of loss, proofs, etc., were duly made, and demand made on the insurance company by both parties for such proportionate part of the value of the insurance as each claimed they were entitled to. The insurance company denied any liability under the policy. Hence the suit uniting all parties as plaintiffs. The second count is much the same as the first. It alleges that the title to the property is in Emily Bridges, the wife of Burton Bridges, and that the building insured was occupied by them as a homestead. It further alleges that it was the intention of Burton Bridges to take out the insurance in the name of Emily Bridges, but that without his fault and by accident and mistake the policy was written in the name of Burton Bridges, instead of his wife. There is no allegation that the insurance company knew of the condition of the title and waived it in any way. The second count demands the balance of the insurance, being \$187 after allowing the sum of \$512.91 to be paid to Bacot; that being the conceded amount of his interest. The declaration was demurred to and many grounds assigned. We simply state those we deem material. The demurrer states: (1) That the declaration shows that the policy of insurance was issued to Burton Bridges, and not Emily Bridges, and therefore Emily Bridges is improperly made a party plaintiff; (2) that the declaration shows that the title to the property is in Emily Bridges, and not Burton Bridges, the insured, and because of this policy is void, as Burton Bridges was not the "sole and unconditional owner" of the property, as it was provided in the policy that he should be in order to claim the benefit of the insurance; (3) because the policy was issued on the 17th day of January, 1907, and the property covered by the policy had been conveyed to E. M. Bacot by Burton and Emily Bridges long prior to that time, to wit, on the 17th day of December, 1905, and therefore there was no title in either of them at the date of the insurance; (4) because the declaration and policy show that the policy was void at the time of its issuance by reason of the failure of Burton Bridges to be the sole and unconditional owner of the property, and therefore there could be no right accruing to Bacot as mortgagee under the mortgage clause of this void policy; (5) because it is not shown that E. M. Bacot is a mortgagee or grantee, nor that Burton and Emily Bridges are mortgagors or grantors in any mortgage or deed in trust, but that Bacot was the owner of the property intended to be covered by the policy, and, not being the insured, had no right of action. These issues thus

raised by demurrer sufficiently present all questions in the case. The trial court sustained the demurrer and dismissed the declaration, from which judgment an appeal is prosecuted.

The first question which we shall consider is whether the policy in favor of Burton Bridges ever attached by reason of the clause making the policy void "if the interest of the insured in the property be not truly stated," or "if the interest of the insured be other than unconditional and sole ownership." We do not conceive the question in this case to depend at all on whether or not the husband had an insurable interest in the property on account of his homestead rights; but the question is whether the terms of the policy covered any such interest. The condition on which the policy is given any validity by the contract of insurance is that the insured is the unconditional and sole owner, and yet the declaration itself shows that he never was the owner. In the case of *Groce v. Phoenix Ins. Co.*, 48 South. 298, this court said in regard to this clause that "it is very generally agreed, and, indeed, repeatedly decided in this state, that the clause in an insurance policy as to sole and unconditional ownership is reasonable and valid, and that a breach of such stipulation, unless waived by the company, will excuse the company from liability." In the case of *Rosenstock v. Insurance Co.*, 82 Miss. 674, 35 South. 309, the court also upheld this clause. In fact, it may be said that the unconditional and sole ownership clause of insurance policies has been sustained in all courts. What is unconditional and sole ownership is not a question of legal difficulty. In the case of *Rochester German Ins. Co. v. Schmidt*, 162 Fed. 447, 80 C. C. A. 333, quoting from 2 *Clement on Insurance*, it is said: "An insurance ownership is sole when no one else has any interest in the property as owner, and is unconditional when the quality of the estate is not limited or affected by any condition." The husband or wife, as the case may be, have certain rights given by statute in the homestead; but it is in no sense of the word any kind of ownership, that is to say, where the title is absolute in the one or the other, the right which that other has in the homestead is not ownership in any sense of the word, and it can make no difference under the terms of the policy, so far as avoiding it is concerned, that the insured was the husband of the owner, or that the property was used by them as a homestead at the date the insurance was procured. Burton Bridges represented that he was the unconditional and sole owner of the property, and his title must be at least substantially as represented. The contract of insurance was with him alone, and he alone can recover on the contract if it is a valid insurance contract, and its validity must be determined by the conditions in the contract made with him. It

is not shown that he was acting as the agent of his wife, nor is it shown that the insurance company had any knowledge of the true status of the title. While it has been held in the case of *Liverpool Ins. Co. v. McGuire*, 52 Miss. 227, and in the case of *Groce v. Phoenix Ins. Co.*, 48 South. 298, that this clause had to do not with nice questions of title to be precisely determined, but with beneficial, practical, and equitable ownership, yet this clause deals with ownership of the kind just named, and we have not found any case that so extends the construction of this clause as to make it comprehend mere rights which a husband or wife may have in a homestead, unless the policy is so worded as to undertake to insure those rights.

Many of the authorities cited by counsel for appellant, in fact most all of them, are merely discussing the question of whether or not a husband or wife has an insurable interest in the homestead when the title is in the others. This interest is doubtless an insurable interest; but the question in this case is not that. The question here is: Is it permissible for a husband and wife to insure a homestead the title to which is in the other, and represent that the one procuring the insurance is the sole and unconditional owner, and when the risk is destroyed abandon the insurance contract and its conditions as to sole ownership and collect the value of the policy on the idea that he or she, though not the sole owner as represented, yet has an insurable interest in the property because it is his homestead? We say not. That was not the contract, nor was it the interest insured. This company might be willing to insure the sole owner of the property, but unwilling to issue a policy on any interest which he might have in the property. To so hold would be to substitute a different contract from that which the parties made.

The next question is: If the original policy is void because of a violation of the sole and unconditional ownership clause, thereby making the policy as to the original owner void from its inception, can it be valid as to a mortgagee? Let it be remembered that Bacot held a valid and enforceable mortgage on the property at the time the mortgage clause was inserted and on the date it was destroyed; his interest being, as now shown by the pleadings, \$512.91. Before discussing this question in its legal aspect, it will be well to consider the terms of the policy in relation to the mortgagee. The policy of insurance was a part of the security which Bacot held on his interest in the property, and it was obtained for that purpose. Under the mortgage clause of this policy, it was only such interest that Bacot had in the property "as it might appear" that he undertook to insure, and it was only that interest that the contract of insurance undertook to protect. The consideration paid for the policy by the owner is a continuing consideration, day by

day, and is not fully earned until the expiration of the full life of the insurance policy. That this is the case and is so understood by the insurance company is evidenced by the clause in the policy which permits either party to cancel the policy on certain conditions therein named, whereupon it becomes the duty of the company to refund a certain proportion of the unearned premium. No additional consideration is required to be paid as a condition for the insertion of the mortgage clause in the insurance policy, nor is any additional risk incurred by the insurance company. The consideration paid by the original insurer constitutes a sufficient and valuable consideration for the contract between the insurance company and the mortgagee, since it imposes no increased hazard; nor does it increase the amount of the insurance contract, but merely imposes upon the insurance company the obligation of paying to the mortgagee, in the place of the insured and out of the proceeds of the policy, such sum, not in excess of the face value of the policy, as the interest of the mortgagee, in the identical thing insured, shall amount to.

When a mortgage clause is inserted in an insurance policy, its effect is limited and controlled by section 2596 of the Code of 1906, and the rights of the parties are determined by the provisions of the above statute, which automatically writes itself into every insurance contract where the insurance company allows a mortgage clause to be inserted. In other words, where an insurance contract is made with the owner of property on which there is a mortgage, and the mortgagor, with the consent of the insurance company, undertakes to have a mortgage clause inserted in favor of the mortgagee, the statute says that such contract "shall have attached, or shall contain the following mortgage clause," etc., and proceeds to give in detail what this clause shall contain. This, then, irrespective of any mortgage clause inserted by the insurance company to the contrary, constitutes the only mortgage clause that can be placed in the policy. Since the mortgage clause in the policy is in the language of section 2596 of the Code of 1906, we will not incur this opinion by a reproduction of the statute, as we have already set out the principal parts of the statute as contained in the clause referred to. The rights of the mortgagee under this policy turn upon a construction of this statute, and, if the mortgagee is entitled to recover, it is by virtue of this statute and independent of the provisions contained either in the original policy or the mortgage clause, in so far as same may conflict with the statute.

The effect of this statute is to make the contract between the insurance company and the mortgagee a new and independent contract, which is not in any way dependent upon or subservient to the conditions of the original policy between the owner and the



insurance company. It may be that the original policy was void from its inception; but this fact cannot in any way invalidate the independent contract of insurance between the mortgagee and the insurance company, if the mortgagee have really a valid and insurable interest in the subject of the insurance. Under section 2596 the mortgagee does not take by assignment from the original owner of the policy, taking only the rights which the original owner has and subject to all the conditions imposed upon the owner; but the very design and purpose of the statute is to place the insurable interest of the mortgagee on a safer basis than it would be if it were subject to be defeated by all the uncertainties accompanying the taking out of insurance by the owner in stating correctly his title, etc., and the many other conditions imposed by the insurance company, the nonobservance of which work a forfeiture of the policy in so far as the owner is concerned. It is not because the law looks with any special favor on the mortgagee that this statute was passed securing him from forfeiture of his rights because of a breach of the conditions of the policy on the part of the original insurer. The business of insurance has reached that stage in commercial affairs that it is relied on as a kind of security in multiplied transactions. Men part with valuable property in part reliance on an insurance policy as indemnity against loss. The mortgagee does not live in the property. He knows nothing of the representations made by the insured when obtaining the policy of insurance that would render the policy void because of a breach of its conditions. He knows nothing of any fraud or false swearing which may have been done by the owner. He knows nothing of the hazards incurred by the insured in the use of the property which invalidates same under its terms. In short, he cannot know of the possible violation by the mortgagor of the many conditions imposed on the owner by the insurance company that would defeat a recovery under the policy, and the object of the statute was to relieve this indemnity taken by the mortgagee from its precarious attitude as a security, so liable to be defeated by the fraud, the ignorance, and the carelessness of the mortgagor, and, while leaving it optional with the insurance company whether or not they will insert the mortgage clause, yet, if they do, there can be inserted in it only such conditions of invalidation, as regards the mortgagee, as the statute provides.

In so construing this statute, we are fully aware of the fact that there are cases which construe this clause differently, and hold that if the original policy never attached to the risk, and the policy was therefore void from the beginning, the mortgage must fail; but we do not think the reasoning of those cases is sound, and, while resting on almost the identical clause that is required by our statute to be inserted, yet no statute had re-

quired that these clauses be inserted in the policy, as is the case here; but, if this be incorrect, still we cannot agree with those decisions. It seems to us that those decisions wholly misconceive the true principle which should control, and overlook the fact that the contract of insurance made with the mortgagee is independent; that is, free from the provisions and purposes of the contract with the owner, and made for the purpose of securing the interest of the mortgagee. It is merely a more convenient method, adopted by the company and mortgagee, of effecting an independent insurance through the premiums paid by the original insurer on his contract, without requiring the multiplicity of transactions which would be required by each party, mortgagor and mortgagee, taking out separate policies. To illustrate: A. owns property worth \$5,000 and insures same for \$4,000. A. borrows from B. \$3,000, and B. requires of A., in addition to a mortgage, that A. keep up an insurance in favor of B. for the sum of \$3,000. Were it not for the present method of conducting this business under the mortgage clause provided by the statute, it would be necessary for B. to insure his interest in a separate policy for \$3,000, and in order that the insurance might be kept up to the original amount of \$4,000 a separate policy would have to be issued in favor of A. for \$1,000. Again, at the end of six months, A. pays B. \$1,500 of the debt. New policies would have to be issued in order to cover the value of the property, and the amount of A.'s policy increased to \$2,500, and B.'s policy reduced to the value of his then interest, to wit, \$1,500. It was in order to avoid all these complications that the statute was enacted, making separate and independent contracts of the transactions, yet so arranging it as that both mortgagor and mortgagee, automatically, under one policy, keep insured whatever interest they may have in the subject of the insurance. If the mortgagor have no interest in the property, or if he has so stated his interest as that he forfeits his rights under the policy, but the insurance company is forced, under the policy, to pay the valid interest of the mortgagee, the insurance company is protected under the statute, by being legally subrogated to all the rights of the mortgagee as against the mortgagor. By the terms of this statute, so construed, complications are eliminated, and justice worked out to all parties. The following cases are in conflict with this view: *Hanover Fire Ins. Co. v. Nat. Exchange Bank* (Tex. Civ. App.) 34 S. W. 333; *Genessee Falls Sav. Bank v. U. S. Fire Ins. Co.*, 16 App. Div. 587, 44 N. Y. Supp. 979; *Baldwin v. Insurance Co.*, 105 Iowa, 379, 75 N. W. 326. Before we had any statutes on this subject, this court held, in the case of *East v. Insurance Association*, 76 Miss. 697, 26 South. 691, that this mortgage clause constituted a new and independent contract, and the mortgagee might recover

as to his interest without reference to any condition imposed upon the owner by the policy. See, also, the cases of: *Phoenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb. 334, 60 N. W. 133, 25 L. R. A. 679; *Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663.

If, then, the contract between the mortgagee and the insurance company is a wholly independent contract from that of the original owner or mortgagor, how can it be that any but the conditions contained in the mortgagee's contract affect his rights? His rights are independent, not derivative from the mortgagor's contract. Under this independent contract, he is not a mere appointee of the mortgagor to receive the proceeds of the policy, in case of loss, by virtue of and under the contract of the mortgagor, but the mortgagee gets an independent right, an independent contract with the insurance company, whereby the insurance company insure his individual interest in the property. In the case of *Insurance Company v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614, a case expressly approved by this court in the case of *Rosenstock v. Insurance Co.*, 82 Miss. 674, 35 South. 309, it is expressly held, in construing a mortgage clause almost identical with the one attached to this policy, that, even if the original policy issued to the owner was void from its inception, that in no way affected the right of a valid mortgagee to collect the value of his interest in the property under this independent contract as mortgagee with the insurance company. The question in the *Bohn Case*, *supra*, was this: Certain persons, being the sole owners of the capital stock of a corporation, procured a policy of insurance on same in their individual names. The policy contained the usual unconditional and sole ownership clause. The property was under mortgage, and the policy of insurance had inserted in it the union mortgage clause required to be inserted in this policy by the statute. Subsequently the property was destroyed by fire, and the questions in this case were: First, was there a violation of the sole and unconditional ownership clause so as to prevent the original policy from ever attaching? And, second, if the original policy never attached because of a breach of this condition, can the mortgagee recover on his contract? The court held that the sole owners of the capital stock of a corporation have not the sole and unconditional ownership of the corporate property within the meaning of an insurance policy, which is void unless they have such ownership; but the court further held, in regard to the mortgagee, as follows, viz.: "But the plaintiffs in error say that, although the indemnity of the blameless mortgagee is protected by this contract against any act or neglect of the mortgagors

subsequent to the issue of the mortgage clause, yet any prior act or neglect of theirs, which excludes their interest from insurance under the policies, precludes the mortgagee from obtaining any indemnity under this mortgage clause. Before we assent to a construction of this contract so narrow and subtle, it will not be un instructive to notice the history and purpose of this clause, and the situation of these parties when they made it their contract. We all know that 20 years ago a contract between a mortgagee and an insurance company, like that before us, was novel and rare. At that time the customary method of indemnifying against loss by fire was to indorse upon the policy the words, 'Loss, if any, payable to —', mortgagee, as his interest may appear,' or words of similar import. To-day such an indorsement is rare, and a contract similar to the mortgage clause before us is in general use. Why this change? The reason is not far to seek. The old indorsement made the mortgagee a simple appointee of the mortgagor, and put his indemnity at the risk of every act or neglect of the mortgagor that would avoid the original policy in his hands. Indemnity so precarious, so liable to be destroyed by the ignorance, carelessness, or fraud of the mortgagors, was not satisfactory to the mortgagees; and they proceeded to make contracts with the insurance companies similar to that before us, for the purpose of securing indemnity to their interests that should not be affected by any act or negligence of the mortgagors. \* \* \* Our conclusion is that the effect of the union mortgage clause, when attached to a policy of insurance running to the mortgagor, is to make a new and separate contract between the mortgagee and the insurance company, and to effect a separate insurance of the interest of the mortgagee, dependent for its validity solely upon the course of action of the insurance company and the mortgagee, and unaffected by any act or neglect of the mortgagor, of which the mortgagee is ignorant, whether such act or neglect was done or permitted prior or subsequent to the issue of the mortgage clause."

In line with the case above quoted from are the cases of *Insurance Co. v. International Trust Co.*, 71 Fed. 88, 17 C. C. A. 616, and *Hartford Ins. Co. v. Olcott*, 97 Ill. 439, and the case of *Westchester Fire Ins. Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682; 2 *Cooley's Briefs*, 1520. In the last case cited above, the court says, in construing the mortgage clause: "The rules laid down in the authorities cited have no application, however, to a case where a provision has been inserted in the policy which places the mortgagee upon another and a different footing from that of a mere assignee or appointee to receive the loss. The mortgage clause was agreed upon for this very purpose, and created an independent and a new contract, which removes the mortgagees beyond the

control or the effect of any act or neglect of the owner of the property, and renders such mortgagees parties who have a distinct interest separate from the owner, embraced in another and a different contract. The tendency of the recent cases is to recognize these distinctions, and thus protect the rights of the mortgagee, when named in the policy, and the interest of the owner and of the mortgagee are regarded as distinct subjects of insurance. *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Insurance Company v. Allen*, 43 N. Y. 392, 3 Am. Rep. 711." This same rule is re-announced in the case of *Insurance Co. v. International Trust Co.*, 71 Fed. 88, 17 C. C. A. 616.

We unhesitatingly hold that the contract of Bacot with the insurance company as mortgagee was an independent contract, dependent for its validity alone upon the conditions placed by the statute in the mortgage clause, and unaffected by any conditions which invalidated the policy as to the mortgagor, whether prior or subsequent to the insertion of the mortgage clause. Our views of the mortgage clause can be stated in no better language than it is put in the case of *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141: "The intent of this clause was that in case, by reason of any act of the mortgagors or owners, the company should have a defense against any claim on their part for a loss, the policy should nevertheless protect the interest of the mortgagees, and operate as an independent insurance of that interest, and indemnify them against loss resulting from fire, without regard to the rights of the mortgagors under the policy; and, to effectuate that intention, we should hold that, as against the mortgagees, the defendant cannot set up any defense based upon any act or neglect of the mortgagors, whether committed before or after the issuing of the policy, or the making of the agreement between the company and the mortgagees. \* \* \* The intent of the clause was to make the policy operate as an insurance of the mortgagors and the mortgagees separately, and to give the mortgagees the same benefit as if they had taken out a separate policy, free from the conditions imposed upon the owners, making the mortgagees responsible only for their own acts. \* \* \* This provision, in case the policy were invalidated as to the mortgagors, made it, in substance, an insurance solely of the interest of the mortgagees by direct contract with them, unaffected by any questions which might exist between the company and the mortgagors."

It is next argued that this case should be affirmed, if for no other reason than because there is a misjoinder of parties, and the cases of *Lowry v. Insurance Co.*, 75 Miss. 43, 21 South. 664, 87 L. R. A. 779, 65 Am. St.

*Rep.* 587, and *East v. Insurance Co.*, 76 Miss. 697, 28 South. 691, are cited as authority for this position. It is undoubtedly true that neither Emily Bridges nor Burton Bridges have any interest in this suit, and are therefore improperly joined; but it is also true that the question of whether or not they did have an interest, and the manner in which they should assert that interest, was one of the questions to be litigated in the case, and the court can now eliminate them on motion, or control the matter by instructions, and thus dismiss them from the case.

It is further argued that Bacot, the mortgagee, cannot maintain this suit because the amount of his interest is less than the policy, and the *East Case* and *Lowry Case*, cited above, are relied on as authority for this proposition. We do not think those cases are in point at all. In the present case, though Bacot's interest is less than the face of the policy, yet, as mortgagee, his is the only valid liability under the policy. This being the case, all that is due under the policy is due to him "as his interest may appear," and, being the only interested party, of course, he is the only one who can sue. This was not the case in either of the two cases cited above.

Reversed and remanded.

(124 La.)

No. 17,396.

Succession of KING.

(Supreme Court of Louisiana. May 10, 1909.  
On Rehearing, Nov. 29, 1909.)

1. APPEAL BY CURATOR.

The curator of a vacant estate has a standing to appeal from a judgment awarding the estate to a claimant, to whom, in his opinion, it does not rightly belong.

2. EVIDENCE (§ 588\*)—WEIGHT AND SUFFICIENCY.

Courts are unwilling to rest their judgments on the testimony of witnesses who are incapable of distinguishing between facts which are within their knowledge and those whose existence, without such knowledge, they are willing to take for granted and swear to.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2437; Dec. Dig. § 538.\*]

On Rehearing.

3. APPEAL AND ERROR (§ 150\*)—APPEALABLE INTEREST—EXECUTORS AND ADMINISTRATORS—RIGHT OF CURATOR TO APPEAL FROM JUDGMENT RECOGNIZING WIDOW AS HEIR.

Where, in the court below, there were only two claimants to the heirship, to wit, the alleged surviving widow of the deceased and the state of Louisiana, the unknown heirs being represented by an attorney appointed by the court, and a provisional judgment was rendered in favor of the widow, recognizing her as heir, but requiring her to give security as provided by law to restore the estate to any heir or heirs that should appear within three years, and the curator of the succession alone appealed from the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment, *held*, that the said curator had no appreciable interest in the controversy.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 150.\*]

Monroe, J., dissenting.

(Syllabus by the Court)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

In the matter of the succession of A. M. King. From the settlement of the provisional account, the curator appeals. Dismissed.

T. Jones Cross, for appellant. R. A. Tichenor, John D. Nix, and Pierson, Walton & Pierson, for appellee. Thos. J. Kernan, for absent heirs. Hubert N. Wax, Dist. Atty., for the State.

#### Statement of the Case.

MONROE, J. Decedent died in the parish of East Baton Rouge in April, 1905, leaving what was regarded as an intestate and vacant estate, of which appellant, claiming to be the largest creditor, was appointed curator, after a contest in which the state of Louisiana, Thomas E. McHugh, and M. F. Amrhein participated. In December, 1905, he filed a provisional account, showing assets to the value of \$8,312.12 and debts (including his own claim for \$944) to the amount of \$2,792.92. The attorney for absent heirs opposed the claim of the curator, and in January, 1906, the account was homologated, so far as not opposed. Nothing further appears to have been done until September, 1907, when Mary C. Boehm, alleging that she is the widow, by first marriage of Frederic R. Lauth, and by second marriage of Edward King, alias Adam King, alias Allen M. King, appeared and claimed the estate, as widow in the community and heir of the decedent, and thereupon the state intervened, and, opposing the claim so set up, asked that it be rejected. The attorney for absent heirs and the curator did likewise, and upon the issues so made there was judgment in favor of the widow, from which the curator alone has appealed.

The claimant, giving her testimony in April, 1908, tells substantially the following story: She would be 38 years old on May 10, 1908. She was married to F. R. Lauth in 1874, lived with him seven years, when she obtained a divorce, and was keeping a boarding house in St. Louis when, in December, 1883, she married a man calling himself Edward King, but who received letters addressed to Adam King, and who was sometimes called Jack King. He stayed with her a few days, then went away, and, returning in January, stayed five days, then went away again, and was gone two months, then came and went, sometimes making her a visit of an hour or two, until August 18, 1884, when he disappeared, and she never saw him after-

wards. She says that at times (prior to his disappearance) he wrote to her, signing his letters merely, "Yours, King." She produces none of the letters. After his departure, she inspected his baggage, and found a notebook, two handkerchiefs, and a suit of "convict" clothes, and she destroyed the "baggage"; but whether she destroyed the notebook and the handkerchiefs she does not say. The notebook, which might possibly have aided her in this case, was not, however, produced, nor did she produce any scrap of the handwriting of her husband, which might have been compared with that of the man who died at Zachary. Being asked, "What kind of a looking man was King?" she replied:

"He was not a very tall man; say he was a little over five feet. He was short and muscularly built, well built. His weight was about 165 pounds or 170 pounds, somewhere about that."

She says that she heard, though she does not say when, that King was dead, "that several were killed in the mines, and that he was among them;" but she does not remember where "the mines" were, and she "did not hunt him up or try to find anything at all." After King disappeared, she went to Philadelphia, and remained there three years, then returned to St. Louis, where, about six years prior to the time at which she was testifying, she married Mr. Void, and, when testifying, was living either in New Orleans or Baton Rouge. She is asked:

"How long have you been living in New Orleans?"

And she answers:

"When I came here, first time, it was three years ago, when I came to Baton Rouge. I came here in November, and in May I heard of the death, and I have been here ever since the death of King."

She is asked:

"What brought you here?"

And she answers:

"I came here with Mr. Void, who is in business here."

She says that the man (King) whom she married told her that he had no relatives. She produces a marriage certificate, showing that Jeremiah Ryan, a justice of the peace in St. Louis, on December 20, 1884 (one year later than the date stated in her testimony), united in marriage—

"Edward King, of Alton, state of Illinois, and \* \* \* Mary C. Boehm, \* \* \* of St. Louis, who is over the age of 18 years."

James Spurlock, George Ward, and Mrs. W. B. Shouldis were examined, under commission, in New Orleans, as witnesses for the claimant, so that our Brother of the district court had not the advantage of hearing them testify and of observing them while so doing.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The testimony of Spurlock reads as follows:

"Interrogatory No. 1: What is the extent of your acquaintance with the late A. M. King, who died in the town of Zachary, La., some few years ago?

"Answer: I met Mr. King at a boarding house at which I was stopping, which boarding house was kept by the lady whom I now know as Mrs. Void, who resides in this city and claims to be the widow of Mr. King, and she is the widow of Mr. King, and there ain't no doubt about it. I afterwards met Mr. King in Zachary, La. I went to Zachary to do some work a few years ago, for a man named Tucker, who lives between  $1\frac{1}{2}$  and 2 miles from town. While I was in Zachary, I went into a store, and while I was there I saw Mr. King, and he looked at me, and I looked at him, and he said, 'I have met you before.' I said, 'Yes; but I don't know where.' King says, 'I guess it was in St. Louis, but we won't say anything about that.' And that was the last time St. Louis was mentioned, as he didn't seem to like for me to talk about it. Whenever I came to town I generally stopped at his place, because I felt like I knew him and didn't know anybody else, being a stranger there.

"Interrogatory No. 2: If you say that you are acquainted with the said Mr. King, please state when and where you first became acquainted with him, giving all the details.

"Answer: I have just told you that I met him at a boarding house kept by the lady whom I now know as Mrs. Void, who then claimed to be Mrs. King, and afterwards met him at Zachary, as I have just said.

"Interrogatory No. 3: Are you acquainted with the lady who is claiming, in these proceedings, to be the wife of the late A. M. King? If so, please state when and where you first became acquainted with her.

"Answer: Yes; I first met her in St. Louis. She was then keeping a boarding house; I afterwards met her in New Orleans, at a rooming house. \* \* \* I wanted to get two rooms, together, in the house, so a lady said to me and the landlady that she would move back to another room, in the rear of the house, so that I could have two rooms, together, for my wife and children. The next day, when I saw this lady, she remarked, 'I have met you before,' and I said, 'Yes; but I can't place you.' She asked me if I was in St. Louis at any past time, and I then told her that I was, and that was just where I met her, at the boarding house kept by her who was known to me then as Mrs. King. She told me that King was dead, and I told her I had met him in Zachary. She told me that she had a notice of his death, and I asked her why she was living here and King was living in Zachary, and why she did not know anything about him. We talked about Mr. King for some time.

"Interrogatory No. 4: Please state whether or not you knew the Mr. A. M. King, of Zachary, by any other initials.

"Answer: I do not remember what Mr. King's initials were. All that I know is that the Mr. King I met at Zachary is the Mr. King that I met in St. Louis.

"Interrogatory No. 5: Please state whether or not you ever met the plaintiff in this suit in St. Louis, Mo. If so, when and under what circumstances, and whether or not you were ever introduced to her husband, giving the time and place and the description of the man who was introduced to you; also, give the name.

"Answer: As I said before, I met the plaintiff in this case in St. Louis, where she was keeping a boarding house. I stopped at her boarding house in St. Louis a few days, and, while I was there, I was introduced to a man as her husband—Mr. King. When I met him, in St. Louis, Mr. King was about 80 years of age, weighed 140 or 150 pounds, and was a lit-

tle taller than I am, and I am 5 feet 9 inches. He was a man that had very little to say.

"Cross-Interrogatory 1: If you say that you were acquainted with A. M. King, state when and where was the last time you saw him; also, when and where was the first time you saw him.

"Answer: The last time, I met him in Zachary. The first time, I met him in St. Louis.

"Cross-Interrogatory 2: If you say that A. M. King died at Zachary, La., state how you know this to be a fact, and whether you were in Zachary at the time of his death; and, if so, whether you visited him during his last illness, and how often, and whether you attended his funeral.

"Answer: I was not in Zachary at the time of his death, and only knew about his death from what I heard.

"Cross-Interrogatory 3: If you say you saw a Mr. King in Zachary, La., at any time, state whether or not you had any conversation with him; and, if you say you did have conversations with him, state whether or not he admitted he was the same man, named King, whom you had previously met in St. Louis. Did you tell him that you had previously been acquainted with him? Did he admit to you that he had known you before meeting you in Zachary?

"Answer: He admitted us meeting in St. Louis, as I have told you already. The fact is, he was the first to mention it to me; but he did not seem to want to talk to me about the matter. While I was in the neighborhood, I went to Zachary quite often, and would spend the time with King, and we would drink together and have a good time; but I boarded at Mr. Tucker's.

"Cross-Interrogatory 4: Give an accurate description of the person you refer to, giving his height, weight, age, color of hair, color of eyes, and all his personal characteristics, either of body, mind, or character, that would serve to assist in his identification.

"Answer: As I stated before, Mr. King, when I knew him at Zachary, was 45 or 50 years of age, weighed somewhat more than when I knew him in St. Louis, and his hair was dark, with some gray in it. I don't know the color of his eyes, but think they were light. He was strange, and did not talk much, as a rule, but was a deep man, and did not discuss his business affairs."

The same interrogatories and cross-interrogatories were propounded to the witness Ward and to Mrs. Shouldis.

Ward's testimony is, in substance, as follows: He lived in Zachary for many years before the Yazoo & Mississippi Valley Railroad was built, and for a few years afterwards. King kept a barroom, and he met him frequently; did some carpenter work for him, and talked to him on many occasions; is slightly acquainted with the lady who is claiming to be Mrs. King. She called to see him, at the Soldiers' Home, "about a year ago," and asked if he had known her husband; said King was her husband and had been missing for several years; never knew him otherwise than as A. M. King; never knew him until he met him at Zachary, but King told him that he once lived at St. Charles, which is several miles from St. Louis; also said that he had been in St. Louis, in East St. Louis, Ill., Mexico, and other places. He did not talk much, and seldom discussed his affairs, but his statement about St. Louis led witness to believe

that he had been there; saw him, for the last time, about two months before he died. "Mr. King was a man about or nearly, six feet high, and weighed about 170 pounds." When witness first knew him, "he was about 40 or 45 years of age."

Mrs. Shouldis says: She never met King at Zachary, and does not know whether he is the Mr. King whom she met in St. Louis. About Christmas time, in 1884 or 1885, she was living in St. Louis, and was introduced by Mrs. Mary Boehm to a Mr. King, to whom Mrs. Boehm said she had been married. That lady is now living in New Orleans. Witness met her, she thinks, about 1905, and was told by her that she believed that the Mr. King who had died at Zachary was her husband. Witness met her on the street in St. Louis, and it was then that she was introduced to Mr. King. He was not very large; could not say how tall. He was a quiet-spoken man and did not have much to say; looked like a laboring man. She never met him but once.

William McCarthy testified, in the presence of the court, about as follows: He lived in Zachary about 20 years; became acquainted with King in St. Louis in 1882. Witness was getting out timber, and King engaged a few hands for him; does not know where he lived. It was at a boarding house, and witness used to go around there every day or two. It was down town; does not know the street; went to the house and saw a woman. "The woman that I seen was about the height of that woman" (referring to the claimant), "but a little more fleshy." He and King went from St. Louis to Utica (in Tennessee). He (King) was getting out ties and timber; does not know how long he staid in Utica. King went back to St. Louis about twice a month. He went from Utica to Arkansas, and witness did not go with him, but met him afterwards at Rosetta (Miss.). He was at Rosetta a good while—six or eight months. Witness worked for him; next saw him at Zachary in 1887, he thinks, and there saw him frequently, and worked for him at times, in his barroom; waited on him in his last illness. When in health, he was a stout-looking man. Witness thinks he was about 26 or 27 years old when he came to Zachary, and about 41 when he died. He and King had talked about it, and witness was about six months the elder. Witness will be 43 on March 5th next (1909); is unable to say whether they staid in Utica a year—maybe more, maybe less. King never said anything to him about being married. He was a man of dissolute habits. He never talked of his family, or told where he came from.

Dr. W. G. Millican, sworn for the defense, says: That he is the curator of the estate; is a practicing physician; lives in Zachary; had known King since the fall of 1885, or spring of 1886; was his physician from 1893 until he died. He never mentioned any relative, save an uncle, who, he said,

had treated him badly; spoke of marrying a certain young lady, in the neighborhood, but said he was prevented by the interference of others. It was well known that he visited her.

T. H. Charlton (for the defense) says he is a farmer, and lives near Zachary; knew King since 1885 or 1886; was thrown with him a great deal; never heard him speak of his family, though he may, possibly, have spoken of a sister. "He was a great talker. If he got started, you would have to walk off and leave him." He and King talked of their ages, and, King would have been about 52 at the time witness was testifying.

J. W. Kirkwood (for defense) was marshal of Zachary for about 10 years; knew King; nursed him during the last 30 days of his life; became acquainted with him, probably, in 1886 or 1887; tried to get him to tell, shortly before he died, whether he had any relatives, but he declined to talk on that subject; said they could do no good; never intimated that he was married. He visited a young lady in the neighborhood; said he had a sister, but did not know whether she was living, and he spoke of an uncle. He was a great talker. "I would have to leave him while he was talking, get up and leave him talking on different subjects, when he got started. \* \* \* After he died, I looked at the register's book. He was 49, when he died, according to the register." (Witness refers to the register of voters.)

#### Opinion—On Motion to Dismiss Appeal.

The claimant, appellee, moves to dismiss the appeal, on the ground that the curator, appellant, is without appealable interest. The Code of Practice, however, provides:

"Art. 572. Tutors, curators and other persons, charged with the administration of another's estate, may appeal, for the benefit of the persons whose property they administer, if they deem an appeal necessary."

And the appeal in this case was granted to the "curator."

The motion to dismiss is, therefore, denied.

#### On the Merits.

The claimant testifies in part as follows:

"I will be 38 years old the 10th of May."

She made that statement on April 27, 1908, from which it would follow that she was born on May 10, 1870. At another time, she is asked (on cross-examination):

"When were you married, the first time?"

And she replied:

"In 1874."

She then goes on to say that her first husband was Frederic R. Lauth; that she lived with him for seven years, and had three children; and that she then obtained a divorce from him, and in December, 1883, was married to Edward King. According to her sworn statements, therefore, she married

Lauth when she was 4 years old, had three children by him, obtained a divorce, and was again married, before she had attained the age of 14 years. The certificate which she produced shows that she was married to Edward King in December, 1884 (instead of 1883), and thus she is allowed one more year for the accomplishment of the results mentioned; but it must, nevertheless, be admitted, either that she was an unusually precocious child, or else that she has fallen into some error in the giving of her testimony. She does not pretend, herself, to have identified the man who died at Zachary with the man whom she had married 21 years before in St. Louis. She swears that the man whom she married was "a little over 5 feet; he was short." Spurlock says that the man whom he saw in St. Louis was a little taller than he, and that he measures 5 feet 9 inches. And Ward says that the man who died at Zachary was "about, or nearly, 6 feet high." There are but two witnesses whose testimony may be supposed to tend in the direction of identifying Edward King, who married the claimant, with Allen M. King, who died at Zachary; and their testimony does not go very far in that direction.

McCarthy in 1882 met in St. Louis the man whom he knew afterwards for years in Zachary, and whom, so far as appears from his testimony, he knew as Allen M. King, and not otherwise. But the claimant, who married Edward King, in December, 1884, testifies that she had known him, off and on, "say about a year," before she married him, so that the King with whom McCarthy became acquainted in 1882 was a person to whom she was not only not married, but whom she did not know, and there is no evidence in the record to show that she ever made his acquaintance. The only direct evidence which is left, tending to identify the vanished husband with the man who died at Zachary, therefore, is the testimony of Spurlock, and that testimony has certain peculiarities which prevents its acceptance as importing absolute verity. Thus, being under oath, he volunteers to say, in connection with his answer to the first interrogatory propounded to him:

"She is the widow of Mr. King, and there ain't no doubt about it."

But how could Spurlock know, with sufficient certainty to justify him in swearing to it so positively, that the claimant was the widow of Allen M. King, or of Edward King, or of any one else, when he had only her statement, made in casual conversation, that she had ever been married, and knew only by hearsay of the death of one of her supposed husbands.

The statement made, as it was, so early in his examination, and without any particular provocation, suggests an oversanguine temperament, and a disposition on the part of the witness to take for granted the main fact here at issue, and thereby so shakes the

confidence of the judicial mind in the conservatism, or exactness, of the witness as to render recovery somewhat difficult, not to say impossible. When, therefore, he tells of his meeting with the man of Zachary and with the claimant, we are led to speculate as to whether such things as he describes could really be, or whether, perchance, he is again putting his temperament, instead of the facts which we need, in evidence.

Referring to his meeting with King, to whom he had been introduced, at a boarding house at which he had spent a few days, perhaps, 20 years before, he says:

"I saw Mr. King, and he looked at me, and I looked at him, and he said: 'I have met you before.' I said: 'Yes; but I don't know where.' King says: 'I guess it was in St. Louis; but we won't say anything about that.' And that was the last time St. Louis was mentioned, as he didn't seem to like for me to talk about it."

Referring to his meeting with the claimant, he says:

"The next day, when I saw this lady, she remarked: 'I have met you before.' And I said: 'Yes, I know you; but I can't place you.' She asked me if I was in St. Louis at any past time, and I then told her that I was, and that was just where I met her, at the boarding house kept by her."

If Spurlock had been the one to open the conversations above reported, and had done so by saying to each of the parties, "I have met you before," one might say, "Well, that is a habit." But for two people, who had not seen or heard of each other for more than 20 years, and between whom no collusion is charged, to select the same five words for the conveyance of an idea which might have been expressed in so many other ways, added to the meetings themselves, and to the fact that the other parties should both have recognized the witness, rather than he them, or either of them, was an unusual coincidence. Another matter, in this connection, presents a psychological paradox, for which no theory, even of coincidences, seems to afford an adequate explanation. If King did not want to say anything about his meeting with Spurlock in St. Louis, why did he say anything about it? We find nothing in the record, and nothing, that we know of, in human nature, which throws any light upon that question; and, it being demonstrated that Spurlock, who alone lives to report what took place, is inexact at times, we are driven to the suspicion that there may be an error somewhere, and that King, instead of voluntarily and unnecessarily broaching a subject that was disagreeable to him, and, after making a single remark, closing his mouth (with reference to that subject) forevermore, really said nothing about it, and, in point of fact, that there was no such conversation. Now, it is true that Spurlock, in answer to other interrogatories propounded to him, says that the King whom he met in St. Louis and the King whom he met at Zachary were one and the same; but, what with his tempera-

mental exuberances, his coincidences, and his paradoxes, we do not feel that his testimony would be a sufficient support for the judgment which the plaintiff claims, nor do we find any other testimony, which, in our opinion, would answer that purpose. We rather conclude that the claimant, being in the neighborhood, heard of the death of Allen M. King, and heard also, that he had left behind him some thousands of dollars, which nobody claimed, and which were likely to go to the state, for lack of a widow and heir, and, having had a husband named King, who had unaccountably to her disappeared, she became obsessed with the idea that she must necessarily be the person needed, and that her ship had arrived. We regret the necessity of awakening her from so pleasant a dream, but we are constrained to deal with the situation from somewhat a different point of view.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that the demand of the claimant, calling herself Mary C. Boehm, widow, by first marriage, of Fred-eric R. Lauth, and widow, by second marriage, of Edward King, alias Adam King, alias Allen M. King, be rejected, at her cost in both courts.

#### On Rehearing.

LAND, J. In the reasons assigned for granting a rehearing of this cause, this court said:

"In this case, neither the state of Louisiana nor the attorney for absent heirs having appealed, and the court entertaining doubts whether the curator has sufficient interest to prosecute the appeal taken by him, it has been deemed advisable to grant a rehearing."

Since the granting of the rehearing on June 7, 1909, neither the state nor the attorney of absent heirs have taken advantage of the reopening of the case to prosecute an appeal and contest the judgment in favor of Mrs. Boehm.

The said judgment, having become final, concludes the state from disputing the status of Mrs. Boehm as the widow of the deceased. Hence the state can take nothing as heir, nor claim the custody of the balance in the hands of the curator on the ground that no heir has presented himself. Rev. Civ. Code, art. 1196: The judgment by its very terms does not conclude the unknown heir or heirs, but requires the widow to give security for the restitution of the estate in case any heir should come forward within the space of three years. Rev. Civ. Code, art. 931. The curator has no interest in the contest between Mrs. Boehm and the state, and cannot be permitted to appeal for the purpose of championing the claim of the state at the expense of the mass of the succession. The curator cannot appeal in the interest of unknown heirs, because they

are represented by the attorney for absent heirs.

The Civil Code requires that the surviving wife, claiming as heir, shall proceed to assert her rights contradictorily with a person appointed to defend the interests of the absent heirs. Articles 930-931; Succession of Allen, 44 La. Ann. 801, 11 South. 42. A decree of possession rendered without such appointment is null. Id. Hence the curator is a mere stakeholder and cannot represent the absent heirs.

Under the facts of the case, the reversal of the judgment would leave in the hands of the curator, after the payment of all debts and costs of administration, a considerable sum of money which the judgment precludes the state from claiming. The law does not contemplate any such result. The curator must deliver the balance in his hands to the heirs or pay the same to the State Treasurer. In paying to the heir who appears and is recognized by judgment of the court, the curator is fully protected. It is only when no heir appears that the curator is authorized to pay the balance into the state treasury.

Hence the curator has no appealable interest in this controversy.

The Civil Code does not contemplate that the curator should interfere in a case of this kind. The law provides for the citation of the attorney for absent heirs, and not of the curator, and further protects the interest of the unknown heirs by requiring the wife to give bond and security in their favor. The judgment below, in recognizing Mrs. Boehm as heir, orders her to give the security required by law.

The merit of Mrs. Boehm's claim cuts no figure in the consideration and determination of the motion to dismiss. However weak this claim may be, the state and the unknown heirs are precluded from contesting it by their failure to appeal, and the curator has no interest in the question.

It is therefore ordered that our former decree herein be vacated, and that this appeal be dismissed.

MONROE, J. I dissent, on the grounds stated in the original opinion.

(124 La.)

No. 17,649.

UNION GARMENT CO., Limited, v.  
NEWBURGER et al.  
MOSS v. KORY.

(Supreme Court of Louisiana. June 14, 1909.  
On the Merits, Nov. 2, 1909. Rehear-  
ing Denied Nov. 29, 1909.)

1. APPEAL AND ERROR (§ 630\*)—DISMISSAL—  
INCOMPLETE RECORD—LOSS.

If the court is unable to review the judgment appealed from because a material part of the record has been lost without appellant's

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



fault, the appeal will not be dismissed, but the case will be remanded for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2723; Dec. Dig. § 630.\*]

**2. ACTION (§ 57\*)—CONSOLIDATION—SAME ISSUES.**

Plaintiff, having purchased property of an insolvent firm at the liquidators' sale, sued in the civil district court for specific performance and to cancel a mortgage on the property made by one of the partners after the sale, but before its consummation, on the ground that such mortgage was fraudulent, in which suit the liquidators, the auctioneer, the firm, and its members, and the nominal mortgagee were made defendants. Pending such suit, the holder of the mortgage notes began executory process in another division of the court, in which plaintiff intervened and enjoined the executory process on the ground of fraud in executing the mortgage; and thereafter petitioned that the holder of the notes be made a defendant in the specific performance suit, and the executory process suit was transferred to the division in which the specific performance suit was pending, and the suits were consolidated. *Held* that the suits, being between the same parties and involving the same issues, were properly consolidated, though the consolidation was not expressly authorized by Code Prac. art. 422.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 632-675; Dec. Dig. § 57.\*]

**3. APPEAL AND ERROR (§ 189\*)—PRESENTATION BELOW—OBJECTIONS—CONSOLIDATION OF ACTIONS.**

Objections to the transfer of a case to another division of the civil district court and its consolidation with an action there pending cannot be first made on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 189.\*]

**4. PRINCIPAL AND AGENT (§§ 155, 175\*)—RIGHTS OF PARTIES—AUTHORITY TO PURCHASE.**

A purchase of property at an auction sale by an unauthorized agent was not binding upon the nominal purchaser until ratified by it, and was not binding upon the sellers, and they could refuse to recognize the sale even after being notified of its ratification by the purchaser.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 581, 663; Dec. Dig. §§ 155, 175.\*]

**5. PRINCIPAL AND AGENT (§ 34\*)—POWERS—POWER COUPLED WITH INTEREST.**

An insolvent firm and another executed an agreement, by which, in consideration of the latter advancing money to settle the firm debts, the firm agreed to vest the administration of its property in him, to be administered as he thought best, empowered him to sell all its property for that purpose, and bound themselves not to revoke the authority thereby given; and on the same day the firm and its members, the liquidator, and certain creditors made an agreement by which the latter agreed to postpone their claims and advance money to facilitate a settlement, to be repaid out of the first proceeds of the firm assets. *Held*, that the power of attorney to the liquidator to sell firm property could not be revoked by a partner; it being an essential part of the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 55; Dec. Dig. § 34.\*]

**6. PRINCIPAL AND AGENT (§ 103\*)—SALE OF PROPERTY—SALE THROUGH AUCTIONEER.**

Liquidators of an insolvent firm who were authorized to sell firm property could make the sale through an auctioneer.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 103.\*]

**7. FRAUDULENT CONVEYANCES (§ 295\*)—VALIDITY—EVIDENCE—SUFFICIENCY.**

In an action to cancel a mortgage of partnership property placed thereon by one of the firm, evidence *held* to show that the mortgage was simulated and fraudulent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 295.\*]

**8. BILLS AND NOTES (§ 332\*)—BONA FIDE PURCHASER—EVIDENCE.**

A transferee of notes secured by a mortgage fraudulently given upon property which the mortgagor had agreed should be sold for the benefit of creditors of his firm, was not a bona fide holder; he being the father-in-law of the mortgagor, and having knowledge of the latter's agreement authorizing the sale of the property for creditors.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 806; Dec. Dig. § 332.\*]

Appeal from Civil District Court, Parish of Orleans; George H. Theard, Judge.

Consolidated actions by the Union Garment Company, Limited, against Sylvan Newburger and others, and by Hartwig Moss against Edward Kory. From a judgment for the first-named plaintiff, Moss and others appeal. *Affirmed*.

Benjamin Rice Forman, for appellant Moss. Solomon Wolff, for appellants Kory and Ducros. Charles Rosen, for appellee Union Garment Co., Ltd. Titcher & Rogers and B. I. Cahn, for other appellees.

**On Motions to Dismiss.**

NICHOLLS, J. In the certificate of the clerk to the transcript of appeal that officer certifies that:

The "answer of Edward Kory filed October 28, 1907, three notes filed July 24, 1908, and sheriff's indemnity bond filed September 13, 1908, are missing from the record, and cannot be found notwithstanding due and diligent search cannot be found."

The appellees move to dismiss the appeal by reason of the absence of those papers from the record.

Since the filing of the motions to dismiss a carbon copy of the missing answer of Edward Kory has been found, and replaces the original.

The practice of this court where a material part of the record or the evidence adduced has been lost through no fault of the appellant, and he is unable for that reason to bring up a record upon which the court can review the judgment appealed from, has been to remand the case to be tried *de novo*, and not to dismiss the appeal.

Under that rule, the motion to dismiss would be denied, and the cause remanded, if the situation of the cause was such as to require the application of that rule to this case.

As we are presently advised, the missing papers will not be necessary to enable us to pass upon the issues submitted in this case for our decision.

If, on the hearing, it should be ascertained

that such is not the case, we can then order the case to be remanded. See, on this subject, *Barton v. Burbank*, 119 La. 227, 43 South. 1014, and the numerous authorities therein cited; *Grubbs v. Pierson*, 111 La. 101, 35 South. 474; *Immanuel Presbyterian Church v. Riedy*, 104 La. 319, 29 South. 149.

The motions to dismiss are denied.

#### On the Merits.

**PROVOSTY, J.** The following instrument is self-explanatory:

"This agreement made and entered into this 26th day of November, 1906, by and between

"(1) A. Kory & Sons a commercial and manufacturing firm of the city of New Orleans composed of Abraham Kory, Edward Kory and Max Kory,

"(2) Clarence E. Kory, Eugene Kory and Roscoe Kory,

"(3) Newburger and Levy represented by E. Levy, all designated hereafter as parties of the first part, and Silvan Newburger, party of the second part,

"Witnesseth:

"That whereas the firm of A. Kory & Sons is unable to meet its obligation and desires to offer in settlement of same the sum of 50% in cash, which amount they find it necessary to borrow from Silvan Newburger,

now, therefore:

"In consideration of the agreement on the part of Silvan Newburger to advance the amount necessary to make the said settlement aggregating to a total of said firm, to be sold, collected or otherwise administered by him for the purpose of reimbursing himself for the said amount to be advanced as aforesaid. The said A. Kory & Sons and the individual members of said firm, hereby agree to vest the absolute and unrestricted administration of said property in the said Silvan Newburger to be disposed of in such a manner and for such price and on such conditions as, in his own judgment may deem best, said A. Kory & Sons binding themselves not to revoke this authority which is based upon an adequate consideration nor to interfere in any manner in the said administration.

"They the said A. Kory & Sons further agree to sign all papers, documents, transfers and checks and to make any and all endorsements that may be necessary to make this agreement effective and to sign and execute Powers of Attorneys authorizing the said Silvan Newburger to dispose of all the real estate belonging to the said firm or the individual members thereof in the city of New Orleans and should they fail to execute a separate power of attorney they agree that this instrument shall constitute and have full force and effect of a power of attorney and be sufficient for said purpose.

"The said A. Kory & Sons further agree to sign checks upon such funds of theirs as may be in banks, in favor of the said Silvan Newburger when requested by him to do so, in order to enable him to utilize the said funds in carrying out the above-stated object.

"The above-named Edward Kory and Max Kory furthermore agree to give their assistance, employing their whole time if necessary, to enable the said Silvan Newburger to administer the said assets and estate above described, collect outstanding accounts and to dispose of all the assets to the best possible advantage, their compensation to be fixed and paid by said Silvan Newburger as aforesaid, the said Silvan Newburger to have the right to dispense with their services whenever, in his opinion, no longer needed.

"The firm of A. Kory & Sons and the said

Eugene Kory, Clarence Kory and Roscoe Kory, hereby promise and agree that they will hold the said Silvan Newburger harmless for any negligent act in the premises as well as for any of all errors of judgment or acts of omission in the premises, hereby expressly waiving and abandoning in advance, any claims that might accrue to them on account of such acts or omissions.

"The said A. Kory & Sons and the individual members thereof, Clarence Kory, Eugene Kory and Roscoe Kory and the said Newburger and Levy, hereby agree to postpone any and all claims that they might have against the assets of the said firm or the individual members thereof as owners or creditors until the aforesaid sum of \$56,700 or whatever sum shall be required to pay the debts, together with expenses and charges, are reimbursed to the said Silvan Newburger.

"It is agreed that said Silvan Newburger shall have the right to pay out of the proceeds the charges, costs, attorney's fees and expenses of administration, clerk hire, and the like.

"In witness thereof the parties have hereunto signed their names in duplicate in this city of New Orleans on this twenty-sixth day of November, 1906.

"A. Kory & Sons.

"Edward Kory.

"Max A. Kory.

"A. Kory.

"Eugene Kory.

"Clarence Kory.

"Roscoe Kory.

"Silvan Newburger.

"Newburger & Levy, per L. Levy.

"Witness:

"Bernard Titche.

"Bertrand I. Cahn."

For the execution of the trust with which he was charged by this instrument Newburger, by consent of all parties, associated with himself Mr. Sol. Wexler.

Among the creditors of A. Kory & Sons were the Whitney-Central National Bank, Newburger & Levy, and Eugene, Clarence and Roscoe Kory. On the same day on which said instrument was executed, the creditors here named and the liquidators Newburger and Wexler entered into a contract, to which A. Kory & Sons, as a firm and individually, were parties, by which said creditors agreed to postpone their claims until all the other creditors of A. Kory & Sons had been settled with; and, in order to facilitate said settlement, the bank agreed to advance \$56,700, to be repaid out of the first proceeds realized from the assets of A. Kory & Sons, and all the parties agreed as to how the other proceeds should be apportioned after the said \$56,700 should have been refunded.

A. Kory had furnished the entire capital of A. Kory & Sons, to wit, \$50,000.

The premises in which A. Kory & Sons carried on its business had been acquired by an act reciting that the property was sold

—unto Messrs. A. Kory & Sons, a firm domiciled and doing business in this city, composed of Messrs. Abraham Kory, Max A. Kory and Edward Kory, herein purchasing \* \* \* in the proportion of an undivided one-third each."

When, in the execution of their said trust of liquidating the affairs of A. Kory & Sons, Newburger and Wexler caused the said real estate to be advertised for sale at public

auction, Edward Kory objected, and served notice upon them that he revoked the power of attorney given them to sell his property. He at the same time made an effort, through his counsel, to have them agree to postpone the sale, or, at any rate, to fix an upset price of \$25,000 upon the property. He claims that a positive assurance was given him that the sale would not take place.

The property was adjudicated to one Flonaker. Flonaker was purchasing for the plaintiff company; but his authority to do so had not been given by formal resolution by the plaintiff company's board of directors.

On the day after the auction sale, but before the adjudication could be consummated by the execution and registry of a deed of sale, Edward Kory placed a mortgage upon his undivided third of said property for \$7,500 represented by notes to the order of himself, and by him indorsed in blank. The mortgage purported to have been given to one Ducros; but Ducros was a mere nominal mortgagee, and there was no real mortgagee.

A few days later the plaintiff company by a formal resolution of its board of directors ratified the purchase made by Flonaker for its account; and was given possession of the property by the liquidators. It then brought the present suit nominally for specific performance of the auction sale, but in reality for the annulment of the mortgage executed by Edward Kory.

The grounds of the latter demand are that said mortgage is a simulation, and, if not a simulation, has been executed in fraud of the rights of the plaintiff company. The liquidators, Wexler & Newburger, the auctioneer, the partnership, and the members thereof, and the said nominal mortgagee were made parties defendant.

The said nominal mortgagee appeared, and disclaimed all interest. The other defendants, except Edward Kory, expressed their perfect willingness to comply with the demand of plaintiff. Edward Kory, after the general denial, answered as follows: That, before the said auction, he had revoked the power of attorney to Newburger, and that, moreover, the said power of attorney had been vacated by all the debts of A. Kory & Sons having been paid out of the assets of the firm theretofore sold; that the said auction sale was made in violation of an agreement between the liquidators and himself that it should not take place; finally, that the liquidators had no authority to make said sale through an auctioneer.

While this suit was pending in one of the divisions of the civil district court, the mortgage notes matured, and executory process was instituted on them, in another of the divisions of the court, by Hartwig Moss as holder and owner of them. The plaintiff company intervened in this executory process suit, and enjoined the executory process on the same grounds of simulation and fraud which it had theretofore alleged against the

same mortgage in the specific performance suit.

This intervention was filed on August 28, 1908. Three days thereafter, on September 1, 1908, the plaintiff company filed a supplemental petition in the specific performance suit, asking that Hartwig Moss be made a party defendant to that part of the suit wherein the mortgage was sought to be annulled on the grounds of simulation and fraud.

To the said supplemental petition Hartwig Moss filed exceptions of his pendens and misjoinder of parties and of causes of action; and on the same day he filed his answer to the intervention of the plaintiff company in the executory process-injunction suit.

In this answer, which was filed on October 14, 1908, after pleading no cause of action and the general denial, he averred that immediately after their execution the mortgage notes were pledged to him by Edward Kory "to secure him in advances and indorsements made to Edward Kory to the amount of \$5,000," and that he accepted said pledge on a clear certificate of the records of the mortgage office that Edward Kory had not alienated the mortgaged property.

The same issues of the simulated and fraudulent character of the mortgage being thus involved in the two suits, the plaintiff company took a rule in the executory process-injunction suit on Hartwig Moss and Edward Kory to show cause why that suit should not be transferred to the division of the court wherein the specific performance suit was pending, "to be there cumulated and consolidated" with said other suit. Moss and Kory accepted service of this rule; and, so far as the record shows, made no defense thereto. In due course the rule was made absolute.

On November 20, 1908, the plaintiff company filed in the court in which the specific performance suit was pending and to which the executory process-injunction suit had been transferred an ex parte motion for the consolidation of the two suits, and the motion was granted.

The exceptions to the filing of the supplemental petition having been on December 2, 1908, overruled, Hartwig Moss on December 8, 1908, filed his answer—merely a general denial.

When the consolidated cases came on for trial, Hartwig Moss and Edward Kory objected to the consolidation, and reserved a bill to the overruling of the objection.

The ruling thus made is the first matter coming up for discussion.

The only provision of our Code of Practice bearing upon the consolidation of suits is article 422, which reads:

"When parties have instituted against each other several suits, either as principal or incidental demands, before the same tribunal, the court may, at the request of one of the parties, order that the same be consolidated, if from

their nature they may be compensated, in order that they may be all decided by one single judgment."

The learned counsel for Hartwig Moss contends that, except under the circumstances specified in this article, suits cannot be ordered to be consolidated.

We do not agree with that view. Every reason would dictate that two suits before the same court between the same parties and involving the same issues should be consolidated. If the Code has not made any express provision to that effect, it is simply because such a provision was unnecessary. The above quoted article authorizes the consolidation of suits involving different issues. If so, a fortiori, does it authorize the consolidation of suits involving the same issue.

Hartwig Moss complains for the first time in his brief in this court of the transfer which was made of the executory process-injunction suit. Needless to say such complaint comes too late. The time to have made it was when he was ruled to show cause why the transfer should not be made. No cause was shown then. It is too late to attempt to show it now.

As all the issues which are sought to be raised by the supplemental petition filed in the specific performance suit are also raised in the executory process-injunction suit which is held to have been properly consolidated with the specific performance suit, the exceptions or *lis pendens*, and misjoinder of parties and of causes of action interposed to the filing of said supplemental petition become *functus officio*; since whether or not said exceptions are sustained or overruled, and whether or not the said supplemental petition is sustained or dismissed, the issues in the case continue to be exactly the same.

Coming to Edward Kory's defenses to the specific performance suit, we have no hesitation whatever in pronouncing them without merit. In addition to those set forth in the answer, it is contended in his behalf that the firm assets had to be exhausted before the individual property of the partners could be resorted to, and that, in the absence of a formal resolution of the board of directors of the plaintiff company authorizing Flonaker to bid at the auction for the plaintiff company, the latter was without authority to bind the plaintiff company by his bidding at said auction and that consequently there was no sale; and in the latter connection the decision of this court in the case of *Jackson Brewing Company v. Canton*, 118 La. 823, 43 South. 454, is invoked.

The legal propositions here advanced are above criticism, but have no application to the case. The power of attorney authorized Newburger to dispose of this individual property of the partners, and the evidence shows that there was pressing reason for selling this real estate. So far as concerns the auction sale not having been binding on the

plaintiff company, of course, it was not until it had been ratified by a formal resolution of the plaintiff company's board of directors. And, equally of course, Newburger and Wexler, the liquidators, were not bound by the auction sale, and might have receded from it when advised of the ratification of it by the plaintiff company's board of directors. But very far from desiring to recede from it, they, on the contrary, confirmed it, and are now asking that it be consummated.

Edward Kory's revocation of the power of attorney to Newburger and Wexler amounted to naught, since the said power of attorney formed an essential part of a contract, and therefore was not revocable at his will, and since, moreover, the contract entered into by the Whitney bank and others on the same day and to which Edward Kory was a party was based upon it. This power of attorney having invested Newburger and Wexler with full, unlimited, and unqualified power to sell the real estate of the partners as in his judgment might seem best for the speedy settlement of the affairs of the firm, the contention that they could not make the sale through an auctioneer is manifestly without merit. Through an auctioneer was the proper mode for them to make the sale. All the debts of A. Kory & Sons had not been paid; in fact, there was pressing reason for selling the property.

Far from finding as a fact that the liquidators agreed that the auction sale should not take place, we find, on the contrary, that there was an express refusal on their part to enter into any further agreement with Edward Kory in the premises. What took place between the parties in that connection amounted to nothing more than the courtesy that was due to defendant's learned counsel.

As concerns the pretended mortgage of Hartwig Moss, we have had no difficulty in reaching the conclusion that it is a pure simulation. For some reason or other, Edward Kory had become hostile to the arrangement by which Newburger had been given complete control of the affairs of A. Kory & Sons and of the property of said firm and of the members thereof. He was, or pretended to be, under the impression that the true condition of the accounts was being kept from him. He had demanded \$5,000, which he insisted was his share of the surplus of the assets of A. Kory & Sons over liabilities. He was threatening not to allow the auction sale to take place unless the liquidators would agree to pay him one third of what would remain of the price of the sale after there had been paid out of it a certain mortgage debt due on the property. The day after the auction sale, but before it could be consummated by the execution and registry of a deed, Edward Kory hurriedly placed this simulated mortgage on his one third, and, as if to leave no room for doubt as to what was the true nature of the act,

his counsel wrote to the liquidators on the day after its execution as follows:

"I regret that circumstances prevented you from receiving my letter in time to stop the sale. As it is, my client at once advised me to stop the consummation of the sale, and I have done so."

The attempt on the part of Hartwig Moss to show that the notes were transferred to him to secure indorsements for Edward Kory is too transparent, and lets in daylight through too many flaws and cracks to serve any purpose. He is the father-in-law of Edward Kory, and was as familiar as Edward Kory himself with every circumstance connected with the whole matter.

Judgment affirmed.

(124 La.)

No. 17,672.

BLANK et al. v. BLANK et al.

(Supreme Court of Louisiana. Nov. 2, 1909.  
Rehearing Denied Nov. 29, 1909.)

#### 1. PARTITION SUIT.

In a partition suit, in which plaintiffs set out that one of the heirs, who is defendant, should collate.

This heir made a surrender of his property in bankruptcy.

The trustee of his estate was made a party defendant without prayer for a judgment as to him.

The position that the want of such prayer is fatal to the proceedings is not sustained.

#### 2. PAYMENT OF INHERITANCE.

Payment, made by one authorized, to one of the heirs of his inheritance from one of his parents, may be taken into account when the true nature of the act is proven without objection.

#### 3. NO RIGHT IN TRUSTEE OR BANKRUPT.

There remained no right in the trustee, and less in the bankrupt, to require the amount of his inheritance, which had been paid, to be added to the mass of the assets of the latter. The pleadings do not direct attention to the necessity of adding the amount inherited and settled to the mass.

#### 4. NO EXCEPTION BY TRUSTEE.

The trustee did not except and in his answer met the issues on the merits. Contradictorily with him, rights of parties can be litigated and fixed.

#### 5. DESCENT AND DISTRIBUTION (§ 109\*)—COLLATION—DUTY OF HEIR TO MAKE.

Effect was given to the payment made by the survivors in community to the heir who is defendant.

The plaintiffs in their pleadings sought to recover an amount received by the heir, and alleged that it was due by him as a collation.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 416, 419, 420; Dec. Dig. § 109.\*]

#### 6. PAYMENT OF INHERITANCE.

The amount handed over to the heir by his mother, and survivor in community, was not a loan. It was a payment of his inheritance as heir of his father. It was a valid agreement between mother and son, entered into many years before the son was adjudged a bankrupt.

#### 7. CREDITORS WITHOUT GROUND OF COMPLAINT.

It appears that he had received an amount much larger than the amount to which he had a right as an heir.

The creditors have no good ground of complaint. In no event can they recover anything in face of the fact that from any point of view the heir is not entitled to anything more from the succession of his father.

#### 8. BANKRUPTCY (§ 151\*)—RIGHT ACQUIRED BY TRUSTEE.

The mother, by whom the payments were made, departed this life some time after the surrender in bankruptcy.

The trustee has no right to any portion of her estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239; Dec. Dig. § 151.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by William P. Blank and others against John Blank and others. From the judgment, the trustee defendant appeals. Affirmed.

Henry Denis and H. G. Dupré, for appellant. Dart & Kernan, for appellees Blank and others. Rouse, Grant & Grant, for appellee Southern Redistilling & Rectifying Co. Rice & Montgomery, for appellee American Brewing Co. Irving R. Saal, for appellee H. Block & Co.

BREAUX, C. J. This is an action of partition. The petition for the partition was filed in August, 1908.

The heirs who sue for the partition are the issue of the late John Blank and Kuni-gunda, his widow.

Five of these heirs are plaintiffs, and the sixth heir, a brother, John Blank, is defendant.

The latter was adjudged a bankrupt, and in 1906 the German-American Savings Bank & Trust Company was appointed trustee of his estate.

The father of John Blank died some time prior to the latter's bankruptcy, and the mother died after he had been adjudged a bankrupt.

The trustee and the bankrupt were made defendants.

A judgment is prayed for against the bankrupt, but no judgment is prayed for against the trustee.

Plaintiffs in their petition stated that John Blank, the son, has received his share of his father's estate in advance, made to him by his mother to be accounted for by him upon final settlement of the estate of his father; and that he, John Blank, in addition, has received from his mother advances exceeding \$7,000, which he should collate in the mother's succession.

John Blank filed no defense, and a default was entered and confirmed against him.

The trustee filed a general denial, and, an-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

swering further, averred that it, the German-American Savings Bank, is vested with title to all the property of the bankrupt, John Blank, including his undivided interest in the estate of his father.

The trustee denied that John Blank was indebted to his father or to the latter's estate in any amount, and denied that any collation is due by it as trustee.

Three of the creditors of John Blank intervened and joined the trustee. They are the Southern Redistilling & Rectifying Company, the American Brewing Company, and Henry Block Company, Limited.

The judge of the district court in the first judgment reserved all questions of collation, either to the father's or mother's estate, to be considered later on final partition.

There is a question for decision relating to the case as instituted.

The heir, John Blank, was made party defendant, and judgment was asked for against him, but no judgment was asked for against the trustee, although he was made party defendant.

There was no exception filed against the proceeding, and in the answer these defendants, particularly the trustee, met the issues on the merits.

The question presented can be disposed of without the necessity of rendering judgment against the trustee.

Contradictorily with him, the rights of parties can be fixed to the extent of finding that there is no necessity of placing him in possession of the inheritance of the bankrupt from his father's succession in as much as, owing to his having received at a time when he was *sul juris* an amount far in excess of the amount to which he was entitled in the succession.

When a trustee appears in a succession and demands an heir's portion, it should be made to appear by him that the heir had something coming to him from the succession, the property of which it is proposed to partition.

In matter of the partition the court referred the parties to a notary as required to adjust and settle the respective rights of the heirs.

The share of each heir was fixed by the notary at \$7,260.25—one-half derived from the father's, the other from the mother's estate.

The notary referred back to the court the question of the disposition to be made of the share of John Blank in his father's and mother's estate.

The plaintiffs in the partition filed a rule setting out that an act of partition had been executed before Felix J. Dreyfous, notary.

That the share of John Blank has not been disposed of by said notary for the reasons stated in said act of partition, viz., that claims had been urged by the coheirs of said John Blank to collation due by him to his

father's and mother's estate, and that the trustee claims an amount from his share.

The parties named in the rule as defendants were ordered to show cause why collation should not be made.

The district court on this rule, in accordance with judgment dated August 19, 1909, instructed the notary to complete the partition by distributing the share or portion of John Blank in the succession of his father and mother among the plaintiffs, the coheirs of John Blank.

It is not out of place to state here that at different times John Blank received amounts from his mother. The last sum received by him from her was \$8,000.

John Blank testified that this money was given to him by his mother from the estate of his deceased father, and that is a conceded fact.

In her last will the mother declared that John Blank, her son, had received more than the amount to which he had a right from his father's succession, and that he had received from her more than the amount to which he had a right, and that he had no right to anything more from their estates.

This declaration is fully sustained by the testimony of witnesses. No question but that he had received over and above the amount to which he had a right. That was made evident by the testimony admitted without objection.

Counsel for the trustee Bank admitted that it had no concern in matter of collation to the mother's estate because she died after the son's surrender in bankruptcy, and the trustee has no right to property inherited after the surrender in bankruptcy.

These declarations are fully sustained by the weight of the testimony.

As relates to the father's succession: The record discloses that he died about the year 1889. The last amount paid by the mother for the account of the father's succession—that is, the \$8,000—was paid in 1904. The son, John Blank, was adjudged a bankrupt in 1906.

It is true, as contended by learned counsel representing the trustee, that by the federal bankrupt law all the bankrupt's property is vested in the trustee by operation of law. Section 70 of the statute (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]).

The bankrupt, John Blank, it follows could not make any disposition of the property of which he has been divested by the surrender. He was not divested of his inheritance in his father's estate for he had been settled with years before.

While giving to that law the broadest scope, it remains that the trustee went into possession of the bankrupt's estate in the condition in which it was at the date of the surrender, and that is all that he can expect under the bankruptcy law. He does not take

property and acquire rights over and above those which the bankrupt had. In other words, he does not acquire additional right by the surrender.

The first point urged by the heirs—who are here plaintiffs and appellees—in the petition, is that John Blank should return to the succession of his father and mother the amounts he received, as before stated. This return was not originally claimed as a collation due by the heir; that is, in the first petition. Afterward, in the pleadings, the amount was mentioned by plaintiffs as an amount to be collated; i. e., its collation was claimed by the plaintiff heirs.

The issue of collation due vel non is before the court.

We now have to consider whether it is due as a collation, and, in the second place, if not due as a collation then whether the heir can be treated in the settlement of the father's and mother's succession as a debtor and charged with amounts received after the death of the father, but before the surrender in bankruptcy.

We only incidentally mention the mother's succession. As to that succession, there is really no issue.

We now decide that the amounts paid are not to be considered as amounts to be collated.

The next inquiry is whether the trustee is precluded from claiming the inheritance in the father's succession, not because there is no collation possible in these proceedings, but because the father died long before the surrender and the father's succession had been settled.

Now, to return to the question of collation, there is no collation due because the amount paid by the mother was not an *avancement d'hoirie*, nor did this payment constitute or give rise to an indebtedness of the heir to his late father's succession. It was a payment by the mother.

An heir who comes to a succession under the terms of the Civil Code and as authorized thereby must return to his coheirs all that which he has received from the common ancestor. He cannot retain anything donated unless he has a defense.

That is the interpretation given to article 1227. *Flower and King v. Myrick*, 49 La. Ann. 321, 21 South. 542.

This court said in the cited case:

"The mere definition of collation of the Civil Code, we think, is a complete answer to this proposition.

"The children or grandchildren must collate what they have received from their fathers, mothers, or grandparents." Civ. Code, art. 1228.

In the case before us, we have noted the children had not received any donation for which they were accountable and owed no debts to their mother.

As a mere matter of collation, under the article of the Code relative to that subject, the heir could not be called upon to collate.

This relates exclusively to the question of collation.

We now pass to the relation from a business point of view between the late mother of the bankrupt and the bankrupt: The mother survivor in community had the succession property in her possession.

She paid the amount to him.

The court would not be warranted in overlooking this payment. The proof of payment was made.

John Blank, as we read the evidence, importuned his mother for the amounts which she paid to him on the condition before mentioned. This payment was made at a time not suspicious, a very considerable time before the son's surrender in bankruptcy. It was made in good faith, and no one at any time has questioned the right to make the payment. The heir had the right to receive the amount from the father's succession. It is not due as a collation, but it is a payment.

The heir was *sui juris*, and the statutes of bankruptcy do not release him from an obligation growing out of a payment. He and those who stand in his place cannot recover an inheritance which he has already collected.

The evidence of payment consists of a receipt issued at the time the money was paid by the mother administering the succession as a survivor in community.

This court has decided that an heir could take his share in currency or in property of the succession if the heirs were competent to partition the property among themselves.

Two decisions were rendered. In each decision it is expressly stated that effect will be given to a payment under circumstances similar in points to the case before us for decision. *Boisse v. Dickson*, 31 La. Ann. 754; *Boisse v. Dickson*, 32 La. Ann. 1150.

To resume before closing, the mother chose to advance an amount in payment of an heir's share before it is ascertained precisely the amount to which the heir had a right. On final settlement it appears that she has not only paid him, but that she has overpaid him very much more than the amount to which he had a right.

There can no authority be found in law or jurisprudence that would sustain the proposition that, in face of the condition of the payment, she is a mere creditor and the heir continues in the ownership. Much less can it be held that creditors can intervene and have the payment considered as naught.

They cannot have the property brought to the mass of the estate of a bankrupt. It would be the merest form if it were brought to the mass for the bankrupt is very much indebted to both the succession of his father and his mother.

We will not discuss further the proposition from the point of view of the necessity of transferring the claim to the bankruptcy estate.

In addition to the fact that the creditors have no right to such a transfer, they have

not asked for it in their answer to these proceedings.

For reasons assigned, the judgment appealed from is affirmed.

(124 La.)

No. 17,464.

BOAGNI v. COLORADO SOUTHERN, N. O. & P. R. CO.

(Supreme Court of Louisiana. Nov. 15, 1909.)

1. RAILROADS (§ 113\*)—DAMAGES FROM CONSTRUCTION OF RAILROAD—FRANCHISE AS PROTECTION—LIMIT OF GRANT.

The franchise will not protect the grantee who damages private property.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 351; Dec. Dig. § 113.\*]

2. RAILROADS (§ 114\*)—DAMAGES FROM CONSTRUCTION—SUFFICIENCY OF EVIDENCE.

The preponderance of the evidence sustains the amount of damages assessed.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 114.\*]

3. SUBSTANTIALLY SAME AMOUNT AWARDED.

The amount does not differ substantially from that allowed for damages to other owners of property near by of about the same value.

(Syllabus by the Court.)

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; Edward T. Lewis, Judge.

Action by Edward M. Boagni against the Colorado Southern, New Orleans & Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Saunders, Dufour & Dufour, Dudley L. Guilbeau, and Henry Mooney, for appellant. Lewis & Lewis, for appellee.

BREAUX, C. J. Plaintiff sued the defendant for damages in the sum of \$3,450.

He owns a town lot fronting on Grolee street in Opelousas. On this lot he has his residence and outbuildings.

He also owns another lot immediately north of his residence lot on Railroad avenue, and he owns a third lot fronting on the same avenue.

The defendant road laid its track through Cheney street.

For alleged damages to the first lot, plaintiff claims \$1,200; for damages to the second lot, he claims \$2,000; and for damages to another of his lots, he claims \$250.

These amounts make up the sum first above mentioned.

The defendant does not admit that its road has caused any damages, and, besides, it urged that it derived its right of way from the municipality; that it complied with the established grade of another road in throwing up its embankment for its track; that, having lawfully acquired its right of way, it owes no damages; and that, if there were damages committed by its road, it was dam-

num absque injuria, as it acted under proper authority.

We will here state: There are unquestionably amounts due for damages. We do not agree with defendant's theory of legitimate authority under which it claims immunity from all damages.

The questions to which these theories of defendant gave rise have been passed upon by this court adversely to its contention. The whole ground has been heretofore considered, no point overlooked, and the conclusion arrived at that they did not have the effect of protecting the defendant, and that it was not possible to consider as *damnum absque injuria* whatever damages were committed by the railroad company in running its road through Cheney street.

No convincing light has been thrown upon the subject since the cases were decided.

We have held, and still hold, that the municipal authorities, however much they could grant a right of way, could not grant a right to commit damages with impunity. Besides, there is no evidence in the franchise showing that the municipality assumed to grant any such right.

We refer to the case of *W. B. Lewis v. Same Defendant*, 122 La. 572, 47 South. 906; *Delphine Fontenot v. Same*, 122 La. 779, 48 South. 205, and *George W. Kelley v. Same*, 123 La. 1068, 49 South. 717, recently handed down by this court.

It now becomes necessary to fix the amount of the damages.

We approach the analysis of the evidence without misgivings in this case with regard to the good faith of witnesses. They seem to have sought to arrive at the value of the property, although they differ from one another in their estimates.

This fact does not render easy the task of arriving at the amount to be allowed as damages.

It is undeniable that the question of value cannot be solved with absolute certainty. Some one has said that values are beyond the ken of knowledge.

We do not take that extreme view. On weighing the testimony of witnesses, an amount can be fixed with some reasonable degree of certainty.

We take up for review in the first place the testimony of Mr. J. H. Harmason, a witness for plaintiff, who is in the real estate business and has the experience of about 17 years in that business. He has had a number of deals in land in charge, and is familiar with the lots in question.

The drift of his testimony sustains, as reasonably certain as to value, the amount allowed by the district court, viz., \$2,250.

We will state here that plaintiff has not asked for an amendment of the judgment on appeal. We would not increase it, if he had.

The remaining witnesses, to whose testi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



mony we will refer in general terms, in their estimates vary one from the other from 30 per cent, the lowest of their estimates, to 50 per cent, the highest. There are five witnesses for plaintiff. Their estimates, taken as a whole, easily sustain the correctness of the amount heretofore allowed. They have given their reasons for thus estimating the property. The front of one of the properties is greatly damaged. It is not possible, at a place mentioned on the street, to drive through Cheney street, or walk, without climbing up the railroad embankment of defendant company, some 9 feet in height.

Defendant's witness testified, as to value, in regard to the diminution in value of plaintiff's property and the consequent damages caused by the defendant road. He is conservative in his estimate, and differs from plaintiff's witnesses in this respect.

We have compared the reasons given by each, the witnesses for plaintiff and this witness for the defendant. The preponderance in weight and number is with plaintiff.

The defendant argued as one of the grounds for defense that the railroad running through the place has given additional value to such an appreciable extent that it should be taken into account in fixing damages.

This contention is not sustained by the testimony.

Besides, if it were, the conservative figures adopted render it certain that plaintiff will not receive in excess of the amount to which he has a right.

Judgment affirmed.

# WILLIAMS et al. v. STATE.

(Supreme Court of Florida, Division A. Nov. 23, 1909.)

## 1. CRIMINAL LAW (§ 1129\*)—APPEAL—ASSIGNMENT OF ERROR.

An assignment of error in the following language: "For errors apparent by an examination of the record"—presents nothing for consideration by an appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2957; Dec. Dig. § 1129.\*]

## 2. CRIMINAL LAW (§ 1129\*)—APPEAL—ASSIGNMENT OF ERROR.

A single assignment of error attacking a plurality of rulings of the trial court, whether upon the pleadings, the admission or rejection of evidence, or the granting or refusal of instructions to the jury, will be unavailing, unless all of such rulings so grouped en masse are erroneous, and the determination by an appellate court that one of the rulings so attacked is correct disposes of the assignment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2958; Dec. Dig. § 1129.\*]

## 3. CRIMINAL LAW (§ 1129\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

In preparing assignments of error, each error relied upon should be clearly and distinctly specified and separately assigned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956-2958; Dec. Dig. § 1129.\*]

## 4. CRIMINAL LAW (§ 366\*)—DECLARATIONS—"RES GESTÆ."

The declaration or exclamation of a person who had been shot, within the space of two minutes after the firing of such shot and just prior to his death, which ensued almost immediately from the wound so inflicted upon him, "Oh, Lordy! Turner Williams shot me," is admissible in evidence as part of the *res gestæ* in a prosecution for murder against the person so named by such deceased person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 819, 820; Dec. Dig. § 366.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6130-6136; vol. 8, p. 7787.]

## 5. CRIMINAL LAW (§ 693\*)—TRIAL—OBJECTIONS TO EVIDENCE.

Objections to the admissibility of evidence must as a general thing be made when it is offered, or its admissibility cannot be assigned as error. In a criminal prosecution an objection to a question after it had been answered comes too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1630; Dec. Dig. § 693.\*]

## 6. CRIMINAL LAW (§ 1160\*)—APPEAL—REFUSAL OF NEW TRIAL—REVIEW.

In passing upon an assignment questioning the correctness of the ruling of the trial court in denying a motion for a new trial, which is based upon the sufficiency of the evidence to sustain the verdict, the guiding principle for an appellate court is not what it may think the jury ought to have done, or what such court may think it would have done had it been sitting as a jury in the case, but whether as reasonable men the jury could have found such verdict from the evidence adduced. If this question can be answered in the affirmative, the action of the trial court upon such motion should not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1160.\*]

## 7. CRIMINAL LAW (§ 1160\*)—APPEAL—REVIEW OF EVIDENCE.

The verdict of a jury should be conformable to legal rules and defensible in point of sense. It must not be absurd or whimsical. But an appellate court is not warranted in substituting its standard of what is reasonable for that of the jury. If reasonable men might have found the verdict in question, and it has received the sanction of the trial court, an appellate court should not disturb it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

## 8. CRIMINAL LAW (§ 1160\*)—APPEAL—REFUSAL OF NEW TRIAL.

The refusal of the trial court to grant a new trial for insufficiency of the evidence to sustain the verdict, or because the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the appellate court that it is wrong and unjust.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

## 9. CRIMINAL LAW (§ 1160\*)—APPEAL—REVIEW OF EVIDENCE.

When the trial court concurs in the verdict rendered by a jury by denying the motion for a new trial, and there is evidence to support it, an appellate court should refuse to disturb it, in the absence of any showing that the jurors must have been improperly influenced by considerations outside the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

**10. CRIMINAL LAW (§ 1189\*)—APPEAL—REVIEW OF EVIDENCE—REVERSAL.**

In criminal cases, especially in felony, where the penalty is severe, in passing upon an assignment based upon the denial of the motion for a new trial, which is based upon the sufficiency of the evidence to sustain the verdict, an appellate court will weigh the evidence, and where, in its opinion, it preponderates so strongly against the verdict that it cannot conclude such verdict was founded upon the evidence adduced by the state, no evidence having been introduced by the defendants, the judgment of conviction will be reversed and the case remanded for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1189.\*]

**11. CRIMINAL LAW (§ 1189\*)—APPEAL—REVIEW—INSUFFICIENCY OF EVIDENCE.**

In a prosecution for murder in the first degree against three defendants, which resulted in their conviction, one being named in the verdict as principal and the other two as accessories thereto before the fact, in passing upon an assignment based upon the denial of the motion for a new trial, which questioned the sufficiency of the evidence to sustain the verdict, when an appellate court, in weighing all the evidence adduced, cannot find the evidence upon which such verdict as to the two defendants convicted as accessories could have reasonably been predicated, and is impelled to the conclusion that as to such two defendants the jury must have been improperly influenced by considerations outside the evidence, and where the evidence against the defendant convicted as principal is not clear, but in many respects is unsatisfactory, it should declare the verdict vitiated and tainted as to all three of the defendants, reverse the judgment of conviction, and remand the case for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1189.\*]

(Syllabus by the Court.)

Error to Circuit Court, Wakulla County; J. W. Malone, Judge.

Turner Williams and others were convicted of murder in the first degree, and bring error. Reversed.

W. H. Ellis and Wm. C. Hodges, for plaintiffs in error. Park Trammell, Atty. Gen., for the State.

**SHACKLEFORD, J.** The plaintiffs in error were convicted of murder in the first degree, with a recommendation to the mercy of the court, Turner Williams as principal and Maurice Williams and Jacob Hargrove as accessories thereto before the fact. All of such defendants were sentenced to confinement in the state prison for the period of their natural lives. Relief is sought here upon writ of error.

Nine errors are assigned, but the fifth, sixth, and seventh, all of which are based upon the refusal of certain requested instructions, are not argued, not even being mentioned by the defendants in their brief; hence must be treated as abandoned. The ninth assignment is "for errors apparent by an examination of the record." This assignment is not argued, and presents nothing for

consideration. See *Douberly v. State*, 51 Fla. 41, 40 South. 675.

The first assignment questions the sufficiency of the evidence to support the verdict, and the second and third assignments are to the effect that the verdict is contrary to the charge of the court and to the law. We pass these assignments temporarily, but shall take them up for consideration presently. The fourth assignment is as follows:

"Because the court erred in admitting the testimony of the witnesses Frank Thomas, Alex Franklin, John Henry Franklin, Mary Jane Franklin, and Lucius Bryant, or the testimony of any one of them, as to that particular part of the testimony wherein they testified to hearing alleged dying exclamations of the deceased as follows: 'Oh, Lord! Turner shot me.'"

It will be observed that this assignment is based upon different rulings of the trial court in admitting the testimony of several witnesses as to the "alleged dying exclamations of the deceased as follows: 'Oh, Lord! Turner shot me.'" When we turn to the bill of exceptions and examine the testimony of these several witnesses upon the point in question, we find that objections were interposed to certain portions thereof and also motions made to strike out designated parts. All of these different rulings were severally excepted to, and it is attempted to group them all en masse in one assignment. This is a very unsafe practice, to say the least of it, though we do not feel called upon, in the absence of any point being made, to enter into any extended discussion. Suffice it to say that this court has several times called attention to the necessity for particularity in the assignments of error. See *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318, and authorities there cited. Also see *Daniel v. Siegel-Cooper Co.*, 54 Fla. 265, 44 South. 949. In line with our repeated holding that a single assignment predicated upon the refusal to give two or more requested instructions containing separate propositions of law must fail if it appears that any one was properly refused, it would seem that a single assignment attacking a plurality of rulings upon the admission or rejection of evidence would be unavailing, unless all of such rulings were erroneous. See *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 South. 410. See generally *Seaboard Air Line Ry. Co. v. Hubbard*, 142 Ala. 546, 38 South. 750.

The testimony is set out in the bill of exceptions in narrative form. We find disclosed therein that a negro "festival" was being held on the night the tragedy was enacted which resulted in the death of Henry Franklin and in the defendants being indicted and tried for murder. Frank Thomas was the first witness introduced on behalf of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

state, and, after having testified that he was acquainted with both the deceased and the three defendants and that he attended such "festival," further testified: "We heard a shot, and Franklin ran inside the gate and said, 'Oh, Lordy! I am shot. That boy Turner Williams shot me.' Then I ran to him, and said 'Who shot you?' and he said—" Before he finished the sentence, the bill of exceptions recites: "Thereupon the attorney for the defendants objected to the testimony of the said witness as to who shot him upon the ground that the same was not part of the *res gestæ*, and, secondly, that no predicate had been laid for the introduction of dying declarations, but the said judge did then and there deliver his opinion and decide that the objection ought not to be allowed, and permitted the witness to testify on the ground that such statement of the said witness was part of the *res gestæ*, to which said opinion and decision the attorney for the said defendants in their behalf did then and there except." The witness then completed the interrupted sentence by saying, "Oh, Lordy! Turner Williams shot me." As we have already said, the questions propounded to the respective witnesses and their answers thereto are not given, the testimony being set out in narrative form. As appears from the bill of exceptions, the witness had already given the exclamation or declaration of the deceased as to who shot him before any objection was interposed thereto, and, after the overruling of the objection which was made later, simply repeated such exclamation or declaration. As we held in *Schley v. State*, 48 Fla. 53, 37 South. 518: "Objections to the admissibility of evidence must as a general thing be made when it is offered, or its admissibility cannot be assigned as error. In a criminal prosecution an objection to a question after it has been answered comes too late." No motion was made to strike out any portion of the testimony of this witness. As we held in *Dickens v. State*, 50 Fla. 17, 38 South. 909: "Where an answer to a question presents evidence which is illegal or objectionable on any known ground, the proper practice is a motion to strike it out and have the jury directed not to consider it, the movant specifying his objections to the evidence with like particularity as in objecting to questions." The witness goes on to testify that the deceased "was shot with a shotgun just outside the gate about six or eight feet, and ran inside the gate and to the house, which is about 30 feet away from the gate, and died." He further testified that "immediately after the gun fired the exclamation was made."

Aleck Franklin testified that the deceased was his father; that he was present on the night that his father came to his death; that he heard only one shot "fired at the frolic" that night, upon which he looked around as quickly as he could, and saw his father out-

side the gate. The witness proceeded to testify: "As soon as he was shot, he fell down, and then jumped up and hollered, and said ——" Here was promptly interposed a like objection to that offered to the testimony of Frank Thomas, which we copied above, and upon the same being overruled for like reasons, the witness proceeded to complete the sentence, saying that his father exclaimed, "Oh, Lordy! Turner Williams shot me," adding that the deceased "then ran inside of the gate and said, 'Oh, Lordy! Turner Williams shot me,' and then ran to the house, and said, 'Oh, Lordy! Turner Williams shot me,' and fell down and died. It was right after the gun fired, about two minutes I reckon, when he said who shot him. It was right after the gun fired." The defendants moved to strike out that part of the testimony of the witness as to the exclamation or declaration of the deceased as to who shot him, on the grounds that same was not part of the *res gestæ*, and was also hearsay testimony. This motion was denied by the court.

Like testimony was given upon the point in question by John Henry Franklin and Mary Jane Franklin, and like objections and like motions were made by the defendants with like rulings by the court. We do not find in the bill of exceptions any testimony given by Lucius Bryant as to any exclamation or declaration made by the deceased as to who shot him, or, indeed, as to any statement of any kind made by the deceased.

Even if we pass the irregularities which we have pointed out and consider this assignment on its merits, no error upon the part of the trial court has been made to appear to us either in overruling the objections to such testimony or in refusing to strike it out. Under the rulings of this court, we are clear that such exclamation or declaration of the deceased as to who shot him, taken in connection with the attendant circumstances, was properly held to constitute part of the *res gestæ*. See *Lambright v. State*, 34 Fla. 564, 16 South. 582, and *Marlow v. State*, 49 Fla. 7, 38 South. 653. The facts and circumstances of this case distinguish it from *Vickery v. State*, 50 Fla. 144, 38 South. 907. Also see 1 *Bishop's New Crim. Proc.* § 1086, and authorities cited in notes.

The eighth assignment is as follows:

"Because the court erred in refusing to charge the jury, as follows: 'I charge you that, before you are warranted in finding Turner Williams guilty, you must believe from the evidence beyond a reasonable doubt that he, Turner Williams, fired the fatal shot, and that none other than Turner Williams could have shot Franklin, and, if you believe that it was reasonable that some other person than Turner Williams could have fired the fatal shot, then you should acquit the defendant Turner Williams.'"

We are of the opinion that no error is made to appear here. It is by no means very

happily worded, but is confusing and well calculated to mislead the jury. It is not strenuously insisted upon here and no authorities are cited to us in support of this assignment. We find from an inspection of the general charge that it fully covered the proposition of law embraced in the requested and refused instruction, in so far as such instruction stated the law correctly. Therefore it was properly refused. See *Bass v. State* (decided here at the present term) 50 South. 531, and authorities therein cited.

We now take up the first three assignments, which we temporarily passed. Was the evidence adduced sufficient to support the verdict? The jury evidently thought so, and the trial judge concurred in their finding by overruling the motion for a new trial, and refusing to disturb the verdict. Under such circumstances, this court is disinclined to interfere with the verdict or to reverse the judgment rendered thereon. Its policy has been declared in a long line of decisions. See *McNish v. State*, 47 Fla. 69, 36 South. 176, and cases there cited. A number of cases to the same effect have been rendered by this court since the opinion in the cited case was handed down. In other words, this court will refuse to disturb a verdict, especially where it has been approved by the trial judge, where there is evidence to support it. The mere fact that the evidence was conflicting will not suffice. Also see the reasoning in *Wilson v. Jernigan*, 57 Fla. 277, 49 South. 44, which we shall not repeat here. On the other hand, it was held in *Green v. State*, 17 Fla. 669, which ruling has been followed in subsequent cases, that: "In criminal cases, especially in felony, where the penalty is severe, the court will weigh the evidence, and where, in its opinion, it preponderates so strongly against the verdict that it cannot conclude such verdict was founded upon the evidence on the part of the state, no testimony having been introduced on the part of the defendant, a new trial will be granted." In the instant case the defendants introduced no testimony. Also see *Rushton v. State*, 50 South. 486, *Graham v. State*, 50 South. 531, and *Stewart v. State*, 50 South. 642, all decided here at the present term.

With these guiding principles before us, we turn now to a consideration of the testimony adduced at the trial. We have already had occasion to refer to and set forth the testimony of the different witnesses concerning the exclamation or declaration made by the deceased as to who shot him, and have held that such exclamation formed part of the *res gestæ* and was properly admitted as such; consequently we shall not repeat such portions of the testimony.

Frank Thomas, the first witness introduced on behalf of the state, further testified that at the time he heard the shot fired which killed the deceased he was standing at the

door with Maurice Williams, one of the defendants, and other named persons; that Maurice Williams did not have any shotgun with him, but had a small rifle, which was broken; that he did not see Turner Williams there that night; that the deceased was shot with a shotgun. He further testified: "I met Jack Hargrove about a quarter of a mile from the place where the festival was held later that night. He was going to the festival with Willie Williams, who is sometimes called 'Madison' Williams, but, when they heard that somebody had been killed at the festival, they turned back, and Jake stopped in his mother's house a few minutes, while his companion waited outside, and then they both went to Jake's house." The witness further testified "that, when deceased was shot, he was standing about four or six feet from the gate."

Aleck Franklin, the second witness introduced on behalf of the state, testified as follows: "Henry Franklin was my daddy, and who was shot on the 19th day of December, 1908, at a frolic at Ned Acree's house in Wakulla county, Fla. He was shot in the left breast. Turner Williams shot him. I did not see him shoot him. I did not see him there that night, but I saw Morris (Maurice) there and Capus and their sister Lucy. I heard Maurice say, 'We are going to get us a nigger,' and I asked, 'Where is Turner?' and he said, 'Turner is coming.' I did not see either of these have a gun, except Maurice had a little rifle which I had borrowed from him, and which I returned to him that night at the frolic. It was broken. Father was shot with a breach-loaded shotgun one time. I only heard one shot fired at the frolic. There was drinking going on there. I was standing on the porch, and my father told me there was drinking going on, and I had better look out that no trouble occurred, and then he walked to the gate, and, before I could walk from here to the corner of the courthouse, he was shot. I looked around as quickly as I could. I thought Rube Garin fired the gun because Rube had been drinking, but I saw Rube standing near, and he didn't have a gun. I then looked at my father, who was just outside the gate, but I could not see anybody else."

After going on to testify as to the exclamation made by the deceased as to who shot him, to which we have previously referred, the witness proceeds: "My daddy, Henry Franklin, and Turner and Morris Williams met in the road that night, and had a row. I did not know Morris when I saw him there at first, because he had on Turner's hat, but later in the evening I saw him again with his own cap on. I first thought it was Turner, but, when he spoke, I recognized his voice."

The next witness introduced by the state was John Henry Franklin, who testified as follows: "I only saw Maurice and Capus at

the frolic at which my father was killed. I asked Maurice where Turner is at. He said, 'Turner is coming.' The frolic was in Wakulla county, Fla., and occurred on the 19th day of December, 1908. I do not know where Maurice and Capus were when the gun fired. I did not see them then. I did not see Turner there at all. There was some shooting at the frolic some time before that and some drinking, but I did not know who did the shooting."

Omitting his testimony as to the exclamation made by the deceased, the witness proceeded with his testimony: "There never had been any trouble between Turner and the other defendants and my father that I know of, except about some hogs, and that trouble was between my father and their mother, and they were having some words about it about two weeks before this, and Turner said, 'Mama, why don't you go along and let the old man alone. If you don't, you will make me do something to hurt him, damn his old soul.' Then he turned to his little sister Pauline, and told her to go up to Jenkins Hick's and buy him a shell, that he wanted to kill a hawk. A short time afterward I saw him walking out in the field back of our barn with his gun. He didn't say anything, but he would stop as if he was looking for somebody. He stayed there a little while, and then he went away. He and his mother live on the same plantation that my father lived on, and we were all close neighbors."

Mary Jane Franklin testified as follows:

"I was the wife of Henry Franklin. He was killed December 19, 1908, in Wakulla county, Fla., at a frolic at Ned Acree's house. He was shot in the left breast with a breech-loaded shotgun. He lived only a few minutes after he was shot. I heard him speak after he was shot. I was in the house, but he was in the yard. I did not see who shot him. I did not see Turner Williams at the frolic at all, and Jake Hargrove was not there. I saw Maurice Williams and Capus Williams there. Maurice Williams had a rifle which my son had borrowed from him, and gave back to him at the frolic that night. It was broken. I was present when the mother of these boys and my husband had a quarrel about some hogs, and I heard Turner tell her to go on and let the old man alone, or she would make him hurt him, 'damn his old soul.' Then he sent his little sister up to buy a shell, and said he wanted to kill a hawk with it, and a short time afterward I saw him walking in the field back of the barn. He didn't say anything, and didn't stay very long. He had a gun with him."

Lucius Bryant simply testified to the effect that he helped to bury the deceased, who met his death at a frolic at Ned Acree's house December 19, 1908, in Wakulla county, Fla., being shot in the left breast with a shotgun, the hole being large enough for witness to put his hand in.

James Smith gave the following testimony:

"I am sheriff of Wakulla county, Fla. I was informed of the killing of Henry Franklin out at Ned Acree's house some time during the night. I went to Turner Williams' house, and went in. His mother told me Morris and Capus were in bed, but that Turner had not got in yet. I found Morris and Capus lying on a pallet on the floor in front of the door, and, when I turned the cover down, I found Turner in bed with them also. He was covered up head and ears. I found a shotgun there. The barrel looked bright as if it had been recently wiped out, and I also found the rag on the floor that had been used in wiping it out. The rag felt damp. The breech of the gun was cold, though, and was practically bright and dry. I also then made a search for some other gun, but could not find any. Morris told me that Henry Taylor had loaned a gun to them, and that it was back of the bed, but I could not find it, and have never been able to find it. I also examined the place where Henry Franklin was killed. There was an oak tree standing about eight feet from the gate. There were tracks by this oak tree, and the wadding of a gun with blood on the wadding where Franklin had been shot, outside of the gate. It appeared as if the gun had been pushed so close to him that it almost touched him. The gate is about 30 feet from the house. When Turner dressed and put on his shoes, there was damp sand on them."

Willie Williams, sometimes called Madison Williams, testified as follows:

"I was with Jacob Hargrove down in a neighborhood called 'The Rocks' on December 19, 1908. We went down there early in the day, and did not leave there until after night. We started back from the rocks to Ned Acree's place to go to the frolic, but on the road to the frolic a man came dodging through the bushes, and called Jacob to him, calling Jacob 'Buddle,' and I heard him say, 'If anybody asks if I was at the frolic, tell them I was at home asleep, for I have killed old man Franklin.' I could not tell who this was, or whether he was a black man or a white man. Turner Williams called Jake Hargrove 'Buddle.' Also Capus Williams and Maurice Williams called Jacob 'Buddle.'"

The last witness introduced by the state, Anthony Hicks, testified thus: "I had a conversation with Jake Hargrove three days before Franklin was killed. We were walking along the road together. There were some other parties with us, but I do not think they were in hearing distance. I told him that he was the oldest one and the head of the family of the boys, and should be a peacemaker and not do anything with old man Franklin, and that he should go to Franklin and make peace, and not hurt him, and he said: 'I won't do anything of the kind. He has been meddling with the folks,

and we will make way with the damn old son of a bitch.' " At the close of his testimony, the state rested its case, and, the defendants announcing that they would offer no testimony, the court then proceeded to charge the jury. After carefully weighing the evidence, we are irresistibly impelled to the conclusion that there was not sufficient evidence adduced to warrant the verdict of the jury that the two defendants Jake Hargrove and Maurice Williams were guilty of the murder of Henry Franklin as accessories thereto before the fact. We cannot find the evidence upon which such verdict could have been reasonably predicated. This being true, it necessarily follows that the jury must have been influenced by considerations outside the evidence. Having reached such conclusion, as reluctant as we are to interfere with verdicts of juries in which the trial court has concurred, the judgment must be reversed as to such two defendants. In addition to the authorities previously cited, see *Williams v. State*, 20 Fla. 391; *Small v. State*, 20 Fla. 780; *Armstrong v. State*, 30 Fla. 170, 11 South. 618, 17 L. R. A. 484; *Whetson v. State*, 31 Fla. 240, 12 South. 661; *Baker v. State*, 54 Fla. 12, 44 South. 719. We would also refer to 1 *Bishop's New Criminal Procedure*, § 1278, and authorities cited in the notes thereto.

A still more serious question confronts us in regard to the conviction of Turner Williams, the principal. While the evidence adduced against him is by no means as convincing as we would like, and in many respects is unsatisfactory, if he were the only defendant, we would hesitate long before we would disturb the verdict. Having reached the conclusion, however, that the jury must have been influenced by considerations outside the evidence in finding their verdict against his codefendants, we cannot give our consent to let the verdict stand as to him. We feel that the ends of justice will be better met by reversing the judgment as to all three of the defendants and remanding the case for a new trial. In view of the conclusion reached, we have refrained from commenting on the testimony in detail.

Judgment reversed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

HULL et al. v. BURR.

(Supreme Court of Florida. Nov. 16, 1909. On Rehearing, Dec. 21, 1909.)

1. MORTGAGES (§ 3\*)—CHATTEL MORTGAGES (§ 5\*)—ABSOLUTE TRANSFER AS MORTGAGE—STATUTES.

Section 2404 of the General Statutes of 1906, providing that "all deeds of conveyance, obligations conditioned or defeasible, bills of

sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints, and forms as are prescribed in relation to mortgages," is quite comprehensive in its scope, and should be liberally construed in order to carry out the legislative intent.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 3;\* *Chattel Mortgages*, Cent. Dig. §§ 4-13, 16; Dec. Dig. § 5.\*]

2. MORTGAGES (§ 33\*)—ABSOLUTE TRANSFER AS MORTGAGE.

An instrument must be deemed and held a mortgage, whatever may be its form, if, taken alone or in connection with the surrounding facts and attendant circumstances, it appears to have been given for the purpose or with the intention of securing the payment of money; and the mere absence of terms of defeasance cannot determine whether it is a mortgage or not.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 67-82; Dec. Dig. § 33.\*]

3. CONTRACTS (§ 147\*)—CONSTRUCTION—INTENT OF PARTIES.

In construing any written instrument, whether a deed of conveyance, a bill of sale, mortgage, contract, or what not, the entire instrument must be considered in order to gather the real intent and to determine the true design of the makers thereof. To that end all the different provisions of such instrument must be looked to and all construed so as to give effect to each and every of them, if that can reasonably be done. If clauses therein seem to be repugnant to each other, they must be given such an interpretation and construction as to reconcile them if possible, remembering that the intent is the principal thing to be regarded. If one interpretation, looking to the other provisions of the instrument and its general scope, would lead to an absurd conclusion, such interpretation must be abandoned and one adopted which will be more in accord with reason and probability.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.\*]

4. MORTGAGES (§ 32\*)—CHATTEL MORTGAGES (§ 34\*)—ABSOLUTE TRANSFER AS MORTGAGE—CONSTRUCTION.

Courts of equity in pursuance of a wise and benign rule in cases of doubt as to whether the parties intended the transaction to be an absolute deed of conveyance or bill of sale, conditional sale, or a mortgage will deem and hold the transaction and instrument to constitute a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 60-66, 84-84; Dec. Dig. § 32;\* *Chattel Mortgages*, Cent. Dig. § 38; Dec. Dig. § 34.\*]

On Rehearing.

5. APPEAL AND ERROR (§ 832\*)—REHEARING—SCOPE.

A petition for a rehearing in this court which suggests nothing in the case as presented that has not been fully considered by the court in making its decision will be denied; the proper function of a petition for a rehearing here being to present to the court some point which it overlooked or failed to consider, by reason whereof its judgment is supposed to be erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.\*]

**6. EQUITY (§ 153\*)—CONSTRUCTION AGAINST PLEADER.**

Any indefinite or uncertain allegations that may appear in a bill of complaint should be taken most strongly against the pleader.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 386-389; Dec. Dig. § 153.\*]

**7. MORTGAGES (§ 32\*)—ABSOLUTE DEED.**

Under the statutes of this state, a mortgagee acquires only a specific lien on the property of another described in the mortgage, and an "instrument of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money," may upon its face convey title to property, subject to the provisions of the statute that it "shall be deemed and held a mortgage," if by extrinsic facts the statute is shown to apply.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\*]

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Polk County; J. B. Wall, Judge.

Action by Arthur E. Burr, as trustee in bankruptcy of the Port Tampa Phosphate Company, against Joseph Hull and others. From an interlocutory decree overruling demurrers to the bill, defendants appeal. Affirmed.

On the 26th day of March, 1908, the appellee, as complainant, filed his original bill against the appellants as defendants. A demurrer was interposed to such bill, upon which the trial court made the following order: "The demurrer to the bill assigns a number of grounds which are not tenable, among them that there is no averment of a distinct agreement between the Port Tampa Phosphate Company and Hull; that the deed to the latter from Stuart and Meminger should operate as a mortgage. While this is true, there is an averment of a loan and the taking of the deed as security for its payment. This is sufficient to constitute the deed a mortgage. Nor, under the case stated, was it necessary to aver a tender; but, as there is no positive and definite allegation as to the amount of money made by the present holder of the property, over and above Hull's claims against it, but only an assumption, there should be in the bill an offer to pay the defendants any sum or sums of money which may be ascertained to be due them, or either of them on an accounting, that is due them from the bankrupt estate. The demurrer will be sustained on that ground, and overruled on all the others. The complainant will have leave to amend his bill, and the defendants be allowed 60 days after notice of the amendment in which to answer or plead."

On the 14th day of September, 1908, the complainant filed his amended bill, which, with the exhibit attached thereto, is as follows, omitting the purely formal parts:

"Your orator, Arthur E. Burr, as trustee in bankruptcy of the estate of the Port Tampa Phosphate Company, a corporation, brings this, his bill of complaint, against Joseph Hull, the Prairie Pebble Phosphate Company,

a corporation, and Savannah Trust Company, a corporation, and thereupon your orator complains and says:

"First. That heretofore, to wit, on the 19th day of November, A. D. 1904, one Clarence A. Boswell, of Polk county, Fla., made and entered into a certain contract with one Hiram W. Rowell, whereby the said Clarence A. Boswell agreed to sell to the said Hiram W. Rowell, and the said Hiram W. Rowell agreed to purchase from the said Clarence A. Boswell, the following described premises, lying, being, and situate in Polk county, Fla., to wit: The S.  $\frac{1}{2}$ , and the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$ , and the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section thirty-four (34), in township twenty-nine (29) S., range twenty-three (23) E., containing in all four hundred and forty (440) acres, more or less, subject to a right of way for a railroad track across said land according to the terms of an agreement of even date therewith, together with the buildings situate thereon, consisting of three storehouses, one mill building, eleven dwelling houses, and one commissary and office building. Also the following personal property located upon said premises and described as follows: One drier, three (3) stationary engines, six boilers, five force pumps, one lot of tools, one Worthington pump 6x9x10, one feed and service pump 3" suction and 4" discharge, all elevator chains and buckets, two rock cars, twelve hundred feet steel rails, all pulleys, shaftings, sprockets, wheels, rotary, and wringing screens, debris, hoppers, one Cameron pump No. 10, one Cameron pump 18x9x20, one Cameron pump No. 15564 6" discharge and 6" suction, one lot of boiler tubes, all iron and galvanized pipe, all pipe fittings, gears, pulleys, valve and valve fittings, one lot of box and post hangers, two vertical marine engines, one Moran joint, and all other personal property including office furniture and fixtures.

"Second. That thereafter, to wit, on December 6, A. D. 1904, the said Hiram W. Rowell, for a valuable consideration, assigned and transferred the said contract, together with all of his right, title, and interest in and to the premises therein described, to the Port Tampa Phosphate Company, a corporation, and the said Port Tampa Phosphate Company immediately entered into possession of the said premises described in the said contract, and became the equitable owner thereof, subject to the payment to the said Clarence A. Boswell of an unpaid balance of the purchase price, amounting to approximately \$12,000.

"Third. That the said premises so embraced in the said contract assigned by the said Hiram W. Rowell to the said Port Tampa Phosphate Company were acquired by it for the purpose of carrying out the objects for which the said corporation was incorporated, viz., the establishment and operation of a phosphate plant, and the said premises of which the said Port Tampa Phosphate Com-

pany became the equitable owner as aforesaid, subject to the payment of the unpaid balance of the purchase price to the said Clarence A. Boswell, constituting the entire plant and property then or thereafter acquired by the said Port Tampa Phosphate Company for the purpose of carrying out the aforesaid purpose for which it was incorporated, and the assignment of his rights under the aforesaid contract with the said Clarence A. Boswell by the said Hiram W. Rowell was made to the said Port Tampa Phosphate Company in consideration of certain stock of the said corporation issued to him as an equivalent for the rights so transferred to the said corporation.

"Fourth. That immediately upon the transfer by the said Hiram W. Rowell to the said Port Tampa Phosphate Company of his rights under the aforesaid contract with the said Clarence A. Boswell, and his rights in and to the premises therein mentioned and described, the said Port Tampa Phosphate Company entered into possession of the said premises, and proceeded to complete and extend the phosphate plant which had been partially constructed thereon, preparatory to commencing mining operations when the same should be fully completed, so as to carry out the object for which the said Port Tampa Phosphate Company was incorporated, and, in making the said improvements and completing and extending of said plant, the said Port Tampa Phosphate Company expended a large sum of money on the said premises, to wit, upwards of the sum of \$60,000.

"Fifth. That thereafter, to wit, on the 27th day of May, A. D. 1905, the said Port Tampa Phosphate Company, being pressed for payment by E. C. Stuart and C. G. Meminger, to whom the said Clarence A. Boswell had assigned his rights under the aforesaid contract, upon which there was then due an unpaid balance amounting to upwards of the sum of \$12,000, applied to the defendant Joseph Hull for a loan of money with which to pay the said balance, together with a small amount of additional indebtedness then owed by the said Port Tampa Phosphate Company, and also certain other moneys that would be required by the said Port Tampa Phosphate Company to complete the said phosphate plant on the said premises, and the said Joseph Hull agreed to advance the said moneys to the said Port Tampa Phosphate Company, but, the legal title to the said premises not having vested in the said Port Tampa Phosphate Company, was unwilling to accept a mortgage from it, and required that the deed of conveyance to said premises to be executed on the payment of the balance of the purchase price should be made to him, the said Joseph Hull, so as to secure him for the money then advanced and thereafter to be advanced by him for the completion of the said plant.

"Sixth. That the said Port Tampa Phosphate Company being financially embarrassed and unable to procure money with which to

pay the balance of the purchase price of the said premises, and to complete the said plant and protect it in its outlay already made amounting to upwards of the sum of \$60,000 in cash, its board of directors assented to the terms of the defendant Joseph Hull, and agreed that the said deed of conveyance to the said premises, to be delivered on payment of the balance of the purchase price, should be made to the said defendant Joseph Hull upon his entering into an obligation to convey the same to the said Port Tampa Phosphate Company upon being repaid the sum of money then advanced by the said defendant Joseph Hull, and such sums as he might thereafter advance for the purpose of completing the said phosphate plant, but the said proposition of the said Joseph Hull was never submitted by the said board of directors to the stockholders of the said Port Tampa Phosphate Company, or assented to by the stockholders of the said Port Tampa Phosphate Company, although the said premises embraced and included all of the property and assets of the said corporation.

"Seventh. That in pursuance of the said agreement between the defendant Joseph Hull and the board of directors of the said Port Tampa Phosphate Company the defendant Joseph Hull advanced the sum of \$13,404.77, with which to pay to E. C. Stuart and C. G. Meminger the balance of the purchase price of the said premises, and the said premises at the request of the board of directors of the said Port Tampa Phosphate Company were conveyed by the said E. C. Stuart and C. G. Meminger, then the owners thereof, to the said Joseph Hull, and contemporaneously therewith, as part of the same transaction, the defendant Joseph Hull executed and delivered to the said Port Tampa Phosphate Company an agreement in writing dated June 9, 1905, whereby he agreed to convey the said premises to the said Port Tampa Phosphate Company upon the repayment to him within four months from said date of the said sum of \$13,404.77 so advanced by him, and such other and further sums of money as he might thereafter advance for the improvement or operation of the said property, together with a profit of 16 per cent. on any sum either advanced or paid out, all of which will more fully appear by reference to a true copy of the said agreement which is hereto annexed, marked 'Exhibit A' hereto and hereby made by reference a part of this bill of complaint as fully as if the same were herein incorporated in *hæc verba*.

"Eighth. That after the execution and delivery of the said deed of conveyance of the said premises to the defendant Joseph Hull, and after the execution and delivery by the said Joseph Hull, and the said Port Tampa Phosphate Company of the instrument, 'Exhibit A' hereto, the said Port Tampa Phosphate Company continued and remained in possession of the said premises, and continued to make improvements thereon, and con-



tinued to endeavor to complete the phosphate plant thereon so as to place the same in condition for mining phosphate from the said premises, and the said Joseph Hull advanced to the said Port Tampa Phosphate Company for the purpose of carrying on the said improvements and completion of said plant sums of money from time to time, the exact amount of which is unknown to your orator, but your orator alleges, on information and belief, that the sums of money so advanced by the said defendant Joseph Hull subsequently to the execution of the said deed of conveyance to him amounted to approximately the sum of \$12,000, and all of the said moneys so advanced were applied by the said Port Tampa Phosphate Company towards the construction, extension, and completion of the said phosphate plant on the said premises.

"Ninth. That the said Port Tampa Phosphate Company continued in possession of the said premises, and continued to endeavor to complete the same preparatory to commencing mining operations thereon, until, to wit, November 9, A. D. 1905, when, owing to its embarrassed circumstances, a petition in bankruptcy was filed against it in the District Court of the United States for the District of Massachusetts, under the laws of which state the said Port Tampa Phosphate Company was incorporated, and where it had its domicile, and the said Port Tampa Phosphate Company, to wit, on the 27th day of November, A. D. 1905, was duly adjudged a bankrupt by the said District Court of the United States for the District of Massachusetts, and your orator was duly appointed on the said date as trustee of the said bankrupt corporation, and thereafter, to wit, on the 27th day of December, A. D. 1905, your orator duly qualified as such trustee, and is now trustee of the bankrupt estate, and as such trustee your orator brings this bill of complaint.

"Tenth. That immediately upon the appointment of your orator as trustee in bankruptcy of the said Port Tampa Phosphate Company all of the property, including that herein described, of which the said Port Tampa Phosphate Company was in possession at the time of the said adjudication and of the appointment and qualification of your orator as trustee in bankruptcy, vested in your orator as such trustee in bankruptcy, and your orator became entitled to the possession thereof, but your orator alleges that, after his appointment and qualification as trustee in bankruptcy of the estate of said corporation, the defendant Joseph Hull instituted an action of ejectment in the Circuit Court of the United States for the Southern District of Florida against one N. B. Childs and the said Port Tampa Phosphate Company, to which your orator was not made a party, nor did he become a party, and in which no service was had upon the said Port Tampa Phosphate Company or any officer, agent, or representative of the said

Port Tampa Phosphate Company, and in which it did not appear, but in which, as your orator is informed and believes, the only service made was upon N. B. Childs, a deputy sheriff of Polk county, Fla., in possession of the personal property on the said premises under certain writs of attachment issued out of the circuit court of Polk county, Fla., and in the said proceeding in the Circuit Court of the United States for the Southern District of Florida to which neither the said Port Tampa Phosphate Company nor your orator were made, or become, parties, the defendant Joseph Hull on or about the 3d day of March, A. D. 1906, secured a judgment by default and a final judgment purporting to award him possession of the said premises, and under the said judgment the defendant Joseph Hull entered into the possession thereof.

"Eleventh. That thereafter, to wit, on the 6th day of November, A. D. 1906, the defendant Joseph Hull, who was then and is now a large stockholder and the president of the defendant Prairie Pebble Phosphate Company, a corporation, undertook to convey the said premises to the Prairie Pebble Phosphate Company, but your orator alleges that the said Prairie Pebble Phosphate Company at the time of the conveyance to it of the said premises had full notice and knowledge of all the facts hereinbefore set forth, and of your orator's rights in the premises, and thereafter, to wit, on the 25th day of July, A. D. 1907, the said Prairie Pebble Phosphate Company undertook to mortgage the said premises, together with other premises, to the defendant Savannah Trust Company, of which corporation the defendant Joseph Hull was also a large stockholder, and a director and officer, which last-mentioned corporation at the time of the execution and delivery to it of the said mortgage, the amount, terms, and conditions of which are unknown to your orator, also had full notice and knowledge of all of the facts hereinbefore set forth and of your orator's rights in the premises.

"Twelfth. Your orator further alleges that the defendant Joseph Hull and the defendant Prairie Pebble Phosphate Company since acquiring possession of the said premises as hereinbefore set forth have operated the same as a phosphate plant and mining plant, and removed from the soil of said premises and mined therefrom many thousand tons of phosphate rock and sold and disposed of the same, and that, if an accounting were had between your orator and the said defendants, there would be due to your orator, after paying in full all moneys advanced by the defendant Joseph Hull to the said Port Tampa Phosphate Company with interest thereon, a large sum of money, to wit, the sum of \$100,000 and upwards.

"Thirteenth. Your orator further alleges that the deed of conveyance of the said premises to the defendant Joseph Hull by the said E. C. Stuart and C. G. Meminger, as afore-

said, in consideration of the payment by the said Joseph Hull of the balance of the said purchase price and the further advances to be made by the said Joseph Hull, did not operate to make the defendant Joseph Hull the owner thereof; but merely gave him a security thereon for the amount of his advances and interest for the following reasons, viz.:

"(a) The said premises constituted the entire plant and property of the said corporation acquired for the purpose of carrying out the business of the corporation for which it was incorporated, and that the same could not be sold by the board of directors of the said corporation without assent of its stockholders, which consent was never requested or given by the stockholders.

"(b) The said premises, after the execution and delivery of the said deed of conveyance to the said Joseph Hull, continuously remained in the possession of the said Port Tampa Phosphate Company until after the appointment of your orator as trustee in bankruptcy of the said corporation, and the said Port Tampa Phosphate Company during all that period continuously exercised acts of dominion and ownership over the same with the consent of the defendant Joseph Hull, and the consideration for the said conveyance was only a fractional part of the actual value of the said premises, and by reason thereof the said conveyance, if a conveyance, was fraudulent and void as to creditors of the said Port Tampa Phosphate Company, and your orator alleges that there were such creditors then existing whose claims still remain unpaid.

"(c) The said conveyance to the said Joseph Hull, in connection with the said instrument of defeasance, 'Exhibit A,' hereto were and constituted a mere security, and the said Port Tampa Phosphate Company at all times prior to the appointment of your orator as its trustee in bankruptcy was the equitable owner of the said premises, and your orator is now the equitable owner thereof.

"Fourteenth. That your orator is entitled to an accounting from the defendants Joseph Hull and the Prairie Pebble Phosphate Company to determine the amount of phosphate rock that has been mined and removed from the said premises and the other property that has been taken and removed therefrom or consumed by the said defendants, and to a determination on such accounting of the value thereof, and to a decree that the balance found to be due to your orator on such an accounting after deducting all moneys advanced by the defendant Joseph Hull to the said Port Tampa Phosphate Company shall be paid to your orator as trustee in bankruptcy of the said Port Tampa Phosphate Company, and that the said premises shall be conveyed by the said Prairie Pebble Phosphate Company to your orator as such trustee in bankruptcy, and that any claim on the part of the said defendant Prairie Pebble Phosphate Company, a corporation, or the

said Savannah Trust Company, a corporation, shall be canceled as clouds upon the title of your orator to the said premises.

"Fifteenth. And, should such accounting when completed as prayed by your orator show that there is due to the said Joseph Hull from the Port Tampa Phosphate Company on the money advanced to said company any sum or sums of money whatsoever, your orator stands ready and willing to pay the same to the said Joseph Hull, and hereby expressly agrees to pay the same into court as soon as any such amount of indebtedness should be ascertained.

"To the end, therefore, that the said defendants Joseph Hull and the Prairie Pebble Phosphate Company, a corporation, and the Savannah Trust Company, a corporation, and each of them, may if they can show cause why your orator should not have the relief herein and hereby prayed, and that they may, but not under oath, answers under oath of the said defendants being hereby expressly waived, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the premises in as full and particular a manner as if the same were herein set forth as interrogatories, and the said defendants specially interrogated in regard thereto.

"And, in view of the premises, may it please your honor to order, adjudge, and decree that an accounting be had by and under the direction of a master of the court, to be appointed for that purpose, to ascertain and report to the court the amount in full of all phosphate or other property that may have been removed by the defendant Joseph Hull or the Prairie Pebble Phosphate Company from the said premises, or otherwise converted by the defendants, as well as the amount due to the defendant Joseph Hull for moneys advanced in the payment of the balance of the purchase price of the said premises, and for expenditures on the said property by the said Port Tampa Phosphate Company after the purchase of the said premises, and to further order, adjudge, and decree that the said defendants Joseph Hull and the Prairie Pebble Phosphate Company should pay to your orator as trustee in bankruptcy of the said Port Tampa Phosphate Company the balance found to be due him upon such accounting.

"May it please your honor to order, adjudge, and decree that the claims of the defendants Joseph Hull, the Prairie Pebble Phosphate Company, a corporation, and the Savannah Trust Company, a corporation, and each of them, shall be canceled and set aside as clouds upon the title of your orator to the said premises, and that they, and each of them, shall execute and deliver unto your orator sufficient deeds of release releasing unto your orator any and all their rights or claims therein, and that your orator shall thereupon be quieted in his title to the said

premises as against the claims of the said defendants, and each of them.

"May it further please your honor to enjoin and restrain the defendants Joseph Hull and the Prairie Pebble Phosphate Company, a corporation, and each of them, and their and of their agents, servants, and employes, during the pendency of this litigation, from mining or removing any phosphate rock or other property from the premises herein described, and to further order, adjudge, and decree that a receiver of the said premises be appointed to take charge and control of the same, and to care for and protect the same during the pendency of this litigation, and that your orator may have such other and further relief as he may be entitled to under the facts set up in his bill."

#### Exhibit A.

"This agreement made this 9th day of June, 1905, between the Port Tampa Phosphate Company, a corporation of the state of Massachusetts of the first part, and Joseph Hull of Savannah, Georgia, of the second part:

"Whereas, the said Port Tampa Phosphate Company owns the property hereinafter described under and by virtue of a certain contract dated the 19th day of November, 1904, between Clarence A. Boswell and wife of the first part, and H. W. Rowell of the second part, which said contract has been duly assigned by the said Rowell to the said Port Tampa Phosphate Company; and

"Whereas, the said Port Tampa Phosphate Company, under and by virtue of a certain resolution of the Board of Directors of said company passed on the 23d day of May, 1905, has sold the said property to the said Joseph Hull and has caused the same to be conveyed to the said Joseph Hull by E. C. Stuart and C. G. Meminger being the assignee of all the rights and interests of the said Boswell and wife under said contract; and

"Whereas, the said Hull has agreed to sell back and reconvey the said property to the said Port Tampa Phosphate Company at any time within four months from the date hereof, upon the payment to him by the said Port Tampa Phosphate Company of the sum of thirteen thousand four hundred and four dollars and seventy seven cents (\$13,404.77) and such other and further sums of money which may have been advanced or paid out by the said Hull, in the improvement or operation of said property, together with a profit of sixteen per cent. (16%) on any such sums so advanced or paid out.

"Now, therefore, this agreement witnesseth: That the said Joseph Hull for and in consideration of the premises, does hereby agree and bind himself, his executors and administrators and assigns, upon the payment to him by the said Port Tampa Phosphate Company or its assigns, of the said principal sum of \$13,404.77 and of such other and further sums which may have been paid out or advanced by him in the operation or improvement of said property, together

with a profit of sixteen per cent. on such sums so advanced or paid out, that he shall convey to the said Port Tampa Phosphate Company, or its assigns, all the following described property:

"The south half, and the south half of the northeast quarter and the southeast quarter of the northwest quarter of section thirty-four (34) in township twenty-nine (29) south, range twenty-three (23) east, containing in all four hundred and forty (440) acres, more or less, subject to a right of way for a railroad track across said land according to the terms of an agreement of even date herewith, together with the buildings situate thereon consisting of three storehouses, one mill building, eleven dwelling houses, and one commissary and office building. And also the following personal property now located upon said premises and described as follows: One drier, three (3) stationary engines, six boilers, five force pumps, one lot of tools, one Worthington pump 16x9x10, one feed and service pump 3" suction and 4" discharge; all elevator chains and buckets, two rock cars, twelve hundred feet steel rails, all pulleys, shaftings, sprockets, wheels, rotary and wringing screens, debris, hoppers, one Cameron pump No. 10, one Cameron pump 18x9x20, one Cameron pump No. 16564 6" discharge and 6" suction, one lot of boiler tubes, all iron and galvanized pipe, all pipe fittings, gear, pulleys, valve and valve fittings, one lot of box and post hangers, two vertical marine engines, one Moran joint, and all other personal property including office furniture and fixtures.

"The Port Tampa Phosphate Company agrees that if it shall fail to exercise its right to repurchase said property within the time prescribed, this contract shall forthwith become void and of none effect, and the said Joseph Hull shall own said properties free from any claim or demand of the said Port Tampa Phosphate Company.

"In witness whereof the said Port Tampa Phosphate Company has caused this agreement to be executed by its president and said Joseph Hull has executed the same in proper person in duplicate.

"Joseph Hull.

"Port Tampa Phosphate Company,

"H. W. Rowell, Pres.

"Signed, sealed, and delivered in the presence of W. W. MacKall."

The amended bill differs from the original bill only in the insertion therein of the paragraph numbered "Fifteenth" and of the general prayer.

To such amended bill the defendants interposed two demurrers, which are as follows:

"Demurrer of the above-named defendants and each of them to that part of the second bill of complaint of the said plaintiff in this cause designated therein by the number 'Thirteenth,' and divided into subsections or paragraphs designated by the letters 'a,' 'b,' and 'c,' and which reads as follows:

"Thirteenth. Your orator further alleges

that the deed of conveyance of the said premises to the defendant Joseph Hull by the said E. C. Stuart and C. G. Meminger, as aforesaid, in consideration of the payment by the said Joseph Hull of the balance of the said purchase price, and the further advances to be made by the said Joseph Hull, did not operate to make the defendant Joseph Hull the owner thereof, but merely gave him a security thereon for the amount of his advances and interest for the following reasons, viz.:

"(a) The said premises constituted the entire plant and property of the said corporation acquired for the purpose of carrying out the business of the corporation for which it was incorporated, and the same could not be sold by the board of directors of the said corporation without assent of its stockholders, which consent was never requested or given by the stockholders.

"(b) The said premises, after the execution and delivery of the said deed of conveyance to the said Joseph Hull, continuously remained in the possession of the said Port Tampa Phosphate Company until after the appointment of your orator as trustee in bankruptcy of the said corporation, and the said Port Tampa Phosphate Company during all that period continuously exercised acts of dominion and ownership over the same with the consent of the defendant Joseph Hull, and the consideration for the said conveyance was only a fractional part of the actual value of the said premises, and by reason thereof the said conveyance, if a conveyance, was fraudulent and void as to creditors of the said Port Tampa Phosphate Company, and your orator alleges that there were such creditors then existing whose claims still remained unpaid.

"(c) The said conveyance to the said Joseph Hull, in connection with the said instrument of defeasance, "Exhibit A" hereto, were and constituted a mere security, and the said Port Tampa Phosphate Company at all times prior to the appointment of your orator as its trustee in bankruptcy was the equitable owner of the said premises, and your orator is now the equitable owner thereof."

"These defendants and each of them by protestation, not confessing or acknowledging all or any of the matters and things in that part of the said plaintiff's bill contained, and hereby demurred to be true in the manner and form as the same is therein and thereby set forth and alleged, do demur to said part of the said bill and for cause of demurrer show:

"(1) On the ground that the said part and thirteenth section of the bill attempts to state a cause of action separate and distinct from the remainder of the bill of complaint, and does not state any separate cause of action.

"(2) That said part and thirteenth section of the bill in no way aids to make out a cause of action as set up in the remainder of the bill not covered by this demurrer.

"(3) That the plaintiff does not represent the stockholders of the Port Tampa Phos-

phate Company, and, if he did represent them, he is estopped and has lost his right by lapse of time and acquiescence to question the said conveyance to defendant Hull as a valid deed of conveyance of the legal title.

"(4) That evidence is admissible, if admissible at all, under the allegations of the other parts of the bill nor covered by this demurrer of the value of the property at the time of said conveyance to Hull and of the amount Hull paid for said conveyance. And subsection of said thirteenth section of the bill, designated therein by the letter 'b,' states no issuable facts tending to establish that such conveyance was fraudulent and void as to creditors of the said the Port Tampa Phosphate Company, but states merely an argumentative conclusion of law.

"(5) That subsection of the thirteenth section of the bill, designated by the letter 'c,' attempts to set up that said deed of conveyance to defendant Hull and his contract with the Port Tampa Phosphate Company, 'Exhibit A' to the bill and made a part thereof, constitute a distinct cause of action separate from and independent of the allegations in the bill not covered by this demurrer, but they do not state such cause of action.

"(6) And on other grounds apparent on the face of the said thirteenth section of the bill."

"The demurrer of the above-named defendants to a part of second bill of complaint of the said plaintiff in this cause:

"These defendants by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill contained to be true in the manner and form as the same are therein and thereby set forth and alleged, do severally demur to a part of the said bill, and for cause of demurrer show:

"(1) That the plaintiff hath not in and by the part of his said bill demurred to make or stated such a case as entitled him in a court of equity to the relief against them as prayed for in the said bill, or to any relief.

"(2) Because in the part of the said bill of complaint demurred to there is no direct, positive averment that there was any agreement or contract between the defendant Joseph Hull and the said the Port Tampa Phosphate Company that the deed of conveyance of the property described in the bill by E. C. Stuart and C. G. Meminger was taken and held as a mortgage for money lent; and in this respect the said bill is too vague and uncertain to tender any issue. There is no averment in the bill that the defendant Hull lent any money to the Port Tampa Phosphate Company or that the Port Tampa Phosphate Company borrowed any money from the said Hull. The bill shows on its face and exhibit attached thereto that the Port Tampa Phosphate Company never agreed to pay said Hull any money and never became bound to do so.

"(3) Because in and by the fourteenth section of the said bill and the prayer thereof the plaintiff claims relief which this court is not competent to give, in this: That this court has no power or jurisdiction to apply

the rents and profits of the premises which may be due from the defendants or any of them, if any is due, to the payment of the moneys admitted in the said bill and claimed to be due Joseph Hull as a creditor of the said bankrupt. This court is without power or jurisdiction to decree what, if anything, may be due from the defendants or either of them for phosphate removed from the land, to be applied to pay what is due Joseph Hull as set forth in the bill, whether the case made by the bill is that of a mortgage or not, because such moneys, if any, belong to the other creditors of the bankrupt.

"(4) Because the bill does not allege that the amount that the plaintiff admits to be due said Hull was ever tendered him before this suit was brought, and because there is no offer in the bill to do equity or that the plaintiff is ready, able, and willing to pay the amount he admits to be due the said Hull; nor is there any excuse stated in the bill for not having tendered the amount due Hull before suit brought, and for not alleging in the bill that plaintiff was ready, able, and willing to pay the amount which may be decreed to be due the said Hull, including moneys which may be found to be due to the defendants or either of them on account of improvements and betterments made by the defendants or either of them in good faith on the said properties.

"(5) Because it is shown in and by the said bill of complaint that the plaintiff as trustee in bankruptcy has a full and complete and adequate remedy at law; that his remedy at law is more complete and adequate than this court is competent to give upon the theory of the rights of the trustee presented by the said bill.

"(6) The bill does not pray any discovery, and the court is without power or authority to grant the specific relief prayed.

"(7) No case is made by the bill for an accounting in equity; it appearing from the bill that, if the plaintiff did not know how much money Hull paid out, it was because plaintiff chose to be willfully ignorant and could have known by making due inquiry either of the said Hull or of the officers of the said the Port Tampa Phosphate Company.

"(7½) Because the bill is multifarious and a misjoinder of distinct causes of action, in that the Savannah Trust Company has no interest in respect to the amount Hull or the Prairie Pebble Phosphate Company owe plaintiff for rock removed, nor has either of the latter defendants any interest in respect to the amount the other owes for rock removed, and it is in violation of good pleading in a suit to remove a cloud on title to join therein money demands against a part of the defendants.

"(8) And for divers other good and sufficient grounds of demurrer appearing upon the face of the said bill.

"This demurrer is to all of the said second bill of complaint except that part of it or section numbered 13."

On the 9th day of February, 1909, the trial court made an order overruling each of such demurrers. From this interlocutory decree or order the defendants have entered their appeal to this court, and have filed the following assignment of errors:

"First. The court erred in overruling the demurrer of the several defendants to all of the bill of complaint except the part of section thereof numbered thirteenth, in this: That the court should have sustained said demurrer on the ground that the facts stated in the bill do not entitle the plaintiff to any relief in a court of equity; and particularly because the said bill does not state any facts in issuable form to admit evidence to turn a deed absolute on its face into a mortgage security, there being in the said bill of complaint no direct, positive averment that there was any agreement or understanding between the defendant Joseph Hull and the said Port Tampa Phosphate Company that the deed of conveyance of the property described in the bill by E. C. Stuart and C. G. Meminger was received and held as a mortgage for money lent, and in this respect the bill is too vague and uncertain to tender any issue upon that subject, and because there is no averment in the bill that the defendant Hull ever lent any money to the Port Tampa Phosphate Company or that said company ever borrowed any money from the said Hull; nor does the bill show that the said company ever agreed to pay any money, or ever become bound to pay any money.

"Second. The court below erred in overruling the said demurrer to said bill of complaint on the ground that the plaintiff claims in and by the fourteenth section of said bill and prayer thereof relief which the court below was not competent to give, in this: That the said court had no power or jurisdiction to apply the rents and profits of the premises or the amount due from defendants for phosphate rock taken therefrom, if any was due, to the payment of moneys admitted in the said bill to be due Joseph Hull as a lien creditor of the said bankrupt. All moneys, if any, due the plaintiff on account of phosphate rock taken from the premises described in the bill belong to the general creditors of the bankrupt, and neither the said trustee or the said court or any other court has power, authority, or jurisdiction to apply the same to pay the said moneys admitted to be due Hull on the theory that he is a mortgagee.

"Third. The court erred in overruling the said demurrer, in this: That the bill does not allege that the amount the plaintiff admitted in said bill was due the said Hull was ever tendered him before this suit was brought.

"Fourth. The court erred in overruling the said demurrer, in this: That there is no averment in the bill of any offer to do equity, or that the plaintiff is ready, able, and willing to pay the amount he admits to be due said Hull, nor is there any averment in the

bill that the plaintiff is willing to pay the amount which the court may decree to be due the said Hull or any of the defendants.

"Fifth. The court erred in overruling the said demurrer, in this: That it is shown in and by the said bill of complaint that the plaintiff as trustee in bankruptcy has full and complete and adequate remedy at law, and that such remedy at law is more complete and adequate than a court of equity is competent to give upon the theory of the rights of the trustee as plaintiff, prayed by the said bill.

"Sixth. The court erred in overruling the said demurrer, in this: That the bill does not pray any discovery, and the court was without power or authority to grant the specific relief prayed.

"Seventh. The court erred in overruling said demurrer, in this: That no case is made in and by the said bill for an accounting in equity, it appearing from the allegations in the bill that, if the plaintiff did not know exactly how much money Hull paid out to the said Port Tampa Phosphate Company, it was because plaintiff chose to be willfully ignorant on the subject, and could have known the amount of said moneys by making the proper inquiry either of the said Hull or of the officers of the said Port Tampa Phosphate Company.

"Eighth. The court erred in overruling the said demurrer, in this: That the bill shows on its face that it is multifarious and a misjoinder of distinct causes of action, in that the defendant the Savannah Trust Company has no interest with respect to the amount of money Hull or the Prairie Pebble Phosphate Company owe for rock removed from the said premises, nor have either of the last-named defendants any interest in the amount the other owes for said rock removed.

"Ninth. The court erred in overruling the said demurrer, in this: That it appears from the said bill that it is one to remove a cloud on title, and the plaintiff in his said bill has joined therein a money demand against some or all of the defendants, which is contrary to the rule of good pleading.

"Tenth. The court below erred in overruling said demurrer on the part of the said Prairie Pebble Phosphate Company and the said Savannah Trust Company on the ground that it is not shown in and by the said bill and the facts alleged therein that the said defendants were not bona fide purchasers for value without notice, but the contrary is shown in the said bill.

"Eleventh. The court erred in overruling the second demurrer to the thirteenth paragraph or section of said bill, which in the said bill is divided into subsections designated by the letters 'a,' 'b,' and 'c,' and which said thirteenth section of the bill reads as follows:

"Thirteenth. Your orator further alleges that the deed of conveyance of the said premises to the defendant Joseph Hull by the said E. C. Stuart and C. G. Meminger as afore-

said, in consideration of the payment by the said Joseph Hull of the balance of the said purchase price and the further advances to be made by the said Joseph Hull, did not operate to make the defendant Joseph Hull, the owner thereof, but merely gave him a security for the amount of his advances and interest for the following reasons, viz.:

"(a) The said premises constituted the entire plant and property of the said corporation acquired for the purpose of carrying out the business of the corporation for which it was incorporated, and the same could not be sold by the board of directors of the said corporation without assent of its stockholders, which consent was never requested or given by the stockholders.

"(b) The said premises after the execution and delivery of the said deed of conveyance to the said Joseph Hull continuously remained in the possession of the said Port Tampa Phosphate Company until after the appointment of your orator as trustee in bankruptcy of the said corporation, and the said Port Tampa Phosphate Company during all that period continuously exercised acts of dominion and ownership over the same with the consent of the defendant Joseph Hull, and the consideration for the said conveyance was only a fractional part of the actual value of the said premises, and by reason thereof the said conveyance, if a conveyance, was fraudulent and void as to creditors of the said Port Tampa Phosphate Company, and your orator alleges that there were creditors then existing whose claims still remained unpaid.

"(c) The said conveyance to the said Joseph Hull in connection with the said instrument of defeasance, "Exhibit A," hereto were and constituted a mere security, and the said Port Tampa Phosphate Company at all times prior to the appointment of your orator as its trustee in bankruptcy was the equitable owner of the said premises and your orator is now the equitable owner thereof."

"Said error consists, in this: That by the said thirteenth section it appears that the transaction finally consummated between the said Tampa Phosphate Company and the said Joseph Hull was a conditional sale of the premises in question, and that, the said company not having paid the said Hull within the time limited in the contract, 'Exhibit A,' to the said bill, the said Hull became and was the absolute owner of the said premises, and, in this: Because the plaintiff does not represent the stockholders of the said company, and could not ask that the said deed be set aside in their behalf. And, in this: Because the subdivision 'b' of the said section thirteen does not state any case for setting aside said conveyance to the said Hull, on the ground of inadequacy of price. And in this: Because the ground of relief in subsections 'a' and 'b' of the said thirteenth section are inconsistent with each other, and inconsistent with the grounds for relief attempted and imperfectly set up in sections

fifth and sixth and seventh of the said bill of complaint."

The complainant also filed a cross-assignment of error based upon the order sustaining the demurrer of the defendants to the original bill upon the ground stated therein.

Blasbee & Bedell and Wilson & Swearingen, for appellants. Glen & Himes and E. R. Gunby, for appellee.

SHACKLEFORD, J. (after stating the facts as above). We have copied in full in the foregoing statement the amended bill, the demurrers interposed thereto, and the assignments of error predicated upon the order of the court overruling such demurrers, omitting only the formal parts of the several instruments. Our purpose in doing this is to show clearly just what points are presented to us for consideration and determination. As will be readily seen, all of such points are embraced within the general question as to whether or not the amended bill is sufficient to withstand the attack made upon it by the demurrers. That question we shall now undertake to answer, but without discussing the several assignments in detail.

It seems well to begin with the consideration of the proper construction to be placed upon section 2494 of the General Statutes of 1906, which is as follows:

"Sec. 2494. (1981.) Instruments deemed mortgages.—All deeds of conveyance, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages."

Originally this section formed section 1 of an act approved the 30th day of January, 1838, found on page 12 of the Acts of 1838, reading as follows:

"Section 1. Be it enacted by the Governor and Legislature council of the territory of Florida, that all deeds of conveyance, bills of sale, or other instruments of writing, conveying or selling property, either real, personal or mixed, for the purpose or with the intention of securing the payment of money, whether such deed, bill of sale, or other instrument, be from the debtor to the creditor, or from the debtor to some third person or persons in trust for the creditor, shall be deemed and held as mortgages, and shall be subject to the same rules of foreclosure, to the same regulations and restrictions as now are, or may hereafter be prescribed by law, in relation to mortgages."

This act was amended by chapter 525, Acts 1852-53, found on page 104, reading as follows:

"An Act to Amend the Laws Now in Force Relating to Mortgages.

"Section 1. Be it enacted by the Senate and House of Representatives of the State of Florida in General Assembly convened, that all deeds, obligations, conditioned or defeasible, bills of sale, or other instruments of writing, made for the purpose, or with the intention of securing the payment of money, whether such instruments of writing be from the debtor to the creditor, or from the debtor to some third person, or persons in trust for the creditor, shall be deemed, and held as mortgages, and shall be subject to the same rules of foreclosure, to the same regulations, restrictions, restraints and forms, as are now, or hereafter may be prescribed by law in relation to mortgages; but in no case, shall the obsolete, and antiquated claim in favor of the mortgagee to the right of possession of the property, specified in said mortgage, or any part thereof, by reason of any alleged failure of payment, or breach of promise, or other default, be recognized or admitted in a Court of Justice in this state, either by judge or jury, until all other steps and forms prescribed by law for the foreclosure of mortgages be complied with and observed.

"Sec. 2. Be it further enacted, and declared, that a constructive possession, or possession in the eye of the law, by the mortgagee, shall not be allowed to impair, or bring in question, the actual, and for ages, the admitted right of possession of the mortgagor, until deprived thereof by decree; that a mortgage is, and shall be, held in our courts a specific lien on property, thereon for a specific object, and in point of fact as well as law, the mortgagee is incapable of acquiring possession until after decree of foreclosure, and then only by bidding, and out bidding all competitors in market.

"Sec. 3. Be it further enacted, that all acts, or parts of acts, conflicting with the true intent and meaning of this act, be and the same are hereby repealed.

"(Passed the House of Representatives, January 3, 1853. Passed the Senate, January 6, 1853. Approved by the Governor, January 8, 1853.)"

This chapter was brought forward, with certain modifications, into the Revised Statutes of 1892 as sections 1981 and 1982. Such section 1981 is the same as section 2494 of the General Statutes of 1906, which we have copied above, and such section 1982 is brought into the General Statutes as section 2495, which is as follows:

"Sec. 2495. (1982.) Nature of a mortgage.—A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession."

The differences in the acts of 1838 and 1853 and the sections of the Revised and General Statutes are obvious, so that no comment thereon is necessary.

These sections in their different forms have been before this court several times for construction. In *McGriff v. Porter*, 5 Fla. 373, it was held that the act of January 30, 1838, was "intended to limit and restrict the operative force of certain classes of conveyances therein mentioned, and not to extend or enlarge the effect of others." As was said therein: "The act mentions 'deeds of conveyance and bills of sale,' and although it uses the terms, or 'other instruments of writing,' yet these terms, upon a familiar rule of interpretation, must be taken to mean instruments ejusdem generis, of a kindred character to those which are specifically designated, and this is fully sustained by the description which is contained in the statute, which shows that it was designed to operate on those instruments, alone which have the effect of 'conveying or selling property, real, personal or mixed, for the purpose or with the intention of securing the payment of money.'" This construction has been recognized, approved, and followed in *Chalres v. Brady*, 10 Fla. 133, and *Lindsay v. Matthews*, 17 Fla. 575. In *Hollingsworth v. Hancock*, 7 Fla. 338, will be found a discussion and definition of the distinction or difference between a mortgage and a conditional bill of sale. In *Smith v. Hope*, 47 Fla. 295, 35 South. 865, it was held that, "where parties intend a conditional sale rather than a mortgage, the intention will be given effect. An instrument in form a conditional bill of sale, and alleged in a bill seeking to enforce it to be a conditional bill of sale, will not, upon a demurrer to the bill, be held a mortgage. If the circumstances under which it was given are such that it will be held in law a mortgage, but these do not appear from the bill, they must be set up by plea or answer. A feature essential to a mortgage is an indebtedness which it is designed to secure. The existence of this is not implied in a provision that a bill of sale shall be void if the grantors shall 'pay' a certain sum of money by a certain day. Payment of money does not necessarily imply a previous binding obligation to pay, but may be made as the recompense or equivalent for some present benefit, the procurement of which is optional with the prayer." It is true that in this last cited case a dissenting opinion was filed by Mr. Chief Justice Taylor, in which the writer hereof concurred. This case came a second time before this court. See *Smith v. Hope*, 51 Fla. 541, 41 South. 69. The pleadings in the cited case, including the written instrument presented for construction, are so variant from the pleadings and written instrument in the instant case that such cited case throws but little light upon the question now presented. However, as we see it, it makes practically no difference, so far as the instant case is concerned, whether we uphold the majority opinion or follow the dissenting opinion in the cited case. Therefore we shall spend no time in discussing that point. Without mean-

ing to question the correctness of either the reasoning used or the conclusion reached in *Hollingsworth v. Hancock*, supra, we would call attention to the points of difference also existing in that case and in the instant case. It was held in *Campbell Printing Press & Mfg. Co. v. Walker*, 22 Fla. 412, 1 South. 59, that it was not the intention either of the act of 1838 or of 1853, both of which we have copied above, to give any other construction to an instrument of writing than the parties thereto intended. In *Franklin v. Ayer*, 22 Fla. 654, it was held that "courts of equity will, in pursuance of a wise and benign rule, in cases of doubt as to whether the parties intended the transaction as a mortgage or conditional sale, hold it to be a mortgage." In addition to the cases already cited, the following decisions of this court dealing with the statute from different view points will prove of service as showing the extent to which the court is willing to go in order to ascertain the real intention of the parties as to the instrument which may be in question and under what circumstances and how far parol evidence is admissible to show that an instrument which may on its face be an absolute deed of conveyance or bill of sale is in reality of such a nature that it must be "deemed and held" a mortgage and "subject to the same rules of foreclosure and to the same regulations, restraints, and forms as are prescribed in relation to mortgages," in accordance with the provisions of such statute. *Matthews v. Porter*, 16 Fla. 466; *Shear v. Robinson*, 18 Fla. 379; *Walls v. Endel*, 20 Fla. 86; *First National Bank of Florida v. Ashmead*, 23 Fla. 379, 2 South. 657; *Shad v. Livingston*, 31 Fla. 89, 12 South. 646; *Margarum v. J. S. Christie Orange Co.*, 37 Fla. 165, 19 South. 637; *De Bartlett v. De Wilson*, 52 Fla. 497, 42 South. 189, 11 Am. & Eng. Ann. Cas. 311; *Wylly-Gabbett Co. v. Williams*, 53 Fla. 872, 42 South. 910. It is true that in the instant case we are not called upon to deal with any questions of evidence, but only with questions of pleading; yet these cases are useful in showing the policy of this court. Another principle which may prove of service to us is that in passing upon a demurrer to the whole bill in a suit in equity every presumption is against the bill, but it is also true that such a demurrer operates as an admission that all the allegations in the bill which are well pleaded are true, and a demurrer to the whole bill should be overruled if the bill makes any case for equitable relief. *Lindsley v. McIver*, 51 Fla. 463, 40 South. 619, and authorities there cited; *Holt v. Hillman-Southland Co.*, 56 Fla. 801, 47 South. 934. This principle cannot be applied in its entirety for the reason that neither demurrer was interposed to the whole bill, one going only to the thirteenth paragraph and the other to all of the bill, except such thirteenth paragraph. However, so far as such principle is applicable, it will prove helpful to us. There is still another prin-



ciple which it may be well to keep before us. In construing any written instrument, whether a deed of conveyance, a bill of sale, mortgage, contract, or what not, the entire instrument must be considered in order to gather the real intent and true design of the makers thereof. To that end all the different provisions of such instrument must be looked to and all construed so as to give effect to each and every of them, if that can reasonably be done. If clauses therein seem to be repugnant to each other, they must be given such an interpretation and construction as to reconcile them if possible, remembering that the intent is the principle thing to be regarded. If one interpretation, looking to the other provisions of the instrument and its general scope, would lead to an absurd conclusion, such interpretation must be abandoned, and one adopted which will be more in accord with reason and probability. See *Jacobs v. Parodi*, 50 Fla. 541, 39 South. 833, and *McNair & Wade Land Co. v. Adams*, 54 Fla. 550, 45 South. 492, and authorities cited therein.

Taking up now for consideration the bill and the exhibit attached thereto and made a part thereof, and looking at the same in the light of the cited authorities, does the instrument of which such exhibit to the bill is a copy fall within that class of instruments contemplated by the statute so that it must be deemed and held a mortgage? That is the crucial question presented by the assignment of errors and which we are called upon to answer. Having copied the bill and exhibit in the prefatory statement to this opinion, we shall not undertake to set forth herein in detail the allegations or provisions thereof, but content ourselves with referring to such statement. Stated in a very succinct form, we find from such bill and exhibit that one Hiram W. Rowell made and entered into a contract with one Clarence A. Boswell for the purchase from such Boswell of certain described realty and personalty, which contract was assigned and transferred by Rowell to the Port Tampa Phosphate Company, a corporation, which corporation immediately entered into the possession of such property and became the equitable owner thereof, subject to the payment to Boswell of the balance of the purchase price, approximately \$12,000; that such property was acquired by such corporation for the purpose of establishing and operating a phosphate plant and also constituted its entire property; that, immediately after taking possession thereof, such corporation proceeded to complete and extend the phosphate plant which had been partially constructed and expended in so doing upwards of \$60,000; that afterwards such corporation, being pressed by the persons to whom Boswell had assigned his rights under the contract made with Rowell for the payment of the balance of the purchase price, applied to the defendant Joseph Hull, who is one of the appellants here, for "a loan of money with which to pay the said

balance, together with a small amount of additional indebtedness then owned by the said Port Tampa Phosphate Company, and also certain other moneys that would be required by the said Port Tampa Phosphate Company to complete the said phosphate plant on the said premises"; that Hull was willing and "agreed to advance the said moneys," but was unwilling to accept a mortgage on such premises from such corporation because it had never acquired the legal title thereto, and required that the deed of conveyance to such premises should be made direct to him, the said Hull, "so as to secure him for the money then advanced and thereafter to be advanced by him for the completion of the said plant"; that, for the reasons stated in the bill, the board of directors of such corporation assented to the terms demanded by Hull "upon his entering into an obligation to convey" such premises to such corporation upon being repaid the sum of money then advanced and the sums to be thereafter advanced by him, but that such proposition was never submitted by the board of directors to the stockholders of such corporation or assented to by them," although the said premises embraced and included all of the property and assets of the said corporation"; that, in pursuance of such agreement, Hull advanced the sum of \$13,404.77 with which to pay the balance of the purchase price, and that such premises were conveyed direct to Hull by the assignees of Boswell, who were then the owners thereof, and that contemporaneously therewith Hull executed and delivered to such corporation a written agreement, a copy of which is attached as an exhibit to the bill and made a part thereof; that after the execution and delivery of such deed and agreement on or about the 9th day of June, 1905, such corporation continued to remain in possession of such premises and to make improvements thereon until a petition in bankruptcy was filed against it in the United States District Court for the District of Massachusetts, under the laws of which state such corporation was incorporated and where it had its domicile, and on the 27th day of November, 1905, such corporation was duly adjudged a bankrupt by such court, and the complainant, who is the appellee here, was on such date duly appointed as trustee of such bankrupt corporation and duly qualified as such on the 27th day of December, 1905; that, after the execution of such deed and agreement and prior to the time such corporation was adjudged a bankrupt, and while it remained in possession of such premises, Hull continued to advance money from time to time to such corporation, the exact amount being unknown to complainant, but alleged to be approximately \$12,000, all of which was applied by such corporation towards the extension and completion of the phosphate plant on such premises; that immediately upon the appointment of complainant as such trustee all the property of such corporation, including that de-

scribed in the bill of which such corporation was in possession at the time of such adjudication and of such appointment and qualification of complainant as trustee, became vested in him as such trustee and he became entitled to the possession thereof, but that, after the appointment and qualification of complainant as such trustee, "the defendant Joseph Hull instituted an action of ejectment in the Circuit Court of the United States for the Southern District of Florida against one N. B. Childs and the said Port Tampa Phosphate Company, to which your orator was not a party, nor did he become a party, and in which no service was had upon the said Port Tampa Phosphate Company or any officer, agent, or representative of the said Port Tampa Phosphate Company, and in which it did not appear, but in which, as your orator is informed and believes, the only service made was upon N. B. Childs, a deputy sheriff of Polk county, Fla., in possession of the personal property on the said premises under certain writs of attachment issued out of the circuit court of Polk county, Fla., and in the said proceeding in the Circuit Court of the United States for the Southern District of Florida to which neither the said Port Tampa Phosphate Company nor your orator were made, or became, parties, the defendant Joseph Hull on or about the 3d day of March, A. D. 1906, secured a judgment by default and a final judgment purporting to award him possession of the said premises, and under the said judgment the defendant Joseph Hull entered into the possession thereof."

It would seem that the foregoing synopsis of the allegations of the bill will be sufficient to enable us to answer the question now under consideration. Other allegations of the bill will be adverted to later. We must now look at the exhibit to the bill. We find that such instrument was signed by Hull as well as by the Port Tampa Phosphate Company by H. W. Rowell, its president. We pass over the informalities connected with the execution of such instrument which are readily apparent but there is no occasion to consider, since no point is attempted to be made thereon. However, see *Margarum v. J. S. Christie Orange Co.*, 37 Fla. 165, 19 South. 637. We find, in brief, that such instrument contains a recital to the effect that whereas the Port Tampa Phosphate Company under and by virtue of a certain resolution of its board of directors had sold the property in question to Hull and caused the same to be conveyed to him by E. C. Stuart and C. G. Meminger, the assignees of Boswell, and whereas Hull had agreed to sell back and reconvey such property to the Port Tampa Phosphate Company at any time within four months from the date thereof upon the payment to him of the sum of \$13,404.77 and such other and further sums of money which may have been advanced or paid out by the said Hull, in the improvement or operation of said property, together with a profit of 16 per cent. on any such sums so advanced or paid out, in

consideration thereof, Hull bound himself, his executors, administrators, and assigns, upon such payment to him of the sums of money just set forth above, to convey such property to such corporation, the same being set forth and particularly described. Such instrument contains the following additional clause: "The Port Tampa Phosphate Company agrees that, if it shall fail to exercise its right to repurchase said property within the time prescribed, this contract shall forthwith become void and of noneffect, and the said Joseph Hull shall own said properties free from any claim or demand of the said Port Tampa Phosphate Company."

It will be observed that nothing whatever is said in this instrument as to the possession of such property or the right of possession. Is it not significant that the Port Tampa Phosphate Company continued to remain in possession of such property from the date of such instrument the 9th day of June, 1905, until after it was adjudged a bankrupt in the month of November, 1905, and that Hull continued to advance money to it, which was applied toward the construction, extension, and completion of the phosphate plant thereon? If the absolute legal title to such property became vested in Hull by the execution of the deed to him by Boswell's assignees, is it not a little singular that this instrument, with its rather peculiar phraseology, should have been executed contemporaneously with such deed, and that nothing should be said therein about the possession or the right of possession? It will be observed from the description of the property in such instrument which forms an exhibit to the bill that a portion thereof was personalty. As was said in *Briggs v. Weston*, 36 Fla. 629, text 633, 18 South. 852, text 853: "It is the rule, then, in this state that, when it is shown in case of an absolute sale of personal property that the vendor has continued in possession of the property and the vendee has in two ways assumed possession of the same, the burden rests upon the latter to show that the former's possession is consistent with the deed, is unavoidable, temporary, or for the reasonable convenience of the purchaser." Also see authorities there cited, including prior decisions of this court, especially *Holliday v. McKinne*, 22 Fla. 153, wherein it was held that "the retention of personal property by the vendor after a sale is prima facie evidence of fraud, and the evidence to rebut such presumption is an explanation of the retention by showing that it is consistent with the deed, or is unavoidable, or is temporary, or for the reasonable convenience of the owner." Also see *Volusia County Bank v. Bertola*, 44 Fla. 734, 33 South. 448. As to the retention of the possession of realty by the vendor it was held by this court in *Neal v. Gregory*, 19 Fla. 356, that "the retention of the possession of land after absolute sale accompanied with the exercise of unequivocal acts of ownership over it is a badge of fraud, for it is not in the usual course of business and indicates a se-

cret trust for the debtor. In case of such a sale and retention of possession accompanied by appropriation of the rents and profits and acts of ownership, the burden of proof is upon the party asserting the existence of and payment of the consideration named in the deed, and claiming the benefits thereof to establish such facts." Of course, these cited cases were dealing with the rights of creditors, but if such a transaction as is set forth in the instant case would be lawful, even as to creditors, if deemed and held a mortgage, but illegal as to them, if held to be an absolute sale, that fact or principle should be considered. In a case of doubt, where the transaction is equivocal, the presumption is that the parties thereto had in contemplation what they could legally do, and intended a lawful rather than an unlawful transaction. We should also bear in mind that the bill alleges that the property in question constituted the entire assets of the Port Tampa Phosphate Company, and that the proposition of Hull was never submitted by the board of directors of such corporation to its stockholders. It would seem that a board of directors of a corporation have not the right or power to make a sale of the entire assets of the corporation, unless authorized so to do by its stockholders. See 10 Cyc. 764, and 21 Amer. & Eng. Ency. of Law (2d Ed.) 863, 864, and authorities cited in notes. As we have already seen from the cited decisions of this court, in case of doubt the transaction will be held a mortgage. Gross inadequacy of the consideration is another test which may be applied in determining whether a transaction was intended as a mortgage or an absolute or conditional sale, especially when coupled with the financial embarrassment of the grantor. See 1 Jones on Mortgages, § 320; 27 Cyc. 972, 1014; Russell v. Southard, 12 How. 139, 13 L. Ed. 927. We would also refer generally to the discussion and reasoning in Flagg v. Mann, 9 Fed. Cas. No. 4,847, which case was approvingly cited by this court in Stockton v. National Bank of Jacksonville, 45 Fla. 590, text 600, 34 South. 897, text 900; Campbell v. Dearborn, 109 Mass. 130, text 138, 12 Am. Rep. 671 et seq; Hassam v. Barrett, 115 Mass. 256; Plummer v. Ilse, 41 Wash. 5, 82 Pac. 1009, 2 L. R. A. (N. S.) 627, 111 Am. St. Rep. 997. The respective counsel have cited a large number of authorities in their elaborate briefs dealing with these different points, but we deem it unnecessary to cite further authorities along this line in this opinion. Suffice it to say that, after having made a careful investigation of the authorities and after mature deliberation, we are constrained to the conclusion that, under the allegations of the bill, tested as they are by demurrer, the deed from Boswell's assignees to Hull taken in connection with the contemporaneous agreement executed by Hull and the Port Tampa Phosphate Company must be deemed and held a mortgage, in accordance with the provisions of our statute, copied in full above.

We have not lost sight of the fact that the legal title to the property in question was never vested in the Port Tampa Phosphate Company, but that such corporation was only the equitable owner thereof, entitled to have the legal title vested in it by a proper conveyance upon the payment of the balance of the purchase money. However, before this was done, being pressed for payment of such unpaid balance by the holders of the legal title, such corporation applied to Hull for a loan, which Hull agreed to advance upon the condition that the holders of the legal title conveyed the property direct to him, which was done. Strictly speaking, then, the assignees of Boswell were the vendors and not the Port Tampa Phosphate Company, but such corporation, the equitable owner, was in possession, and, at its request, the holders of such legal title conveyed it to Hull, while such corporation continued to remain in possession. We fail to see the difference in principle between this transaction and what would have existed had such corporation taken the legal title in its own name from such vendors and then executed a conveyance to Hull, and are of the opinion that the authorities which we have cited are just as much in point in one instance as the other. See Lindsay v. Matthews, 17 Fla. 575. There is no question but that Stuart and Meminger, Boswell's assignees, became divested of the legal title by their conveyance to Hull, so that the contention as to their being either proper or necessary parties to this litigation cannot be seriously entertained. The legal title, then, became vested in Hull, subject to the equitable ownership or title of the Port Tampa Phosphate Company. However, such transactions as took place between Hull and such corporation, taken in their entirety, must be deemed and held a mortgage, as we have already seen, therefore, under the statute, "subject to the same rules of foreclosure and to the same regulations, restraints, and forms as are prescribed in relation to mortgages." As is also provided in the next succeeding statute, which we copied in full above, "a mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession." We also have a long line of decisions of this court construing this statute and holding in effect that "a mortgage is a specific lien on the land it covers, and a failure to comply with its conditions does not divest the mortgagor of the legal title, nor vest it in the mortgagee." Berlack v. Halle, 22 Fla. 236, 1 Am. St. Rep. 185. We would also refer to the following cases: Brown v. Snell, 6 Fla. 741; McMahon v. Russell, 17 Fla. 698; Bush v. Adams, 22 Fla. 177, text 189; First National Bank of Florida v. Ashmead, 23 Fla. 379, 2 South. 657; Jordan v. Sayre, 24 Fla. 1, 3 South. 329; Seedhouse v. Broward, 34 Fla. 509, 16 South. 425; Coe v. Finlayson, 41 Fla. 169, 26 South. 704; Wylly-Gabbett Co. v. Williams, 53 Fla. 872, text 935, 42 South. 910, text 929.

By virtue of his appointment and qualification as trustee in bankruptcy of the Port Tampa Phosphate Company, the complainant succeeded to and acquired all the title and rights of such corporation of, in, and to the property in question. It is obvious, however, from the allegations of the bill that a court of law could not afford complainant a plain, adequate, and complete remedy, so as to render a resort to a court of chancery unnecessary and improper. See *Barnett v. Hickson*, 52 Fla. 457, 41 South. 606. As we have seen, neither the complainant nor the Port Tampa Phosphate Company ever was vested with the legal title to the property in question. This fact clearly differentiates the instant case from *Brown v. Snell*, 6 Fla. 741; *Endel v. Walls*, 16 Fla. 786; *Berlack v. Halle*, 22 Fla. 236, 1 Am. St. Rep. 185; *Ashmead v. Wilson*, 22 Fla. 235, all of which are cited and relied upon by appellants to support their contention that the proper remedy for the complainant to pursue was an action at law. Taking in connection with the absence of the legal title in the complainant the allegations in the bill as to the manner in which Hull acquired the possession of such property and the conveyance by him to the Prairie Pebble Phosphate Company and the mortgage executed by it to the Savannah Trust Company, and the circumstances under which such conveyance and mortgage were executed, all of which were admitted by the demurrer, it is perfectly obvious why neither an action of ejectment nor any other action at law could give the complainant adequate relief. We see no occasion for dwelling upon this point or citing further authorities. We think that it is also apparent from such allegations that both such Prairie Pebble Phosphate Company and Savannah Trust Company were proper, if not necessary, parties defendant.

We see no useful purpose to be accomplished by a further prolongation of this opinion. Although we have declined to discuss the different errors assigned in detail, we have considered each and every of them, and have given all the pleadings and briefs of counsel close study. We appreciate the full and elaborate manner in which the points have been presented to us by the respective counsel, including the copious citations of authorities, but we do not think it advisable to enter upon a more detailed discussion of the points raised. What may develop in the further progress of the case we do not know. We find no reversible error in the interlocutory order overruling the two demurrers to the bill. Therefore the same must be affirmed.

WHITFIELD, C. J., and OOCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### On Rehearing.

WHITFIELD, C. J. A petition for rehearing having been filed in this cause, the transcript and briefs have been carefully re-examined, and it does not appear that the court omitted to consider any point or to determine any question proper to be adjudicated on this appeal. See *Florida Land Rock Phosphate Co. v. Anderson*, 50 Fla. 516, 39 South. 392.

The bill of complaint alleges that the Port Tampa Phosphate Company, a corporation, for which the appellee is trustee in bankruptcy, was the equitable owner in possession of the property under a contract of purchase; that, being pressed for the unpaid balance of the purchase money, the Port Tampa Phosphate Company applied to Hull "for a loan of money with which to pay the said balance, together with" other small amounts of indebtedness, "and the said Joseph Hull agreed to advance the said moneys to the said Port Tampa Phosphate Company, but the legal title to the said premises not having vested in the said Port Tampa Phosphate Company was unwilling to accept a mortgage from it, and required that the deed of conveyance to said premises, to be executed on the payment of the balance of the purchase price, should be made to him, the said Joseph Hull, so as to secure him for the money then advanced and thereafter to be advanced by him for the completion of said 'plant.'" The other allegations of the bill are perhaps not so definite and certain, but they are not repugnant to the above allegations, and when considered with the agreement made a part of the bill, and read in the light of the controlling statute, the prayers of the bill, and the admissions of the demurrers, it appears that the bill of complaint is not amenable to the specifications of the demurrers.

The substance of the holding on this interlocutory appeal is that taking any indefinite or uncertain allegations that may appear in the bill of complaint most strongly against the pleader, and giving to the subject-matter of the suit and all the facts and circumstances as alleged, the construction and effect required by the statute, and yielding any doubts in favor of the property holder who sells or conveys property "for the purpose or with the intention of securing the payment of money," so as to do equity and as far as may be to preserve the status quo, it appears upon the face of the instrument that the title to the property had passed to Hull subject to the provisions of the statute that it "shall be deemed and held a mortgage" if by extrinsic facts the statute is shown to apply, and that consequently the bill is not subject to the demurrers as interposed. The ability of the complainant to redeem and the funds to be used in redeeming do not require determination on this interlocutory appeal, where a prima facie right to redeem appears. A rehearing is denied. All concur.

(124 La.)

No. 17,800.

**WALL v. OUACHITA LUMBER CO.,  
Limited.**

(Supreme Court of Louisiana. Dec. 13, 1906.)

**LOGS AND LOGGING (§ 84\*)—CONTRACT OF  
MILLOWNER—CONSTRUCTION.**

A contract whereby a millowner agrees to receive logs, on the Ouachita river, during the floating season of 1906-07, does not oblige him to accept logs tendered in November or December, 1907, at which period the floating season of 1907-08 begins.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.\*]

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; J. P. Madison, Judge.

Action by S. E. Wall against the Ouachita Lumber Company, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

Lamkin & Millsaps and Ben C. Dawkins, for appellant. Hudson, Potts & Bernstein, for appellee.

**MONROE, J.** On April 2, 1907, plaintiff and defendant entered into a written contract, whereby it was agreed that plaintiff should "cut, haul, raft and deliver," to defendant, or its agent, at West Monroe, "during the remainder of the floating season of 1906 and 1907, all the pine timber that may be cut, hauled, floated out, rafted, or all the pine timber that may be handled," by him between the date of the contract and August 1, 1907, not to be less than 1,000,000 feet; same to be delivered above the mill of defendant, securely tied to the bank of the river, and each stick branded "S. E. W." Plaintiff guaranteed that all the timber should be "well rafted and in good floating condition at the time of delivery," and that it should be new, good, sound, merchantable, pine logs, free from wormholes and red, or rotten, hearts. Defendant agreed: That it would not go, or send its purchasing agent, "on the Bayou D'Arbonne or on the Ouachita river, below Alabama landing, to buy logs, during the time mentioned" in the contract; that it would leave that territory exclusively to plaintiff, provided that plaintiff would buy and secure all the merchantable pine logs that were put into the D'Arbonne bayou or Ouachita river and rafted and offered for sale, even if he had to pay as much for them as his full contract price. Defendant agreed to buy said timber from plaintiff at \$8 per 1,000 feet, Doyle scale, payment to be made, \$100 cash (acknowledged to have been advanced), and the balance when the logs should be received by defendant, above its mill, and scaled. And there are some other stipulations which are immaterial to this case. This suit was brought in September, 1908, and plaintiff al-

leges: That defendant received about 600,000 feet of timber, under the contract, and appeared ready to receive all that he could deliver, prior to August 1, 1907; but that on November 2, 1907, it declined to receive any more; that in July, after the water in Bayou D'Arbonne and in the Ouachita river had fallen too low to permit the floating of logs in those streams, defendant refused to pay \$900 for logs which had already been delivered, on the ground that it feared that he (plaintiff) would not deliver, when high water came again, other logs, which had been cut and rafted; that it was only when he promised that he would make such deliveries that defendant paid over the sum mentioned; that, when notified that defendant would not receive any more timber, he had already cut, hauled, and rafted 638,518 feet, according to contract, and was ready to deliver it; and that, in consequence of defendant's refusal to receive it, he was obliged to sell it at a loss, including extra expense incurred of \$1,649.57, to which should be added \$500, as punitive damages, making a total of \$2,149.57, for which he prays judgment, with interest.

Defendant answers: That it agreed to take all the timber that was cut, hauled, floated, and rafted, or handled by plaintiff, between the date of the contract and August 1, 1907, and delivered, between those dates, above its mill in West Monroe, tied to the banks of the river and branded with the letters "S. E. W.," and to pay for same at the rate of \$8 per 1,000 feet, Doyle scale, as delivered, save \$100, which was advanced; that the time at which the timber was to be delivered was of the essence of the contract; that it was during the "remainder of the floating season of 1906 and 1907," and not later than August 1, 1907; that within that time plaintiff delivered 915,252 feet of merchantable timber, the price of which, at the rate agreed on, was \$7,313.18; and that the same was paid in full. Defendant denies that it refused to receive any timber tendered in accordance with the contract, and alleges that it complied with all of its obligations thereunder.

It is shown, and plaintiff admits it in the testimony, that the term, or expression, "remainder of the floating season of 1906 and 1907," as used in the contract sued on, meant the remainder of the season of high water in the Ouachita river, which season had begun in the fall, or winter, of 1906, and was expected to end about August 1, 1907, and which, as a matter of fact, did end about August 10, 1907, after which date the water was too low for the floating of logs. It is also shown that defendant accepted and paid, at the contract price, for all logs that were delivered by plaintiff, at the place of delivery and within the time specified in the contract; the last delivery having been

made on July 31st, and the last payment on August 7th, and that thereafter no other logs were tendered, until some time in December, when defendant was given to understand that plaintiff had a lot of logs which had been cut upon a tributary, or tributaries, of Bayou D'Arbonne, perhaps 80 miles from the mouth of the bayou, and had not been brought out until after the floating season of 1906-07 was over and the season of 1907-08 had begun, and hence were not available for the purposes of the contract on which this suit is brought. Either for that reason, or for the reason that, having been in the water since the previous floating season, they were not considered "new" logs, or because, at that time, they were not needed by it, defendant declined to receive them, a course which we agree with the judge a quo in thinking it was authorized to pursue.

The judgment appealed from is therefore affirmed, at the cost of the plaintiff.

(124 La.)

No. 17,926.

STATE ex rel. WOODS v. THERIOT, Registrar of Voters.

(Supreme Court of Louisiana. Dec. 13, 1909.)

1. ELECTIONS (§ 98\*)—REGISTRATION OF VOTERS.

An elector, who leaves the parish and precinct in which he is entitled to vote and removes to another parish, is not entitled to be registered in the parish and precinct from which he removes, after residing in the parish to which he removes for 10 months and while still residing there.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 98.\*]

2. ELECTIONS (§ 95\*)—REGISTRATION OF VOTERS—STATUTES.

The proviso, contained in section 35, Act No. 199, p. 465, of 1898, to the effect that "the name of no voter shall be stricken from the list of registration in any parish who has left said parish within six months of the time for holding the election, so that the elector shall not lose his right to vote in one parish before he has acquired his right to vote in another," cannot be sustained as establishing a rule in conflict with that established by article 167 of the Constitution.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 95.\*]

3. ELECTIONS (§ 98\*)—REGISTRATION OF VOTERS—QUALIFICATION.

No one is entitled to be registered as a voter who does not possess the qualifications required of a voter.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 98; Dec. Dig. § 98.\*]

(Syllabus by the Court.)

Appeal from Twenty-Seventh Judicial District Court, Parish of St. James; Paul Leche, Judge.

Application by the State, on the relation of Van A. Woods, for a writ of mandamus to Mark Theriot, Registrar of Voters. From a judgment denying the writ, relator appeals. Affirmed.

Pugh & Himel and Walter Lemann, for appellant. Philip H. Gilbert, Dist. Atty., for the State.

MONROE, J. Relator appeals from a judgment denying his application for a writ of mandamus ordering defendant to register him as a voter in the first ward of the parish of St. James. The ground upon which the application was denied is that relator had not resided in the First ward of the parish of St. James for six months preceding the date of his application. The admitted facts are:

"That, up to 10 months prior to the time he applied to be registered, relator was an actual bona fide resident of the state of Louisiana for two years, of the parish of St. James for one year, and of the First ward of the parish of St. James for six months; that relator is, at present, residing in the parish of East Baton Rouge, and has been residing there for the 10 months prior to the time he applied to be registered."

The Constitution provides:

"Art. 197. Every male citizen of this state and of the United States, native born or naturalized, not less than twenty-one years of age, and possessing the following qualifications, shall be an elector, and shall be entitled to vote at any election in this state, by the people, except as may be herein, otherwise, provided: Section 1. He shall have been an actual bona fide resident of the state for two years, of the parish for one year, and of the precinct in which he offers to vote, six months, next preceding the election; provided that removal from one precinct to another, in the same parish, shall not operate to deprive any person of the right to vote in the precinct from which he has removed, until six months after such removal."

Save the proviso above quoted there is nothing in the Constitution which in any way qualifies the requirement that in order to entitle a person to vote, he shall have resided in the state for two years, in the parish for one year, and in the precinct for six months, and, as the exception contained in the proviso, is, by its terms, confined to cases of removal "from one precinct to another, in the same parish," it merely serves to emphasize the rule. In other words, if it had been the intention of the framers of the Constitution that a voter, moving from one parish to another, should not lose his right to vote in the parish a quo for 12 months, or that a voter leaving the state should not lose his right to vote in the state for two years, it is to be presumed that such intention would have found expression, just as did the intention that a voter, moving from one precinct to another in the same parish, should not lose his right to vote in the precinct from which he removes for six months.

As the matter stands, we are confronted with the unqualified requirements of the Constitution that, in order to entitle a person otherwise qualified to vote, he must have resided in the state for two years, and in the parish for one year, next preceding the elec-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion at which he offers to vote; and with the further requirement that he must have resided in the precinct in which he offers to vote for six months next preceding such election, to which there is provided the exception that, if he has not moved farther away than to another precinct in the same parish, he shall not lose his right to vote in the precinct from which he has removed for six months.

The relator does not measure up to any of these requirements, or fall within the single exception; but his counsel argue that neither the requirements nor the exception have anything to do with his right to be registered, and that he is entitled to be accorded the status of a registered voter, though he may have no right to vote.

According to our understanding of the matter, however, the theory of the constitutional and statutory provisions upon the subject of registration is to provide a method by which it may be ascertained, in advance, who shall have the right to vote at the elections, and it is the duty of the registrars to see to it that no one is allowed to become a registered voter who does not possess the qualifications required of a voter. If it were otherwise, any one, without regard to age, sex, nationality, or residence might be registered, and the registration laws would serve no purpose whatsoever.

Our attention is called to the proviso contained in section 35, Act No. 190, p. 465, of 1898, which reads, in part:

"That the assessors, supervisors and clerks of registration of each parish shall, within thirty days next preceding an election, strike from the registration the names of all voters who may have died, left the parish, or, from any cause, become ineligible as electors; provided, that the name of no voter shall be stricken from the list of registration who has left said parish within six months of the time for holding the election, so that the elector shall not lose his right to vote in one parish before he has acquired his right to vote in another."

The proviso can hardly be said to apply to the relator, since he left the parish of St. James ten months (and not within six months) prior to the date of his application for registration; but if it did apply to him, it could not be sustained as establishing a rule in conflict with that established by the Constitution, and according to which a person cannot vote in a parish unless he has resided there for two years next preceding the election at which he offers to vote, whereas, according to the idea expressed in the concluding language of the proviso in the statute, the elector who leaves the parish should never lose his right to vote there, until he acquires such right in another parish, so that, not acquiring the right to vote in another parish, he would be entitled to vote in the parish that he leaves for the balance of his life, which he could spend elsewhere.

Judgment affirmed.

(124 La.)

No. 17,665.

PEARCE et al. v. FORD et al.

(Supreme Court of Louisiana. Dec. 13, 1906.)

1. PARTITION (§ 4\*)—EFFECT.

The language of an act of partition by heirs that the heirs respectively sell to each other the portions falling to them in the partition, and that the consideration of the sale is the amount of the purchasers' interest in the estate of their deceased ancestor, shows a mere partition, and not a sale.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 4.\*]

2. ADVERSE POSSESSION (§ 75\*)—BASIS FOR PRESCRIPTION—PARTITION.

A partition is merely declamatory and not translatif of ownership and cannot serve as a basis for prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 448-450; Dec. Dig. § 75.\*]

3. ABANDONMENT (§ 4\*)—ACTS CONSTITUTING—SILENCE.

Mere silence does not bring about the loss of title to real estate except in connection with prescriptions established by law.

[Ed. Note.—For other cases, see Abandonment, Dec. Dig. § 4.\*]

4. REAL ACTIONS (§ 8\*)—PETITORY ACTIONS—JUDGMENT.

The court, in a petitory action by some of the heirs of a decedent against other heirs to recover an interest in real estate of decedent, cannot, on giving judgment for the interest claimed, adjudge that the taxes and improvements are equal to the revenues, as the proper time for the determination of that matter is on a general settlement among the heirs.

[Ed. Note.—For other cases, see Real Actions, Dec. Dig. § 8.\*]

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Petitory action by B. M. Pearce and others against H. Frank Ford and others to recover an undivided three-fourths interest in land. From a judgment for plaintiffs, defendants appeal. Judgment set aside and rendered.

W. H. Peterman and T. H. Couvillion, for appellants. Andrews & Hakenyos, for appellees.

PROVOSTY, J. Joshua Pearce was twice married. He had issue only with his first wife. These were B. M., William, Joseph, and Eliza Pearce. Not knowing that the law strikes with nullity any settlement attempted to be made of the succession of a living person, he made what he thought was a legal settlement of his own succession with his children and grandchildren. He then gave by will to his second wife the property in controversy, a 100-acre plantation in the parish of Rapides, on which he lived. He died in 1879. In 1882 his will was set aside, at the suit of B. M. and Eliza Pearce. Although the effect was to cause the property to revert to his succession, Eliza Pearce, then married to Horace Marshall, took possession of it as if be-

longing to herself alone, and continued so to hold it until her death in 1893. In 1896 her children made a partition of the property of her succession and of that of her husband, their father, and the property in controversy fell to her daughter Esther, wife of I. C. Johnson, and to the children of her predeceased daughter, Alzin, first wife of I. C. Johnson. The language of the act of partition is that the heirs respectively sell to each other the portions falling to them in the partition; but the consideration of the sale is stated to be "the amount of the said purchasers' interest in the estates of their deceased father and mother," and therefore the act is manifestly a mere partition. The present petitory action is brought by B. M. Pearce and the children and grandchildren of William and Joseph Pearce against Mrs. I. C. Johnson and the children of the first Mrs. Johnson to recover a three-fourths interest in the property, together with a like proportion of its fruits and revenues from the time Mrs. Eliza Pearce Marshall, their mother and grandmother, took possession of it, in 1882, to the present time.

The main reliance of the defendants is on the prescription of 10 years, based on the partition which they made with their coheirs; the contention being that said partition was not a partition, but a sale. But, as already stated, it is manifestly a partition, and, of course, a partition, being merely declaratory, and not translatiue, of ownership, cannot serve as a basis for prescription. *Kernan v. Baham*, 45 La. Ann. 811, 13 South. 155.

The other contention is that the coheirs of Eliza Pearce Marshall consented to her taking the property, and abandoned their rights to it, as is shown by their silence and inaction from 1882 to the filing of this suit, in April, 1907; but we know of no law by which silence and inaction will bring about the loss of title to real estate, unless in connection with the prescriptions established by law.

The trial court gave plaintiffs judgment for the interest claimed in the property, but offset the revenues with the taxes and useful improvements. We have to set aside this judgment in so far as it finds that the taxes and improvements are equal to the revenues; but we think that the proper time and place for the settlement to be had between parties for these revenues and taxes is when the heirs of Joshua Pearce have a general settlement among themselves of his succession. Non constat that the plaintiffs will not then be found to be indebted to the heirs of Eliza Pearce, instead of the latter to them.

The judgment appealed from is therefore set aside; and it is now ordered, adjudged, and decreed that the plaintiffs be decreed to have an interest of three-fourths, undivided, in the property described in the petition; that their demand for fruits and revenues, and

the defendants' demand for taxes and useful improvements, be dismissed, as in case of nonsuit; that the defendants pay the costs of the lower court; and that the plaintiffs pay one-half, and the defendants one-half, of the costs of this appeal.

(124 La.)

No. 17,419.

**STATE v. HACKLEY, HUME & JOYCE.**

(Supreme Court of Louisiana. April 26, 1909.  
On Rehearing, Nov. 29, 1909.)

**1. SUFFICIENCY OF PLEADING.**

A pleader in the courts of this state has the right to make use of terms which are specifically defined by the law of the state, without giving the definitions, and, in an action for the recovery of property, on the ground that the title was acquired by fraud, practiced upon plaintiff, the allegation that defendant is a holder in bad faith is, in effect, an allegation that he assumed, and is assuming, to be the owner of the property, well knowing that the title under which he claims is vicious or defective; and such allegation discloses a cause of action for the recovery of the property.

**2. VENDOR AND PURCHASER (§ 299\*)—ACTION TO RECOVER PROPERTY—TENDER OF PRICE.**

Ordinarily it would be inequitable to permit the vendor to recover property sold by him, whilst retaining the price; but if the vendee has appropriated to himself the fruits and revenues of the property to an amount more than sufficient to reimburse the price, and if the circumstances are such as to entitle the vendor to demand an accounting so that, in the end, the vendee may be found indebted to the vendor, there is no reason, in equity or otherwise, why the vendor should be required to pay or tender the price, as a condition precedent to the maintenance of his action for the recovery of the property. In such case, if, after trial, it is found that there is a balance of account in favor of the vendee, he can be retained in possession until such balance be paid.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 838; Dec. Dig. § 299.\*]

(Syllabus by the Court.)

On Rehearing.

**3. CANCELLATION OF INSTRUMENTS (§ 24\*)—RETURN OF CONSIDERATION.**

Previous tender is not required in a suit to set aside a sale for fraud, especially where an accounting is demanded.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 33-38; Dec. Dig. § 24.\*]

**4. PUBLIC LANDS (§ 152\*)—RESCISSION OF SALE—RETURN OF CONSIDERATION.**

Failure to make a previous tender, in a suit by the state to set aside a sale of lands as fraudulent and making the decree conditional that the state restore the price before it takes back the land, are not objectionable because by such a decree the defendants would be left at a great disadvantage because the lands were wild, producing no revenue, so that the mere possession would be of no benefit, and the state might delay indefinitely to take back the lands and return the price, for defendants are but themselves to blame, if, as the result of their own fraud, their money has been paid into the State Treasury, whence it cannot be withdrawn.

[Ed. Note.—For other cases, see *Public Lands*, Dec. Dig. § 152.\*]



**5. PUBLIC LANDS (§ 152\*)—FRAUD BY PAT-ENTER—EFFECT AS TO THIRD PERSONS.**

The state cannot recover land from a third person for fraud of a patentee, where such third person acquired it for a valuable consideration and without notice of the fraud.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 152.\*]

**6. PLEADING (§ 8\*)—CONCLUSIONS OF LAW.**

An allegation, in an action to set aside a sale of state land for fraud, that defendants were holders in bad faith, is not an allegation of a fact, but a conclusion of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28; Dec. Dig. § 8.\*]

**7. PLEADING (§ 228\*)—DEMURRER—EFFECT AS ADMISSION.**

An exception of no cause of action admits the facts well pleaded, but not conclusions of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 590; Dec. Dig. § 228.\*]

**8. PLEADING (§ 8\*)—ALLEGATION OF ULTIMATE FACTS.**

Ultimate facts of necessity are conclusions from intermediate and evidentiary facts; but legal conclusions cannot be pleaded as ultimate facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28; Dec. Dig. § 8.\*]

**9. PLEADING (§ 243\*)—AMENDMENT.**

Unless a cause of action is stated, there is no suit, and hence nothing to amend.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 646; Dec. Dig. § 243.\*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Clay Elliott, Judge.

Action by the State against Hackley, Hume & Joyce. Judgment for defendants, and plaintiff appeals. Affirmed.

Walter Gulon, Atty. Gen., and W. H. McClendon, Dist. Atty. (R. G. Pleasant, of counsel), for the State. Farrar, Jonas, Kruttschnitt & Goldberg, for appellees.

**Statement of the Case.**

**MONROE, J.** The state having brought this suit for the recovery of certain lands in the parish of Tangipahoa, the defendants excepted, on the grounds that the petition discloses no cause of action, and that the state has made no tender of the price and of the taxes collected by it, with interest thereon. The exception of no cause of action was maintained, and the state appeals from a judgment dismissing the suit. Defendants answer the appeal and pray that, should the court not find the exception of no cause of action good, it maintain the exception of want of tender, and affirm the judgment on that ground. Since the appeal was lodged here, William P. Joyce has died, and his executors have been made parties defendant in his stead. The allegations of the petition are, substantially, as follows: That, at different (specified) dates in the years 1859, 1868, 1869, 1879, W. R. Adams, J. M. Bach,

John E. Hudson, Thomas M. Akers, O. E. Terry, and Felix S. Mix (acting separately) entered certain described tracts of land, under certain described certificates, at 25 cents per acre, and received patents therefor; that they were permitted to make the entries under Act No. 197, p. 159, of 1859, known as the "tidal overflow act," upon their representations to the register, supported by affidavits, that the lands were subject to "regular tidal overflow," and were unfit for settlement and cultivation. The state alleges: That the lands were never subject to overflow, and could not legally have been entered for less than \$1.20 per acre; that gross fraud was perpetrated by the entrymen named, in representing to the register, who was, presumably, ignorant of their character, that the lands were subject to overflow and to entry at 25 cents per acre; that said representations were false, and the register was thereby deceived, and, by reason of such deception, was induced to issue patents for the lands; that the patents were illegally and fraudulently obtained and were void ab initio, and should be so decreed and ordered canceled from the records, and said lands declared subject to entry at \$1.50 per acre; that the defendants (naming them) "now claim to own, in indivision, the said lands, by a chain of title emanating from the said entrymen; that they are holders in bad faith; that their titles, or pretended titles, \* \* \* and the said outstanding patents, act as a cloud upon the state's title and are an injury thereto, and, for the reasons above stated, the said Hackley, Hume & Joyce have no rights of ownership in and to the said lands, and their titles should be ordered canceled, \* \* \* and the said lands decreed to belong to the state of Louisiana"; that defendants have cut and removed and sold, from said land, timber worth \$50,000; and that the state is entitled to an accounting for the same and to judgment for its value. By supplemental petition it is alleged, as an additional ground of nullity, with respect to patents issued to Adams and Hudson, that the quantities of land fraudulently sold to them exceeded 640 acres, in violation of Act No. 247, p. 306, of 1855, and Rev. St. §§ 2920, 2929.

The prayer of the petition is that the patents be decreed to have been illegally obtained, that they, together with the titles of the defendants, be ordered erased from the records, and that the state be recognized as the owner of the lands and have judgment against defendants ordering them to vacate the same and to account for the value of the timber removed therefrom.

**Opinion.**

1. It is not denied that the petition discloses a cause of action as against the orig-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

inal entrymen, but counsel for defendants say:

"There are no averments in these petitions that the defendants, or any of them, were, in any way, parties or privies to the alleged frauds of the entrymen, or that they ever had any knowledge of said frauds, actual or constructive, either before, or at the time, they acquired their titles to the property sued for, or that any of the persons standing in the chain of title between themselves and the entrymen were parties or privies to such frauds or had any knowledge of them. The sole substantial averments in the petition are that the patents were obtained by frauds of the entrymen, that the defendants hold under a chain of title emanating from the entrymen, and 'that they are holders in bad faith.' No particulars, or facts, or circumstances of any kind, are set forth, which would constitute defendants possessors in bad faith. This charge is therefore a general and vague charge, without any specifications whatever."

Article 3452 of the Civil Code reads:

"The possessor in bad faith is he who possesses as master, but who assumes this quality when he well knows that he has no title to the thing or that his title is vicious or defective."

A pleader in the courts of this state has the right to make use of terms which are specifically defined by the law of the state, without giving the definitions. Thus, when one sues an universal legatee, a widow in community, or the indorser of a note, he is not required to recite the provisions of law which establish those relations, and so, we think, that, in alleging that the defendants are holders in bad faith of the land here claimed, plaintiff has sufficiently alleged that they assumed, and are assuming, to be the owners of it, well knowing that the titles under which they claim are vicious or defective, and, if that allegation be true (and it is taken as true, for the purposes of the exception), plaintiff is entitled to recover. The exception of no cause of action should therefore have been overruled.

2. The obligation, resting upon plaintiff, who has received the price of property sold, to offer to return the amount so received as a condition precedent to the rescission of the sale, rests upon the principle that he who seeks equity must do equity, and, ordinarily, it would be inequitable to permit the vendor to recover property sold by him whilst retaining the price. If, however, the vendee has appropriated to himself the fruits and revenues of the property to an amount more than sufficient to reimburse the price, and if the circumstances are such as entitle the vendor to demand an accounting, so that, in the end, the vendee may be found indebted to the vendor, there is no reason, in equity or otherwise, why the vendor should be required to pay or tender the price as a condition precedent to the maintenance of his action for the recovery of the property. In such case, if, after trial, it is found that there is a balance of account in favor of the vendee, he can be retained in possession until such balance shall have been paid.

In the case now under consideration, the plaintiff alleges that defendants have cut \$50,000 worth of timber from the land in question, and it demands an accounting therefor, so that, assuming that all the allegations of the petition are true, the defendants may be found to be indebted to plaintiff in a sum far in excess of that due in reimbursement of the price and of the taxes paid by them.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, the exceptions filed by defendants overruled, and the case remanded to the district court to be there proceeded with according to law and to the views expressed in the foregoing opinion; the costs of the appeal to be paid by defendants, and those of the lower court to await the final judgment.

#### On Rehearing.

PROVOSTY, J. Our former decree in this case was set aside, and a rehearing granted. The case is here on exceptions of want of tender and no cause of action. The lower court overruled the exception of want of tender, and maintained that of no cause of action, and dismissed the suit.

The state sues to recover certain lands which, she alleges, the register of her land office was induced by the misrepresentations, deception, and fraud of the entrymen and patentees to sell at 25 cents per acre, as lands subject to regular tidal overflow, when, in point of fact, the lands were not of that character, but were of a class not legally salable at less than \$1.25 per acre. It is alleged that the defendants "now claim to own these lands by indivision by a chain of title emanating from said entrymen; that they are holders in bad faith." It is also alleged that the defendants have sold timber from said lands to the amount of \$50,000, and that the state is entitled to an accounting and to judgment for said amount.

The exception of want of tender was properly overruled. Previous tender is not required in a suit to set aside a sale on the ground of fraud. *Germaine v. Mallerich*, 31 La. Ann. 371; *Heirs of Burney v. Ludeling*, 41 La. Ann. 627, 6 South. 248; *Killelea v. Barrett*, 37 La. Ann. 865; *Self v. Taylor*, 33 La. Ann. 769; *Heirs of Wood v. Nicholls*, 33 La. Ann. 744; *Aronstein v. Irvine*, 48 La. Ann. 301, 19 South. 131. Especially where an accounting is alleged to be due. 28 Ency. Pl. & Pr. 834.

Whether, in any case, previous tender can be required of the state, is a question not needing to be considered in this case.

We agree with defendants that the state cannot have both the property and the price; but this can be avoided by requiring the state to restore the price before she can take back the property. The decree in favor of the state was made thus conditional in the case

of State v. Cross Lake Shooting & Fishing Club, 123 La. 208, 48 South. 891. See, also, 24 A. & E. E. 621.

It is doubtless true that by such a decree the defendants would be left at a great disadvantage, because the lands are wild lands, producing no revenue, so that the mere possession of them can be of no benefit to defendants; and yet the state might delay indefinitely to exercise her right of taking them back and returning the price, thus keeping the defendants indefinitely out of both the property and the price, and defendants would be remediless, since the state is not liable to be sued except with her permission. The answer to that argument is that the defendants have but themselves to blame if, as the result of their own fraud, their money has been paid into the State Treasury, whence it cannot be withdrawn without an act of the Legislature. See, in that connection: *Moffat v. U. S.*, 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623; *United States v. Trinidad Coal & Coking Co.*, 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640.

Coming to the exception of no cause of action, we have, on further consideration, reached the conclusion that it was properly maintained. Even though the patent itself should be invalid, by reason of the alleged fraud of the patentees, the several titles which constitute the chain of title by which the defendants are alleged to hold may be good, and each of them be an insurmountable barrier to the pretensions of the state. This is so because, where fraud has been committed by the patentee, the government cannot recover the land from a third person who has acquired it for valuable consideration and without notice of the fraud. *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162; *Cochran v. Cobb*, 43 Ark. 184; *Johnson v. Smith*, 21 Tex. 729; *U. S. v. B. & M. R. R.*, 98 U. S. 334-342, 25 L. Ed. 198; *Colorado Coal Co. v. U. S.*, 123 U. S. 313, 8 Sup. Ct. 131, 31 L. Ed. 182; *U. S. v. Marshall Silver Mining Co.*, 129 U. S. 579, 9 Sup. Ct. 343, 32 L. Ed. 734; *U. S. v. California Land Co.*, 148 U. S. 41, 13 Sup. Ct. 453, 37 L. Ed. 354; *U. S. v. Winona R. R.*, 165 U. S. 479, 17 Sup. Ct. 363, 41 L. Ed. 789; *U. S. v. Stinson*, 187 U. S. 205, 25 Sup. Ct. 426, 49 L. Ed. 724; *U. S. v. Detroit Lumber Co.*, 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499; *U. S. v. Clark*, 200 U. S. 601, 26 Sup. Ct. 340, 50 L. Ed. 613; *Thomas v. Mead*, 8 Mart. (N. S.) 342, 343, 19 Am. Dec. 187; *Broussard v. Broussard*, 45 La. Ann. 1085, 13 South. 699. Therefore, for showing a cause of action against the defendants, it was necessary that the petition should have shown that the acquisition of the property under each and every one of these several titles was without valuable consideration, or else with notice of the alleged fraud; in other words, connected these subsequent holders of the title with the fraud by proper allegations, and the petition has not made this showing.

It has contented itself with the allegation

hereinabove transcribed, namely, that the defendants hold by a chain of title emanating from the patentees, and are holders in bad faith. This would be a sufficient allegation if the fact of the title having emanated from the patentees were in itself sufficient to invalidate the several titles of the alleged chain of title; but such is not the case, as fully appears from the authorities just cited. The further fact needs to be alleged that under these several subsequent titles the property was acquired without valuable consideration, or else with notice of the alleged fraud; and this further fact is not alleged.

To say that the defendants are holders in bad faith is not to allege a fact, but merely a conclusion of law. It is merely to say that their title is invalid, and that they know it. A "holder in bad faith" is defined by the Civil Code to be he "who possesses as master, but who assumes this quality when he well knows that he has no title to the thing or that his title is vicious or defective." Civ. Code, art. 3452. The validity, vel non, of a title, is the result which flows as a matter of law from the facts which render the title valid or invalid. To say to a defendant that his title is invalid is merely to convey to him the expression of a legal opinion on the condition of his title. It is not to inform him of the facts from which the invalidity of his title is sought to be deduced.

The said allegation of the defendants being holders in bad faith, or in other words, of their title being vicious or defective and their knowing it, being nothing more than the allegation of a conclusion of law, is no allegation at all, since the allegation of a conclusion of law is no allegation. It "does not aid a pleading." 31 Cyc. 51. "Facts, not conclusions of law, must be alleged in pleadings." *Id.* An exception of no cause of action admits the well-pleaded facts, not the conclusions of law, contained in the petition. 6 Eng. Pl. & Proc. 336; 31 Cyc. 333; *Fertilizer Co. v. Wolf*, 48 La. Ann. 631, 19 South. 558; *State ex rel. v. Judge*, 50 La. Ann. 296-273, 23 South. 839.

A pleader is not required to allege the evidentiary or intermediate facts; but he must at least allege the ultimate facts. Otherwise how can his adversary know what facts he must come prepared to disprove. In the instant case, the evidentiary or intermediate facts are all the circumstances from which the state seeks to draw the conclusion that the defendants and their several predecessors in title acquired the lands without valuable consideration, or else with notice of the alleged fraud. The ultimate fact is their having acquired the lands without valuable consideration, or else with notice of alleged fraud. This ultimate fact needed to be stated, because until it was stated there was nothing to show that the said titles, constituting the alleged chain of title of defendants, were not good. "Ultimate facts of necessity are conclusions drawn from intermediate and

evidentiary facts; but legal conclusions cannot be pleaded as ultimate facts." 31 Cyc. 70.

If the rule by which the allegation of a conclusion of law is no allegation, but facts must be stated, is once departed from, it is not easy to see what rule is to be adopted in its place for the guidance of courts in judging of the sufficiency of pleadings. The pleader is allowed to dispense with the evidentiary or intermediate facts, and to content himself with alleging the ultimate facts; but further than this it is not possible to go, without losing sight of the principal object of pleading, which is to inform the adversary of what he must come prepared to meet with his evidence. It is not possible to go a step further and hold that even the ultimate facts may be dispensed with, provided a conclusion of law is alleged from which they may be deduced with a certain degree of cogency. The question in every case would then resolve itself into whether the cogency in the particular case was sufficient to let the conclusion of law which was alleged do service for the facts which were not alleged, but left to be ascertained by a deductive process.

In contending that the petition sets forth a cause of action, the learned Attorney General relies upon the allegation that the defendants are holders in bad faith; but that allegation, as already shown in this opinion, is nothing more than the allegation of a legal conclusion, and, as also shown, the allegation of a legal conclusion is no allegation and does not aid a pleading. Such an allegation stands as if not made. It does not aid a pleading. It is merely the legal opinion of the person who drafted the petition. Whether the defendants are holders in bad faith or not is a question which the court must decide, and must decide upon the facts, and, in order that the court may have an opportunity to decide that question, the facts necessary for its decision must be alleged. The mere opinion of the Attorney General alleged in the petition that the defendants are holders in bad faith cannot be accepted by the court in place of the facts upon which the court is to judge whether or not the defendants are holders in bad faith.

If that allegation could be accepted as a substantive allegation, the petition would not be open to the exception of no cause of action, but merely to that of vagueness and generality. These two exceptions are not to be confounded. A petition which does allege all the facts upon which the cause of action depends may do so in terms so vague as not properly to convey to defendant all the information he needs for making his defense. The petition we are dealing with would have been of that character if it had alleged the ultimate fact of the defendants and their predecessors in title having acquired without consideration, or else with knowledge of the alleged fraud. Defendants could not then

have pleaded no cause of action, but at most could have asked that the state be required to allege the facts intended to be relied on for contending that the property was thus acquired by them and their predecessors in title.

Pleadings were held insufficient to show a cause of action, or, which is the same thing, to authorize the introduction of evidence, in the following cases: *Seghers's Adm'r v. Lemaitre*, 5 La. Ann. 263, where plaintiff sought to annul a lease on the ground that it had been executed "in fraudem legis and out of the usual course of business." *Compton v. Compton*, 9 La. Ann. 490, where the allegation was that "defendant has been unfaithful to the marriage bed, and has committed acts of adultery since her marriage with defendant and since this suit." *Waddell v. Judson*, 12 La. Ann. 13, and *Louallier v. Castille*, 14 La. Ann. 777, where the allegation was that "the requirements for sheriff's sale were not complied with." *Landry v. Dickson*, 7 La. Ann. 239, where the allegation was that the judgment had been unduly and improperly obtained. *Rooks v. Williams*, 13 La. Ann. 374, where the allegation was that the judgment had been obtained through fraud and other ill practices.

In *Triscoy v. Orr*, 49 Cal. 617, it was held that it is not sufficient to allege that the defendant took the property unlawfully or fraudulently, but that the facts which constitute the unlawful taking or the fraud must be set out; and in *Wing v. Hayden*, 10 Bush (Ky.) 280, a case closely analogous to the one at bar, it was held that an allegation in an answer that a defendant is "an innocent purchaser" was insufficient as being a mere conclusion of law, and not equivalent to a statement that he had purchased without notice of the plaintiff's homestead right. In *Kellogg v. Tout*, 65 Ind. 152, where, in a suit to redeem land from judicial sale, the averment was that there had been no valid appraisal of the rents and profits of the land sold and no valid appraisal of the fee simple of the land, the court said that no averment was made of any facts showing why the appraisements were invalid, and that therefore the pleading did no more than allege a conclusion of law. And the pleading was, in like manner, declared to be the mere statement of a legal conclusion in *Smith v. Kaufman*, 3 Okl. 571, 41 Pac. 722, where the allegation was that "the said P. W. Smith is not now, and never has been, legally appointed assignee of J. A. Newkirk." And so likewise, in *Thomas v. Desmond*, 12 How. Prac. (N. Y. Sup. Ct.) 321, where the plaintiff alleged a contract made by defendant with a third person, and then alleged that he, the plaintiff, "is now the sole owner of the said demand against the said defendant," without stating the facts showing how he became owner of the demand. From 81 Cyc. 61, we quote as follows:

"Averments that the plaintiff is entitled to the proceeds of a sale; that an instrument conferred no right to the property; that a party was not invested with the legal ownership and control of an instrument; that a party is or is not entitled to the possession of the property; that one is or is not an innocent purchaser, or bona fide holder; that possession was taken in good faith; that plaintiff has a better title than defendant; that plaintiff is entitled to a right of way; that a party became an owner of an instrument; that one has no right, title, or interest in certain land; that a judgment or certain goods became the property of defendant; that defendant is in open, notorious, continuous, and adverse possession of the premises; that the city took possession of property under a paramount title; that plaintiff has a special ownership in certain property; or that a note is a wife's separate estate—are conclusions of law."

In most of the foregoing cases the unalleged facts necessary to support the conclusion of law alleged could have been deduced with approximate certainty from the conclusion of law alleged; but the court unflinchingly enforced the rule that allegations for supporting the petition must be of facts, and not of conclusions of law, and applied the principle that the allegation of a conclusion of law is no allegation and does not aid a pleading.

But if, in any case, the facts necessary to support the cause of action, when unalleged, will be eked out from a legal conclusion that is alleged, it will not be done in a case where the facts to be deduced would involve moral turpitude. Thus, in *Gunning Gravel & Paving Co. v. City of New Orleans*, 45 La. Ann. 916, 13 South. 182, which was an injunction suit to prevent the city of New Orleans from letting a paving contract in violation of the provision of the city charter requiring contracts to be let to the lowest bidder, apparently every necessary allegation was made, saving that the city officials were not charged in express terms with arbitrary conduct or improper motives, and yet the court said:

"Only a few days since, in the case of *Hughes v. Murdock*, 45 La. Ann. 935, 13 South. 182, we cited the well-recognized doctrine in pleading that up to the judgment the pleadings will be taken most strongly against the pleader, and that unknown, unrecited facts would not be assumed in his favor, particularly in the face of an adverse ruling of the district judge. The case at bar falls directly under that principle. The plaintiff asks us to 'assume,' as an absolutely necessary consequence of its being the lowest bidder for the contract, that it should be awarded to it, and it asks us to assume that fact in presence of the repeated declarations of courts everywhere that sworn officers will be assumed to have done their duty, certainly at least until they have been 'alleged' to have done otherwise. There is not one single word in plaintiff's petition accusing the common council of New Orleans with having acted arbitrarily, fraudulently, or improperly in any manner. The plaintiff relies upon the naked facts advanced by it that its bid was the lowest, and that its material was equal or superior to that of the other bidders, and that it could furnish security. We are left absolutely in the dark as to the reasons upon which the council acted. We are

bound, in the absence of direct charges and statements of facts, to presume that their action was honest and legal. We cannot eke out a case for the plaintiff by inference of wrongdoing and make suspicions and conjectures take the place of allegations. Whilst it is possible there was such wrongdoing, it might also well be that the council acted after a very strict examination into all the facts and circumstances which it had the legal right to examine into in order to determine whether plaintiff's bid was a proper one or not, and that their conclusions thereon are justified and right. It may well be that, although the plaintiff 'alleges' his ability to furnish security, he may in fact never have tendered it at all, or that the security furnished was insufficient. Plaintiff's petition is silent on these points. If the council was guilty of wrongdoing, plaintiff should have directly so alleged, and stated facts and circumstances to show in what way and from what cause that wrongdoing arose. We repeat here what we said in the *Hughes Case*, that when a plaintiff selects an act as the object of his attack which is not per se necessarily wrongful and illegal, but which may exist consistently with honesty, fair dealing, and legality, it is the duty of the attacking party to set out specially the facts which would give to the act an illegal or wrongful character."

These observations of the court were made in a case which was being disposed of on the face of the petition; that is to say, the question was as to whether or not the petition showed a cause of action. Needless to point out the appositeness of the foregoing remarks to the case at bar, where the fact left to be assumed or deduced is fraud on the part of defendants and their predecessors in title. See, on the same line: *U. S. v. Throckmorton*, 98 U. S. 70, 25 L. Ed. 93; *Marguez v. Frisbie*, 101 U. S. 478, 25 L. Ed. 800; *U. S. v. Atherton*, 102 U. S. 372, 26 L. Ed. 213; *Maxwell v. Land-Grant Case*, 121 U. S. 379, 7 Sup. Ct. 1015, 30 L. Ed. 949.

In behalf of the state, it is asked that the suit be not dismissed, but remanded with leave to amend, and the case of *McCubbin v. Hastings*, 27 La. Ann. 715, is cited. That decision was expressly overruled in *Burbank v. Harris*, 32 La. Ann. 395. See, also, *Abadie v. Berges*, 41 La. Ann. 281, 6 South. 529. Unless a cause of action is alleged, there is no suit, and hence nothing to amend. There is nothing but an empty petition.

Judgment affirmed, without prejudice, however, to the right of the state to renew the suit on proper allegations.

BREAUX, C. J., concurs in the decree.

MONROE, J. I have concluded, after further considering the point presented, that it cannot fairly be held that any other knowledge of the facts, which would render their title void, is charged to the defendants than knowledge of the original fraud, perpetrated by the entryman, and that, in order to disclose a cause of action, the petition should have alleged that each successive holder of the title possessed the same knowledge.

(124 La.)

No. 17,508.

**MANNING v. COHEN.**(Supreme Court of Louisiana. Nov. 15, 1909.  
Rehearing Denied Dec. 13, 1909.)**1. SPECIFIC PERFORMANCE (§ 129\*)—DAMAGES—ATTORNEY'S FEES.**

Attorney's fees are not recoverable as part of the damages in a suit for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 420-423; Dec. Dig. § 129.\*]

**2. SPECIFIC PERFORMANCE (§ 129\*)—SCOPE OF RELIEF—DAMAGES.**

Rev. Civ. Code, § 1926, provides that on the breach of any obligation to do, or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, or he may require the dissolution of the contract, and in all these cases damages may be given where they have accrued, according to the rules established in the succeeding section, and section 2486 declares that in all cases the seller is liable to damages if there result any detriment to the buyer occasioned by nondelivery at the time agreed on. *Held*, that the vendee was not required to elect between specific performance and damages, but was entitled in a suit for performance to recover damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 420-423; Dec. Dig. § 129.\*]

**3. SPECIFIC PERFORMANCE (§ 129\*)—RELIEF DEMANDED—DAMAGES.**

Where, in a vendee's suit for specific performance, it appeared that on the vendor's refusal to perform the vendee retained the cash payment, he was entitled to recover as damages the amount of rents lost to him during the period when he was entitled to possession under the contract, less the interest on the payment retained.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 420-423; Dec. Dig. § 129.\*]

Appeal from First Judicial District Court, Parish of Caddo; A. J. Murff, Judge.

Specific performance by D. T. Manning against Heyman Cohen. Judgment for plaintiff for less than the relief demanded, and he appeals. Modified and affirmed.

Blanchard, Barret & Smith, for appellant.  
John B. Files, for appellee.

**PROVOSTY, J.** This suit is for specific performance of a contract of sale of real estate, and for damages alleged to have been suffered from defendant's failure to perform the contract. The damages consist of the rents of the property and of attorney's fees for bringing this suit; the rents being those from the 31st of July, the day on which the defendant was put in default by the formal tender of a deed for him to sign accompanied by an offer of payment, to the date of delivery of possession.

Defendant answers that he has been willing and ready all along to perform the contract. We think the evidence shows differently.

Attorney's fees cannot be recovered in a

case of this kind. *Fox v. Jones*, 39 La. Ann. 929, 3 South. 95; *Ross v. Goldman*, 36 La. Ann. 132.

But we do not agree with our learned Brother below that the vendee must elect between suing for specific performance and suing for damages; and that, if he chooses the former, he cannot claim damages. Articles 1926, 2486, Rev. Civ. Code, are express to the contrary. 24 Laurent, Vente, No. 180, p. 178, says that the vendee is entitled to the damages "in all cases; that is to say, whether he sues for the resolution of the contract or for specific performance." And indeed, it stands to reason that, as announced by article 1930, a party who violates his contract is liable for the damages which his default has caused the other party. In the instant case, if plaintiff were to be given nothing more than the property itself, after having been kept out of it for one year and lost the rents of one year, he would not be given the full measure of his rights under the contract; and defendant, on the other hand, would be profiting that much from his own default and wrong. Plaintiff is entitled to these rents, less, however, an amount equal to legal interest for the same period on the \$200, which, with the \$50 actually paid, was to constitute the cash payment. Not having deposited said amount, but retained and enjoyed it, plaintiff must pay interest on it.

It is ordered, adjudged, and decreed that the judgment appealed from be amended by condemning defendant to pay plaintiff damages at the rate of \$113 per month from July 31, 1908, until the date of the delivery of the property in controversy, less 5 per cent. per annum interest from July 31, 1908 on \$200. the said \$200 being that part of the purchase price of said property which was to have been paid cash, and was not paid, until the payment of said \$200, and that said judgment be in all other respects affirmed, defendant to pay all costs.

(124 La.)

No. 17,713.

**ORIENT INS. CO. v. BOARD OF ASSESSORS et al.**(Supreme Court of Louisiana. Nov. 15, 1909.  
Rehearing Denied Dec. 13, 1909.)**1. TAXATION (§ 253\*)—STATUTES—MODIFICATION OF REVENUE LAW.**

Acts 1908, p. 230, No. 170, providing that notes and indebtedness and all evidence of indebtedness shall be taxable only at the situs and domicile of the holder or owner thereof, is not an interpretation, but a modification of the revenue law, having no retroactive effect.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 253.\*]

**2. TAXATION (§ 499\*)—ASSESSMENTS—SUIT FOR REDUCTION—LIMITATIONS—STAY BY AGREEMENT.**

The operation of Revenue Law (Acts 1898, p. 360, No. 170) § 26, prescribing the time within which action shall be brought to test the cor-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rectness of an assessment, cannot be stayed by agreement by the assessors and tax collectors with tax debtors to await the result of pending suits.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 499.\*]

**3. TAXATION (§ 499\*)—CORRECTION OF ASSESSMENT—OPERATION AND EFFECT OF STATUTE.**

Though assessments are grossly excessive, and the taxpayer made a correct return, courts can give no relief; action not being brought in the time prescribed by statute.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 499.\*]

**4. TAXATION (§ 347\*)—ASSESSMENTS—EXCESSIVENESS—ANNULMENT IN TOTO.**

An assessment being intended as such, and being such in fact, though grossly excessive, six times as large as it ought to be, is not absolutely null, on the ground of its being the result, not of exercise of judgment by the assessors as required by law, but merely of guesswork and caprice.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 581, 583; Dec. Dig. § 347.\*]

Breaux, C. J., and Monroe, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Suit by the Orient Insurance Company and others against the Board of Assessors and others. From the judgment, plaintiffs appeal. Affirmed in part and annulled in part, and suits dismissed.

Hall & Monroe, for appellants. F. C. Zacharie (Harry P. Sneed, of counsel), for appellee State Tax Collector. Geo. H. Terriberry (Harry P. Sneed, of counsel), for appellee Board of Assessors. H. Garland Dupre (Harry P. Sneed of counsel), for appellee City of New Orleans.

**PROVOSTY, J.** This appeal embraces 23 consolidated suits. The plaintiffs in these several suits stand in the same category. They are insurance companies of other states and of foreign countries doing business in this state through local agents. They were assessed in the years 1906, 1907, and 1908 for money in possession, credits, and open accounts, and are suing to have the assessments canceled as illegal and null; or, in the alternative, reduced, as excessive. The manner in which they conduct their business in this state is the same as was that of the plaintiff in *National Fire Insurance Co. v. Board of Assessors*, 121 La. 108, 46 South. 117, 128 Am. St. Rep. 313, and the nullity of the assessments is claimed on precisely the same grounds as in that case, namely, that as a matter of fact the plaintiffs have no money in possession, and that the credits or open accounts in question have no situs in this state, and therefore are not taxable in this state.

Since that decision and others in the same sense, namely, *Insurance Co. v. Board*, 121 La. 1068, 47 South. 27, *General Electric Co. v. Board*, 121 La. 116, 46 South. 122, and *U. S. Fidelity & Guarantee Co. v. Board*, 122 La. 139, 47 South. 442, etc., were rendered, the

Legislature has passed Act No. 170, p. 230, of 1908, which reads:

"Mortgage notes and indebtedness and all evidence of indebtedness shall be taxable only at the situs and domicile of the holder or owner thereof."

By this act, say counsel, the Legislature has put upon the revenue law a different interpretation from that adopted by the court in said cases.

Sometimes language is so plain that even legislative omnipotence cannot construe it into a different meaning from that which it plainly expresses; and that is the case with the provision of law which the court is here asked to interpret differently from what has been done heretofore. The provision is so plain as not to leave room for interpretation. The above quoted statute is a modification, not an interpretation, of the revenue law; and nothing in it indicates an intention that it should have a retroactive effect.

In so far as the suits are for reduction of the assessments, the defendant opposes to them section 26 of the revenue law (Acts 1898, p. 360, No. 170), which reads:

"But the action to test such correctness shall be instituted on or before the first day of November of the year in which the assessment is made."

The suits were filed in August, 1908. The assessments of 1906 and 1907 are barred therefore by said statute, unless the reason assigned by plaintiffs why said statute should not have application is valid.

It is that there was a tacit understanding between the tax officers of the state and plaintiffs, by which the officers, on the one hand, should do nothing towards the enforcement of the taxes under said assessments, and the plaintiffs, on the other hand, should take no steps to annul or reduce said assessments until the case of *Liverpool, London & Globe Ins. Co. v. Board of Assessors*, 122 La. 98, 47 South. 415, involving the same issue, and then pending, should have been decided. For proof of there having been such an understanding, the plaintiffs show that, when they applied to the board of assessors for a reduction of the assessments of 1907 and 1908, they were told that as the result of the said pending suit said assessments might be found to be null, and that, therefore, until said suit should have been decided, it would be waste of time and labor to consider the question of their reduction. Plaintiffs show further that no steps were taken by the tax officers to exact payment of the taxes under said assessments.

Counsel for the defendants deny that there was any such understanding, and the fact that the assessors went on and made an assessment for 1908 would go towards supporting that theory. But would an understanding of that kind amount to anything even if there was one? Have the assessors and the tax

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

collectors, together or separately, any authority to stay the operation of the tax laws of the state by agreement with tax debtors? The Constitution denies that power even to the Legislature. As to the assessor's want of authority in such a case, see *Railway Company v. Davis*, 50 La. Ann. 1058, 23 South. 946.

The assessments are grossly excessive. So much so that it is manifest they were the result of mere guesswork; as, indeed, is testified to by the one member of the board of assessors. More than this, the Board of Assessors was furnished by the plaintiffs with a correct return for the years 1907 and 1908. But the suit for the reduction of the assessments of 1906 and 1907 is barred by the said statute. As to them, the court is powerless to grant relief. A plain and positive provision of law cannot be disregarded even for the purpose of correcting gross injustice. See to that effect, *Larkin v. Portsmouth*, 59 N. H. 28; *Dees v. Moss Point Baptist Church* (Miss.) 17 South. 1. See, also, *Town of Farmington v. Downing*, 67 N. H. 441, 30 Atl. 345. The returns made by plaintiffs for 1908 were correct; and the assessments for that year will have to be reduced accordingly.

The contention of the plaintiff's learned counsel that assessments so grossly excessive as those here in question—six times as large as they ought to be—are absolutely null, in that they are not the result of an exercise of judgment on the part of the assessors, as the law requires that an assessment should be, but merely of guesswork or caprice.

We cannot adopt that view. Such as the assessments are, they are assessments. They were intended to be such, and are such in fact. They are not annulable in toto.

The judgment appealed from is therefore affirmed in all particulars, except that it is annulled in so far as it reduces the assessment of the year 1906 on "credits, bills receivable," etc., and it is now ordered, adjudged, and decreed that the suits of the plaintiffs are dismissed with costs and 10 per cent. penalty on state taxes, also as to said assessment of 1906, and that plaintiffs pay the costs of this appeal.

BREAUX, C. J., and MONROE, J., dissent.

Removed to Supreme Court of United States by writ of error, with supersedeas.

(124 La.)

No. 17,931.

STATE v. LATHAM.

(Supreme Court of Louisiana. Nov. 29, 1909.)

CRIMINAL LAW (§ 923\*)—NEW TRIAL—INCOMPETENCY OF JUROR.

The defendant, indicted for and convicted of manslaughter by a verdict of nine to three by

a jury, was sentenced to six years' imprisonment in the penitentiary. He has appealed.

The complaint urged before the Supreme Court is: That one of the nine jurors who voted for conviction had on his voir dire declared that he had never expressed an opinion that defendant was guilty of the crime charged; that in consequence of that declaration he was accepted by the defense; that after the verdict it had for the first time come to the knowledge of the defendant that this declaration was not true; that defendant moved for a new trial on that ground, and attached to his motion the affidavits of four persons showing that the juror's declaration on his voir dire was not true; that on the trial of the motion the trial judge incorrectly overruled it.

For reasons assigned, the ruling of the district judge refusing on defendant's motion to grant him a new trial is set aside, as is also the sentence of the court; but the Supreme Court refuses, under present conditions, to set aside the verdict of the jury and remand the cause to the district court for a new trial on the merits. It reinstates defendant's motion for a new trial and remands the cause to the district court for a hearing and trial on that motion and for further proceedings according to law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2226; Dec. Dig. § 923.\*]

(Syllabus by the Court.)

Appeal from Eighth Judicial District Court, Parish of Franklin; D. N. Thompson, Judge.

Ora Latham was convicted of manslaughter, and appeals. Order refusing new trial set aside, and cause remanded for rehearing on such motion.

S. N. Dorsett, for appellant. Walter Guion, Atty. Gen., and Riley J. Wilson, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

#### Statement of the Case.

NICHOLLS, J. The defendant was indicted by the grand jury of Franklin parish for the crime of manslaughter. His case was set for trial for September 23, 1909, at which time it was tried, and a verdict of guilty was the result of the trial.

On the polling of the jury, it was ascertained: That the verdict was rendered by a vote of nine to three; that among the jurors who voted for a conviction was Robert Killian.

Upon the 25th of September, 1909, counsel for defendant filed a motion for a new trial upon the grounds:

(1) That the juror Robert Killian was not a competent juror for the alleged reason that he had previously expressed himself as being firmly of the opinion that the defendant should be convicted. That said juror was prejudiced against the defendant, and was in favor of his conviction, and had so expressed himself on several occasions before he was accepted as a juror. To this motion is attached the affidavits of Mrs. H. C. Abell, Curtis Beaird, W. J. Ensminger, and Mack Wiggers.

(2) That the court had improperly delivered a charge to the jury in the respect that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



the judge had charged without any qualification that, if the accused had provoked the difficulty, he forfeited the right of self-defense.

The motion for a new trial was overruled. The defendant was then sentenced to serve for a term of five years at hard labor in the penitentiary, from which sentence he prosecutes his appeal.

We find two bills of exception in the transcript. The first bill is to the following effect:

"Defendant was indicted September 10, 1909. Being a stranger in this community, without friends or money, counsel was appointed to represent him on the 20th or 21st of same month and case fixed for trial on 23d. September 23d case was tried, and accused was convicted by a verdict of nine to three; it having been shown by the polling of the jury that Robert Killian, one of the jurors, voted with the nine and made one of that number. An affidavit and motion for a new trial was filed September 25, 1909, about 10 o'clock a. m. Counsel for state announced that he was ready for trial, whereupon counsel for defendant, understanding that the motion was to be tried on its face and the face of the affidavits attached to it, read and proceeded to argue it to the court without interference or interruption on the part of the district attorney till the argument was finished, when he announced to the court that he proposed to introduce testimony in rebuttal to the affidavits.

"The court ruling that this might be done, counsel announced that having only learned of the facts set up in said motion late in the day of September 24, 1909, and not having been able to see and talk to some of the witnesses whose affidavits are attached till the following day, he was not prepared at that time to proceed with the taking other testimony of other witnesses, and that those who had made the affidavits had not been summoned; one of them living at a distance of four miles from the courthouse. The court ruling that the case must proceed, and that the testimony on part of the accused would be limited to the swearing of the witnesses whose affidavits were attached, defendant's counsel declined to present the defendant's side of the case.

"The affidavit and motion for a new trial, the affidavits attached thereto with the filings on them, the indictment with the filings on it, and all the minutes of this court with reference to this case are hereto attached and made parts hereof for reference and further explanation.

"As soon as the court ruled as above stated with reference to the proceedings with the taking of testimony and its limitation as set forth above, counsel for defendant asked for and reserved a bill of exceptions to the said ruling. Said motion being overruled by the court, counsel for defendant at once reserved another bill to said action. Referring to and making the foregoing statement of facts a part hereof, counsel for defendant now moves this honorable court in open court to sign this, his bill of exceptions, which is accordingly done."

Bill No. 2 declares: That counsel for defendant filed a motion for a new trial for the causes set out in said motion, which motion was specially referred to; that said motion, with the affidavits thereto, was tried in open court and overruled by the court, to which ruling counsel then and there in open court reserved a bill of exception, attaching thereto all the testimony taken on its trial and the affidavits attached to it, all of which

is now presented and signed in open court as the law requires.

Defendant's motion for a new trial, which was verified by his oath, was as follows:

"Defendant moved for a new trial for the reasons: That he has discovered since the trial that Robert Killian, one of the jurors of the trial panel, had on more than one occasion expressed himself as being firmly of the opinion that appearer was guilty and should be punished. That he attaches hereto the affidavits of Mrs. H. C. Abell, Curtis Beaird, W. J. Enslinger, and Mack Wiggers, showing that the said Killian has given expression to such opinion and such feeling of prejudice prior to his being selected as one of the panel to try this defendant. That appearer is a very poor man not able to employ counsel or to furnish bail. That he has since a short time after the homicide been confined in the jail of the parish of Richland. That he has no friends or relatives in this state. That being without money, without friends, and without relatives, confined in jail at some distance from the scene of the killing, it was impossible for him to learn anything about the feeling of the members of the jury except by the examination of them on voir dire in open court at his trial. That the said Killian was carefully examined by his appointed counsel, and answered clearly and affirmatively that he had neither formed nor expressed an opinion.

"Defendant shows: That he has clearly been prejudiced by the action of said juror, because: First, the said Killian frequently visited and was well acquainted in the town where the difficulty occurred, and would therefore exercise and especially influence against him; and, second, because there were only nine jurors in favor of conviction; the said Killian making one of that number. That he had no knowledge or intimation of the feeling of the said juror against him and was surprised when he learned of his attitude and conduct after the trial. Defendant further alleges: That he should be granted a new trial for the reason that he was prejudiced by the charge of your honorable court when it was stated without proper explanation, and without any sort of qualification, that if accused had provoked the difficulty he absolutely forfeited the right of self-defense.

"That counsel for this defendant tried to have a qualification of this charge so as to have the jury understand that, if deceased had become provoked while defendant was acting within his legal rights, he did not forfeit his plea of self-defense; but such instruction was refused. That this charge was especially necessary in this case because the contention of defendant, sustained by his testimony, was that he should not use indecent language so near his house that it would be in hearing of his wife. Defendant, for the foregoing reasons, and for the further reason that the verdict is contrary to the law and the evidence, prays that he be granted a new trial."

Annexed to this motion were the affidavits of Curtis Beaird, Mack Wiggers, W. J. Enslinger, and Mrs. H. C. Abell. Curtis in his affidavit declares: That about May 15, 1909, Robert Killian (one of the jurors on the jury which tried the case) expressed in his presence the positive opinion that the accused was guilty and should be convicted; that he expressed himself forcibly about the merits of the case; "that one of the expressions of said juror was that Latham was guilty and, should he be a juror, he would send him down the river."

Wiggers in his affidavit declared that about

the 8th of May, 1909, Robert Killian expressed in his presence the positive opinion that the accused was guilty and should be convicted, and expressed himself forcibly about the merits of the case, and on or about the 8th of May said:

"That Ora Latham ought to be punished for the killing of John Bowman."

Ensminger in his affidavit declared that on or about May 8 or 10, 1909, Robert Killian in his presence expressed, in the town of Winnsboro, himself, forcibly about the merits of this case; that the said Killian said:

"That if he was on the jury it would be a hung jury."

Mrs. Abell in her affidavit declared that, on or about the 28th of April, Robert Killian expressed in her presence the positive conviction that the accused was guilty and should be convicted; that he expressed himself forcibly about the merits of this case; that one of the expressions of said Killian referring to defendant was:

"He ought to be hung, and if I were on a jury to try him I would vote to hang him."

On the trial of the motion for a new trial, Robert Killian testified that he was one of the jurors in this case. The following questions were put and answers given by him:

"Q. Had you before the trial of this case made a statement that you were of the positive opinion that the defendant, Ora Latham, was guilty and should be convicted?"

"A. No, sir; I did not."

"Q. Had you ever expressed such an opinion before this trial?"

"A. No, sir."

"Q. Did you state in Winnsboro, or anywhere else, before this trial, that if you were on the jury in this case that it would be a hung jury?"

"A. No, sir."

"Q. Did you ever make the statement before this trial in the presence of Mrs. H. C. Abell, or any one else, that Latham ought to be hung, and if you were on the jury you would vote to hang him?"

"A. No, sir; I had no conversation with Mrs. Abell in regard to this at all since it happened."

"Q. Have you had any conversation with reference to this case with Curtis Beaird, Mack Wiggers, W. J. Ensminger?"

"A. Well, for Curtis Beaird, I might have mentioned the case to him; but, as to the other parties, I have had no conversation with them."

"Q. Did you make any statement to Curtis Beaird to the effect that Latham ought to be convicted, and if you were on the jury he would go down the river?"

"A. No, sir; and to nobody else."

On the trial of the motion for a new trial, W. H. Adams testified: That he knew Mack Wiggers, W. J. Ensminger, and Mrs. H. C. Abell; that all said persons lived in Winnsboro, and all of them were in attendance in court at the trial. Adams gave no testimony as to Curtis Beaird.

The district court made the following ruling on the motion for a new trial:

"The motion for a new trial is incorrect wherein it states that the court, without proper explanation, and without any sort of qualification, charged that if the accused had provoked the difficulty he absolutely forfeited the right of self-defense."

The court charged that no person could provoke a difficulty, and create the necessity for taking life, and then plead justification in excuse, and that, where the right of self-defense was forfeited by provoking a difficulty, such right could only be regained by abandoning the difficulty and giving notice to the other party.

No objection to the charge was made, and the special charge requested was given with qualification and explanation and, the court at the time stated to counsel that the special charge would be given with such qualification and explanation, and no objection was made by counsel. The jury could not have misunderstood the charge and could not have been misled. The court appointed Mr. S. N. Dorsett, an attorney at the bar, to represent the accused, and he was assisted in selecting the jury by Messrs. C. L. Berry and A. W. Moore, who have practiced at this bar for more than 30 years.

I do not consider that the motion for a new trial has any merit whatever.

#### Opinion.

In this case the district judge declared that defendant's motion for a new trial had no merit whatever and refused the application. We understand from this that in his opinion the verdict was sustained by the evidence.

The question before us is whether that verdict should be set aside for the assigned reason that Robert Killian, one of the nine jurors who voted in favor of the conviction of the defendant, was an incompetent juror for the reason that he had formed and expressed (before being accepted on the jury) an opinion to the effect that defendant was guilty of the crime charged against him and should be punished.

In *State v. Nash*, 45 La. Ann. 1144, 13 South. 732, 734, the same question was submitted to this court for decision. The court then declared that it considered that for the maintenance of a motion for a new trial on that ground it was essential that defendant should prove all of three facts:

(1) That the jurors were incompetent (in that case under age).

(2) That that fact was unknown to the defendant and his counsel until after verdict.

(3) That the juror was questioned as to his competency on his own voir dire and answered that he was.

The defendant, in his motion for a new trial (which was verified by his oath), declared that Killian was carefully examined by his appointed counsel and answered clearly and affirmatively that he had neither formed nor expressed an opinion. That fact is substantially submitted in the brief filed on behalf of the state. Defendant in his motion for a new trial declared his want of knowledge of any ground for the incompetency of Killian until after the verdict was rendered. Counsel for defendant gave no testimony

whatever in the case and filed no affidavit. The district judge assigned no reason for refusing to grant a new trial on the ground that Killian was not a competent juror. The state urges, in its brief filed by the Attorney General:

"That all the statements alleged to have been made by Killian were claimed to have been made in Winnsboro, where the case was tried, and where the attorneys of defendant reside, that the testimony taken on the trial of the motion for a new trial showed that Ensminger, Wiggers, and Mrs. Abell were present in court during the trial of the defendant, and from their affidavits had evidently taken an interest in the case, and it occurred to counsel for the state, as it no doubt did to the trial judge, that, if this juror had made these statements, they were and should have been known by defendant or his counsel, and it was asking too much for the court to believe that such statements were made by the juror when the examination on his voir dire by the counsel for defendant disclosed no feeling on his part against the accused, and when the juror whose testimony was taken on the trial denied absolutely the statements attributed to him."

It cannot be denied that the affidavits filed by defendant, and which were annexed to his motion, make a strong showing in support of the claim that Killian had, prior to his acceptance as juror, made the statements attributed to him. The credibility of those parties is neither attacked nor suggested, and their interest in the defendant is merely assumed from the fact of their presence in court at defendant's trial. We are inclined to think that the ruling of the district judge adverse to the granting of a new trial was predicated upon the absence of any showing by defendant's counsel of their want of knowledge, until after the verdict was rendered, of any fact going to show the incompetency of Killian. The case we are dealing with is a very serious one. The judgment rendered carries with it the imprisonment of the defendant for ——— years in the penitentiary. The verdict returned was by a vote of nine to three; the three opposing. The juror Killian was one of the nine who voted in favor of the verdict of guilty. Under the circumstances of this case, we are not disposed to reject defendant's application on account of what was likely a want of appreciation by defendant's counsel of the importance of his adding his testimony to that of defendant of want of knowledge on his part, until after verdict, of any ground for believing that Killian was incompetent as a juror. We are not willing, however, in the present condition of the case, to reverse the ruling of the district judge on the motion and to remand the case for a new trial on its merits; but we feel impelled and justified in setting aside the ruling and remanding the case for a new trial of and full hearing upon the motion for a new trial.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the ruling of the district judge in refusing to

grant defendant a new trial and the sentence of the court be set aside, and it is now ordered, adjudged, and decreed that the motion for a new trial be reinstated, and a hearing and trial had on said motion.

The cause is remanded to the district court for further proceedings according to law.

(124 La.)

No. 17,751.

ISRAEL v. STATE NAT. BANK OF NEW ORLEANS.

In re ISRAEL.

(Supreme Court of Louisiana. Nov. 15, 1909.  
Rehearing Denied Dec. 13, 1909.)

1. BANKS AND BANKING (§ 148\*)—DEPOSITS—  
PAYMENT OF FORGED CHECKS—LIABILITY TO  
DEPOSITOR—NEGLIGENCE OF DEPOSITOR.

Plaintiff's checks were always signed by himself and written by himself or his clerk. On November 21, 1905, his passbook was returned with the checks paid to that date, and three of the canceled checks, which were payable to bearer, and were not shown by the stubs of his check-book, were in a handwriting entirely different from that of plaintiff or his clerk, except the signature, which was an exact imitation of plaintiff's signature. Plaintiff discovered these facts at the time, but did not notify the bank, claiming at trial that he thought the fact that the checks were not shown in his stubs might be explained by his forgetting to enter them, and he was not sure at the time that they were forged. On January 25, 1906, 18 other checks forged in the same manner were returned to him, when he notified the bank and sued to recover the entire amount of the forged checks. *Held*, that the fact that the checks, except the signature, were in a strange handwriting, was sufficient to arouse plaintiff's suspicion and require him to inform the bank, and he could not recover the amount of the forged checks paid after November 21st.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 442, 443; Dec. Dig. § 148.\*]

2. BANKS AND BANKING (§ 148\*)—DEPOSITS—  
PAYMENT OF FORGED CHECKS—LIABILITY—  
FACTS PUTTING UPON INQUIRY—ABSENCE  
OF DATE.

That the year was not filled out on a forged check dated "New Orleans, La., Dec. 4, 190 , " was not sufficient to put the bank upon inquiry so as to make it liable for its payment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 439; Dec. Dig. § 148.\*]

Action by Jacob Israel against the State National Bank of New Orleans. Judgment for plaintiff for partial relief, and he brings writ of review. *Affirmed*.

Lazarus, Michel & Lazarus, for petitioner.  
W. S. Parkerson, for defendant.

PROVOSTY, J. The plaintiff was a depositor in the defendant bank. On November 21, 1905, his passbook was balanced and returned to him with those of his checks which had been paid and canceled up to that date. Among these checks were three which were forged, aggregating \$90. Plaintiff's checks were never signed by any other person

than himself, and were always written either by himself or by his clerk. The written part of these forged checks, except the signature, was in a handwriting distinctly different from plaintiff's and that of his clerk. The checks were payable "to bearer." The signatures were so well imitated as to defy detection. Plaintiff examined the returned checks, and discovered that the three in question were not in his handwriting nor in that of his clerk, and that they did not appear on the stubs of his checkbook. He did not notify the bank of the forgeries. Two months later, on January 25, 1906, the passbook was again balanced and returned to him with his canceled checks. In the meantime 18 other forged checks, aggregating \$763, with signatures equally well imitated, had been paid by the bank; and then, only, plaintiff notified the bank.

The present suit is for the recovery of the entire amount paid by the bank on the forged checks. The district court gave judgment for \$90, the amount of the three checks which accompanied the passbook on its first return to plaintiff, and rejected plaintiff's demand for the amount of the forgeries subsequently paid. The Court of Appeal affirmed this judgment, except that it added \$10 to it for one forged check which was paid the day itself of the first return of the passbook and before plaintiff could have given notice of the forgeries. The case is here on writ of review to the Court of Appeal, parish of Orleans.

Plaintiff quotes extracts from certain decisions, and also from text-books, founded, doubtless, on the same decisions, to the effect that the depositor in a bank owes no duty to the bank to examine his passbook and returned checks with a view to the detection of forgeries, but has the right to assume that the bank before paying the checks made sure that the signatures were genuine. Those decisions are reviewed by the Court of Appeals of New York in the case of *Critten v. Chemical National Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529, and by the Supreme Court of the United States in the case of *Leather Mfg. Bank v. Morgan & Co.*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, and the more conservative conclusion reached that:

"A depositor in a bank, who sends his passbook to be written up and receives it back with entries of credit and debits and his paid checks as vouchers for the latter, is bound personally, or by an authorized agent, and with due diligence, to examine the passbook and vouchers, and to report to the bank without unreasonable delay any errors which may be discovered in them; and if he fails to do so, and the bank is thereby misled to its prejudice, he cannot afterwards

dispute the correctness of the balance shown by the passbook."

Upon the facts of the instant case, plaintiff did not exercise this due diligence. He failed to report to the bank the forgeries which had revealed themselves to him by the return of his checks on November 21st. He cannot recover therefore the amounts which were subsequently paid. Had he made the report, the bank would have been put on its guard.

Plaintiff makes a feeble effort to absolve himself from negligence in the premises by saying: That he was not sure that the three checks were forgeries; that he would sometimes draw checks away from his place of business and forget to enter them on the stubs of his checkbook; that he was not sure the absence of these particular checks from the stubs of his checkbook might not be accounted for in that way; that during the two months which elapsed before notice was given to the bank, during which time the bank was paying the other checks similarly forged, he was searching in his mind and trying to remember whether he had drawn these three checks or not. But how could plaintiff not have known that the checks were not drawn by him when in all but the signature they were distinctly in a strange handwriting? This alone was enough to arouse his suspicion and put him under the necessity of giving some warning to the bank.

One of the subsequently paid checks, that of December 4, 1906, bears date as follows:

"New Orleans, La., Dec. 4, 190 ."

Plaintiff argues that a check must be dated, and that the defect in the dating of this check should have put the bank upon inquiry, and that if the bank had made inquiry the forgery would have been detected and all the subsequent forgeries prevented.

We fail entirely to see why the absence of the "5" in "1905" should have put the bank upon inquiry. This looseness in the confederation of the check was better calculated to lull than to arouse suspicion. The trouble with the check was, not that it was not dated, but that it was forged. The absence of a date could be material only if the check had been genuine, but had been left undated in order that it might not be payable, and the bank had nevertheless paid it and a loss had resulted. This is not the case here. In the instant case the absence of a date would have been utterly immaterial if the check had been genuine.

The judgment of the Court of Appeal is affirmed.

(124 La.)

No. 17,502.

**FURLOW v. BENOIT.**(Supreme Court of Louisiana. Nov. 15, 1909.  
Rehearing Denied Dec. 13, 1909.)**BROKERS (§ 65\*)—SALE OF REAL ESTATE—COMPENSATION—FRAUD.**

Services were rendered by plaintiff to defendant. The former was to find a purchaser for the latter.

The purchaser was found and the sale made.

The amount stipulated for the services was due.

The plaintiff did not seek his own interest to the extent of forfeiting right to compensation.

The fee was contingent. The sale was consented to by defendant readily without inquiry.

There had been no agreement entered into between plaintiff and the one who bought the property, only general conversation which did not result in any agreement, prior to the sale.

Under the circumstances, there was no fraudulent concealment of facts.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 48-50; Dec. Dig. § 65.\*]

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; J. P. Madison, Judge.

Action by Thomas E. Furlow against Henry T. Benoit. Judgment for plaintiff, and defendant appeals. Affirmed.

John M. Munholland, for appellant. Ben C. Dawkins and Lamkin & Millsaps, for appellee.

**BREAUX, C. J.** This suit was brought by plaintiff against defendant for \$4,000 and legal interest, for asserted services rendered in finding a purchaser for a mill plant owned by defendant.

By the first agreement between the parties, dated August, 1908, plaintiff was to receive for his services 3 per cent. of the first \$20,000 and all of the purchase price over and above that amount.

Plaintiff interested others in the attempt to sell the property on commission contingent upon the price over and above the amount before stated.

This, after a short time, was not satisfactory to him. He called upon defendant and requested him to enter into another contract of employment which would enable him to recover an amount more in accordance, as he stated, in substance, with the value of the services to be rendered.

This request resulted in a modification of the original contract on the 29th day of September, 1908, whereby for procuring a buyer, plaintiff was to receive for his services all over and above the price of \$18,000.

The property was sold for \$20,000.

The defendant declines to pay on the grounds: That plaintiff knowingly concealed information from him and kept him in ignorance of his negotiations and improperly induced him to enter into another contract than the one of August, 1908; that he signed

the second contract, of September, 1908 (a modification of the first), in error.

It appears that plaintiff on the same day that the last contract in date was signed, after it had been signed, met E. C. Lamm, the buyer, and after preliminary discussion, in which a larger amount was asked for the property, finally closed for \$20,000.

The deed of sale was prepared the next day and signed by defendant and the buyer, Lamm.

Going back prior to the sale, the defendant charged that, in effecting the sale, plaintiff, without his authority, bound respondent to guarantee that there were 5,000,000 feet of timber on the land, and further bound him to deposit the last maturing note of the purchase price for \$4,000 as security for the guaranty, and defendant urged that before the timber on the land is used it cannot be known how much there is or what amount will have to be deducted from the purchase price in making good the guaranty.

The facts are that Corbitt & Co. of Denver, Ill., real estate agents, acting for plaintiff at his instance, advised E. C. Lamm, the one who afterward bought the property, to come to Louisiana and look at the plant, and said to him that plaintiff, acting for the defendant owner, would meet him at Monroe, La., on the day following.

Lamm came to Louisiana, met plaintiff, and together they went to Simsborough, La., and looked over the sawmill and planing mill of the defendant. On the Monday following, they looked over the timber, and afterward the question of price arose.

In the meantime the defendant had not been overlooked by plaintiff. He had been requested by him to be present, and meet the one who had some thought of buying. The defendant declined, and stated that his business at home did not permit him to leave, and meet Lamm at the site of his lumber plant at some distance.

Plaintiff put up the price of the plant and timber in conversing with Lamm at \$28,000. This was met by the future vendee, Lamm, with the usual answer, "The price is too high." He said that he thought \$20,000 was enough.

There is a difference between these two as witnesses.

Plaintiff said that Lamm stated that the property was not worth more than \$20,000, "if it was worth that," while Lamm's statement as a witness omits the words, and speaks of \$20,000 only, thereby creating the impression that he thought it was fully worth that sum.

The matter was left open when they agreed to leave Simsborough and return to Monroe to resume negotiations. No definite offer was made by the vendee until Tuesday, the 29th of the month.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiff testified that he had interested others in the endeavor to find a purchaser to whom he had promised a commission. He added that he feels bound to share whatever may be recovered in this suit with the other two agents. He and the agents (three) were to receive one-third each.

After the property had been looked over, as before stated, the future vendee said that he was disappointed in the timber, or something to that effect, although highly pleased with the sawmill and planing mill.

The statement of plaintiff, as a witness, is that defendant had informed him that he had from 5,000,000 to 6,000,000 feet of pine stumpage, and from 1,000,000 to 1,500,000 feet of oak and other hard wood trees. Defendant denied this part of the testimony. He is not as positive in his denial as he is in regard to other testimony of plaintiff.

Plaintiff and defendant disagree very much in regard to the conversation held between the two the day before the sale.

The account of plaintiff is that he told defendant that the prospective buyer was pleased with the plant, but not with the timber; while the defendant's statement is that he was imposed upon because plaintiff withheld information which he should have imparted to him.

It remains as a fact that, on the day before mentioned, plaintiff spoke to the defendant of his commission, and said to him that he would have to divide, and that the condition of the agreement under which he was acting with the defendant was such that he would not recover anything for his services if the place was not sold for over \$20,000, and that he preferred to seek another purchaser willing to pay a larger price. This was declined by defendant, who said that he would have nothing to do with plaintiff if the sale under discussion was not effected.

The plaintiff admitted that he did not report to defendant all the conversation he had with Lamm, the prospective buyer, about the amount discussed between him and Lamm; but he emphatically denied that any price was agreed upon, or that he had any reason to assume with any degree of certainty that the buyer would pay as much as the sum last above mentioned.

During the interview held the day before the sale, the defendant agreed to sell to Lamm for a minimum price of \$16,000. It was stipulated that plaintiff would have a right to all over and above that amount.

There was considerable disagreement between plaintiff and defendant about the guaranty clause in the deed in regard to the number of feet of timber that were to be transferred with the land.

The buyer insisted and said he would not think of buying unless the number of feet was guaranteed, and it is evident that there would have been no sale if the defendant had not consented to the guaranty clause regarding the number of feet of timber.

In accordance with the request of defendant, plaintiff, as notary public, prepared the deed of sale of the property for \$20,000 and in the deed inserted the guaranty clause of the number of feet of timber.

The parties appeared before the notary and signed this deed without the least objection; but shortly after having signed the defendant became dissatisfied. He evidently regretted that he had made the sale. He sought to cancel the deed in his possession, which had not yet been signed by the vendee. He was called upon a few days afterward for this deed. Upon reconsideration he signed in accordance with the original agreement, and the vendee also signed.

In his disgruntled condition he drew up a deed to be signed by the plaintiff, in which he sought to bind him to stand in his place and guarantee the number of feet of timber sold. His position was that the guaranty clause had been inserted in the deed on account of plaintiff, and that it was really an act for which he (plaintiff) was responsible, and in consequence he should sign the deed which he (defendant) offered to him to be signed.

This deed recited that plaintiff had given the guaranty about the 5,000,000 feet of timber without the consent of defendant; that he obligated the defendant to deposit as security for the guaranty the note of \$4,000, representing the purchase price.

Defendant declared in this deed that he had transferred to plaintiff this note for \$4,000 which the plaintiff received in full satisfaction of the commission of that amount stipulated to be paid by him to plaintiff for effecting the sale; and he further stated in the deed that it was to be a receipt for the commission to be paid by him, and that it would serve to enable the plaintiff to make good his guaranty. He further stated that the note was to continue on deposit as originally agreed upon.

The plaintiff refused to sign this agreement.

A copy of the agreement was offered in evidence and admitted without objection. It proves that after the sale the defendant admitted his indebtedness.

Having been admitted without objection, and both parties referring to it as a document in evidence and relying upon it, it has not the effect of a compromise. It is an admission of disputed facts.

From the foregoing it is manifest that defendant seeks to have it offered that, if plaintiff had correctly stated all the details of the conversation he had with the one who afterward became the vendee, he (defendant) would not have signed the deed of sale.

Defendant was dilatory in arriving at the conclusion just above stated. He allowed time to pass without formal protest or objection.

The gravamen of defendant's complaint is stated:

"He said to me that he could not sell it for the price that I put on it, and I had put the price of \$20,000 on it; his commission to be 3 per cent. As I have put that price on it, and he said he could not sell for the price I put on it, it looks as he intended me to get the impression that he would not sell for \$20,000."

The foregoing, taken with the evidence in the case, does not sustain defendant's contention of great wrong perpetrated on him. We infer that no sale would have been effected at all if defendant had not consented to the guaranty clause, so that plaintiff was right in the surmise that there would be no sale to the present vendee, unless the defendant changed his mind.

The principle of agency is invoked by the defendant, and the duty due by an agent to his principle to report every fact of any moment to his principal.

This is true; but we do not understand that in this instance the relations between the two were such that the plaintiff was obliged to state all the particulars of a conversation that he had with the one who became the buyer. Plaintiff was not defendant's agent except to find a purchaser. He was active in his endeavor in this respect. He interested others and proposed to them to divide with them the amount he would receive for services in effecting the sale.

A day or two before the sale, he realized that, if the property sold for the amount fixed in the first contract, his earnings in the deed would be small. He informed the defendant of that fact. Before informing him, he did not withhold the name of the buyer with whom he was negotiating. He discussed the question of price. Not only that, but he called on the defendant when this buyer came to Louisiana to look at the property to meet the buyer. He signed the deed of sale voluntarily.

If the defendant did not meet this buyer it is no fault of plaintiff.

We have not found that the plaintiff ever made misstatements to the defendant, or assumed to act fraudulently in order to carry his point. True, he did not communicate to the defendant the details of the conversation with Lamm, the vendee; nor did he import to him his impression as to whether or not this future buyer in question would buy. But no particular price had been mentioned with a view of closing the sale. There was no agreement at all made. Not the least had been said with a view of finally agreeing upon a price. There was no absolute certainty that the purchaser in question would buy. On the contrary, it was well understood that he would not buy unless the defendant guaranteed the number of feet of timber on the land. There had been nothing completed when they left Simsborough to meet in Monroe, and before they met in Monroe again the plaintiff called on the defendant and stated to him that he was not pleased with the

amount he was to receive if the transaction was completed, and it was then that the defendant deliberately proposed to the plaintiff to accept the net sum of \$16,000; a proposition which he confirmed by signing the deed of sale, and by calling on the plaintiff to sign an instrument of writing after the deed of sale had been signed, in which he again acknowledged his indebtedness to plaintiff, as before noted.

He would have these two instruments considered null and of no effect as between him and the plaintiff only because plaintiff neglected or did not choose to say to him that Lamm had spoken of \$20,000 as a possible value, this according to Lamm, or \$20,000 "even if that much," according to Furlow, the plaintiff.

Were we to give effect to defendant's theory of the case, it would give too much effect to the unimportant information to which the defendant would give so much importance.

Defendant did not seek further information than he received.

He should have declined to grant the request to increase the commission. He had it in his power to refuse to make any change.

Plaintiff's right to compensation was contingent upon his success. If the amount had been a flat rate of 3 per cent., it might have been different.

A positive amount creates a greater right in the owner to exact information. Where the fee is contingent, it is not passing strange that the agent to sell does not tell all, particularly if he is not questioned.

A contingent commission may be very convenient. It is not always the safest or the best way of doing business.

The defendant is the appellant; the plaintiff, the appellee. Both complain of the judgment; the former in the appeal, and the latter by motion here to amend.

We think the judgment does justice between the parties. Under its terms defendant receives \$16,000. The remainder remains as a guaranty of the shortage in measurement of timber and for the commission due.

The judgment is affirmed.

(124 La.)

No. 17,507.

HAMMAR v. J. B. & J. W. ATKINS.

(Supreme Court of Louisiana. Nov. 29, 1909.)

MALICIOUS PROSECUTION (§ 21\*)—DEFENSES—STATEMENT TO PROSECUTING OFFICER.

Where, in an action for damages for alleged malicious prosecution and false imprisonment, it appears that defendant had made a full and fair statement of the case to the prosecuting officer, and was guided by his instructions in making the affidavit upon which the prosecution complained of was based, there can be no recovery.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 40, 44; Dec. Dig. § 21.\*]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by G. F. Hammar against J. B. & J. W. Atkins. Judgment for defendant, and plaintiff appeals. Affirmed.

C. F. Mead and Looney & Scheen, for appellant. Hall & Jack, for appellee.

MONROE, J. This is a suit for damages for alleged malicious prosecution and false imprisonment, in which the defense is a general denial, coupled with the averment that defendant's action in the matter complained of was taken in good faith and upon the advice of the district attorney of the parish of Caddo, given by that officer after he had been fully informed of the facts. There was judgment in the district court in favor of defendant, and plaintiff has appealed. The facts, as they appear from the transcript, are as follows: On January 26, 1907, J. B. & W. S. Atkins & Co. (of which concern J. W. Atkins was, perhaps, also a member) made a contract with J. S. Connelly, whereby they agreed to furnish certain gas land leases, gas wells, municipal franchises, and contracts for gas, and Connelly agreed to build certain pipe lines and to furnish \$15,000 in money. The original contract was amended and modified, and it was understood that a corporation would be formed by which bonds would be issued, and that the parties who should advance money should receive the equivalent in bonds, together with stock of the company, in due proportion, as a bonus. Connelly sold a one-fourth interest in the contract to Geo. F. Hammar (plaintiff herein) in consideration of Hammar's furnishing the first \$10,000 required for the building of the pipe line, and it was stipulated that:

"For all funds provided and paid by Geo. F. Hammar, he shall have bonds, when issued, or other negotiable evidence of indebtedness, of like character as that given to J. S. Connelly and his associates."

Connelly also interested O. J. McLane in the enterprise, and McLane advanced between \$15,000 and \$20,000, which were invested in pipes. McLane, however, became dissatisfied and concluded to sell out, and Atkins, Connelly, and J. W. Jolly (who had, by that time, taken an interest) gave him their note for \$15,000 payable in 60 days and secured by (what purported to be) a pledge of the pipes which were on hand, the gas land leases, the wells, etc., in payment for his interest. There were some other agreements, the particulars of which need not be recited, and thereafter a corporation was organized under the name of "Louisiana Gas Company," with Connelly as president, J. B. Atkins as vice president, Hammar as secretary-treasurer, and J. W. Atkins, Jolly, and McLane (the latter having reacquired an interest) as members (with the others) of the board of directors, and provision was made for the issuance of \$100,000 of bonds in two series, payable, respectively, in 1908 and

1909. On August 14, 1907, before the bonds had been received from the engraver, the board of directors adopted a resolution reading as follows:

"Resolved that J. B. Atkins, vice president of this company, be hereby authorized to borrow a sum of money, not to exceed a total amount of \$25,000, on such terms and conditions as he may deem to be to the best interest of this company, and to surrender as security for the payment of the amount so borrowed, such securities of this company as may be necessary and to him may be deemed best."

There were present at the meeting: Connelly, president; Atkins, vice president; Hammar, secretary-treasurer; J. W. Atkins; J. W. Jolly; and O. J. McLane—and the resolution was seconded by Hammar and unanimously adopted. The bonds did not arrive until about August 17th, and \$15,000 of them were at once turned over to McLane, in satisfaction of the note held by him and the pledge by which it was secured, leaving \$85,000 (of bonds), which, under the resolution of August 14th, were placed under the control of the vice president, as securities of the company, to be used in borrowing money for its purposes. Considerable money had already been borrowed or negotiated for, on terms which required bonds as collateral security, largely in excess of the amounts obtained or to be obtained, so that, whilst the company was still sorely pressed for money, it had but few bonds at its disposal, and it would have had none had the different members of the company who were to receive bonds for their subscriptions demanded them. No such demand was made, however, at that time, and the vice president of the company, acting under the resolution of August 14th, and, as he testifies, upon an understanding between the parties interested that they were to allow the bonds to which they were entitled to remain in the treasury, in order to tide the company over its difficulties, assumed that such bonds as were not actually pledged for loans already obtained were available as security for further loans; but he appears to have been unsuccessful in his attempts to obtain money, in Shreveport, even with the bonds, and mentioning that fact, and the pressing need of the company, to Hammar, the latter suggested that, if \$10,000 of the bonds were turned over to him, he might be able to borrow some money on them elsewhere.

Atkins testified on that point as follows:

"I had exhausted all of my means to obtain additional money, and we were still in need of funds to construct the pipe line, and I talked to Hammar about the matter, and was very much worried; did not see how we could go any further without additional money; told him that the banks here refused to lend money on the bonds; nor could I find any individual who would give any additional money. Mr. Hammar then remarked, he says, 'If you will turn over to me \$10,000 of the bonds of the Louisiana Gas Company, I feel satisfied I can go to some city'—I think he said 'Iowa'—where he knew several banks and parties very well, and he felt satisfied he could raise \$5,000 in



cash to help us out of this trouble. We talked over the financial situation very fully, and I told him, if he could do that, it would relieve us very much, in the embarrassed circumstances we were under. We then went over to the First National Bank, and I got Mr. Byersdoffer to release \$10,000 worth of bonds of the Louisiana Gas Company, and we came back to the office."

Upon returning to the office of the gas company, the bonds thus obtained from the bank were delivered to Hammar, who gave a receipt for them, and he then returned to the bank and exchanged the bonds that he had received for others. The receipt given by him reads as follows:

"August 23, 1907.

"Received from the Louisiana Gas Company ten gold bonds, of the value of one thousand dollars (\$1,000) each, and numbered as follows: 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10. These bonds are to be used as collateral security to borrow money. Said money so borrowed is to be placed to the credit of the Louisiana Gas Company, with the First National Bank of Shreveport, La., for the purpose of being used for pay rolls, constructive work, or for other matters in the ordinary course of business. \* \* \* Exchanged above ten bonds with the First National Bank for bonds numbered 14-23, inc."

With regard to the exchange thus referred to, Atkins testifies that Hammar said that he wished to exchange the bonds that he had received for bonds bearing other numbers, and that, whilst he (Atkins) did not understand why, he made no objection. Hammar's explanation is that he had received from Connelly, the president of the company, an order for the \$10,000 of bonds coming to him under the contract agreeably to which he had subscribed, and paid \$10,000 to the company, and that the order called for bonds maturing December 1, 1909; whereas, the bonds that he had at first received were of a different series. Speaking of what took place at that time between him and Atkins, he says:

"The idea was this: I was going to Iowa, and I told them that I thought that I could raise some money on the bonds, so we went and got the bonds from Mr. Byersdoffer, and we got ten bonds—one to ten. Now, after we went over to the office, I told Mr. Atkins that I would go back and change the bonds, that I had an order for certain bonds, and that I would go and get those bonds and go to Iowa, and if I was successful in raising the money I would pledge them and I would take other bonds in place of them, and we exchanged them. When we came back to the office, Mr. Atkins says: 'Here is a receipt I want you to sign.' Not having the order in my pocket, I did not think it was wrong to give a receipt. Consequently I signed the receipt."

The order to which the witness refers reads as follows:

"Carthage, Mo., August 3, 1907.

"Louisiana Gas Co., Shreveport, La.—Dear Sir: When executed, and bonds have been certified by the Conqueror Trust Company, of Joplin, Mo., deliver to G. F. Hammar, or order, bonds of the Louisiana Gas Company, of the following maturity: Ten thousand dollars of the issue maturing December 1, 1909.

"Yours very truly,

"By J. S. Connelly, President.

"Attest: G. F. Hammar, Sec.-Treas."

Atkins denies that Hammar told him of the possession of any such order, when the bonds were delivered to him, or that he knew of its existence until some time afterwards, and neither Hammar nor Connelly nor any other witness undertakes to testify to the contrary, save (as stated above) that Hammar says that he spoke of his having an order as his reason for wishing to change the bonds. He did not have the order in his possession at that time, however (having, as he says, left it at his home in Kansas), and no one pretends that Atkins had ever seen it. After obtaining the bonds, Hammar went away, presumably, to borrow money on them for the company, and was gone for, say, two weeks, and when he came back he was asked by Atkins whether he had been successful, and he replied that he had not. Atkins then told him that he (Atkins) was negotiating with a gentleman in Shreveport for a loan of \$6,000, and asked where the bonds were, to which Hammar replied that he had them, or could get them in five minutes. When pressed to give them up, for the purposes of the proposed transaction, he said that he had left them in Iowa, pledged for \$1,500 that he had borrowed for his own account. He was then asked to allow the company to pay the \$1,500 and take back the bonds, which he declined to do; but, according to the testimony of Atkins, he gave that gentleman to understand that if, upon an examination of the Atkins' books, it was found that they had advanced to the company the money that they had agreed to advance, he would then lend his assistance. He does not say why, having agreed to use the bonds in order to borrow money for the company, he changed his mind and used them for his own purposes. His explanation of his signing the receipt is that he was in a hurry to catch a train and did not read it carefully. When he admitted that he had pledged the bonds for his own account, Atkins went to the office to examine the receipt that he had given, and found that it had disappeared, and that there had been substituted, in place of it, the order to which we have referred, and which, when found, bore the memorandum:

"Shreveport, La., August 28, 1909.

"Received bonds No. 14 to 23, inclusive, on account above order.

"[Signed] G. F. Hammar."

Whether plaintiff, who as "sec.-treas." of the company, had access to the safe where the receipt was kept, made the substitution himself, or whether it was done, at his request, by the stenographer, is a matter about which there is some conflict in the testimony, and it makes no difference. It is undisputed that, after the substitution was made, plaintiff destroyed the receipt, and Atkins testifies that he told him that he destroyed it because he had no business to sign it.

Plaintiff says that having furnished the order, as a receipt to the company, it was

not worth while to keep the receipt. Atkins also testifies that he never saw the order, or knew of its existence, until he found it in the safe, and that, the bonds having been intrusted to him by the company, he felt personally responsible in the matter and continued his efforts to induce Hammar to return them, but without success. He finally consulted a lawyer, and, having told him the facts, was advised that it looked like a case of embezzlement, but that he had better submit the matter to the district attorney, which he did, and that officer, after several interviews, and after having examined the various papers to which we have referred, instructed him to make an affidavit, which he did, charging Hammar with the embezzlement of the bonds. Thereupon, about December 18th, the sheriff, to whom a warrant for the arrest of Hammar had issued, telegraphed to the chief of police, at Parsons, Kan., where Hammar was then staying, requesting that the latter be held to await a requisition, and Hammar was arrested, charged with being a fugitive from justice, and, after spending the greater part of a night in arranging the matter, was released on bond, without having been incarcerated in prison. He employed counsel, who shortly, afterwards represented him before the Governor of Kansas in the matter of the requisition which had been granted by the Governor of Louisiana, and the Governor of Kansas declined to honor the requisition. Later still, say in January, 1908, the matter was taken up by the grand jury of Caddo parish, and an ignoramus was returned. This suit was instituted in April following.

No one denies that, under his contract, plaintiff was entitled to \$10,000 of the bonds of the gas company; but at the time that he told Atkins that, if the latter would let him have \$10,000 of the bonds, he thought he would be able to borrow money for the company on them, no particular bonds had been identified as subject to his claim. All the bonds (save the \$15,000 which had been delivered to McLane) were held as the property of the company, either by Atkins, the vice president, acting under the resolution of August 14th, or by creditors of the company, who held them as collateral security for debts due by the company, and plaintiff did not demand and did not receive the bonds which were delivered to him as bonds to which he was entitled by virtue of his contract or by virtue of the order which had been given him by Connelly, but received them as the result of his own suggestion, that, if the bonds were placed in his hands, he thought he would be able to use them for the benefit of the

company. He did not have Connelly's order in his possession at that time, and, of course, did not present it. Atkins denies that he mentioned it; but, whether he mentioned it or not, he signed a written instrument by which he acknowledged that he received ten bonds, not by virtue of such order, or of any right evidenced thereby, but, to quote the language of the receipt:

"To be used as collateral security, to borrow money. Said money so borrowed, to be placed to the credit of the Louisiana Gas Company with the First National Bank of Shreveport, Louisiana, for the purpose of being used for pay rolls, construction work, or for other matters in the ordinary course of business."

Counsel for plaintiff argue that Atkins misrepresented matters to the district attorney in saying that the bonds which were delivered to plaintiff were released by the First National Bank, to which they had been pledged to secure a loan, when, in point of fact, the bonds were delivered to plaintiff on August 23d, and the pledge was not made to the bank until August 30th. The president of the bank testifies that the bonds of the gas company were deposited in the bank for safe-keeping for some time prior to August 30th, and that upon that day the bank loaned the company \$10,000 and received in pledge \$51,000 of the bonds. He further testifies:

"That the loan had been contracted for ten days or two weeks, perhaps, before the money was actually paid over; \* \* \* that was brought about on account of an examination of the charter, contracts," etc.

And it is evident that the negotiations and contract for the loan were predicated upon the bonds then on deposit in the bank, or that were, unpledged, in the possession of the gas company. The material facts for the purposes of this case are: That the bonds belonged to the gas company, and not to the plaintiff; and, conceding that plaintiff was entitled to claim 10 of them, that the 10 delivered to him were not so delivered because, or in satisfaction, of such claim, but were delivered to him as the bonds of the company, to be used for its, and not his, purposes. From the testimony of the defendants, corroborated by that of the district attorney, it appears to us that they made to that officer a full and fair statement of the case, and we are of opinion that, having so done, they were justified in obeying his instructions, and cannot now be held liable for the consequences. *Sandoz v. Veazie*, 106 La. 202, 30 South. 767; *Kirk v. Wiener-Loeb Laundry Co.*, 120 La. 830, 45 South. 738.

The judgment appealed from is, accordingly, affirmed.

(124 La.)

No. 17,468.

**LASTRAPES et al. v. COLORADO SOUTHERN, N. O. & P. R. CO.**

(Supreme Court of Louisiana. Nov. 29, 1909.)

**RAILROADS (§ 114\*)—CONSTRUCTION OF RAILROAD—INJURIES—ACTION FOR DAMAGES.**

Plaintiffs, the owners of property abutting upon the street of a city through which a railroad company had constructed its tracks, sue that company for damages to their property by the construction of the road. The district court rendered judgment in favor of the plaintiffs, and from that judgment the defendant company appeals. The judgment appealed from is held to be correct under the evidence adduced, and it is affirmed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 369; Dec. Dig. § 114.\*]

Monroe, J., dissenting.

(Syllabus by the Court.)

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; Edward T. Lewis, Judge.

Action by the Widow Victor Lastrapes and others against the Colorado Southern, New Orleans & Pacific Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Saunders, Dufour & Dufour, Dudley L. Guilbeau, and Henry Mooney, for appellant. Lewis & Lewis, for appellees.

**Statement of the Case.**

NICHOLLS, J. Plaintiffs alleged: That they owned in indivision in the proportion of one half to the said Widow Lastrapes and the other half to petitioners, Joseph Felix Lastrapes and Joseph Edward Lastrapes, two lots of ground together with the buildings and improvements thereon, in the city of Opelousas, both of said lots fronting on Main street and Union street, and also fronting on Cheney street; 175 feet being the entire depth of both of the squares upon which they are situated. That one of said lots having a front of 127 feet on Main and Union streets contains the blacksmith shop and the family residence, now occupied by petitioner, Widow Victor Lastrapes, and which had been occupied by her with her said deceased husband and family for near 50 years, the said blacksmith shop being the building in which the blacksmithing and horseshoeing business was conducted by the deceased, Victor Lastrapes, and in which petitioner Joseph Felix Lastrapes now carried on the same business; the period for which the father and son had conducted said business in said building being more than 40 years. That the other lot of ground owned by them is located on the opposite side of Cheney street, and had a front of 120 feet on Main and Union streets, and had located upon it the store building and residence occupied by petitioner Joseph Felix Lastrapes.

That the Colorado Southern, New Orleans & Pacific Railway Company had taken exclusive possession of Cheney street, which separated their two properties, and had constructed thereon a railroad through the city of Opelousas, upon which the said company was now operating its construction trains, and upon which it would at an early date be operating its passenger and freight trains, their tracks on said street being a portion of the said company's great transcontinental trunk line to New Orleans. That Cheney street before the said railway company took possession of it had been a public street and thoroughfare of the city long used by and necessary to the public, and especially to the property owners and residents residing on said street, including your petitioners.

That while the construction of said company's railroad on said street and the operation of trains thereon had greatly damaged them as would hereafter be set forth in detail, and would continue to damage them for an indefinite period, the taking possession of said street by the railway company was done in violation of law, and in contravention, not only of petitioner's legal rights, but also those of the public, and especially of persons residing on or owning property on said street, for the following reasons, namely:

First. That the ordinance adopted by the board of aldermen of the city of Opelousas January 27, 1906, granting said company the right of way on said street, was illegal, and in contravention of the provisions of Act No. 79, p. 113, of 1896, entitled "An act to authorize cities and towns of this state of less than 25,000 inhabitants to grant to railroads and other corporations subject to conditions, the right to occupy and use the streets and alleys therein," etc., and which provides that such franchises may be granted by such town or cities, provided that prior to such grant a majority of the property taxpayers in said city or town voting at an election to be called for such purpose shall approve said proposed grant. They show that Opelousas is a city of less than 25,000 inhabitants, and no election was held therein for the purpose of authorizing the grant of said franchise as required by the act of the Legislature above referred to.

Second. That Cheney street has a width of only 40 feet, and the construction and operation of a railroad over and upon it necessarily involved the destruction of the use of said street as a passway, not only to the residents and property owners thereon, but to the public, as the said railroad company must have known, in asking for the grant of said franchise, and as the board of aldermen of said city must also have known when enacting said ordinance, and, even if the board of aldermen had authority to grant a right of way over and along the public streets of the city of Opelousas, including Cheney street,

without obtaining the approval of a majority of the voters of the city at an election held for that purpose, the said board had no legal right or authority to grant a right of way over said street without at the same time providing for the preservation of said street as a thoroughfare, and the said railway had no right to take possession of said street in such a manner as to preclude the use of the same to the public as a passway.

That the said railroad company had by its illegal acts set forth above made itself liable to petitioners, not only for the actual damages inflicted upon them in the deterioration of the rental and salable value of their properties, but also for such consequential damages as they have suffered, and may hereafter suffer, from the construction and operation of said railroad on Cheney street, and also for punitive damages. That the dwelling house and store property occupied by petitioner Joseph Felix Lastrapes, as also the dwelling house occupied by petitioner Widow Victor Lastrapes, were so near to the defendant company's railroad track that the continuous ringing of bells, blowing of whistles, and the noise incident to escaping steam and the clatter of car wheels together with the shaking and trembling of the ground, incident to the frequency of passage to and fro of heavy trains, and the danger of fire from sparks emitted by the locomotive engines, and the nuisance of smoke and cinders and the deprivation of the use of Cheney street as a thoroughfare, had had the effect of so lessening and damaging the value of petitioner's property as to render the same practically valueless for rental or for sale.

That, in addition to the damage done to their other property, they had suffered special damage to their blacksmith shop and the conduct of the blacksmithing and horseshoeing business in their blacksmith shop, and had established a reputation throughout the town and country for expert work in that line, which had been a source of much profit to them, but which had already been greatly impaired by reason of the fact that the animals being shod in the shop take fright at the sight and noise of passing trains, a branch of the blacksmithing business which would have to be abandoned entirely when the defendant company established on its line regular passenger and freight service which would take place in the near future. That they had suffered an actual loss and damage to their property of at least \$6,000 in the diminution of its rental and salable value caused by the defendant company as aforesaid, which it should be compelled to pay them, together with punitive damages in the sum of \$250.

They prayed that the defendant and the city of Opelousas be cited and that they recover against the said railroad company active and exemplary damages in the sum of \$6,250.

Plaintiffs filed an amended petition, in

which they alleged that in their original petition they claimed as actual damages the sum of \$6,000, and which they now apportion as follows:

(1) The lot north of defendant company's railway, together with the buildings and improvements thereon, the sum of \$2,000.

(2) To the lot of ground south of the defendant company's railway, and upon which the family residence and other improvements are situated, the sum of \$3,000.

(3) To the blacksmith stand and business the sum of \$1,000.

They prayed as in their original petition that this amendment be duly served and allowed.

Defendant, after filing an exception of vagueness and insufficiency of allegations to permit of its defending itself intelligently, answered. After pleading the general issue, it averred: That by ordinance adopted by the board of aldermen of the city of Opelousas, La., on January 26, 1906, it was granted the right to lay its main track in the center of Cheney street. That the board of aldermen aforesaid had full authority under the charter of said city, being Act No. 136, p. 224, of 1898, to grant this right, and no such procedure as the submission of the question to a vote of the people was at all necessary. That its roadbed was carefully constructed on this street. That the same was ballasted with sand, entirely covering the cross-ties and on a practical level with the rails of its railroad. That the public passed and repassed along that portion of Cheney street touching the property of plaintiffs with perfect ease and safety. That its railroad was a lawful structure constructed in a lawful manner, and its trains were operated with due care and prudence, and that, if plaintiffs suffered any inconveniences, they were such as were not recoverable in damages under the law.

In view of the premises, respondent company prayed that the demands of plaintiffs be rejected, and their suit dismissed, with costs and for general relief.

The district court rendered judgment in favor of the plaintiff for \$1,357 as actual damages, and rejected their demand for exemplary damages.

Defendant has appealed.

#### Opinion.

In rendering judgment the district judge declared: That the testimony in the case was very conflicting as to the value of the properties before the construction of the road, its value since, and the amount of damage done to the property. That the defendant offered to purchase the property in advance at what appeared to have been a fair price, but made no tender of the amount, nor of the damages. That the court did not consider such an offer as extinguishing or affecting the plaintiffs' claim for damages. That it appeared that the defendant

desired to obtain the property for depot or terminal purposes, but did not institute an expropriation suit to condemn it. That, even had it instituted such a proceeding, the only effect of a tender in advance to the owner would have been to release it from liability for costs, and not from liability for damages. That the constitutional provision was positive and unequivocal, requiring that, in case private property be damaged for purposes, adequate and just compensation must be made to the owner for the damages. That he did not therefore attach any weight to the defendant company's offer to purchase the property as affecting the plaintiffs' damages. Neither did he attach weight to the testimony of J. T. Stuart and Louis Rogers, who stated upon the witness stand what they were willing to give for the property since the construction of the roadbed. Neither of them made any offer to purchase the property, and they were in no manner bound by it at the price stated by them, even if the plaintiffs had offered to sell. That it was well settled that such testimony was valueless in cases of this kind. That the court knew of no method of reconciling the conflict in the testimony as to the damages except by following the rule approved of by the Supreme Court of striking an average between the estimates of the witnesses on both sides.

That the aggregate value of the properties by the witnesses before the construction of the roadbed was the sum of \$4,400. Dividing this aggregate by the number of witnesses, there was an average valuation of the property before the construction of the road of \$6,285. The aggregate valuation of the property since the construction of the road as given by the witnesses was \$34,570, which, divided by the number of witnesses, gave an aggregate valuation after the construction of the roadbed of \$4,938. Subtracting the present average of value of the property as found by the witnesses from the former value as found by them gave as the amount of damages suffered by the plaintiffs the sum of \$1,217. The judge said that in making this estimate he had discarded entirely the testimony of the plaintiffs themselves, and taken only the testimony of the disinterested witnesses.

The district judge is in error in stating that this court has approved and recognized as the proper rule for establishing damages the method adopted by him. We have, on the contrary, declared that method was faulty. We simply declared that, in some particular case where that method for reaching a conclusion as to damages had been resorted to, the conclusion so reached might be found a correct conclusion by this court, applying to the evidence in that case correct rules as the weight and probative force of that evidence.

The testimony shows after the defendant company had established its line of road and had built its tracks on Cheney street,

but had not, as yet, definitely fixed upon the property on which it was to build a depot, Mr. Guilbeau, the attorney of the company, seeking to ascertain from the plaintiffs at what price this property on the south side of Cheney street could be purchased for that purpose, expressed a willingness, and perhaps an offer, to purchase it from them for \$7,000. The plaintiffs declined to sell at all, and thereupon the company proceeded to negotiate for and purchased other property in the vicinity for that purpose.

The company subsequently built its passenger depot on property so afterwards purchased. It is described as a handsome building with proper approaches. We think it is shown that the building of this depot improved, so far as appearances were concerned, the surroundings of plaintiffs' property. It did not follow, however, from that fact that the construction by defendant of its tracks and roadbed thrown along Cheney street in front of plaintiffs' property did not injuriously affect its value. The plaintiffs were under no obligation to sell their property conventionally to the defendant company. They were not called on to disclose the reason why they declined to do so. Sentimental reasons resulting from home associations or unwillingness to sell by reason of the property being of special value to them for the prosecution of the business in which they were engaged warranted them in refusing to deal conventionally with the company. If circumstances were such as to entitle the company to force a transfer to it from considerations of the public welfare and good, it should have had recourse to expropriation proceedings wherein the rights and obligations of parties would have been tested by and fixed under the rules applicable to that proceeding. The company did not do so, but supplied itself independently of the plaintiff with everything it needed to have for the public service. The course followed by the defendant left as its resulting situation the plaintiffs in this case as continuing owners of their property with the undoubted constitutional right of demanding adequate and just compensation for damage done to their property from its having been damaged for public purposes. The rights and obligations of the parties have to be tested from that existing situation of affairs and no other.

The sole question before the court, therefore, is whether plaintiffs' property has been "damaged for public purposes" (Const. art. 167), and, if it has, what is that just and adequate compensation.

We have given close examination to the testimony adduced and brought our own judgment to bear upon it. Plaintiffs' property on the south side of Cheney street prior to the construction of defendant's tracks and line on that street had attached to it, as factors giving it value, the first that it was a comfortable home with a fairly

good house upon it with fences, trees, and other accessories. It had also attached to it, as giving it value, the fact that it was and had been for many years a location specially suitable for carrying on the business of blacksmithing and horseshoeing. Those elements or factors contributing to value have been shown by the testimony to have been practically withdrawn for residential purposes and greatly impaired for the purposes for which up to the time when the road was built it had been profitably employed. Defendant's witnesses themselves admit that neither property is any longer desirable for residential purposes, and we are satisfied that the property has lost largely the benefit of being advantageously employed for at least one remunerative branch of business. We are thus shown good grounds for maintaining plaintiffs' claim that their properties had been damaged by the construction of the road. We are satisfied that, in lieu of these lost factors which gave value to plaintiffs' properties, defendant has not shown the substitution in their place of other factors giving value to the properties. The defendant company, after having supplied itself with all the properties deemed necessary by it for the proper operation of its road for the public benefit, has withdrawn from the market as a probable purchaser, and need not be considered as any longer a factor in determining value. We attach no great weight to the testimony of Rogers and Stuart. The estimates of value which they reached were from a speculative view and from special conditions expected to arise from defendant's needs in the future which the record does not show have in fact been realized. They admit their ability to purchase and their willingness to purchase on speculation, but they have failed to show by their actions that they have any confidence in investments to be made on the line of defendant's properties. No one, it would seem, has shown any disposition since the construction of defendant's road to purchase property on Cheney street along the line of defendant's tracks, though the road had been in operation for more than a year. We are satisfied that Stuart and Rogers and Lawler as witnesses are at fault when they declare that plaintiffs' properties have enhanced in value by the construction of defendant's line of road. We do not think that there is any basis for Lawler's assertion that plaintiffs' properties have gained any advantage over other properties in the vicinity by the construction of the road. We think that there has been a diminution in value, and the only question to be solved is the extent of the diminution.

We think that the estimates of Boagni and of Estorges of the value of plaintiffs' properties before the building of the road are too high. Boagni evidently had in view

in forming his estimate the prices given by the defendant company itself to different parties in acquiring the ownership of properties for depot and switching purposes. We do not think that estimates formed from those facts are accurate and furnish a general standard of value. Lawler's estimates are probably too low. His estimate of the value of plaintiffs' properties since the construction of defendant's road is evidently an optimistic view of what may happen in the future, not of what has happened. We think that witnesses testifying to the values of land furnish to courts more reliable information on that subject when they testify as to what they know to be the consensus of opinion of the people of the community in which they are situated as to the price which the general public would be reasonably expected to offer to acquire the ownership of particular property in view of the advantages and disadvantages of owning that property, than when they testify to their individual opinion of values. The conclusion reached by us after careful consideration of the evidence is that the judgment appealed from is correct, and it is hereby affirmed.

MONROE, J., dissents.

(124 La.)

No. 17,798.

STATE v. PRICE et al.

(Supreme Court of Louisiana. Nov. 15, 1909.  
Rehearing Denied Dec. 13, 1909.)

1. CRIMINAL LAW (§ 1020\*)—APPELLATE JURISDICTION—"FINE ACTUALLY IMPOSED."

Costs follow sentence, but are no part of the "fine actually imposed," within Const. art. 85, limiting the criminal jurisdiction of the Supreme Court where a fine is actually imposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2578-2580; Dec. Dig. § 1020.\*]

2. CRIMINAL LAW (§ 1020\*)—APPELLATE JURISDICTION — LIMITATION BY AMOUNT OF FINE—"FINE."

The word "fine" in its ordinary acceptation has the distinct meaning of a pecuniary penalty, and has that restricted meaning in Const. art. 85, limiting the jurisdiction of the Supreme Court in cases where a fine is imposed, and hence the forfeiture of the right to conduct a barroom, pursuant to section 7 of the Gay-Shattuck law (Act No. 176, p. 239, of 1908), imposed in addition to the fine prescribed by section 6 for its violation, forms no part of such fine, the amount of which determines jurisdiction of an appeal in a prosecution thereunder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2578-2580; Dec. Dig. § 1020.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2810-2813.]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Neill, Judge.

Frank and Fielden Price were convicted and fined for violating the law in relation

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the sale of intoxicating liquors, and they appeal. Appeal dismissed.

See, also, 50 South. 647.

D. Caffery, Jr., James R. Parkerson, and Emmet Alpha, for appellants. Walter Guion, Atty. Gen., and T. M. Milling, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

**PROVOSTY, J.** The state has moved to dismiss the appeal on the ground that this court has no jurisdiction of the case. The jurisdiction of this court in criminal cases is limited to cases where "the punishment of death or imprisonment at hard labor may be inflicted, or a fine exceeding \$300, or imprisonment exceeding six months, is actually imposed." Const. art. 85. The sentence condemns each of the two defendants to pay a fine of \$150 and the costs of court, and adds the following:

"That the defendants Frank and Fielden Price be and they are each permanently deprived hereafter of the privilege of conducting a barroom."

The defendants contend that, under the statute upon which the indictment against them is founded, a firm or corporation conducting a barroom may be prosecuted as well as may an individual carrying on the like business, and that the indictment against them is against their firm and not against them individually; and that, such being the case, the said two fines of \$150 imposed upon them as individuals must be reckoned as one fine of \$300 imposed upon the firm, and that, since the costs and the penalty of permanent deprivation of the right to engage in the business of keeping a barroom must be considered as included in, or added to, this \$300 fine, the case is one where a fine exceeding \$300 has been imposed, and of which, in consequence, this court has jurisdiction.

The statute upon which the indictment is founded is Act No. 176, p. 236, of 1908, popularly known as the "Gay-Shattuck Law." It is entitled "An act to regulate and license the business of conducting a barroom, coffee house, cabaret," etc. (naming every possible place where intoxicating beverages may be kept for the accommodation of the public to be drunk on the premises). Section 6 of the act provides that:

"It shall be unlawful for any person, firm, or corporation, conducting a barroom, coffee house, cabaret," etc. [enumerating the various drinking places] "to sell or permit to be sold or give or permit to be given, any intoxicating liquors to women or minors"; and that "any person violating any of the provisions of this section shall \* \* \* be fined in a sum not less than \$50 nor more than \$500, or imprisonment," etc.

It is noteworthy that, while this section makes it unlawful for a firm or corporation to violate the act, it makes no provision for the imposition of a penalty upon a firm or corporation, unless a firm or corporation can come under the designation of the term "any

person." Section 7 of the act provides that "any person, firm or corporation" violating the act "shall in addition to the punishment prescribed by section 6 of this act be permanently deprived thereafter of the privilege of conducting a barroom, coffee house, cabaret," etc. (naming all the various kinds of drinking places); "and the revocation of said privilege shall be declared by the court having jurisdiction to impose the penalty fixed by section 6 of this act."

The indictment against the two defendants contains three counts, charging three separate offenses. As the three counts are precisely alike in verbiage, saving alone in the name of the offense charged, we need reproduce here only one of them. It reads:

"That Frank Price and Fielden Price, being the proprietors of a place where intoxicating liquors are sold in the parish of St. Mary, state of Louisiana, said business being regularly licensed under the laws of the state of Louisiana, on the second day of April, A. D. nineteen hundred and nine, did unlawfully and willfully give or permit to be given intoxicating liquors, to wit, beer, to a woman, to wit, Mrs. Earnest Frumenthal, on the premises where said intoxicating liquors are sold."

It is not easy to say whether the defendants are right or wrong in their contention that this indictment is against them as a firm and not as individuals. But, granting, argumenti gratia, that they are right, and that the two fines must be cumulated, still, the case would not come within the jurisdiction of this court, since costs and the forfeiture of the right to conduct a barroom forms no part of the fine, though forming part of the penalty. Costs follow sentence; but are no part of the "fine actually imposed." *State v. Belle*, 92 Iowa, 258, 60 N. W. 525; *Appeal of Luzerne County*, 135 Pa. 468, 19 Atl. 1063. If costs constituted a part of the fine, the court in every case would have to take them into account in imposing either the minimum or the maximum fine authorized to be imposed. Such has never been the practice or the understanding. In like manner the forfeiture in question is no part of the fine, since the word "fine" in its ordinary acceptation has the distinct meaning of a pecuniary penalty. 19 Cyc. 544; 13 A. & E. E. 53. It has that restricted meaning as here used in the Constitution. Otherwise it would be synonymous with "penalty" or "punishment"; and the situation would be that the jurisdiction of this court, instead of being sharply delimited, as is done by the use of the word "fine" in its ordinary meaning of a pecuniary penalty, would depend upon what was the money value of the penalty. In the case at bar, for instance, the right of the defendants to keep a barroom being of greater value than \$300, this court would have jurisdiction even though no fine at all had been imposed. In certain connections the word "fine" has been held to be synonymous with "penalty" (*State v. McConnell*, 70 N. H. 158, 46 At.

458; *Hanscomb v. Russell*, 77 Mass. 373), but by decisions too numerous to need to be specially referred to it has been confined to its ordinary meaning; and we think it must be so confined in this case. The framers of the Constitution weighed well their words in prescribing the limits of the jurisdiction of this court. It cannot be supposed that they would have used the restrictive word "fine" if they had meant to express the idea conveyed by the broad word "penalty," or by the still broader word "punishment."

Appeal dismissed.

(124 La.)

No. 17,580.

**TATUM v. ROCK ISLAND, A. & L. R. CO.**  
(Supreme Court of Louisiana. Nov. 29, 1909.)

**RAILROADS (§§ 381, 387\*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.**

It is negligence per se for a traveler to attempt to cross a railroad track a few feet in front of an advancing train, when warned of its approach, and when, by the exercise of the least degree of ordinary care, the imminent danger of the situation could have been discovered. In such a case, the negligence of the party injured, being the proximate cause of the accident, may be urged as a defense by the railroad company, although itself guilty of negligence contributing remotely to the happening of the accident.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1293, 1296, 1314-1316; Dec. Dig. §§ 381, 387.\*]

(Syllabus by the Court.)

Appeal from Fourth Judicial District Court, Parish of Union; R. B. Hawkins, Judge.

Action by R. M. Tatum, tutor, against the Rock Island, Arkansas & Louisiana Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and suit dismissed.

Thos. S. Buzbee and Barksdale & Barksdale, for appellant. Frederick F. Preaus and Clifton Mathews, for appellee.

LAND, J. Plaintiff, representing his minor son, sued the defendants for \$20,000 damages for personal injuries sustained by the minor's mother, and for her resulting death, caused by the alleged negligence of the defendants in the operation of one of their freight trains.

There was judgment in favor of the plaintiff for \$2,000 against the Chicago, Rock Island & Pacific Railway Company, and there was judgment in favor of the Rock Island, Arkansas & Louisiana Railroad Company rejecting plaintiff's demand as against said corporation.

The Rock Island & Pacific Railway Company (hereinafter referred to as the defendant) has appealed, and the plaintiff has joined in the appeal by answer, and prayed for

an amendment of the judgment by increasing the amount to the sum claimed in the petition.

Mrs. Martha J. Tatum, wife of R. M. Tatum, and the mother of the minor, Henry G. Tatum, was on January 18, 1908, struck by a freight locomotive of the defendant company, and mortally wounded. She died on January 31, 1908. The accident happened at the station of Lillie about 6:15 p. m., and as Mrs. Tatum was attempting to cross the track immediately in front of the locomotive.

It is charged, and admitted, that the said locomotive had no headlight burning when it passed the station.

It is further charged that defendant was negligent in not sounding either the whistle or bell as the train approached said crossing, and in not stopping or slackening its speed while passing through said town.

The defense is a denial of the alleged charges of negligence and a plea of contributory negligence.

Lillie is a small station on the defendant railroad. It is not an incorporated town or village. The railroad depot, a few stores, houses, and other buildings are situated on the west side of the defendant's track. The only structures on the east side are a cotton seed warehouse, and a boarding house kept by one Mrs. Buckley. A trail or pathway about 25 paces long led from Mrs. Buckley's to the switch track at a point some 75 yards south of the depot. Thence pedestrians used one of the tracks or the space between them in going to the station house.

In the afternoon of January 18, 1908, Mr. and Mrs. R. M. Tatum and their daughter-in-law, Mrs. P. A. Tatum, came to Lillie for the purpose of taking the north-bound passenger train. On being told that the train was reported as 40 minutes late, the three went over to Mrs. Buckley's to get supper. There they remained about one hour. Immediately after the party had finished supper, the whistle of an approaching train was heard. Some one at the table remarked that it was the passenger train, but another said it was a freight train. The Tatums hurried out of the house, and along the path towards the tracks. Mrs. P. A. Tatum led, followed by Mrs. R. M. Tatum, and her husband brought up the rear. On reaching the switch track, Mrs. P. A. Tatum, seeing that it was a freight train without a headlight, stopped, and turning around, saw her mother-in-law running about 40 feet behind. Mrs. P. A. Tatum testified in part as follows:

"She was running, and I told her that it was no use to try to get across; that it was a freight. I thought she stopped, but she did not hear me, and I supposed she stopped. She passed right back of me. Uncle Dick (Mr. R. M. Tatum) was behind her, and I turned around and told him that it was a freight; that there was no use to try to cross. My back was to her. \* \* \* I thought she heard what I said. "Q. She was really going across the track

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



before you knew she was going to try to cross, was she not?

"A. Yes, sir.

"Q. She was running directly across the track, was she not?

"A. Well, she was running pretty fast, and I don't know whether she was going directly across or not. She was crossing the track when I saw her.

"Q. The last you saw of her before she crossed was she not jumping on the track, or jumping across the track, with her skirts lifted or gathered up, in the act of jumping?

"A. Yes, sir; she was in the act of making a leap.

"Q. Did you see her when she ran across the first track?

"A. No, sir; I did not see till she got on this track that the train was on.

"Q. She was on the first track when you turned around to speak to Mr. Tatum?

"A. Yes, sir."

Mr. R. M. Tatum heard the whistle, and, when he reached Mrs. Buckley's gate, saw the lights on the rear end of the train, but supposed that they were on the locomotive, and that his party would have "plenty of time to get ahead of the train and get to the depot." Mr. Tatum intended to go to the tracks, and thence up to the tracks to the station house. When Mr. Tatum reached the first track, he saw a freight train passing. When the train passed, his daughter-in-law crossed and found Mrs. Tatum lying on her back. Mr. Tatum testified that his wife was the first to leave the boarding house, and it does not appear from his evidence that he saw her afterwards until she was found lying on the ground beyond the main track. When he first saw the lights on the train, he supposed that they were 75 or 100 yards away and he had plenty of time to cross the track. Supposing that the lights were on the locomotive of a passenger train, Mr. Tatum and his party undertook to reach and cross the track before the train arrived at a point opposite the path they were traveling. Mrs. P. A. Tatum realized her mistake in time to save herself and Mr. Tatum. But unfortunately Mrs. R. M. Tatum did not hear or heed the warning given by her daughter-in-law, and, without stopping or looking, attempted to rush across the track immediately in front of the locomotive.

Mr. Tatum and Mrs. P. A. Tatum heard the train, and saw it before they reached the edge of the railroad cut. They must have perceived that the approaching train had no headlight burning. They supposed, without any good reasons, that the colored lights on the rear end of the caboose were on the locomotive. As passenger coaches are lighted at night, the absence of such customary lights should have warned them that it was a freight train. A number of witnesses who had the same opportunity of observation perceived without difficulty that a freight train was approaching. They saw the box cars. It is therefore a fair inference that the Tatum party paid little or no attention to the in-coming train.

Mr. Williams, a witness for the plaintiff,

saw the Tatum party approach the track, and one of them run from the side track on to the main track and try to cross ahead of the train.

Mrs. Buckley, when the whistle sounded, remarked that it was the passenger train, but, on going out on the front porch, saw at once the box cars and the men in the cab.

Mrs. Buckley testified that Mr. Tatum and Mrs. P. A. Tatum were at the gate when Mrs. R. M. Tatum said, "Dick and Cad are going to leave me," and that, on being told that they were at the gate waiting for her, she ran out of the gate, and kept running as long as the witnesses could see her.

Mrs. Lee was at Mrs. Buckley's on the occasion in question. On hearing the whistle, she remarked that it was a freight train, and, on going to the porch as the Tatums were leaving, she saw the box cars and locomotive. She saw Mr. Tatum and Mrs. P. A. Tatum at the gate and heard Mrs. R. M. Tatum say, "Dick and Cad have left me," and saw the party leave, and go towards the tracks.

The engineer and brakeman testified that they were running an extra freight on the schedule of the belated passenger train; that the electric headlight had gone out, and they had neither the tools nor the time to repair the appliances; that on approaching the station of Lillie the whistle was sounded and the bell rung while passing through; that the usual danger lights were on the rear end of the caboose, and two white lights on the locomotive; that the brakeman was performing the duties of the fireman, who at the time was feeding the furnace; and that the trainmen did not see the Tatum party, and knew nothing of the accident at the time.

Plaintiff's case, as disclosed by the allegations of the petition, is not supported by the evidence. The deceased did not, as alleged, stop, look, and listen before attempting to cross the main track of the railroad. The train, instead of being apparently several hundred yards distant, as alleged, was within a few feet of the deceased, when she attempted to jump across the track. If she had looked, she would have seen the train. If she had listened, she would have heard the noise made by the locomotive and the cars. The truth seems to be that the deceased left Mrs. Buckley's obsessed with the fear of being left, and that she commenced running and continued to run until she was struck by the locomotive. She seemed to be oblivious of her surroundings, and did not exercise her faculties of sight and hearing, although she knew that a train had whistled for the station, and was approaching the crossing. The deceased was not blind or deaf. The most that can be said is that her faculties originally normal had been impaired by age. The deceased was out of all danger of contact with the approaching train, and could have avoided the injury by the ex-

ercise of the least degree of ordinary care. Her negligence was the proximate cause of the accident, and bars recovery, although the defendant may have been guilty of antecedent or concurrent negligence.

We make the following extract from a standard work on the subject of negligence:

"1666. Traveller thrusting himself in front of an advancing engine or train—

"Where the case of the traveller's contributory negligence in this situation is clear as a matter of law, the railroad company may urge this as a defense although itself violating a statutory regulation at the time of the accident."

See Thompson's Commentaries, etc.; White Supplement of 1907. See, also, *Heebe v. N. O. & C. R. R. Light & Power Co.*, 110 La. 970, 35 South. 251, and *Dleck v. N. O. City & Lake R. R. Co.*, 51 La. Ann. 262, 25 South. 71.

As the deceased could have avoided the accident by the exercise of the least degree of ordinary care, it is useless to inquire into the particular acts of negligence charged against the defendant, as none of them, if established, would affect the result.

The case, we think, is clearly with the defendant on the law and the facts.

It is therefore ordered that the judgment below be reversed, and it is now ordered that plaintiff's suit be dismissed, with costs in both courts.

(124 La.)

No. 17,542.

**HINTON v. ROANE, Constable, et al.**

(Supreme Court of Louisiana. Nov. 29, 1909.)

**1. TIME (§ 4\*)—"CURRENT YEAR"—CROPS—EXEMPTIONS.**

The words "current year" in Code Prac. art. 645, exempting from seizure upon execution, apart from the land, corn, provisions, and other supplies necessary for running the plantation to which they are attached for the current year, means from harvest to harvest, and not a calendar year.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 4; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1795, 1796.]

**2. EXEMPTIONS (§ 37\*)—PROPERTY SUBJECT—CROPS—CROPS IN GROUND.**

Code Prac. art. 645, exempting from seizure upon execution, apart from the land, corn, hay, etc., necessary to run the plantation to which they are attached for the current year, exempts the crop while it still hangs by the roots.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 37.\*]

**3. EXEMPTIONS (§ 37\*)—PROPERTY EXEMPT—CROPS—"ON THE FARM."**

The judgment debtor and his family lived on land belonging to his wife and her coheirs in indivision, and his sons cultivated the land under an agreement by which they received the surplus of the cotton after the supplies were paid for, and plaintiff received the other products for the support of the family. *Held*, that corn, hay, and cane raised on the land belonged to the debtor and were "on the farm" within the law, so as to exempt from seizure upon execution;

the law not requiring that the farm belong to the person claiming the exemption.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 37.\*]

**4. EXEMPTIONS (§ 37\*)—EXECUTION.**

Code Prac. art. 645, providing that the sheriff shall not seize corn, provisions, and other supplies necessary for running the plantation, merely prohibits seizure of the articles named therein separate from the land, so that sugar cane, raised to be converted into syrup for family use, may be seized upon execution.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 37.\*]

**5. EXEMPTIONS (§ 76\*)—PROPERTY SUBJECT—JUDGMENT—EFFECT OF PRIVILEGE.**

The fact that the judgment creditor had a privilege on property sought to be seized under execution, because the debts for which the judgment was rendered were for necessary supplies, would not entitle him to seize upon execution property of the debtor which was exempt.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 76.\*]

**6. JUDGMENT (§ 948\*)—PLEADING—NECESSITY.**

An estoppel by judgment must be specially pleaded in order to be available.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787-1794; Dec. Dig. § 948.\*]

Appeal from Fourth Judicial District Court, Parish of Lincoln; A. B. Dawkins, Judge.

Suit by L. W. Hinton against J. S. Roane, constable, and others. From a judgment in part for plaintiff, defendants appealed, and plaintiff joined therein. Affirmed, as modified.

Clayton, Hawthorn & Atkinson, for appellants. Barksdale & Barksdale, for appellee.

**PROVOSTY, J.** In November of last year the plaintiff and his two sons went on a wagon trip to Oklahoma. They set out before day, or during the night, as farmers often do when they wish to make an early start. Their creditors, erroneously supposing that they had left the state permanently, sued out attachments against them, and seized their crops standing in the field. They returned in time for the trial of the attachment suits, and were present at the trials. Judgment went against them, maintaining the attachments. Executions then issued on the judgments; and the constable seized, and advertised for sale, the property which had been attached. Thereupon plaintiff brought the present injunction suit, claiming that the corn, hay, and sugar cane seized were exempt from seizure under article 244 of the Constitution, exempting from seizure "the necessary quantity of corn and fodder for the current year," and under article 645 of the Code of Practice, which reads:

"Nor can he seize the agricultural implements, and working cattle, separately from the land to which they are attached; nor the corn, fodder, hay, provisions, and other supplies necessary for the carrying on the plantation to which they are attached, for the current year."

Defendants contend that the current year means the calendar year. If this were true,

and the seizure had been made on the 31st of December after dinner, nothing more would have been exempt than what would have been enough for supper. Manifestly, by "current year" is meant from harvest to harvest. *Ray v. Hayes*, 28 La. Ann. 641; *Clark v. Lancaster*, 69 Neb. 717, 96 N. W. 593.

Next, defendants contend that the exemption does not operate while the crop still hangs by the roots. But it would seem that it ought then to operate doubly, since a seizure at that time despoils the debtor as effectually as a later seizure might do, and perhaps to nobody's good, as it may bring about the loss of the crop, as has happened with the cane in the instant case, according to the statement in plaintiff's brief.

Next, defendants contend that the property seized does not belong to plaintiff, but to his two sons, and that, even if it does belong to plaintiff, still it is not exempt, because it is not "on a farm." The facts are that plaintiff and his family, consisting of his wife and several grown sons and daughters, live upon a tract of land belonging in indivision to plaintiff's wife and her coheirs. Plaintiff's sons and daughters cultivate a part of this land under an agreement by which the sons are to have the surplus of the cotton after the supply bills of the year are paid, and plaintiff is to have the other products for the support of the family. Under these circumstances, the corn, hay, and cane in question belong to plaintiff; and they are "on a farm" within the meaning of the law. The law does not require that the farm must belong to the person claiming the exemption.

The sugar cane in question was not grown as a money crop, but to be converted into syrup for consumption by the family. Such being the case, plaintiff contends that it comes within the meaning of the term "provisions" found in the first paragraph of article 645, Code Prac., hereinabove transcribed. But manifestly that paragraph of article 645 is not a law of exemption, but merely a prohibition against seizing the articles therein named "separately from land to which they are attached." We think, therefore, that, as to the cane, the seizure must be maintained, as no law exempts it from seizure.

We do not think the case of the defendants would be bettered by their having a privilege on the object seized; but, as a matter of fact, they have none. Nothing shows that the debts upon which the judgments were rendered were for necessary supplies. The only evidence on that point consists in a vague statement that the debts arose from purchases made by plaintiff and his sons from the stores of the seizing creditors. Nothing shows that the articles purchased consisted of necessary supplies.

The question of whether plaintiff is not estopped by the judgment in the attachment suit was argued at the bar; but there being

no plea of estoppel, and estoppel having to be specially pleaded, that question need not be considered.

Plaintiff made an agreement with his counsel for a fee of \$50. The lower court allowed \$25. Plaintiff joined in the appeal by answer in this court, and asked that the said fee be increased to \$50. Considering the services that have had to be rendered on the present appeal, we think the amount ought to be increased to the full \$50, as prayed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside in so far as it decrees the exemption of the sugar cane from seizure, and that, as to said sugar cane, the seizure be maintained and the plaintiff's suit dismissed; and it is further ordered, adjudged, and decreed that the attorney's fee allowed by the said judgment be increased to \$50, with legal interest from this date on the additional amount decreed by the present judgment, and that the said judgment be in all other respects affirmed. The costs of the lower court to be paid by defendants, those of this appeal to be paid one-half by plaintiff and one-half by defendants.

(124 La.)

No. 17,786.

#### STATE v. PERRY.

(Supreme Court of Louisiana. Nov. 20, 1909.)  
1. BURGLARY (§§ 31, 45\*)—BREAKING AND ENTERING WITH INTENT TO KILL—EVIDENCE.

Defendant was indicted for and convicted of having willfully, unlawfully, and feloniously broken into and entered in a dwelling in the nighttime armed with a dangerous weapon and having then and there willfully, unlawfully, and feloniously assaulted one of the occupants thereof with the intent to kill her.

On the trial the prosecuting witness testified to all the facts and circumstances which took place at the time of the entry. This she was entitled to do. Defendant's counsel moved the court to strike out the testimony and direct the jury to disregard it. This the court correctly refused to do. The testimony having been taken, the court had no right to strike it out and direct the jury to disregard it. It was for the jury to determine what the intent of the defendant was under a legal charge from the court.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 83, 88, 110; Dec. Dig. §§ 31, 45.\*]

#### 2. CRIMINAL LAW (§ 364\*)—EVIDENCE.

The prosecuting witness, over defendant's objection, was permitted to testify to the calling of the defendant at her house just prior to the entry charged against him. There was no error in this. The two occurrences were substantially part of the res gestae. The first calling served to give character to the second. It was for the jury to determine what effect should be given to the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 805-818; Dec. Dig. § 364.\*]

#### 3. BURGLARY (§ 35\*)—EVIDENCE—IDENTITY.

The prosecuting witness and another witness were permitted, over defendant's objection, to testify to a conversation between them short-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ly before the entry charged to have been made in the house of the witness and to show that defendant was present at that conversation, which conversation was assigned by the party who assailed her as his reason for making his first call at the house. There was no error in this. The testimony tended to connect the defendant with and identify him as the party who made the entry. It was for the jury to determine how far the testimony had the effect.

[Ed. Note.—For other cases, see *Burglary*, Dec. Dig. § 35; \* *Criminal Law*, Cent. Dig. § 768.]

#### 4. CRIMINAL LAW (§ 723\*)—TRIAL—MISCONDUCT OF DISTRICT ATTORNEY.

Defendant urges that the district attorney in his closing argument to the jury made remarks which were calculated to and had the effect of causing it to disregard the charge made to it by the court, that it could and should convict the defendant only if it was shown that the intent of the defendant in entering the house was that charged in the indictment, viz., an intent to kill, and were calculated to induce the jury to convict him, if it was shown that defendant had entered the house with an intent different from that charged; that the remarks so made were calculated to excite, and did excite, against the defendant race feelings to his prejudice.

The court finds that complaint well founded and sets aside the verdict and remands the case for a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1676; Dec. Dig. § 723.\*]

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas M. Burns, Judge.

John Perry was convicted of breaking and entering a dwelling house in the nighttime armed with dangerous weapons with intent to kill, and he appeals. Reversed.

Miller & Morphy, for appellant. Walter Gulon, Atty. Gen., and Lewis L. Morgan, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

#### Statement of the Case.

NICHOLLS, J. The defendant was indicted by the grand jury of the parish of St. Tammany charged with having in said parish on the 2d day of June, 1909, with the felonious intent to kill, at the time being armed with a dangerous weapon, to wit, a pine club, willfully, unlawfully, and feloniously in the nighttime break into and enter the dwelling occupied by Mrs. Ella O'Neill, she, the said Ella O'Neill, and other persons at that time being lawfully in said dwelling house, and at the same time and place willfully, violently, and feloniously made an assault upon the said Ella O'Neill with the felonious intent then and there to kill and murder her.

The jury before which he was tried found him "guilty as charged," and he was sentenced to be hanged. He has appealed to this court. During the trial he reserved nine bills of exception. The first bill of exception recites that on the trial of the case the state produced a witness, Ella O'Neill, who testi-

fied that the accused went to her house on the night of the 2d of June, 1909, and entered the house and knocked on the inner door, and, when she appeared at the door, stated that he had come back, and that he had come back to have her, and intended to have her that night, and raised a stick as though to strike her, when she called out to another woman, who was then in the house, "Here is that negro again," and ran toward her room, and that the negro then ran out of the house.

The defendant by his counsel thereupon asked the court to strike out this testimony and to direct the jury not to consider it, for the reason that it was evidence of an intent on the part of the accused to commit the crime of rape, and showed his intention and desire to have carnal knowledge of the person of the witness, and was not evidence of an intent to kill, which was the intent alleged in the indictment. This injunction and motion to strike out were overruled by the court; the court stating that it was a matter within the province of the jury. The judge, in signing the bill, said:

"That the evidence was properly within the province of the jury to say; the breaking and entering in the nighttime having been proven. The accused being at the time armed with a dangerous and deadly weapon, to wit, a piece of inch water-sobbed plank, about three inches wide and three feet long, in the kitchen after entering in the nighttime he drew it back to strike the woman Ella O'Neill, stating to her, 'I want you.' I could not say what he meant, unless it was to commit an assault with intent to kill, and no doubt there would have been a killing, had not the woman screamed and the other inmates of the house, a man and another woman, ran to her assistance, when the negro (accused) broke and ran. With this statement I sign the bill."

The second bill of exception recites that Ella O'Neill, a witness for the state, was interrogated as follows:

"Q. What happened just before the defendant made this second attack upon you in your house, if anything?"

Counsel of the defendant objected to this question for the reason that the question showed that the matter inquired about happened prior to the breaking and entering charged in the indictment, and was not admissible under the allegations of the indictment. The objection was overruled by the court, to which ruling defendant's counsel objected and reserved a bill of exceptions, and asked that the testimony of the witness be taken down as a basis for such bill. Thereupon the witness testified as follows:

"Q. Did you see him any time before that?"

"A. He knocked at the door, and I said, 'What is it?' He said Mr. Jack sent for me. I said, 'For me?' He said, 'Yes.' I said, 'How?' He said, 'I have a horse and buggy out there.' He said Mr. Jack P. said for me to come down and he would show me a good time. I told him, 'All right,' to go out in front and I would meet him. I went out in front, and did not see the

horse and buggy. I asked him, 'Where are the horse and buggy?' And he said, 'It is a little further down.' I asked him why he did not bring it up to the house, and he said Mr. Jack P. was a kind of suspicious old fellow, and he was afraid if anybody in Covington would see the horse and buggy they would recognize it. I told him, 'All right,' I would go up there with him. I said, 'Now I will stand here, and you go around and get the horse and buggy.' That he then makes an indecent proposal, and I said, 'What do you mean?' and as I said that he grabbed me with one hand on the neck and tried to push me to the ground. There was a gentleman there, and he said, 'What is it?' and as he said that this negro ran, and I went back and met Mr. Loyd and a deputy sheriff. I think Mr. Eddie Lacroix and I told him about it. A very short time after I got back into the house, he came back again.

"Q. Anybody looking for him?

"A. Yes, sir; several people were looking for him.

"Q. How was he dressed?

"A. He had a dark overcoat and a light hat."

Thereupon counsel took this bill of exception, and, having submitted it to the district attorney, prayed the court to sign the same. The judge made the following addendum to the bill:

"I make this statement of facts to bear out my ruling which applies to bills Nos. 2, 3, and 4. Some few days before this alleged crime, the woman, Ella O'Neill, was seated in a butcher shop kept by J. A. Laborde, on the main street, this town. She stated to Laborde as set out in bill No. 4. The accused, John Perry, was the only party in the place at the time. On the night of the breaking, entering, etc., as charged, about 9 p. m., the accused, John Perry, knocked at the rear door of the house of Ella O'Neill, who went to the door, and the conversation took place as set out in bill No. 2, which shows the accused attempted to ravish the prosecuting witness. He was frightened off by a man coming up at the time. Ella O'Neill, after a few minutes' time, went back to the house, when shortly, not more than 10 or 15 minutes, the accused returned, and the circumstances took place as set out in bill No. 2. The accused was the only person knowing this butcher shop conversation, which he used as a subterfuge to entice the woman from her house. The testimony I considered admissible to show preparation, knowledge, and identification. This last occurrence is not only admissible for these reasons, but is in reality a part of the *res gestæ*. With this statement, I sign bills Nos. 2, 3, and 4."

Bill of exceptions No. 3 recites that Ella O'Neill was produced and sworn as a witness for the state and was asked the following question:

"Q. Did you ever have a conversation at Mr. Laborde's market with reference to Mr. P. visiting your place?"

Defendant's counsel objected to this question as immaterial, irrelevant, and as hearsay, and as not admissible under the allegations of the indictment. The court overruled the objection for the reason that the testimony was admissible to show previous preparation, intention, and motive. Defendant's counsel reserved a bill of exception, and asked that the testimony of the witness be taken down as a basis for the bill, and which testimony of the witness was as follows:

"Q. State the conversation that took place between you and Mr. Laborde in Mr. Laborde's market.

"A. I was down there. This negro was back in the market, and Mr. Laborde said to me that Mr. P. wanted to have a little talk with me. He said, 'You know that old fellow is kind of suspicious, and does not like to have anybody know that he goes down there,' and I said, 'Well, I would be glad if he would put in a good word for me.'

"Q. That took place in the hearing of the darky here?

"A. Yes, sir."

Thereupon counsel took this bill of exception, and, having submitted it to the district attorney, prayed the court to sign the same.

The fourth bill of exceptions discloses the fact that, over defendant's objections, the conversation which took place at Laborde's market between himself and Ella O'Neill was allowed to be proved by Laborde's testimony.

His testimony did not materially differ from that of Ella O'Neill on that subject. He testified to the fact that, when it took place, defendant was behind the block in the rear of the market. Witness said he did not know whether the accused heard the conversation or not. The same objection and the same ruling was made as had been made as set out in bill of exceptions No. 3.

Bill of exceptions No. 5 recites: That on the trial of this case, the district attorney, in his closing argument to the jury, having stated that the defendant was a negro, and that the woman O'Neill, whom the defendant was charged with having assaulted with intent to kill, belonged to the same race to which the jury belonged, counsel for defendant objected to such statements and remarks of the district attorney as intended and calculated to inflame the minds of the jury and to excite race prejudice against the defendant.

That the district attorney again stated to the jury in his argument that, notwithstanding the fact that the prosecuting witness, Ella O'Neill, was a prostitute, she was a white woman, and belonged to the same race to which the mothers of the jury belonged. Counsel for defendant objected to such statements of the district attorney for the reason last stated, and alleged and urged that such remarks and conduct of the district attorney were calculated to and did affect the minds of the jury injuriously to the defendant, and he therefore took a bill of exceptions to the same, and, having submitted the same to the district attorney, prayed the court to sign the same. The district judge in his per curiam to the bill said:

"This statement of the district attorney you will see is not strong. It only bears an innuendo or insinuation. I instructed the jury immediately when it was made not to consider it, and reprimanded the district attorney for going out of the record."

The bill of exceptions No. 6 recites that defendant's counsel requested in writing the court to charge and instruct the jury as follows:

"The court charges you that the good character of a defendant, if proven, may in itself create a reasonable doubt of his guilt, when otherwise no such doubt would exist, and if in this case the evidence of good character, either by itself, or in connection with the other evidence, raises a reasonable doubt in your minds of the guilt of the accused, you have the right to entertain such doubt, and the defendant should have the benefit of the doubt."

This instruction the court refused to give in charge to the jury. To this ruling and decision of the court defendant reserved a bill of exceptions, and, having submitted it to the district attorney, prayed the court to sign the same. The judge in signing the bill stated that he refused this special charge on the ground that he had given it in his written charge on record.

Bill of exceptions No. 7 is to the refusal of the court to give the following special charge to the jury:

"The defense of an alibi—that is, that the defendant was not present at the commission of the crime, but was somewhere else—is as valid and legitimate a defense as any other, and, if in this case the evidence as to the whereabouts of the defendant at the time of the commission of the crime charged raises in your mind a reasonable doubt as to whether the accused could have committed it, it is your duty to give him the benefit of the doubt and find him not guilty. The court refused to give this instruction to the jury, to which ruling and decision the defendant reserved and took a bill of exceptions."

The district judge in signing the bill said:

"That this special charge was refused and given by me under this charge. I charged from Marr's Criminal Law under the title 'Alibi.'"

Bill of exceptions No. 8: Defendant's counsel requested the court to charge the jury:

"That, if the evidence warrants it, you may find any one of the following verdicts:

- "(1) Guilty as charged.
- "(2) Guilty as charged without capital punishment.
- "(3) Guilty of an assault with a dangerous weapon with intent to kill.
- "(4) Guilty of simple assault.
- "(5) Not guilty."

The court refused to give this instruction, on the ground that the evidence did not justify these lesser verdicts.

To this ruling and decision defendant excepted.

Bill of exceptions No. 9: Defendant moved the court to set aside the verdict of the jury and to grant a new trial for the following reasons:

- (1) That the verdict is contrary to the law.
- (2) That it is contrary to the evidence.
- (3) That it is contrary to the charge of the court.
- (4) That the court erred in refusing to give to the jury the second instruction and charge requested by the defendant.
- (5) That the court erred in refusing to give to the jury the third instruction and charge requested by the defendant.
- (6) That the court erred in refusing to give to the jury the fourth instruction and charge requested by the defendant.

(7) That the court erred in permitting the witness for the state to testify to an assault claimed to have been committed on her by the defendant with intent to ravish and carnally know her outside of her house and previous to the alleged breaking and entry charged in the indictment, and in permitting the district attorney to comment in his argument to the jury upon such alleged assault.

(8) That the minds of the jury were improperly influenced, and their verdict the result of the inflammatory and intemperate remarks of the district attorney in his closing argument to the jury, making appeals to the prejudices of the jury which were calculated to excite, and did excite, race prejudice against the defendant, a negro, as objected to by the defendant at the time, and by the statement made to the jury by the district attorney, among other statements of the same tenor and effect, that upon their verdict depended the sanctity of every fireside in St. Tammany parish and the safety of their wives, daughters, and mothers, and that if they acquitted the defendant they would turn loose upon the community a horrible horde of depraved criminals, who would prey upon the virtue of their families and would bring on mob law and violence and do away with the orderly administration of justice.

(9) And for other good and sufficient reasons as shown by the bills of exception taken by the defendant during the course of the trial.

The motion for a new trial was overruled, and a bill of exception reserved. The bill was signed by the district judge without comment after having been submitted to the district attorney.

#### Opinion.

##### First Bill of Exception.

Ella O'Neill, the person upon whom the defendant was charged with having made an assault with an intent to kill, being put upon the stand as a witness, testified to all the facts and circumstances which occurred at the time of the entry into the house. These she was entitled to testify to. She did not undertake to express any opinion as to what the intent of that was with respect to anything which was done by the person entering at that time. All the facts which occurred at the time being shown, it was for the jury, under legal instructions from the court, to determine what that intent was. The court was without authority to strike out the testimony and direct the jury not to consider it. Such a course, if permitted, would practically withdraw any case from the consideration of a jury. In this case the court, at the request of defendant's counsel, in his charge to the jury instructed it that the state was required to prove the intent charged in the indictment—that is, the intent to kill—and evidence of any other intent cannot be

considered by you, and the accused cannot be convicted on evidence of other intent than that charged in the indictment, namely, an intent to kill. The only intent you are to consider is the intent to kill. You cannot legally convict the accused under the indictment for breaking and entering with intent to rob, to steal, to commit rape, or any other crime than the one charged in the indictment, to wit, the intent to kill Ella O'Neill. State v. Meche, 42 La. Ann. 273, 7 South. 573.

#### Second Bill of Exceptions.

The two occurrences testified to by Ella O'Neill—those which took place at her house and those which occurred just outside of the house—followed each other so closely as practically to constitute one single transaction. They bore relevant and important relation to each other. The intent and purpose of the entry were fairly and legitimately permitted to be passed upon under the light thrown upon them by the almost simultaneous action (just before he did so) of the party who entered the house. His first actions gave character to those which followed afterwards. State v. Marceaux, 50 La. Ann. 1141, 24 South. 611. Defendant's counsel, in commenting in his brief upon this bill, states that the man referred to by the witness as having frightened her assailant away said that both the negro and the woman ran away; but this statement is sustained by nothing shown in the record.

The purpose of the statement in the brief is evidently to suggest to the court the probability or possibility that the woman was not in reality assaulted.

#### Bills of Exception Nos. 3 and 4.

Refer to the same facts and present the same questions of law.

Ella O'Neill and Laborde were permitted to testify to a conversation which they had together at the former's butcher establishment. Defendant's objections were that the testimony was irrelevant, immaterial, and hearsay, and inadmissible under the allegations of the indictment. We do not think that the testimony was irrelevant and immaterial. It had a tendency to connect the defendant with the occurrences at Ella O'Neill's house. It served to some extent, in view of what the witness testified the person who she declared had assaulted her outside her establishment said in reference to Mr. P— when he first spoke to her, and in view of the fact that both witnesses testified that defendant was the only person present in Laborde's butcher shop when the conversation between the two witnesses took place in regard to P— *identifying* the defendant as the party who assaulted her.

To what extent that testimony should influence the jury was for that body to determine.

#### Bill of Exception No. 5.

The complaint of the defendant of the remarks made by the district attorney in his closing argument to the jury is in our opinion exceedingly serious in character. The statement made by that officer to the jury that, "notwithstanding the fact that the prosecuting witness was a prostitute, she was a white woman, and belonged to the same race to which their mothers belonged," was evidently intended to direct its attention specially to a consideration of the fact that defendant's primary object and intent in going to Ella O'Neill's was to rape her—a crime known to be really more abhorrent to a jury than that of killing a woman.

If the jury could be brought to know and feel that the accused intended to rape the woman, the intent to kill would play very little part in reaching its conclusions as to what the verdict should be. It would look no further for a reason to justify a verdict of guilty than an intent to rape. There would be no reason for the district attorney to refer to the fact that the prosecuting witness was a prostitute if the case was one involving simply an intent on the part of the accused to kill her. No one would for a moment think a prostitute less entitled to protection from being killed than any other person in the community; but, when it was a question of rape, the jury would be likely to question the reality of a woman of that character having been made the object of an assault of that type upon her, or of her being greatly injured or aggrieved if it were true—hence the necessity for a special appeal in favor of her right to protection against being carnally known against her will, especially by a negro. The extreme abhorrence of the people of this state to the crime of rape, particularly of the rape of a white woman by a negro, is so great that, if the jury could be made to believe that an assault for that purpose had been attempted, the defense would stand little or no hope of acquittal, even if an attempt to kill had been utterly disproved, and no matter what a judge might charge as to the necessity of proving an intent to kill as alleged. We think the district attorney, as an officer of the state, was at fault in pressing, as he did, before the jury, the fact that the accused intended to rape the woman, and thus weakening, as he did, the force of the charge of the judge that the accused could not be legally convicted unless shown to have entered the house with an intention to kill.

We do not think, under the circumstances, that the accused has been fairly and legally convicted, and we are of the opinion that the verdict of the jury should be set aside, and the judgment therein should be avoided, annulled, and reversed, and the cause remanded for a new trial.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment

therein, herein appealed from, be annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that this cause be remanded to the district court and reinstated on the docket, and a new trial be given to the defendant.

(124 La.)

No. 17,496.

CRAIGHEAD et al. v. CONNELLY, Sheriff,  
et al.

(Supreme Court of Louisiana. Nov. 15, 1909.  
Rehearing Denied Dec. 13, 1909.)

**TAXATION (§ 79\*)—LIABILITY OF PERSONS—  
OWNER OF PROPERTY.**

The owners of timber sold it to plaintiffs, who agreed to dig a certain canal of prescribed location and dimensions, and to leave it free of obstructions and open "when they shall have completed taking said timber," and gave their note secured by mortgage of the timber for the price. It was agreed that, upon default in payment of any one of the notes, they should all become due at once. Plaintiffs were given five years in which to remove the timber, after which whatever timber might still be on the land was to revert to the sellers. It was also agreed that plaintiffs should deaden not more than 1,000 trees before completion of the canal, and that they should be entitled to pull timber at the rate of 500,000 feet per month, and that they might pull more than that amount, but, if they did so, they should pay one of the unmatured notes, with interest, for each 500,000 feet extra per month or fraction thereof, and such note should mature and become payable at once. *Held*, that the clauses limiting the number of trees that might be deadened before the canal was completed and the number of feet of timber which might be pulled per month did not suspend the transfer of ownership, but merely suspended the right to possession, and plaintiffs, as owners of the timber under the contract, were liable for taxes thereon before the conditions were performed.

[*Ed. Note.*—For other cases, see *Taxation*, Cent. Dig. § 166; Dec. Dig. § 79.\*]

Appeal from Twentieth Judicial District Court, Parish of Terrebonne; W. P. Martin, Judge.

Action by Charles D. Craighead and another against A. W. Connely, Sheriff, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Emmet Alpha and H. M. Wallis, Jr., for appellants. H. M. Bourg, Dist. Atty. (Beatlie & Beattie, of counsel), for appellees.

**PROVOSTY, J.** Plaintiffs, having been assessed for certain standing timber, have enjoined the assessment, on the ground that they are not owners of the timber. Whether they are right or wrong in that contention depends upon the construction to be placed upon a contract entered into by them with McCallam & Cocke.

This contract recites that McCallam & Cocke sell, transfer, and deliver to plaintiffs all the cypress timber upon certain described lands for and in consideration of the price and sum of \$68,540, and that the plaintiffs

accept said sale and transfer, and obligate themselves to pay said price, and obligate themselves also to dig a certain canal of which the location and dimensions are prescribed, and to leave said canal free of obstructions and open "when they shall have completed taking said timber." The contract further recites that, to represent the said price, the plaintiffs have made their eight notes, payable in 4, 5, 6, 8, 10, 12, 14, 16, and 18 months, to their own order and by themselves indorsed, and that said notes have been delivered to the vendors, and that to secure the payment of said notes a mortgage is reserved upon the property sold, and that default upon any one of the notes is to make them all due and exigible at once. Plaintiffs are given five years within which to remove the timber, after which whatever timber may still be on the land is to revert to the vendors.

So far, the reciprocal obligations under the contract are absolute and unconditional, and the plaintiffs are most unquestionably made the owners of the timber; but the contract contains also the following clauses:

"It is distinctly understood and agreed between the parties that the said Craighead & Riggs, their representatives or assigns, shall deaden no more than one thousand trees before the canal shall have been completed into the swamp lands of said McCallam & Cocke.

"It is distinctly understood that the said purchasers shall be entitled to pull said timber at the rate of 500,000 feet per month, provided that they may pull more than that amount, but in such event for each 500,000 feet extra per month or fractional portion thereof, they shall pay one of the notes not matured with interest, and said note shall mature at once and become payable at once."

Plaintiffs contend that these clauses embody conditions precedent to the transfer of the ownership of the timber; but it is perfectly evident that these clauses, which simply limit the number of trees which may be "deadened" before the canal is completed, and the number of feet of timber which may be "pulled" per month, do not suspend the transfer of ownership, but merely suspend the right to possession. McCallam & Cocke retain possession as additional security for the performance of plaintiffs' obligations under the contract, just as one person may hold possession of the property of another in pledge as security for the performance of an obligation. They retain possession, not as owners, but by a precarious title created by the contract. If the property, instead of being trees standing in a swamp, were revenue yielding, the revenue would belong to plaintiffs. The possession would then be held pretty much as in antichresis.

A case closely analogous to the present one is that of *Collin v. Coblenz*, decided first by the Supreme Court of Paris, and on further appeal by the Court of Cassation, France, April 22, 1872. *Collin v. Coblenz*, *Journal du*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



Palais, 1873, p. 754. Collin had sold a manufactory with all appurtenances and all merchandise and material on hand to Coblenz, on the condition that the latter should be entitled to possession only after he should have paid the price, but should in the meantime have charge of the manufactory as manager for Collin on a salary of 25 per cent. of the profits realized from the operation of the plant; this salary to go towards paying the purchase price. After a certain amount had been paid in that manner, Coblenz went into bankruptcy, and Collin, in order not to come into competition with the creditors of Coblenz, claimed the ownership of the manufactory. The court held that the ownership had passed to Coblenz, though not the possession. "In so far as concerns the absence of delivery by Coblenz," said the court, "we consider that tradition is not a condition precedent to the transmission of ownership."

As a test, counsel propound the query: What would be the situation if, on failure to pay the taxes, the property were sold at tax sale? The answer is very simple: The tax purchaser would step into the shoes of plaintiffs, except that, by operation of the revenue law, the property would pass to him free of mortgages. He would have the right to demand possession, on complying with the conditions precedent to the delivery of possession—the same right which the plaintiffs have.

Simpler tests are the queries: Whether, from and after the signature of this instrument, McCallam & Cocke could have sold or mortgaged this timber to another, or exercised any other right of ownership over it; and whether, had the timber perished, the loss would not have been plaintiffs'. These queries answer themselves, and proclaim the plaintiffs to be the owners.

Plaintiffs, being owners of the timber, were properly assessed with it.

The learned judge a quo reached the same conclusion in a very able and exhaustive opinion.

Judgment affirmed.

(124 La.)

No. 17,797.

#### STATE v. PERKINS.

(Supreme Court of Louisiana. Nov. 29, 1909.)

#### 1. CRIMINAL LAW (§ 1090\*)—APPEAL—REVIEW—MOTION TO RECUSE JUDGE.

Where all the pleadings and evidence adduced are contained in the transcript of appeal, a formal bill of exceptions is not necessary to enable the Supreme Court to review the rulings below on a motion to recuse the district judge.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1090.\*]

#### 2. JUDGES (§ 47\*)—RECUSATION—"ADVOCATE IN THE CAUSE."

In a criminal case, the judge has been consulted "as an advocate in the cause" in the

sense of Act No. 40, p. 38, of 1880, when he has been previously employed and consulted on the same basic matter in civil proceedings.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214-217; Dec. Dig. § 47.\*]

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; D. B. Gorham, Judge ad hoc.

John A. Perkins was indicted for embezzlement. From an order overruling a motion to recuse the presiding judge, defendant appeals. Reversed and remanded.

Stewart & Stewart and John B. Kent (Jerry D. Cline, of counsel), for appellant. Walter Guion, Atty. Gen., and Joseph Moore, Dist. Atty. (U. A. Bell and R. G. Pleasant, of counsel), for the State.

LAND, J. In August, 1904, the defendant, sheriff and ex officio tax collector of the parish of Calcasieu, was charged on information with the crime of embezzling \$60,303.79 of taxes by him collected by virtue of his office.

In June, 1909, the defendant appeared and filed a motion to recuse the Honorable Winston Overton, presiding judge of the district, on the ground that he had been employed and consulted in matters forming the basis of the present criminal prosecution against the defendant.

The district judge declined to recuse himself, and appointed a judge ad hoc to hear and determine the issue raised by the motion. After hearing the evidence, the judge ad hoc overruled the motion, and defendant has appealed.

#### On Motion to Dismiss.

The state has moved to dismiss on the grounds: That the transcript does not disclose any motion or order for an appeal.

That the transcript does not show that any bill of exception was formally taken to the overruling of the motion to recuse the district judge.

The first alleged defect has been cured by certiorari to supplement the record.

The transcript contains the motion to recuse, all the evidence adduced on the trial of the motion, and the judgment of the court thereon.

We make the following extract from the minutes:

"Motion taken up, evidence adduced and is submitted. Motion is overruled. To which ruling counsel for defendant excepts. This is to stand in lieu of a bill."

Act No. 40, p. 38, of 1880, relative to the recusation of district judges, applies to all cases, civil and criminal. The legislative intent was to create a uniform system of recusation, regardless of the character of the case in which the issue might be raised. State ex rel. Jones et al. v. Judges, 41 La.

Ann. 321, 6 South. 22. The issue of recusation vel non therefore may be raised in any case, and may be said to be common to cases of all kinds. Hence there is no warrant for applying the strict rules of criminal procedure to motions to recuse. We do not deem a formal bill of exception necessary in a case of this kind, where all the pleadings and evidence adduced below appear in the transcript. To require a technical bill of exception would serve no useful purpose.

The motion to dismiss is therefore overruled.

#### On the Merits.

Several years after the filing of the information in this case, Winston Overton, Esq., was associated with a law firm representing the surety company on the official bond of the defendant as sheriff and ex officio tax collector. This surety company employed counsel to assist the Attorney General in a suit against a certain bank to make it responsible for taxes deposited by the tax collector in his official name, but which were subsequently checked out by him for his own private purposes. Other parties who had received checks that were paid out of the tax money deposited in the bank were also sued. These suits were predicated on the theory that the defendant was a defaulter to the state, and had misappropriated taxes after they had been collected and deposited in bank for transmission in due course to the State Treasurer. Mr. Overton was also consulted about the bringing of a hypothecary action against certain property of the defendant. In short, Mr. Overton was employed and consulted for the purpose of taking steps to recover the money alleged to have been misappropriated by the defendant as tax collector. Mr. Overton also acted as judge ad hoc in several cases brought to recover taxes due the state, parish, and public schools by the defendant as tax collector. Mr. Overton was never consulted on the part of the prosecution or on the part of the defense as to the criminal responsibility of the defendant.

The statutory ground of recusation reads:

"His having been employed or consulted as advocate in the cause."

The judge ad hoc ruled that, as Judge Overton had never been consulted on the criminal branch of the case, there was no ground for recusation.

In *State ex rel. Stewart v. Reid*, 114 La. 97, 38 South. 70, this court held that a judge who before his election had been consulted in the matter of a suit about to be instituted based on an alleged shortage of a tax collector was properly recused in a subsequent suit based on the same matter. While Mr. Overton was consulted on the civil remedy, the basic matter was the same as in the criminal prosecution. The

recovery against the bank and other parties was predicated, not only on a shortage in the accounts of the tax collector, but also on his alleged wrongful diversion of the taxes to his own use. Such shortage and misuse constitute important elements of the crime with which defendant stands charged. While we have every confidence in the integrity and impartiality of our learned Brother of the district court, we think that the policy of the law would be best subserved by his recusation.

It is therefore ordered that the judgment below be reversed, and it is now ordered that this case be remanded, with instructions to the district judge to recuse himself, and to appoint a judge ad hoc to try this cause.

(124 La.)

No. 17,782.

#### STATE v. BRADY.

(Supreme Court of Louisiana. Nov. 15, 1909.  
Rehearing Denied Dec. 13, 1909.)

#### 1. CRIMINAL LAW (§ 723\*)—TRIAL—REMARKS OF ASSISTANT DISTRICT ATTORNEY.

The remark, addressed by counsel assisting the district attorney, with regard to friendship by a juror, examined on his voir dire, for the accused, was not of such importance as to affect the judgment of the jurors by whom it was heard.

The talesman was excused by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. § 723.\*]

#### 2. HOMICIDE (§ 216\*)—DYING DECLARATION—ADMISSIBILITY—PRELIMINARY EVIDENCE—ANTE MORTEM STATEMENT.

There was sufficient predicate laid for the admission of the dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 457; Dec. Dig. § 216.\*]

#### 3. CRIMINAL LAW (§ 359\*)—EVIDENCE—MOTIVE.

Evidence which does not tend to connect a third person with the crime charged is not admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 789, 790; Dec. Dig. § 359.\*]

#### 4. CRIMINAL LAW (§§ 666, 720\*)—WITNESS—FAILURE TO EXAMINE.

The state is not bound to examine a witness in whom she has lost confidence, although subpoenaed by the state.

Comment of counsel for the prosecution was not so harsh as to justify interference with the finding of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1567-1579, 1670, 1671; Dec. Dig. §§ 666, 720.\*]

#### 5. CRIMINAL LAW (§ 720\*)—ARGUMENT OF COUNSEL.

Argument of counsel assisting in the prosecution was on the hypothesis that the case presented an issue to the jury. The defense denied that there was such an issue before the court upon a particular point.

From the record the court infers that the trial judge ruled correctly; that the point argued was not entirely dehors the record.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 720.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 6. HOMICIDE (§ 314\*)—APPEAL—VERDICT.

The jury had the authority to modify its verdict. The modification does not give rise to the inference that the jurors were not certain of the correctness of the verdict.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 314.\*]

(Syllabus by the Court.)

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Henry Brady was convicted of murder, and he appeals. Affirmed.

Blackman & Overton, for appellant. Walter Guion, Atty. Gen., John R. Hunter, Dist. Atty., and R. G. Pleasant, for the State.

BREAUX, C. J. The defendant was prosecuted on an indictment for murder.

The jury found him guilty as charged and qualified the verdict "without capital punishment."

The facts are that, late in January of this year, the defendant and Will Lacaze, a deputy sheriff were present at a negro dance, given by a negro employé of the Rapides Lumber Company in the parish of Rapides.

Lacaze, the deputy sheriff, was in the employ of that company.

At about 2 o'clock in the morning, he left for his home. On the way, passing through the woods, he was shot in the back in the region of the kidneys.

No witness was present at the shooting.

The report of the shot awakened John Marshall, who walked from his house to the place where the deceased lay.

Marshall states that he could not identify the deceased without a lamp. The wounded man requested him to go and tell his brother, John Lacaze, to come to his assistance at once.

He was carried a little distance and laid upon the gallery of a house near by. Soon after the local physician, Dr. Choppin, came. After a little time, the doctor, who is also the physician of the lumber company before named, had an engine and car brought to take the wounded man to Alexandria, where there are better medical, surgical, and sanitary facilities. About an hour after the shooting, the deceased, together with the physician and some attendants, were placed on the train for the purpose of going to Alexandria. After running a few miles, Lacaze died.

The deceased in his dying declaration charged the defendant with having shot him.

The defendant urged that there was a mistake as to identity and sought to prove an alibi.

Counsel for defendant alleged: That on a dark night it was not possible for the deceased to identify the defendant; that in the darkness the witness Marshall could not identify the deceased without a lamp, and

by reason of the darkness it was not possible for the deceased to identify the defendant.

This is an outline of the facts.

We will go further into their consideration in considering the bills of exception which have brought before us the points for decision.

In June, 1909, the defendant was placed on his trial.

Ten jurors had been selected and sworn. When the eleventh juror was presented to be examined on his voir dire, something was said by him about friendship for the deceased. He was asked, by the attorney assisting the district attorney, if the friendship he professed having for the accused was the friendship "of a white man for a white man, or a white man for a negro."

After this the juror was not selected. He was excused by the court from serving on the jury.

The jury panel was completed.

The words before mentioned, "white man for a negro," were made the grounds of one of the bills of exception.

The first exception of the defense was: That the accused is regarded in the community as a white man; that he associated with persons of the Caucasian race, and was married with a white woman; that the remark before quoted about friendship for a negro caused prejudice against him; that the state relied upon the uncorroborated ante mortem statement of the deceased; that the community was already very much put out by the assassination; that the fact that the attorney alluded to the negro race added to the feeling already prevailing; that the remark had a prejudicial effect upon the cause of the defense; that 10 of the jurors heard the remark; and that the trial judge did not instruct the jury to disregard the statement about friendship for a negro.

The fact is that there was objection made by counsel for the defendant at the time to this statement, and the objection was sustained by the court.

We have noted that the complaint of the defense is that the trial judge did not instruct the jury to disregard the statement. It does seem to us that, having sustained the objection of defendant's counsel, this in itself was sufficient disapproval of the remark made. Besides, it is not to be presumed that 10 serious men are influenced by the utterances of counsel in examining jurors.

The question has no bearing upon the case, and, when considered seriously, was not one to influence a serious man bent upon the performance of his duty as a juror. The jurors, doubtless, knew the surrounding conditions, knew that he was not colored, if he was not, and from that point of view the defendant was not injured.

In any event, these words cannot be given

importance at this time to the extent of justifying the reversal of the jury's action.

The next objection was made to the ruling of the district judge admitting in evidence the dying declaration of the deceased.

The record discloses that the attending physician said to the deceased, in answer to the statement of the latter that he was going to die, that he must not talk that way, for he believed that he might be saved. The deceased said, "No," that he knew he was "going to die." And afterward the deceased added:

"To think that I have been killed by such a G— d— thing as that!"

The deceased said that he knew he was going to die both before and after he had uttered the curse words above quoted. In fact, the deceased talked freely all the time, and repeated that he was going to die. His utterance, at no time, indicated hope.

The curse words, it is true, did not denote that he was very deeply impressed by the solemnity of the occasion.

It is equally true that it is very seldom that men in their last moments will use curse words; but it does not follow always that the use of these words may not be made by one painfully and fatally wounded and conscious of the gravity of his wound. They may be used by a dying man who is in the habit of using such words. It is common knowledge that one who is addicted to the use of curse words may almost unconsciously use them on a solemn occasion.

We have noted that an attempt was made by the physician to take his patient to Alexandria. It does not necessarily give rise to the inference that the deceased had hope of recovering, for it does not appear that his removal was made at his instance, or even after having obtained his consent. They had placed him on the car, and in the short distance that he lived on the way he was heard to say again that he would not live.

It is true again that the physician said to him:

"We will get you all right. Do not talk about dying."

This, at first blush, has the appearance of sufficient influence to give rise to hope. We gather from the testimony that the words of the physician did not have the least influence. He continued to say that he would die.

Physicians do not always impress their patients in assuring them that there is hope. The manner of the physician or his words, while, doubtless, seeking to relieve his patient of his suffering, do not of themselves lead to the inference that he must have had very great hope; but even if he, the physician, entertained hope, the post mortem statement would not of itself be inadmissible. That physicians and others have hope does not affect the admissibility of the declaration if the dying man had no hope.

A surgeon in a celebrated English case, re-

ferred to by Wharton, in his work on Criminal Evidence (section 283), did not think the case hopeless. The patient thought differently. The declaration was read in evidence.

The dying declaration was made to the physician to whom the deceased said that he was coming from the negro dance, to which he had gone as a deputy sheriff, and on his way back he passed several pine trees, and behind one of them he saw the defendant standing. He passed on and paid no attention, as he did not suspect harm at the hands of the defendant. That after passing he heard the click of a gun lock. He turned and looked over his shoulder and recognized the defendant, who shot and started to run down the road toward a fire that was burning, and which we infer gave some light in the dark night.

Regarding the motive of the defendant, deceased said he had caught him selling whisky, and that that accounted for defendant's enmity.

The dying declaration was properly admitted. There was sufficient predicate laid for its admission. The facts do not sustain defendant's contention with regard to deceased's hope of living.

In the next place, another ground of defense is that the deceased, having ascribed as motive for the killing the fact that he had caught the accused selling liquor without a license, and that as the defense of the case is mistaken identity and an alibi, the minutes of the court were admissible to prove that others had been caught and arrested and fined large sums of money, and that they, and not the defendant, were thereby prompted to kill.

The evidence was not connected with the issue. It does not appear that these parties had anything to do with the crime, or were engaged in the least in the direction of committing a crime.

Evidence which does not tend to connect a third person with the crime is not admissible. *Walker v. State*, 139 Ala. 53, 35 South. 1011.

Upon another ground, objection was made by counsel for defendant to a statement of counsel, assisting the district attorney, in giving reason for not examining a witness upon whom a subpoena had been issued to testify for the state.

In argument the question naturally arose why it was that the state had not examined a witness upon whom a subpoena had been served and who was present at the trial. The reason, as given by this counsel, was that the state knew the witness to be unworthy of belief on oath and knew that "he was going to lie."

The statement was objected to as prejudicial. Counsel for the defendant, for the reason that there had been no witnesses placed upon the stand who in any way attacked the veracity of the witness, stated that the statement should not have been made, and com-

plained in argument before this court that the district judge did not instruct the jury to disregard the statement.

We infer that during argument it was deemed proper to state particularly as there was complaint, the reason that had influenced the state in not calling the witness to testify.

It may be that counsel representing the state was more emphatic than he should have been; but, even then, it affords no ground for this court's interference. The state had lost confidence in its own witness. It was so stated. In view of that fact, she could decline to place him on the stand.

We will here state that the defense made him a witness.

The weak point of defendant's objection is that no request was made of the trial judge to instruct the jury to disregard the statement of counsel.

The next point on the part of the defense is that the state failed to sustain the issue of motive which actuated the defendant to kill the deceased; that the attorney assisting the district attorney, none the less, assumed in argument that the motive had been proved, and argued on that hypothesis.

There was evidence admitted to show the motive, and in this respect there is error on the part of the defense in saying that there was no evidence. The dying declaration stated the motive.

The judge informs us that he admonished counsel not to leave the record.

Argument of counsel is left in great part with the trial court to restrain the argument within due bounds. Unless it goes entirely too far, it affords no ground for interference on appeal. There are a number of decisions on the subject to which we deem proper to refer at this time: *State v. Johnson*, 48 La. Ann. 89, 19 South. 213; *State v. Spurling*, 115 La. 790, 40 South. 167; *State v. Meche*, 114 La. 231, 38 South. 152; *State v. Montgomery*, 121 La. 1006, 46 South. 997; *State v. Mitchell*, 119 La. 374, 44 South. 132.

These decisions sustain our view.

Able counsel, in the concluding paragraph of his well-considered and elaborate brief, dwells upon the verdict as indicative of a lurking doubt in the minds of the jurors. That the fact, in a case in which the verdict should have been guilty or not guilty, that the jury found the accused guilty and qualified the verdict, was evidence of uncertainty in the minds of the jurors. That the case was of such a character that there should have been no uncertainty if the jurors were satisfied of defendant's guilt.

This is far from being controlling. To arrive at that conclusion, we would have to assume much more than we are inclined to assume. The sufficiency of testimony under the instruction of the court is left to the jury. It is for them to decide. The fact that

that body has modified its verdict does not afford ground for a legal conclusion different from that at which we have arrived.

It is true that our learned Brother of the district court said, in part.

"There may be some doubt as to identity; but the jury settled the question."

We infer that he was convinced that the jury settled the question correctly.

From our point of view, there remains nothing for us to do except to affirm the jury's verdict.

For reasons assigned, the verdict and sentence of the jury are affirmed.

PROVOSTY, J., concurs in the decree.

(124 La.)

No. 17,452.

### FAUCHEUX v. TOWN OF ST. MARTINVILLE.

(Supreme Court of Louisiana. Nov. 29, 1909.)

#### 1. MUNICIPAL CORPORATIONS (§ 747\*)—TORT OF MAYOR—LIABILITY OF MUNICIPALITY.

When the mayor of a town clears the banks of a stream of trespassers, in accordance with the will of the town council, he is performing a public duty, as the municipality has the authority to clear, in a legal manner, all public property from encroachment and trespass by private individuals. When the mayor employs an irregular method, the municipality is responsible for any damages which might arise because of the employment of this irregular method.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 747.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 747\*)—TORTS OF OFFICERS—LIABILITY OF MUNICIPALITY.

While the banks of Bayou Teche are public property and owe a servitude to the public, still those who have occupied them in good faith for many years must be proceeded against in regular form, unless there is a necessity for the removal under certain circumstances.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 747.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 742\*)—ACTION AGAINST CITY—EVIDENCE.

It is not evident that plaintiff's cabin was on land burdened with a servitude.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 742.\*]

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of St. Martin; James Simon, Judge.

Action by Widow Alex Fauchaux against the Town of St. Martinville. Judgment for plaintiff, and defendant appeals. Amended and affirmed.

See, also, 120 La. 764, 45 South. 600.

Voorhies & Voorhies and F. E. Delahousaye, for appellant. Edward Simon, for appellee.

BREAUX, C. J. Plaintiff sued the town of St. Martinville for \$2,000 damages, on the ground that a small house of which she was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the owner was torn down by order of the mayor with the sanction of the council despite her objections and protests.

Plaintiff's possession of the house was of ancient date.

Twice the municipality, through its council, sought to have the lands bordering on the Teche cleared of all buildings, including plaintiff's. Resolutions were adopted directing the mayor to clear the banks of the bayou and put an end to trespass thereon.

The mayor gave notice to the plaintiff to move out.

Some time after notice had been given, the building was demolished by the chief of police.

After the plaintiff, years ago, had received notice to move, she evidently became concerned about her possession. She applied to the council for permission.

This application was denied.

A question of title incidentally arose, the history of which goes back to the days of the colonists.

After the refusal of the council to permit her to remain, she bought the land from the church, represented by Rev. August Thibault, pastor.

It was donated by D'Hauterire (a name not unknown in days of the colonists) to the church at "the Poste des Attakapas," the seat of such local government as there was in colonial days.

The number of acres donated was 450. The area extended on both sides of the stream.

The grantor and his ministers knew little about, and, doubtless, cared less about, navigable streams and servitude for the public.

The United States government, in accordance with her liberal policy, after the cession, recognized the right of the owner and issued a patent for the land.

Under the well-settled policy of her land department, the land passed to the grantee subject to the servitude and right of way due to the public on the banks of the Teche.

We will have occasion to refer again to the title, although it is not of first importance in deciding the case.

The contention of defendant is that the town council had not authorized the mayor to destroy the building, that its resolutions were not directed against the plaintiff as owner of the cabin on the bayou front, that the officer exceeded his authority, and that the defendant town cannot be held in damages for the ultra vires acts of an officer.

We have not found it possible to arrive at the conclusion pressed upon our attention by the defendant. As to the scope of the resolutions, we are quite confident that the purpose was to have this building taken away from the bayou front.

The municipality, through its council, by resolutions directed that the banks of the bayou be cleared. It notified plaintiff to break down the cabin and vacate the premises.

This notice was followed by the mayor's order to break down the cabin.

The mayor did not step out of his employment to destroy this building. He was empowered to remove it. If he employed an irregular method, under the circumstances, the municipality was liable for damages.

Conceding for the moment that the resolutions of the council are not far-reaching, the town cannot escape liability for the damages. The duty was public, not private. He was clearing the banks of trespassers in accordance with the expressed will of the council.

The defendant goes one step further, and urges that the corporation was not liable because it had no authority to order the destruction of the building.

The municipality had the authority to clear public property from all encroachment and trespass by private individuals, but in a legal manner.

If it undertakes to exercise lawful power in a legal and arbitrary manner, it is liable for the damages.

If it takes part in directing an officer to do a certain act in an illegal manner, it is again liable.

We have decided in this case on appeal that plaintiff had a right of action and remanded the case. She had sufficiently proven her allegations to sustain that right.

See same title, 120 La. 764, 45 South. 600.

This brings us to a consideration of the second branch of the case; that is, that the plaintiff was in good faith, and that is all that is needful in this case in order to maintain her suit.

To maintain her good faith, plaintiff introduced title going back to the early history of the government.

Whether the title was legal or illegal we will not decide. It certainly shows good faith on the part of the occupant of so many years.

The evidence shows that she bought the property in good faith. The pastor of the church testified as to the purchase and as to facts which abundantly sustain this point.

This property may be public. The banks owe servitude to the public, though it is not satisfactorily established.

Be that as it may, if the banks are public, those who occupy them in good faith for as many years as plaintiff had must be proceeded against in regular form, unless there is necessity for the removal under certain circumstances.

This necessity was not established by the evidence.

Having come to the conclusion that plaintiff was in good faith, we are of opinion that she should recover the damages incurred.

Before leaving the case, it occurs to us again to say that the highest water of the stream never reached the cabin. In one year only, and that years ago, the stream overflowed to the cabin. At any rate, it was not proved that the servitude due to the public was in any way affected by the cabin.

A man whose name was Benson, a party to a suit decided by this court, was made to remove his building by a decree of this court.

The facts in that case are not similar to those in the present case. Besides, it is *res inter alios acta*.

We therefore will hold, without prejudice to the rights of the town and to the public to the servitude in question, that the town has not sufficiently proved the right to the servitude urged in argument. The building in question was between the street and the river. There was not sufficient evidence to prove that the river side of the street is on the bayou bank on which servitude is due to the public. A well-known surveyor, who it is reasonable to presume knows the lines of the servitude along navigable streams within the parish, and particularly in his home town, says the cabin is not within the servitude. The testimony of other witnesses upon the subject is conflicting and not satisfactory. Not one testified with positiveness that plaintiff's cabin was within the servitude area of the bayou bank. The servitude is limited in area. It must be made to appear that the structure complained of was within the limits.

In view of the fact that plaintiff had a title, such as it was, which included the site on which the cabin was, she had a right to a more peaceable hearing in regard to it. She might have called her vendor in warranty, and at least obtained judgment for the price she paid to him.

With regard to the amount of damages: The cabin was of very little value, at most \$30. She does not even claim anything for it. She did not reside in it. She occupied it only during the day. She was a vendor of coffee and a few cakes and had wreaths for sale to those who bought to put on tombs in the cemetery near by.

The damages are not considerable.

In view of all the circumstances, we think that the amount of \$250 is not unreasonable.

For reasons stated, it is ordered, adjudged, and decreed that the judgment appealed from be, and is hereby, amended by reducing the amount allowed as damages from \$500 to \$250, with 5 per cent. interest at the last amount from the date on which judgment was rendered in the district court. As amended the judgment is affirmed at appellee's cost on appeal.

(124 La.)

No. 17,765.

#### STATE v. CLARK.

(Supreme Court of Louisiana. Nov. 29, 1909.)

#### 1. INDICTMENT AND INFORMATION (§ 121\*)—BILL OF PARTICULARS.

Where, in a prosecution for unlawfully keeping a tippling shop, defendant claimed that he was conducting a business for the sale of nonintoxicating drinks of various sorts, and that he could not properly prepare for trial unless

he was informed which one of the drinks sold by him was claimed to be intoxicating, the court erred in denying defendant's motion for a bill of particulars disclosing such fact.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.\*]

#### 2. INTOXICATING LIQUORS (§ 224\*)—FORMULA—PRESUMPTION.

Where an alleged intoxicating beverage was sold under the trade name "Senoj" to the trade generally, and was manufactured by a particular concern, it would be presumed that it was manufactured in accordance with a formula, and that all of it sold was of a uniform character and quality.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 224.\*]

#### 3. INTOXICATING LIQUORS (§ 231\*)—INTOXICATING CHARACTER—EVIDENCE—SALES AT OTHER PLACES.

Where a particular beverage, sold under a trade-name to the trade generally, was claimed to be intoxicating, evidence of its intoxicating effects when sold at other places than that of accused charged with the illegal sale of intoxicating liquors was admissible after a foundation had been laid by proof that the beverage sold at such other places was manufactured and sold to the trade generally by the same concern that manufactured the beverage sold by defendant, and was of the same brand, and in the same condition in which it was received from the manufacturer.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 291; Dec. Dig. § 231.\*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

M. L. Clark was convicted of unlawfully conducting a tippling shop for the sale at retail of intoxicating liquors, and he appeals. Reversed and remanded.

Mitchell & Rosenthal (Sompayrac & West-erfield, of counsel), for appellant. Walter Gulon, Atty. Gen., and Joseph Moore, Dist. Atty. (U. A. Bell and R. G. Pleasant, of counsel), for the State.

PROVOSTY, J. The bill of information against defendant reads that:

He "at the parish of Calcasieu on or about the 31st day of March, 1909, did unlawfully keep, carry on and conduct a grog and tippling shop and retail spirituous and intoxicating liquors."

Defendant called for a bill of particulars. As his reasons for making the request, he assigned that he was conducting the business of retailing soft or nonintoxicating drinks, and that, unless he was informed which one of the particular soft drinks sold by him in his business was claimed to be intoxicating, he could not properly make his defense. The court refused the request. On the trial it developed that the particular drink which the state had in view as being intoxicating was a drink known by the name of "Senoj."

The state should, we think, have been required to furnish this bill of particulars. It is well settled that a bill of particulars will

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be required to be furnished when necessary to enable the accused to prepare his defense. Clark's Criminal Procedure, c. 5, p. 161, § 62 et seq.; also, section 63, p. 163; section 151, p. 429 et seq.; Marr's Criminal Procedure, § 253, p. 433, particularly citations under "a" and "c"; City of New Orleans v. Chappuis, 105 La. 179, 29 South. 721; Bishop's Criminal Procedure, § 640, p. 392; Id. c. 29, § 4, par. 624, p. 377; State v. Maloney, 115 La. 511, 39 South. 539. The information was necessary in this case, because the defendant could not know, without it, which particular one of the soft drinks sold by him in his business the state would undertake to show was intoxicating; and hence, unless furnished with the information called for, he would have to come prepared with evidence with reference to every one of the soft drinks sold by him, instead of confining himself to the particular one with reference to which evidence was necessary.

In justification of the ruling, it is said that such a thing might be as that the state could not give any particulars; as, for instance, where nothing more was known than that the visitors to the defendant's place of business became intoxicated while there, without its being known what particular drinks they took. The answer to that suggestion is simply this: That the prosecution cannot be required to furnish a bill of particulars in a case where it has no particulars to furnish. But, because the prosecution is dispensed from furnishing particulars in a case where it has no particulars to furnish, it does not follow that it is dispensed from furnishing particulars in a case where it has them and can furnish them, especially where to furnish them would be so easy as in this case, and so conducive to the fairness of the trial. By admitting that he was carrying on the business of selling soft drinks defendant reduced the possible issues of the case to two: First, whether one or more of the so-called soft drinks sold by him in his business contained intoxicating ingredients; secondly, whether under the pretense of selling soft drinks he was selling alcoholic beverages. He was entitled to know upon which one of these issues the prosecution intended to try the case; and, if upon the former, then which of the several kinds of drinks sold by him the prosecution would contend was intoxicating.

As already stated, "Senoj" is a trade-name. The beverage is manufactured by Jones Bros. & Co. of Louisville, Ky., and is sold to the trade generally. The beverage being thus sold generally under a trade-name, we think that the presumption is that it is manufactured from a formula, and that all of it that is sold is of uniform quality, just as all the beer of a particular brand sold by a brewery can safely be assumed to be of uniform quality. Such being the case, we

think that evidence of the intoxicating effects of the beverage when sold at other places than that of defendant was admissible. This is so on the same principle on which one of the bottles out of the stock which the defendant still had on hand might have been taken as a sample of that which defendant had already sold. Com. v. Kendrick, 147 Mass. 444, 18 N. E. 230.

It goes without saying that, before such evidence could be admitted, a foundation for its admission would have to be laid by showing that the Senoj sold at the other places was manufactured and sold to the trade generally by the same concern, and was of the same brand as that sold by defendant, and that it was sold in the same condition in which received from the manufacturer. In the case just cited, objection was made that the sample bottle used for analysis had not been shown to have come out of the stock of the defendant. Of course, if the proof had failed on that point, the result of the analysis would not have been admissible in evidence. So, in the case at bar, if defendant could raise a doubt as to whether the Senoj sold at the other places had not been tampered with, or was not of a different quality from that sold by him, the predicate for the admission of the evidence would not have been laid, and the evidence would be inadmissible.

In Epps v. State, 102 Ind. 539, 1 N. E. 491, the absence of arsenic from another sample from the same package was admitted for showing the absence of arsenic. In Commonwealth v. Schaffner, 146 Mass. 512, 16 N. E. 280, another sample taken by the inspector from the defendant's milk wagon, on the same day at substantially the same time, was admitted to show the bad quality of the milk. In Ft. Wayne v. Coombs, 107 Ind. 87, 7 N. E. 743, a neighboring break in a sewer was admitted to show that the materials were defective. In Snyder v. Albion, 113 Mich. 276, 71 N. W. 475, the court held, quoting the syllabus:

"Plaintiff, injured by the breaking of a portion of a bridge, may show decay in other parts of the same."<sup>1</sup>

So in Rose v. St. Louis, 152 Mo. 602, 54 S. W. 440, where plaintiff was injured by the falling of a cornice stone alleged to be rotten, the condition of other stones in the same cornice was allowed to be shown. In Randall v. Telegraph Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17, the court held, quoting syllabus:

"In an action for injuries from defendant's negligence in permitting its telegraph wires to be down and lying across a highway at a certain spot, proof that defendant's poles and wires were down at other places within a few miles of the place of injury, and at other times within a few months of the time of the injury, would seem to be admissible to show defendant's negligence."

<sup>1</sup>This quotation is from the syllabus in 71 N. W. 475.



In *Hart v. Walker*, 100 Mich. 406, 59 N. W. 174, the syllabus reads:

"Defendant having claimed that it was so hot on the night of the alleged assault that the family was compelled to sleep with doors and windows open, the weather records of a neighboring town were admissible."

In *Cleland v. Thornton*, 43 Cal. 437, the question being as to the nature of the timber burned, the "character of the timber for milling purposes in that immediate neighborhood" was admitted. In *Central Railroad v. Ingram*, 98 Ala. 395, 12 South. 801, the Supreme Court of Alabama said:

"We are of opinion that the evidence showing equally or more favorable conditions for the formation and prevalence of fog at other places in proximity to the place of injury, and at which the evidence shows there was none, is relevant and admissible as tending to show there was none at the place of injury"—citing *Railroad Co. v. Ingram*, 95 Ala. 152, 10 South. 516.

The principle of all these decisions is that in all probability the parts offered in evidence or testified about and the part under investigation are so closely similar that the court may safely accept the one as a sample of the other. In the absence of contrary proof, the extreme probability would be that all Senoj of the same brand coming from the same manufacturer was of practically the same quality, and would be intoxicating when sold in defendant's place of business if having that effect when sold in other places.

Judgment set aside, and case remanded for trial according to law.

(124 La.)

No. 17,955.

#### STATE v. BROWN et al.

(Supreme Court of Louisiana. Nov. 29, 1909.)

#### 1. ANIMALS (§ 45\*)—KILLING ANIMALS WITH INTENT TO STEAL.

The offense denounced by Acts 1870 (Ex. Sess.) p. 50, No. 8, § 3, is the killing of an animal, the property of another, with intent to steal the same, is a distinct one—not to be confused with larceny, not dependent on the value or the asportation of the animal—not graded, and being punishable possibly at hard labor, triable by a jury of five.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 45.\*]

#### 2. ANIMALS (§ 45\*)—KILLING ANIMAL WITH INTENT TO STEAL—REPEAL OF STATUTE.

Acts 1902, p. 162, No. 107, § 5, deals with larceny, and the act does not repeal Acts 1870 (Ex. Sess.) p. 50, No. 8, § 3.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 45.\*]

#### 3. ANIMALS (§ 45\*)—KILLING ANIMALS WITH INTENT TO STEAL—EVIDENCE.

In a prosecution for killing a hog with the intent to steal the same, proof of the actual stealing includes proof of the intent to steal, but is admissible only to sustain the charge as made.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 45.\*]

(Syllabus by the Court.)

Appeal from Tenth Judicial District Court, Parish of Tensas; John S. Boatner, Judge.

George Brown and Robert Haywood were convicted of unlawfully killing a hog with intent to steal the same, and appeal. Affirmed.

G. H. Clinton, for appellants. Walter Guion, Atty. Gen., Abner E. Green, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

#### Statement of the Case.

MONROE, J. Defendants were prosecuted for feloniously and unlawfully killing "one hog, of the value of \$15, the property of Abe Crayton, with intent to steal the same," and, having been found "guilty as charged" were sentenced to imprisonment at hard labor for 18 months.

The transcript contains one bill of exception and a motion in arrest of judgment. The bill of exception recites: That the defendants were arraigned and pleaded "not guilty." That their case was set down for trial. That on the day fixed for the trial the court appointed Geo. H. Clinton, attorney at law, to represent them, and that they "were permitted to withdraw their former plea and plead not guilty and for trial by jury." That the case was then set for trial for a subsequent day, when a jury (of five) was impaneled and the trial proceeded with. That, after the argument, their counsel requested the court to charge the jury:

"That, if the evidence proved a case of larceny, it was their duty to acquit, for the reason that the value of the property, as charged in the information, was less than \$20, and that the jury was without jurisdiction in such cases, as the accused parties could not be sent to the penitentiary."

This charge was refused. That defendants further asked the court to charge the jury:

"That if the evidence showed that no larceny was committed, but that the accused parties had killed the hog, with the intention of stealing it, it was their duty to acquit, for the reason that Act No. 107 of 1902, repealed that portion of section 3 of Act No. 8, of \* \* \* 1870, under which this prosecution was instituted, and that no such crime as that charged is known to the laws of this state."

This charge was also refused, and the bill of exception was thereupon taken.

The motion in arrest is based on the grounds stated in the bill of exception, and the judge a quo gives the following reasons for overruling the same, to wit:

"In this case, defendants, being prosecuted under section 354 of the revised statutes, and being convicted, file a motion in arrest of judgment, on the ground that the evidence shows they are guilty of larceny of a hog, of a value less than \$20, and that, therefore, it being a case not triable by jury and not punishable by a penitentiary sentence, the verdict should be set aside; and, on the further ground, that the said section was repealed by Act No. 107 of 1902. \* \* \* I do not think that the statute under which the defendants were prosecuted was

intended to be used in cases where there is a perfect case of larceny, but only in cases where there was an incomplete attempt at it, such, for instance, as the failure of asportation. It is the attempt to commit the crime of larceny which is denounced by this statute, and which may be punishable by imprisonment at hard labor for two years, which, if the attempt should be carried to perfection of larceny, the perpetrator, if the value of the thing stolen is under \$20, cannot be tried by a jury, nor sent to the penitentiary, under the graded act."

#### Opinion.

Defendants are prosecuted under section 3, Act No. 8, p. 50, of the Extra Session of 1870, which is published in Wolf's Rev. St. immediately after section 854. The section reads, in part:

"That whosoever shall wound, or kill, any neat cattle, hog, sheep or goat, the property of another, with intent to steal the same, \* \* \* shall, on conviction, be imprisoned, at hard labor, or otherwise, not exceeding two years, and fined, not exceeding \$1,000, at the discretion of the court."

Section 5, Act No. 107, p. 162, of 1902, grades the crime of "larceny of property of a less value than \$100, unaccompanied with any of the several sorts of burglary, or other crimes," and provides that, if the property stolen "be of the value of \$5, or more, but less than \$20, the punishment shall be imprisonment for not more than six months nor less than one month."

Const. art. 116, provides that:

"All cases in which the punishment may not be at hard labor, shall, until otherwise provided by law, which shall not be prior to 1904, be tried by the judge without a jury. Cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict."

In the instant case, the punishment may be at hard labor; hence the case was properly tried by a jury of five.

The crime denounced by the statute, and for which defendants were prosecuted and convicted, was not "larceny," but the killing of a hog, the property of another, with intent to steal the same; and, to have entitled the state to a conviction, it was necessary that the proof should have established the killing and the intent. The intent may have been proved with or without proof establishing the completed crime of larceny. If the completed offense was proved, it necessarily included the proof required to establish the intent, and that was the only purpose for which proof on that subject could have been admitted, since the completed offense was not charged. If there had been a failure to prove the killing, there could have been no conviction; for there would have been nothing left of the charge save the charge of intent to steal, which is not a crime. If there had been a failure to prove the intent, there could have been no conviction, for, though the killing of a hog, the property of another, is denounced as an offense, by Rev. St. § 815, it is not

punishable at hard labor, and the jury of five would have been without jurisdiction.

Section 5, Act No. 107, p. 162, of 1902, deals with larceny, and not with the killing or wounding of animals belonging to others with intent to steal them, which is a distinct offense—not to be confused with larceny—not dependant upon the value, or the asportation of the animal, not graded and being possibly punishable at hard labor, triable by a jury of five. Section 3, Act No. 8, p. 49, of the Extra Session of 1870, establishing said offense, is not therefore repealed by the act of 1902. The requested charges were properly refused.

Judgment affirmed.

(124 La.)

No. 17,714.

#### STATE v. LE BLANC.

(Supreme Court of Louisiana. Nov. 15, 1909.  
Rehearing Denied Dec. 13, 1909.)

#### 1. INTOXICATING LIQUORS (§ 45\*)—ILLEGAL SALES—LICENSES—SECTION 910 OF REVISED STATUTES NOT REPEALED.

The information charged defendant with having retailed spirituous liquors without a license.

The first ground of defense is that section 910 of the Revised Statutes is repealed, under which the information was presented.

Act No. 66, p. 93, of 1902, i. e., section 910, prohibits sales of spirituous or intoxicating liquors without license.

Section 2, Act No. 176, p. 237, of 1908, does not prohibit in words the sale of intoxicants. The latter does not repeal the former as it is not entirely similar.

Repeal by implication not favored.

Reaffirmed in *State v. Bailey*, 49 South. 1011.

Section 910 applies to dry parishes. *State v. Kuhn*, 24 La. Ann. 474; *State v. Brown*, 41 La. Ann. 772, 6 South. 638.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 45.\*]

#### 2. CRIMINAL LAW (§ 1150\*)—APPEAL—REVIEW—QUESTIONS OF FACT.

Questions of fact are involved. The remedy is not by appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1150.\*]

(Syllabus by the Court.)

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Roman LeBlanc was convicted of an illegal sale of liquors, and appeals. Affirmed.

Story & Pugh and Howe, Fenner, Spencer & Cocke, for appellant. Walter Guion, Atty. Gen., John J. Robira, Dist. Atty., and R. G. Pleasant, for the State.

BREAUX, C. J. An information was filed charging the accused with having sold near-beer, a beverage also known as "silver spray," without first having obtained a license.

During the trial a motion to quash the information was overruled.

The case was submitted upon an agreed statement of facts.

The defendant was found guilty.

He applied for a new trial, which motion was overruled, and bill reserved.

The court imposed a sentence of \$500 and all costs, and, in default of payment, imprisonment for six months.

Recurring to the motion to quash: The defendant objected on the ground that he was prosecuted under section 910 of the Revised Statutes, and that the section has been repealed by Act No. 176, p. 236, of the General Assembly of 1908, known as the "Gay Shattuck law."

This act has not repealed the section cited supra.

The section in question is not entirely similar. There is a difference between the two, in that section 910 includes intoxicating liquors, while Act No. 176 of 1908 does not. There is a difference between intoxicating and spirituous liquors. An intoxicating liquor may not be spirituous. Commonwealth v. Livermore, 4 Gray (Mass.) 18-20.

Nothing is said in the statute of 1908 about intoxicating liquors different in that respect from the cited section.

Act No. 66, p. 93, of 1902, applies in prohibition parishes.

The court, through Mr. Justice Nicholls, in a well-considered opinion, from which there was no dissent, expressed that opinion in State v. Bailey, 49 South. 1011. The court said in that case that section 910 of the Revised Statutes, as amended by Act No. 66 of 1902, was in full force.

Being in a prohibition parish, the defendant could not obtain a license.

It is not because he could not obtain a license that he is to be acquitted and go free.

If the construction contended for on the part of the defense were the correct construction, such would be the result.

Evidently that was not intended by the lawmaking authorities of the state, and that is not the law.

In State v. Brown, 41 La. Ann. 771, 6 South. 638, this court held that one is as guilty who sells liquor in a prohibition parish as the one who sells liquor in a nonprohibition parish. The court, in the cited case, held that the distinction attempted to be made could not be sanctioned, and that failure to obtain a license from any cause is a violation of law, citing State v. Kuhn, 24 La. Ann. 474.

There is a law to be enforced where licenses are not issued, as well as in the parishes where they are issued.

Having disposed of this ground of the defense, we pass to a consideration of the motion for a new trial and of the exception taken to the court's ruling on that motion.

We are informed by the record: That the case was submitted upon an agreed statement

of facts, and that, as the case was submitted upon this evidence, the court erred in finding the defendant guilty; that, as made to appear by the agreed statement of facts, he had a license issued by the state and municipality for the year 1909 to sell soft drinks; and that the evidence proved that "silver spray" is not a spirituous drink and does not come within the terms of his license. In other words, that it is a soft drink.

By this agreed statement of facts, it appears that "silver spray" contains less than one-half of 1 per cent. of alcohol, and that no internal revenue license is required by the United States government for its sale.

The evidence to which we have before alluded went to the court without objection.

Objection was urged on the motion for a new trial.

On the application for a new trial it will not be considered whether or not conviction was based on sufficient evidence.

The court will not consider the facts nor the sufficiency of the evidence.

The rule was clearly laid down in State v. Peterson, 2 La. Ann. 921, construing the Constitution (article 63) of 1845, which is not different from the present Constitution. The point here involved was decided adversely to the appellant.

This court again adhered to the same view in State v. Nelson, 3 La. Ann. 497. On similar ground the court declined to interfere with the verdict. State v. Snow, 30 La. Ann. 401.

Again, in State v. Beatty, 30 La. Ann. 1267, and in State v. Crawford, 32 La. Ann. 527, the conclusion was the same.

The law relating to the trial of classes of crimes by the court without a jury does not have the effect of enlarging the jurisdiction of this court as relates to facts on appeal.

In the nature of things, there cannot be two rules of proceedings; one when the case is tried by the court alone, and the other when the case is tried before the court and jury. Jurisdiction is fixed by laws which apply with equal force whether the case is tried before the one or the other. The proceedings are similar in each, to wit: The evidence is offered and admitted, the verdict is arrived at, as when the case is tried before a jury.

There was no conclusion of law drawn by the district judge from the agreed statement of facts which takes the case out of the class of cases tried on the merits.

The case was not appealable as relates to facts upon which the conviction was based.

The contention is that the question of the strength or weakness of the beverage has been considered on appeal by courts of other states and by the Supreme Court of the United States. Sarlls v. United States, 152 U. S. 570, 14 Sup. Ct. 720, 38 L. Ed. 556.

The question in the cases that we have

examined, particularly the last-cited case, was not brought up on the motion for a new trial.

But let us for a moment concede the position of defendant, urgently pressed upon our attention: The result would be that in all cases tried by the court alone it would be possible, on application for a new trial, to bring up the evidence of conviction for review upon the facts, if the prosecuting officer and counsel for defendant were to agree upon a statement of the facts and make it part of the record. The court would then have to pass upon the sufficiency of evidence for conviction, although it has been repeatedly held that the court on appeal has no jurisdiction of facts upon which the verdict was based.

In the well-considered supplemental brief counsel urge that it is proper to leave facts to the jury and trust them with the decision upon the facts after having received correct instructions from the court.

May it not be if the jury can be trusted, as stated, that a judge, trained in the law, who passes upon the case without a jury, can also be trusted? His errors are subject to review. If he were to condemn a defendant without evidence of guilt, as suggested by defendant, the defendant is not without remedy, but not by appeal.

For reasons assigned, the judgment is affirmed.

(124 La.)

No. 17,947.

# BLAISE v. SECURITY BREWING CO.

In re TINKER et al.

(Supreme Court of Louisiana. Nov. 15, 1909.  
Rehearing Denied Dec. 13, 1909.)

## 1. APPEAL AND ERROR (§ 489\*)—STAY OF PROCEEDINGS—POSSESSION OF RECEIVER.

The appointment of a receiver for a business corporation, as a going concern, vests in the receiver, as the court's officer, title to the property of the corporation and right of possession; and such right of possession is not affected by an appeal taken under section 4, Act No. 159, p. 314, of 1898, which provides that "such an appeal \* \* \* shall have the effect of suspending the functions of such receiver, except to perform such administrative acts as may be necessary for the preservation of the property"; the possession being necessary for the performance of the acts of administration required for the preservation of the property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2279; Dec. Dig. § 489.\*]

## 2. RECEIVERS (§ 74\*)—INTERFERENCE WITH POSSESSION—CONTEMPT.

Interference with the possession of a receiver, or obstruction of his attempt to exercise the right of possession, is punishable by proceedings for contempt.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 132; Dec. Dig. § 74.\*]

## 3. RECEIVERS (§ 74\*)—INTERFERENCE WITH POSSESSION—CONTEMPT.

It is not necessary that a person, interfering with or obstructing a receiver in the possession of the property or in the exercise of his right to the possession of property included in

the receivership, should have been officially notified of the appointment of the receiver or of the orders under which he is acting, in order to render him liable for contempt. Actual knowledge of such appointment or orders is sufficient.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 74.\*]

## 4. RECEIVERS (§ 74\*)—INTERFERENCE WITH POSSESSION—CONTEMPT.

Unauthorized interference with the possession of a receiver cannot be justified on the ground that the person interfering considered the appointment of the receiver ill-advised or illegal.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 74.\*]

## 5. CERTIORARI (§ 29\*)—PROHIBITION (§ 11\*)—REVIEW—FINDINGS OF FACT.

The jurisdiction of the district court to make and to enforce, for certain purposes, orders appointing a receiver for a business corporation, and directing him to make an inventory of the property of the corporation, being established, and actual knowledge of the making of the orders being brought home to the persons charged with obstructing their execution, the question whether the district court found correctly or incorrectly, in holding that such parties were guilty of the particular conduct charged, will not be reviewed in this court on application for the writs of certiorari and prohibition.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 29; \* Prohibition, Dec. Dig. § 11.\*]

(Syllabus by the Court.)

Action between George P. Blaise and the Security Brewing Company. Z. W. Tinker and another apply for writs of certiorari and prohibition to the Judge of the Civil District Court. Dismissed.

G. W. Flynn and M. D. Dimitry (T. M. & J. D. Miller, of counsel for relator Tinker), for relators. Clegg, Quintero & Gidlere, for respondent receiver of Security Brewing Co.

## Statement of the Case.

MONROE, J. Relators complain that they have been adjudged guilty of contempt by the judge of the civil district court, division E. and that, for the reasons stated in their petition, the finding was unauthorized, and they pray that the execution of the judgment be prohibited.

The facts are as follows: Relator Blaise, who is secretary of the brewing company, filed a petition in the district court, alleging that he was a creditor of the company, and that, whilst the company was solvent, it was unable to meet its obligations as they matured and was harassed by the demands of its creditors; that its board of directors had passed a resolution admitting those facts, and declaring that a receiver should be appointed to operate it as a going concern. Wherefore he prayed that a receiver be appointed to operate the company as a going concern. The company accepted service of the petition, and answered at once, admitting the truth of the allegations therein contained, and it concurred in the prayer for the appointment of the receiver, and asked:

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"That the recommendation of the appointment of George P. Blaise, as receiver, be carried out."

The court took the matter under advisement, and appointed John McGraw receiver. It also, on the application of McGraw (who qualified according to law), authorized him to employ counsel, to employ a competent man to stay in the office of the company and keep in touch with its transactions, and to cause an inventory to be made of the property of the company. The company applied for, and obtained, an order for a suspensive appeal from the judgment appointing the receiver, in so far as it named McGraw to that position, which appeal was granted upon the day following that upon which the order of appointment had been made. A few days later the receiver ruled the relators, Tinker, as president of the company, and Blaise, as secretary, to show cause why they should not be ordered to deliver to him the property and assets of the company, and why they should not be punished for contempt, for having refused to do so, and for having refused to allow him to make an inventory of such property and assets, and inform himself, by an inspection of the books, of the outstanding liabilities and daily expenditures. After hearing, the rule was made absolute, and defendants in rule were adjudged guilty of contempt; but sentence was deferred. And thereupon said defendants, as relators herein, made the application which we are now considering. Their position is that the receiver's functions were suspended, quoad the right to take possession of the property of the company, and the jurisdiction of the court ousted, by the appeal, and that, in effect, the receiver had no right, under the circumstances, to make the inventory or to inform himself as to the debts due by, or to, the company, and that, no specific orders having been directed to them in regard to those matters, they were not in contempt for not complying with such orders. The judge a quo, for cause why the prohibition should not issue as prayed for, says: That relators, as president and secretary, respectively, of the brewing company refused to allow the receiver to make an inventory of the open accounts of the company, or to permit him to ascertain, by reference to the books, the outstanding liabilities, or to take charge of the property and assets of the company, "all as alleged in the rule for contempt, and as proved at the trial"; that, under the law, a receiver, pending an appeal from the judgment appointing him, is empowered "to perform such administrative acts as may be necessary for the preservation of the property"; that the first step necessary for that purpose is to ascertain, by means of an inventory, of what the property consists, and the next step is to assume control of it; that the power to perform administrative acts is the power to administer, and that there can be no administration of property without possession and control of it; that it was necessary

in this case that the receiver should be in possession of the property in order to protect it from the pursuit of creditors and prevent waste and destruction by those charged with its mismanagement; that the lawmaker intended to vest the same authority in a receiver as is vested in a provisional syndic, and that he has the same right of administration; that the appeal leaves him untrammelled, save that he cannot liquidate; that the brewing company has appealed only in so far as the judgment complained of names McGraw as receiver, instead of Blaise, who was recommended by himself and the board of directors, to whose unhappy administration the embarrassment of the company is due, the necessity for a receivership being admitted, but it being contended that the court is without discretion in the matter of the selection of the receiver, and must appoint the person recommended, as stated; that, if the receiver who has been appointed cannot assume possession and administer the property, notwithstanding the appeal, it must remain under the control of persons confessedly incapable of conserving it for the benefit of those interested.

#### Opinion.

Act No. 159, p. 312, of 1898 (section 1), authorizes the district courts—

"to appoint receivers to take charge of the property and business of corporations: \* \* \* (8) At the instance of a creditor, when the board of directors of the corporation have declared, by resolution, that the corporation is unable to meet its obligations as they mature and that a receiver is necessary to preserve and administer its assets for the benefit of all concerned."

It is not disputed that the proceedings in this case, leading up to, and inclusive of, the appointment of the receiver, were in strict conformity to the law thus quoted, and it cannot well be disputed that they are to be regarded as having been taken as well in the interest of the creditors of the corporation as the stockholders. There can, therefore, be no question that the court was authorized to appoint a receiver and to vest him with such authority as he required in order to enable him to accomplish the purpose in view in making the appointment; and it is equally beyond question that the court did make such appointment. Section 5 of the statute quoted provides that:

"In the order appointing said receiver, the court may, in its discretion, confer on the receiver such powers of administration as it may deem best for the interest of all parties, and, from time to time, restrict or enlarge such powers," etc.

The letters of appointment issued to McGraw confer on him—

"full power to hold, administer, manage, and dispose of the property and income of said corporation, and conduct the business of said corporation, as a going concern, as directed by the court."

Section 4 of the act provides that any person having an interest (to be shown by affidavit)—

"may appeal from any order appointing \* \* \* a receiver. \* \* \* Such appeal, when perfected, shall have the effect of suspending the functions of such receiver, except to perform such administrative acts as may be necessary for the preservation of the property; provided, such appeal must be taken and perfected within ten days," etc.

The section further provides that an appeal may be taken after the expiration of 10 days (from the entry of the order), and within 30 days, but that in such case "it shall not suspend the functions of said receiver in any way." It is not disputed that in this case the company took the appeal within 10 days and that it had the effect of a suspensive appeal. The fact remains, however, that it did not deprive the receiver of the authority "to perform such administrative acts as may be necessary for the preservation of the property"; i. e., the property, the right to the possession of which was vested in him by virtue of his appointment, and which consists of all the property, real and personal, of the brewing company, including the "going business" and the good will thereof.

The acts of administration necessary for the preservation of property vary, more or less, with the character of the property. Thus, for the preservation of a going sugar plantation, it may be necessary to grind the cane, or even to plant and grind it; and for the preservation of property consisting of a going hotel it would seem to be necessary to keep it open to guests. But, whatever may be the character of the property, it is difficult to conceive of a case in which one could reasonably be charged with the performance of the acts necessary for its preservation, and at the same time be denied either information as to its character and whereabouts or possession and control of it. It would, perhaps, be the duty of the receiver in this case to keep certain of the property of the brewing company covered by insurance; but, in order to act as a prudent administrator, he should know, before incurring obligation in that respect, what policies have already been taken out and what premiums paid, and unless it be held that the outstanding accounts, due to the company, are not to be considered property, he should, in order to preserve such assets, be informed who the debtors are and when their obligations mature. The petition and answer upon which the receiver was appointed, and the appointment itself, contemplate a receivership for the going business (which includes the good will) of a brewery; but how is property of that character to be preserved by one who is accorded no control over, and no information in regard to, it?

There is no doubt that a difference exists between acts which are necessary for the preservation of property and those which involve transactions concerning the property; but are not necessary for that purpose, though

in some cases the difference may not be very obvious. For that reason, much is left to the discretion of the court which has charge of the receivership, and in which the custody of the property is vested. The respondent judge was of opinion that, for the preservation of the property here involved, the receiver should assume control and possession of it, and should make an inventory, and should inform himself of the condition of the business; and we find the reasons given by him in support of his opinion amply sufficient.

The remaining question is whether relators were properly adjudged guilty of contempt. Their defense, that the receiver was not entitled to the possession of the property, and, in effect, was not entitled, as administrative acts necessary to its preservation, to make an inventory and to inform himself of the condition of the "going business" of which he had been placed in charge, has been answered. They further say that no specific orders with reference to the delivery of the property to the receiver, or with regard to his administration of it, for the purposes of its preservation, were directed to them, and that they cannot be held guilty of contempt for failure to respect orders that were not made, and, still further, that, even had such orders been directed to them, the proceeding for contempt is not the proper remedy for their enforcement.

The effect of the order appointing the receiver was, however, in legal contemplation, to wrest the possession of the property from the brewing company, and to vest the title and right of possession in the court, through the receiver; and the relators, Blaise and the president of the brewing company, were as much bound by that order as though it had been addressed to them, for the reason that the order was made at the instance of Blaise and the brewing company, and both of them, as also the president of the company, had knowledge and notice of it at the time that the acts charged were committed. Those acts, the court *a quo* found, amounted to an interference with the receiver in the attempted exercise of his right of possession and to an obstruction to the execution by him of the specific orders, authorizing and directing him to hold and manage the property and to make an inventory of it; and the fact that the company may have doubted the advisability or legality of the order appointing the receiver, in so far as it named McGraw, instead of Blaise, and took its appeal therefrom, afforded no justification for a disregard of the appointment in so far as its effect was not suspended by the appeal. Mr. High, in his work on Receivers (3d Ed., § 5), referring to the difference between a writ of injunction and an order for the appointment, or appointing, a receiver, says:

"Perhaps the principal element of difference between those two important remedies lies in

this: That an injunction is strictly a conservative remedy, merely restraining action and preserving matters in statu quo, without affecting the possession of the property or fund in controversy; while the appointment of a receiver is usually a more active remedy, since it changes the possession as well as the subsequent control and management of the property. A court of equity, by an injunction, ties up the hands of defendants, and preserves unchanged, not only the property itself, but the relations of all the parties thereto. But, in appointing a receiver, the court goes still further, since it wrests the possession from defendant and assumes and maintains the entire management and control of the property or fund, frequently changing its form, and retaining possession, through its officer, the receiver, until the rights of all parties in interest are satisfactorily determined."

And, further, upon that point, and upon the other questions which are here involved, we quote from the same authority as follows:

"Sec. 135. As regards the precise time when the receiver's title and right of possession arise to attach property which is the subject of the receivership, the better rule would seem to be, as held in New York, that they vest, by relation, back to the date of the original order appointing him, although the proceedings may not be perfected until a later date, and that the receiver's title and right of possession, during the interval between such order and the time of perfecting his appointment, are superior to those of attaching creditors, or of judgment creditors who levy upon the property during such interval. Thus, when an order of reference is made to a master in chancery for the appointment of a receiver, and the appointment is afterwards made under and pursuant to such order, the receiver's title will be held to have vested as of the date of the original order, and to have attached upon all property to which the receivership could extend, in like manner and with the same effect as if the original order had named the receiver, instead of directing the reference for that purpose. In all such cases actual possession by the court appointing the receiver is not necessary to complete its jurisdiction or control over the property as against other creditors. It is sufficient that the court has assumed jurisdiction over the property in controversy by appointing a receiver, and it is therefore as much in the possession of the court as if already in the hands of its receiver, even though he has not yet complied with the order requiring the execution of a bond."

"Sec. 103. The receiver being an officer of the court, and his possession being regarded as the possession of the court, any unauthorized interference therewith \* \* \* is regarded as a contempt of court and is punished accordingly; the usual punishment to which resort is had being by attachment for contempt. \* \* \* It is also a well-established principle that, to render a defendant or other person liable by attachment for contempt in disturbing or interfering with property of which a receiver is entitled to possession, it is not necessary that he should be officially apprised of the receiver's appointment, or even that the formal orders should have actually been drawn, provided he has due actual notice of the receivership, or of the order of the court directing the appointment. Any actual knowledge of the granting of the order is sufficient to fix defendant's responsibility for its violation; the same principle being applicable in such cases as in case of the violation of an injunction."

"Sec. 106. And where a defendant is present in court during the hearing of a cause, and knows that an order granting a receiver of his

estates has been allowed, although the decree itself has not yet been drawn, he is guilty of contempt of court if he removes a portion of the property and puts it beyond the receiver's possession for the purpose of evading the decree, and he cannot justify on the ground that the decree has not yet been entered."

"Sec. 143. Courts of equity will not permit any unauthorized interference with the possession of their receiver to be justified on the ground that the appointment was ill-advised or illegal, and that the parties interfering were, therefore, not bound to regard it."

The jurisdiction of the court a quo to make and to enforce, for the purposes of the questions here at issue, the orders appointing the receiver and for the taking of the inventory, being established, and actual knowledge of the making of the orders having been brought home to the relators, the question whether the court found correctly or incorrectly in holding that relators were guilty of the particular conduct charged against them, and, if so, whether it constituted a violation of those orders, and hence a contempt of the court, is one which, it has repeatedly been held, is not reviewable in this court on application for writs of certiorari and prohibition. *State ex rel. Barthet v. Judge*, 40 La. Ann. 434, 4 South. 131; *State ex rel. Kiernan v. Judge*, 41 La. Ann. 314, 6 South. 539; *Alverson v. Judge*, 105 La. 280, 29 South. 705.

We therefore conclude that relators can take nothing by this application. The original order herein made is accordingly rescinded, and this proceeding dismissed, at the cost of the relators.

(124 La.)

No. 17,961.

McGAW et-ux. v. O'BIERNE.

(Supreme Court of Louisiana. Dec. 13, 1909.)

APPEAL AND ERROR (§ 405\*)—CITATION—NECESSITY.

A stipulation that the court may render and sign judgment in vacation as though it were in term does not dispense with citation of an appeal moved and granted at a subsequent term.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 405.\*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Geo. H. Theard, Judge.

Action by William H. McGaw and wife against Edward J. O'Bierne. Judgment for defendant, and plaintiffs appeal. Dismissed.

Wm. J. Formento and F. F. Teissler, for appellants. Geo. W. Flynn, for appellee.

On Motion to Dismiss.

LAND, J. This cause was decided in vacation of the court pursuant to the agreement of the parties. Judgment was rendered

in favor of the defendant on August 23, 1909, and was signed on August 27, 1909.

At the ensuing regular term of the court, on October 16, 1909, plaintiffs filed a motion for a suspensive and devolutive appeal, which was granted on bond of \$150, which was filed on October 19, 1909.

Defendant and appellee has moved to dismiss the appeal on the ground that the same should have been taken by petition and citation.

The stipulation reads as follows:

"It is agreed that the court may render and sign the judgment in this case in vacation as though it were in term."

If, as argued by counsel for appellant, this agreement made the whole vacation a term quoad this particular case, such term necessarily expired with the beginning of the next regular term of the court. Citation of appeal is necessary when the petition or motion is filed after the adjournment of the term at which the judgment was rendered, or at a subsequent term, and the appeal will be dismissed if the appellant has not prayed for citation of appeal. Code Prac. art. 573; Garland's Notes, 432, 433. But the stipulation is silent as to an appeal from the judgment to be rendered in vacation. No agreement was necessary to enable the losing party to appeal by petition and citation. We cannot presume that the parties intended to waive citation of appeal. Notice of judgment was waived as a necessary legal consequence of the rendition of the judgment "as though it were in term."

But notice of judgment is one thing, and citation of appeal is another.

Act No. 94, p. 117, of 1898, providing for the rendition of judgments and the granting of appeals out of term time, has no application to the parish of Orleans; but it is noteworthy that the said statute provides for notice of rendition of judgment, and notice of the filing of the appeal bond.

In the parish of Orleans, in cases of this kind, no proceeding can be had in vacation except by consent of parties. While such consent should be liberally construed, it should not be stretched to cover subsequent proceedings not mentioned in the stipulation and not a necessary sequence of the particular subject-matter of the agreement. It is to be noted that the appellant took no proceedings in vacation, but moved for the appeal at the ensuing regular term.

The suggestion that the motion to dismiss is restricted to the suspensive appeal is without force. It is true that the motion recites that the "suspensive" appeal taken by plaintiff should be dismissed; but the grounds for dismissal cover both kinds of appeal, and the prayer is that "said appeal taken herein be dismissed."

It is therefore ordered that this appeal be dismissed.

(124 La.)

No. 17,809.

DEAL v. HODGE.

In re HODGE.

(Supreme Court of Louisiana. Nov. 2, 1909.)

APPEAL AND ERROR (§ 122\*)—COURTS (§ 224\*)  
— APPEALABLE JUDGMENT — PAYMENT OF COSTS.

The suit of Deal v. Hodge was an action brought under section 1419 of the Revised Statutes. Deal and Hodge were opposing candidates for the office of councilman of the city of Shreveport. Hodge was returned elected by the election officers. Deal contested the election, praying to be declared elected, and, in the alternative, that the election be set aside for irregularities. The issues were tried before a jury, which returned a verdict to the effect that the election was null for irregularities in the election proceedings and ordering a new election to take place. The district judge rendered judgment accordingly; but in the judgment ordered and decreed that the defendant should pay the costs. Defendant obtained a suspensive appeal to the Court of Appeal from that part of the judgment which condemned him to pay the costs. The Court of Appeal on motion dismissed the appeal. The present proceeding is to test the correctness of that judgment. *Held:*

That the judgment of the Court of Appeal dismissing the appeal was correct. No part of the judgment of the district court was appealable. The decree of the court condemning defendant to pay costs was an integral part of the judgment and could not be detached therefrom and made the subject of a separate partial appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 60, 866-874; Dec. Dig. § 122;\* Courts, Dec. Dig. § 224.\*]

(Syllabus by the Court.)

Action by Charles Deal against Thomas G. Hodge. Judgment for plaintiff, and defendant appeals to the Court of Appeal, which dismissed the same, and he applies for certiorari or writ of review. Order to show cause. Granted.

See, also, 123 La. 369, 48 South. 999; 50 South. 823.

E. W. Sutherland, L. C. Butler, and H. C. Fisher, for plaintiff. Blanchard, Barrett & Smith and Hall & Jack, for applicant.

NICHOLLS, J. Plaintiff and defendant were opposing candidates for the office of councilman for the Ninth ward of the city of Shreveport at the election in November, 1908. Defendant was declared elected, and plaintiff contested the election, praying that he be decreed elected, and, in the alternative, that the election be decreed illegal and a new election ordered. The suit was brought under section 1419 of the Revised Statutes, and tried by a jury, which returned a verdict in which it declared the election null on account of irregularities and ordered a new election. A judgment was rendered by the district court in conformity to the verdict. By that judgment the defendant, Thomas G. Hodge, was ordered to pay all the costs of suit.

Defendant moved for a new trial on the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



ground that defendant, Hodge, should not have been condemned to pay the costs, but that the city of Shreveport should have been condemned to do so. The court overruled the motion and maintained the judgment as rendered. Hodge then moved the court for an appeal suspensive and devolutive from that part of the judgment which condemned him to pay costs, which he alleged had not yet been taxed, but which he averred exceeded the sum of \$100. Mover asked that the appeal should be made returnable to the Court of Appeal at Shreveport.

The order of appeal was granted. The appellee moved in the Court of Appeal to dismiss the appeal on the grounds:

(1) That this case involved solely a contest between plaintiff and defendant for a municipal office, to wit, the office of councilman of trustee from the Ninth ward of the city of Shreveport, and that no salary, compensation or perquisites are provided for or attached to said office.

(2) "That defendant's application and motion for an appeal in said case only asked and prayed for an appeal from that part of the judgment which condemned defendant and appellant to pay the costs, and this appeal in this case was granted in pursuance of said motion and application only from that part of said judgment which condemned defendant and appellant to pay the costs; and that no appeal can legally be taken from such part only of such judgment; and that the costs in this case (which is not appealable on the main issue) cannot be made the basis of a separate appeal from that part only of the judgment which condemned defendant and appellant to pay the costs."

(3) "That the laws of this state do not provide for, authorize, or allow an appeal in this case; and that this court is without appellate jurisdiction in this case in any way, either on the main issues involving the right to said municipal office, or on the incidental issue involving the liability for costs or any other issue."

The motion to dismiss was sustained, and the appeal was dismissed. Defendant then filed in this court the present application for a certiorari or writ of review to the Court of Appeal. This application so made was granted. The record has been brought up, and that judgment is now before this court for review.

The prayer in defendant's application for review reads:

"Petitioner prays that a writ of certiorari or review be granted and directed to the Court of Appeal, Second District of Louisiana, ordering said court to send up the record in this case, to the end that the errors of said court may be corrected and said case be reinstated on the docket of said court for hearing.

"In the alternative, petitioner prays, should this court be of the opinion that the case was not appealable, then that a writ of certiorari and prohibition be granted directed to the First district court, Hon. F. T. Bell, judge, ordering said judge to send up the record in order that the legality of the judgment rendered therein against defendant for costs may be inquired into, and prohibiting said court from taking any further action in the execution of said judgment until the matter be finally determined by the Supreme Court."

Defendant's application for the writs was assigned to the writer for action in vacation. The question at issue was an important one

involving the appellate jurisdiction of the Court of Appeal of the state, and it was deemed proper that its decision should not be made to rest upon a decision of one of the Courts of Appeal (supposed inferentially to be supported as to its correctness by the refusal of a single justice to order the judgment to be sent to this court for review), but should be settled finally by direct action of this court. It was also deemed proper to have this court pass upon the proper course to pursue in reference to the alternative demand contained in the application for a certiorari and prohibition to issue to the First district court for the parish of Caddo.

The defendant concedes that the case was not appealable on its merits. He contends: That the district judge in rendering judgment under the verdict went further than the jury, and wholly without authority of law condemned him to pay the costs; that no fault or wrongdoing was charged against him in the matter of the election; that the election was set aside solely by reason of irregularities on the part of the election commissioners over whose actions he had no control; that he did not bring the suit as plaintiff, but was forced into it as a defendant; that there is no salary or perquisites attached to the office of councilman of Shreveport; that it is against public policy that a citizen acting solely in discharge of his duty as a citizen should be charged with the costs of an action in which the public itself is the real party in interest; that he made an ineffectual effort to rectify matters through a motion for a new trial and the suspensive appeal taken by him to the Court of Appeal from that part of the judgment condemning him to pay costs amounting to over \$100. He urges that the Court of Appeal erred in holding that it had no jurisdiction; that it is well settled that an appeal may be taken on question of costs alone. He maintains that, where the appeal is on the merits of the case, the question of costs as an incident thereto goes with the appeal on the merits; but where there is no appeal on the merits of a case, and the amounts involved are the costs alone, the case goes to the Supreme Court or the Court of Appeal, according as the amount of the costs gives the one court or the other jurisdiction; and that it is immaterial in such a case whether the costs be taxed simultaneously with the rendition of judgment and in the judgment itself, or later on a rule. He relies upon the cases of *Robson v. Beasley*, 119 La. 387, 44 South. 136, and *Frele v. Luben*, 107 La. 79, 31 South. 634, and refers the court to those cases.

In the brief on behalf of defendant, it is urged:

"That the Court of Appeal fell into the error of supposing that this case is governed by article 91 of the Code of Practice."

He insists that, while that article would have been applicable had he appealed from the merits of the case, it is different where

he does not appeal from the judgment on the merits. He says that he does not contest the correctness of the judgment on the merits. He admits its correctness and concedes it is now final. He urges that the articles of the Code of Practice do not prohibit an appeal on the question of costs alone, where, as in the present case, the case is not appealable on the merits; that the Supreme Court has frequently sustained appeals from particular parts of judgment. He says that this case is covered by *Robson v. Beasley*, 119 La. 387, 44 South. 136, differing only in the fact that in this case there was no rule to tax costs; but he says: That such rule was not necessary, as the judgment on a rule would simply fix the amount which is not in dispute. That the plaintiff has never had the costs taxed.

"That the question involved herein is not what is the amount of the costs, but who is to pay them, and this was settled by the judgment itself; hence the appeal from that part of the judgment condemning defendant to pay the costs."

Defendant's counsel say:

"We understand that the sole question now before the Supreme Court is whether or not the Court of Appeal had jurisdiction."

Notwithstanding this declaration, counsel argue the question as to whether under the law the purpose of showing that the act of 1890, providing that the party cast in a contest for a state or parish office should pay the costs, does not cover a contest for a municipal office.

Defendant prays that the case be remanded to the Court of Appeal and ordered reinstated for hearing; but should this court determine that the Court of Appeal was not in error, in dismissing the appeal, he renews his alternative prayer for a writ of certiorari or prohibition to the district court.

In its opinion dismissing the appeal, it is stated that the costs in the suit amounted to over \$500. The court cites article 98 of the Constitution, which fixes jurisdiction of the Courts of Appeal and article 91 of the Code of Practice, as prohibiting the consideration of either interest or costs in determining jurisdiction. The court said:

"In determining jurisdiction regard must be had to the conditions existing at the time of filing of the suit. When the present suit was filed, the question of costs was not a matter in dispute. It is true that appellate courts are frequently called upon to determine questions relating to costs; but this is because such matters are incidental to the thing in dispute over which they have jurisdiction. It might be (though this is doubtful) that we could review the judgment of the district court on an injunction to restrain an execution for the costs here involved, or possibly on a rule to tax costs, if it had not already been done. The latter contingency existed in the *Beasley Case* upon which counsel for defendant relies, and not, as in the case at bar, simply as a part of a judgment in case over which we have no jurisdiction. As we view the situation, counsel is asking at our hands the exercise of the supervisory control over the district court in order to correct an alleged error by the judge thereof. The Constitution has intrusted this power to the Su-

preme Court alone. If counsel are correct in their contention, the city (of Shreveport), and not the defendant, is liable for the costs. They have an adequate remedy, we think, of invoking the supervisory jurisdiction of the Supreme Court. For this reason the appeal is dismissed."

We are of the opinion that the judgment of the Court of Appeal sought to be reviewed is correct. The action brought by Deal was one unappealable either in whole or in part to the Court of Appeal. Rev. St. §§ 1422, 1423. The district court in rendering judgment in the case was not silent as to the question of costs, leaving that matter open to be determined under articles 523, 549, and 551 of the Code of Practice. By express decree of the court the costs were thrown upon the defendant. The decree on that subject was an integral part of the judgment and could not be detached from it and made the subject of a separate partial appeal. *Frith v. Pearce*, 105 La. 199, 29 South. 809. If the district judge threw the costs upon one who under the law was not liable for them, he, in so doing, exceeded his authority. The party injured thereby was not without remedy; but the remedy would not be by appeal. The Court of Appeal correctly held that:

"Defendant, through an attempted appeal to it, was seeking to have it exercise supervisory control over the judgment of the district court, and that it had no such power under the Constitution."

Article 98 of the Constitution declares that, except as otherwise provided in that instrument, Courts of Appeal have appellate jurisdiction only. They have power, under article 104, to issue writs of mandamus, prohibition, and certiorari in aid of their appellate jurisdiction; but in this instance they have no such appellate jurisdiction. The judgment of the Court of Appeal herein sought to be reviewed was correct, and it is hereby affirmed, and the costs of the present proceeding are hereby decreed to be borne by the defendant. Having so decided, the next question is as to what course we should pursue in respect to defendant's alternative prayer for a writ of certiorari or prohibition to the First district court. We have presently the record of the case before us under the order heretofore rendered herein.

We think the proper action to be taken on the alternative prayer is to rule the judge of the First district court, Hon. T. F. Bell, to show cause why the writs of certiorari and prohibition should not be granted, and why the judgment of the said First judicial district court condemning the defendant, Thomas G. Hodge, to pay the costs in the matter of *Charles Deal v. Thomas G. Hodge*, should not be set aside and annulled as unauthorized by the law.

It is, accordingly, hereby ordered, to the end that the legality of the said judgment condemning said Hodge to pay costs be inquired into, that T. F. Bell, judge of the First judicial district court in and for the

parish of Caddo, do show cause before this court the 15th day of November, 1909, at 11 o'clock, why the judgment of that court condemning Thomas G. Hodge, defendant in the case of Charles Deal v. Thomas G. Hodge, to pay the costs of that suit, should not be annulled, avoided, and reversed, and why said court should not be prohibited from taking any further action in the execution of said judgment. It is further ordered that, until further ordered, the said court be restrained in the execution of said judgment, in enforcing payment of the costs from said Hodge. It is further ordered that the parties be notified in the premises.

(124 La.)

No. 17,959.

DEAL v. HODGE.

In re HODGE.

(Supreme Court of Louisiana. Nov. 29, 1909.)

**1. ELECTIONS (§ 307\*) — CONTESTS — COSTS — PARTIES LIABLE.**

Under Act No. 59, p. 57, of 1880, requiring the costs to be borne by the party cast in suits involving state and parish offices, a city is not liable for the costs of a contest of an election for membership in the city council; no statute making the city liable for such costs.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 333; Dec. Dig. § 307.\*]

**2. COSTS (§ 3\*)—NATURE.**

Costs are the creatures of statutory law.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.\*]

Election contest between Charles Deal and Thomas G. Hodge. The election was set aside, and defendant applies for writs of certiorari and prohibition to review the judgment in so far as it condemned him to pay costs. Application dismissed.

See, also, 123 La. 369, 48 South. 999; 50 South. 820.

Blanchard, Barrett & Smith and Hall & Jack, for relator. E. W. Sutherland, L. C. Butler, and H. C. Fisher, for respondent.

**PROVOSTY, J.** Defendant having been returned as elected over plaintiff, as member of council, city of Shreveport, plaintiff brought this suit contesting the election. The court set aside the election, and condemned defendant to pay the costs, amounting, it is said, to over \$500. Defendant asks this court to review that decision in so far as it condemns him to pay the costs. He refers to the decision of this court in the cases of Borgstede v. Clark, 5 La. Ann. 733. Lanier v. Gallatas, 13 La. Ann. 175, and Duson v. Thompson, 32 La. Ann. 861, as a settled jurisprudence to the effect that, except as otherwise expressly provided by law, the costs of a contested election case should not be borne by the party cast, but by the public. The two latter decisions are founded on the first, and the first is founded up-

on supposed motives of public policy. These motives of public policy were suffered to override the express provision of the Code of Practice requiring the costs to be borne by the party cast. It was doubtless in view of that jurisprudence that Act No. 59, p. 57, of 1880, was passed, requiring the costs to be borne by the party cast in suits involving state and parish offices. That act does not mention municipal offices; but it unquestionably adopts a different public policy from that on which the above-named decisions are based, and, the reason of those decisions ceasing, the decisions themselves lose their authority. It is not very apparent how the municipality could be condemned to pay the costs of a suit to which it is not a party. "Costs are the creatures of statutory law." Johnson v. Judge, 107 La. 70, 31 South. 645; Opelousas, etc., R. R. Co. v. St. Landry, 121 La. 802, 46 South. 810. No statute makes the city of Shreveport liable for the costs of this suit.

This application for writs of certiorari and prohibition is therefore dismissed, and relator is condemned to pay the costs thereof.

(124 La.)

No. 17,554.

BANK OF BERWICK et al. v. GEORGE VINSON SHINGLE & MFG. CO., Limited, et al.

(Supreme Court of Louisiana. Nov. 29, 1909.)

**1. EXECUTORS AND ADMINISTRATORS (§ 423\*)—ACTIONS — FRAUDULENT CONVEYANCES — DEATH OF DEBTOR—RIGHTS OF CREDITORS.**

Judgment creditors of a deceased debtor have a right of action to annul any contract of their debtor made in fraud of their rights. The right of the succession representative to sue to annul fraudulent or illegal contracts is not exclusive.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1660, 1660½; Dec. Dig. § 423.\*]

**2. FRAUDULENT CONVEYANCES (§ 27\*)—MORTGAGES.**

A mortgage given to secure an actual loan of money may be fraudulent as to creditors, if made with the common intent to screen the property of the insolvent debtor from the pursuit of his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 66-71; Dec. Dig. § 27.\*]

**3. CORPORATIONS (§ 387\*)—CONTRACT OF CORPORATION—RIGHTS OF CREDITORS.**

An ultra vires contract of a corporation, like any other contract, may be impeached as in fraud of creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1552; Dec. Dig. § 387.\*]

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Niell, Judge.

Action by the Bank of Berwick and others against the George Vinson Shingle & Manu-

facturing Company, Limited, and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Paul Kramer, for appellants. Foster, Milling & Godchaux, and Alexis Brian, for appellees.

LAND, J. Plaintiffs' petition was dismissed on an exception of no cause and right of action, and they have appealed.

The Bank of Berwick and J. H. Menge & Sons, judgment creditors of Theodore A. Thorgeson, deceased, instituted this suit against the defendant company and the legal representatives of the said decedent, for the purpose of annulling and avoiding, and of canceling and erasing from the record, a certain act of special mortgage of date October 11, 1907, executed by the said Thorgeson in favor of the defendant company to secure the payment of the promissory note of the said mortgagor, and by him indorsed in blank, for the sum of \$5,000. The consideration of the note and mortgage was the sum of \$5,000 borrowed by the said Thorgeson from the defendant company.

The grounds of alleged nullity are as follows: That the defendant company was not authorized by its charter to loan money and take mortgages or any other kind of security, and that consequently the contract in question was an ultra vires act on the part of said corporation, and was and cannot be exercised or enforced to the injury of petitioners as creditors of the said Thorgeson at the date of the execution and delivery of said note and act of mortgage.

That at said time said Thorgeson was insolvent, and his financial condition was well known to the officers, directors, and attorneys of defendant company; and that said ultra vires contract was in fraud of petitioners' rights as creditors, and works great injury to petitioners.

That the property mortgaged as aforesaid is the only property out of which petitioners will be able to realize anything out of their judgments against the said Thorgeson.

The petition alleges that the defendant company is a corporation organized under the laws of the state of Louisiana. The charter is not annexed to the petition; but it is alleged that the company is not authorized by its charter to loan money or take mortgages or any other kind of security. For the purposes of the exception, it therefore must be taken as true that the alleged contract of loan and mortgage was an ultra vires act of the corporation made in fraud of plaintiffs' rights as creditors. It may be that on the trial of the case on the merits the defendant company may be able to show that it had implied power to make the particular loan in question, and that the transaction was bona fide and in the usual course of business.

Plaintiffs' petition discloses two causes of action; one to revoke a contract as in fraud

of creditors, and the other to have the contract declared null and void ab initio as illegal. If either cause of action be good in law, the general demurrer filed by the defendant is bad.

We think that the plaintiffs, as judgment creditors of the deceased, have at least a standing to sue to annul the contract on the ground of fraud and injury. The right of judgment creditors to sue to cancel and erase apparent mortgage on the property of the debtor is too well settled for dispute. *Busiére v. Williams*, 37 La. Ann. 387.

The right of a judgment creditor to sue to annul an alleged illegal sale and bring the property back into the succession was affirmed in *Neda v. Fontenot*, 2 La. Ann. 782, and this doctrine was approved in *Helrs v. Lavedan*, 49 La. Ann. 923, 22 South. 214, and *Hardy v. Pecot*, 113 La. 359, 36 South. 992.

In *Judson v. Connolly*, 4 La. Ann. 169, it was held that the administrator of an insolvent succession, as the representative of the creditors, may maintain an action for their benefit, to annul a simulated sale and recover property belonging to the succession. This case in no way militates against the doctrine that the creditors themselves may maintain such a suit in their own right, especially where it appears that the administrator has taken no action in the premises.

Article 1970 of the Civil Code declares that:

"The law gives every creditor, when there is no cession of goods, as well as the representation of all the creditors where there is any such cession, or other proceedings by which they are everlastingly represented, an action to annul any contract made in fraud of their rights."

This article refers to insolvent proceedings. The right of a trustee, receiver, or syndic to sue does not exclude the right of judgment creditors also to sue, where no action has been taken by their representative to protect their interests.

The present suit, in part at least, is a revocatory action to set aside a contract, as in fraud of creditors.

The fact that Thorgeson was insolvent, and that the defendant company was aware of his financial condition at the time the loan was made, may not in themselves constitute a fraudulent transaction. *Brown v. Kenner*, 3 Mart. (O. S.) 270. But it is alleged that said contract was made in fraud of creditors and to their injury. If such be the case, and both parties participated in the fraudulent intent to defeat the pursuit of creditors, then the bare circumstance that the money was loaned would not purge the transaction. In mortgaging property, the fraud is operated by the incumbrance of the property and the placing of the money borrowed beyond the reach of creditors. In principle there is no difference between a fraudulent mortgage and a fraudulent sale. Fraud may exist in

an onerous contract, if both parties have a fraudulent intent. Civ. Code, art. 1982. The law protects third persons only when they contract in good faith or in the usual course of business with the insolvent debtor. Civ. Code, arts. 1979-1986.

The allegations of the petition suffice to negative the conclusion that the transaction was made in good faith and in the usual course of business. We cannot assume that the money loaned was used by the borrower to pay his debts. The allegations of the petition forbid such an assumption as far as the plaintiffs are concerned.

It is earnestly contended by the defendant that the plaintiffs, as judgment creditors, have no standing to impeach the mortgage as an ultra vires act of the corporation, because Thorgeson, having received the money, would not be permitted to set up the defense of ultra vires while he retained the fruits or benefits of the contract, and because the state alone can maintain proceedings against a corporation which has exceeded its charter powers; but these propositions leave out the element of fraud charged in the petition. Whether a contract be valid or invalid, it may be revoked when made in fraud of creditors and to their prejudice.

The general doctrine that, in executed ultra vires contracts, third persons cannot question the title of the corporation, and that such title is good except against the state alone, may be conceded, but does not meet the case at bar, involving the right of judgment creditors to question an ultra vires act of mortgage alleged to be fraudulent and injurious to them.

On general principles a judgment creditor has a right of action to annul any real contract of the debtor made in fraud of his right. Civ. Code, art. 1970. A fortiori a judgment creditor has a right of action to annul simulated contracts or contracts made in violation of law and in fraud of his rights.

In the opinion of the district judge, and in the oral and written arguments of counsel in this court, the important and difficult questions relative to the ultra vires contracts of corporations have been discussed with great ability.

We do not deem it necessary to consider and determine such questions on this appeal, as the case as presented may be disposed of on the allegations of fraud and injury.

We therefore conclude that the plaintiffs' petition discloses a right of action and a cause of action.

It is therefore ordered that the judgment below be reversed, and it is now ordered that the exception of no cause of action be overruled, and that this cause be remanded for further proceedings according to law, and that the costs of this appeal be paid by the defendant corporation.

(124 La.)

No. 17,967.

STATE v. BABIN.

In re BABIN.

(Supreme Court of Louisiana. Nov. 29, 1909.)

1. ATTORNEY AND CLIENT (§ 17\*)—BAIL OR SURETY.

Under Civ. Code, art. 3042, as amended by Acts 1876, p. 109, No. 67, and article 3064, prescribing the qualifications of sureties, an attorney may become a surety on his client's bail bond, notwithstanding a rule of court declaring that attorneys shall not be accepted as sureties on the bail bonds of their clients.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 25; Dec. Dig. § 17.\*]

2. ATTORNEY AND CLIENT (§ 17\*)—SURETIES—"ANY JUDICIAL OR MINISTERIAL OFFICER."

Acts 1880, p. 18, No. 11, making it unlawful for any judicial or ministerial officer of any of the courts of the state to go bail for any prisoner, etc., refers exclusively to such officers as judges, clerks, sheriffs, and their deputies, etc., as directly constitute the machinery of the court, and does not prohibit an attorney from becoming a surety on his client's bail bond, though an attorney is an officer of the courts generally.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 25; Dec. Dig. § 17.\*]

Application by George E. Babin for a writ of mandamus against the Judge of the Juvenile Court, Parish of Orleans, to compel the acceptance of a bail bond. Peremptory mandamus awarded.

W. A. Bohna, for relator. Walter Guion, Atty. Gen., and St. Clair Adams, Dist. Atty. (R. G. Pleasant, of counsel), for respondent.

PROVOSTY, J. The relator asks for a mandamus to compel the acceptance of his attorney as surety on his bail bond. The respondent judge assigns, as his reason for refusing to accept the surety, that by a rule of his court attorneys are not accepted as sureties on the bail bonds of their clients.

That attorneys may go surety for their clients, notwithstanding a rule of court to the contrary, has been held in a civil case. *Daly v. Duffy*, 28 La. Ann. 468. And the decision has equal force in a criminal case, since the qualification of sureties is a matter of statutory law. Civ. Code, art. 3064; Id. art. 3042, as amended by Act No. 67, p. 109, of 1876. And, of course, a statute cannot be changed by a rule of court.

The learned respondent judge has not assigned Act No. 11, p. 18, of 1880, as a basis for his action. Nevertheless we have considered whether said act disqualifies a lawyer from going bail for his client, and have concluded that it does not. It reads:

"Section 1. Be it enacted by the General Assembly of the state of Louisiana, that hereafter it shall not be lawful for any judicial or ministerial officer of any of the courts of this state, to go bail for any prisoner or other person in any prosecution or criminal proceeding in their respective courts, or to become surety for the appearance of any prisoner or other person before

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

their respective courts to answer any criminal charge.

"Sec. 2. Be it further enacted, etc., that any judicial or ministerial officer who violates the foregoing section shall be deemed guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, at the discretion of the court, or shall be sentenced to labor on the public works, roads, or streets of the parish or city, as the case may be, for a term not to exceed six months."

We think that this act has reference exclusively to those officers, such as judges, clerks, and sheriffs, and their deputies, criers, stenographers, etc., who more directly than the lawyer constitute the machinery of the court. True, the lawyers of the state are, in a certain sense, officers of the courts of the state; but they are the officers of the courts generally, not of any "respective courts." If this statute had reference to lawyers, a lawyer would be disqualified from going bail on the bond, not merely of his client, but of anybody in a criminal case—as well on a bond in another parish as in his own, since he is licensed to practice in every court of the state, and hence is as much the officer of one court as of another. A lawyer signing a bail bond in any court of the state would be committing a crime. Such cannot be the intentment of the statute.

The mandamus is made peremptory.

(124 La.)

No. 17,635.

**BENOIT v. BENOIT.**

(Supreme Court of Louisiana. Dec. 13, 1909.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by Simeon Benoit against Eva Benoit. Judgment for plaintiff, and defendant appeals. Affirmed.

Goudeau & Barbe, for appellant. Williams & Williams, for appellee.

**PROVOSTY, J.** The defendant wife has appealed from a judgment decreeing a divorce on the ground of her adultery. The only point urged by her counsel is that the testimony of the witnesses to the adultery is incredible. The trial judge believed the testimony, and we see no reason for not following his example.

Judgment affirmed.

**BROWARD et al. v. MABRY.**

(Supreme Court of Florida. Division A. Nov. 16, 1909.)

**1. NAVIGABLE WATERS (§ 36\*)—LANDS UNDER WATER—OWNERSHIP.**

Under the common law of England, the crown in its sovereign capacity held the title to the beds of navigable or tide waters, including the shore or the space between high and low water marks, in trust for the people of the realm who had rights of navigation, commerce, fishing, bathing, and other easements allowed by law in the waters. This rule of the common law was applicable in the English colonies of America.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 180; Dec. Dig. § 36.\*]

**2. NAVIGABLE WATERS (§ 36\*)—LANDS UNDER WATER—OWNERSHIP.**

After the Revolution, resulting in the independence of the American states, title to the beds of all waters, navigable in fact, whether tide or fresh, was held by the states in which they were located, in trust for all the people of the states respectively.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 184; Dec. Dig. § 36.\*]

**3. NAVIGABLE WATERS (§ 36\*)—LANDS UNDER WATER—OWNERSHIP.**

When the Constitution of the United States became operative, the several states continued to hold the title to the beds of all waters within their respective borders that were navigable in fact without reference to the tides of the sea, not for purposes of disposition to individual ownerships, but such title was held in trust for all the people of the states respectively, for the uses afforded by the waters as allowed by the express or implied provisions of law, subject to the rights surrendered by the states under the federal Constitution.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 184; Dec. Dig. § 36.\*]

**4. NAVIGABLE WATERS (§ 36\*)—LANDS UNDER WATER—STATE CONTROL.**

The right of the people of the states in the navigable waters and the lands thereunder, including the shore or space between ordinary high and low water marks, relate to navigation, commerce, fishing, bathing, and other easements allowed by law. These rights are designed to promote the general welfare and are subject to lawful regulation by the states, and such regulation is subordinate to the powers of Congress as to interstate commerce, navigation, post roads, etc., and to the constitutional guaranties of private property rights.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 184; Dec. Dig. § 36.\*]

**5. NAVIGABLE WATERS (§ 37\*)—LANDS UNDER WATER—GRANTS BY STATE—REGULATION.**

The trust in which the title to the lands under navigable waters is held is governmental in its nature and cannot be wholly alienated by the states. For the purpose of enhancing the rights and interests of the whole people, the states may by appropriate means grant to individuals the title to limited portions of the lands under navigable waters, or may give limited privileges therein, but not so as to divert them from their proper uses for the public welfare, or so as to relieve the states respectively of the control and regulation of the uses afforded by the land and the waters, or so as to interfere with the lawful authority of Congress.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 203; Dec. Dig. § 37.\*]

**6. NAVIGABLE WATERS (§ 36\*)—LANDS UNDER WATER—CONTROL BY STATE.**

New states, including Florida, admitted "into the Union on equal footing with the original states, in all respects whatsoever," have the same rights, prerogatives, and duties with respect to the navigable waters and the lands thereunder within their borders as have the original thirteen states of the American Union. Among these prerogatives are the right and duty of the states to own and hold the lands under navigable waters for the benefit of the people, as such prerogatives are essential to the sovereignty, to the complete exercise of the police powers, and to the welfare of the people of the new states as of the original states of the Union.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 184; Dec. Dig. § 36.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

**7. NAVIGABLE WATERS (§ 36\*)—LANDS UNDER WATER—STATE CONTROL.**

The provision in Act Cong. March 3, 1845, c. 48, § 5 Stat. 742, admitting Florida into the Union "on the express condition that (the state) shall never interfere with the primary disposal of the public lands lying within" the state, has reference to lands within the territorial limits of the state, the title to which was in the United States for its own purposes, as distinguished from lands held in trust for the people, such as lands under navigable waters, which passed to the state in its sovereign capacity to be held by it in trust for the people thereof, for the public purposes authorized by law subject to the power of Congress under the federal Constitution.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 184; Dec. Dig. § 36.\*]

**8. STATES (§ 4\*)—RELATION TO UNITED STATES—NEW STATES—EQUALITY WITH OTHERS.**

After the United States acquired by treaty of cession from Spain the territory known as "East and West Florida," such territory was held subject to the Constitution and laws of the United States. Upon its admission into the Union, Florida has the same rights and duties of sovereignty that the original states of the Union have.

[Ed. Note.—For other cases, see States, Cent. Dig. § 2; Dec. Dig. § 4.\*]

**9. NAVIGABLE WATERS (§ 1\*)—NAVIGABILITY.**

Whether a stream or body of water is navigable for useful public purposes is to be determined by the application of existing provisions and principles of law to particular facts of separate cases.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 5-16; Dec. Dig. § 1.\*]

**10. NAVIGABLE WATERS (§ 36\*)—NAVIGABILITY—TEST.**

Where a stream or body of water is permanent in character, and in its ordinary natural state is in fact navigable for useful purposes, and is of sufficient size and so situated and conditioned that it may be used for purposes common to the public in the locality where it is located, such water may be regarded as being of a public character, and the title to the land thereunder, including the shore or space between ordinary high and low water marks, when not included in the valid terms of a grant or conveyance to private ownership, is held by the state in its sovereign capacity in trust for the lawful uses of all the people of the state in the water and the land, subject to lawful governmental regulation of such uses.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 184; Dec. Dig. § 36.\*]

**11. NAVIGABLE WATERS (§ 1\*)—NAVIGABILITY—TEST.**

Capacity for navigation, not usage for that purpose, determines the navigable character of waters with reference to the ownership and uses of the land covered by the water.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 5; Dec. Dig. § 1.\*]

**12. NAVIGABLE WATERS (§ 37\*)—LANDS ON NAVIGABLE WATERS.**

Grants and conveyances of land bordering on navigable waters carry title in general to ordinary high-water mark when a valid contrary intent does not appear.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-227; Dec. Dig. § 37;\* Boundaries, Cent. Dig. §§ 108-117.]

**13. EMINENT DOMAIN (§ 84\*)—NAVIGABLE WATERS (§ 39\*)—PROPERTY SUBJECT TO COMPENSATION.**

Those who own land extending to ordinary high-water mark of navigable waters are ri-

parian holders, who, by implication of law, and in addition to the rights of navigation, commerce, fishing, boating, etc., common to the public, have in general certain special rights in the use of the waters opposite their holdings; among them being the right of access from the water to the riparian land and perhaps other easements allowed by law. These special rights are easements incident to the riparian holdings, and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 227; Dec. Dig. § 84;\* Navigable Waters, Cent. Dig. § 243; Dec. Dig. § 39.\*]

**14. NAVIGABLE WATERS (§ 36\*)—LANDS UNDER WATER—RIPARIAN RIGHTS.**

Riparian rights arise by implication of law and give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 185; Dec. Dig. § 36.\*]

**15. NAVIGABLE WATERS (§ 37\*)—LANDS UNDER WATER—POWER TO GRANT.**

The trustees of the internal improvement fund, who have the disposal of the swamp and overflowed lands of the state, have no authority to convey the title to the lands under navigable waters that properly belong to the sovereignty of the state.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 203; Dec. Dig. § 37.\*]

**16. NAVIGABLE WATERS (§ 37\*)—RIPARIAN RIGHTS—PROTECTION—INJUNCTION.**

Where it appears that the waters of an inland lake are in fact navigable for useful public purposes, the title to the lands under such navigable waters is held by the state in trust for all the people of the state for the uses and purposes allowed by law, and, when it appears that the owners of the lands abutting on the lake are entitled to the riparian rights given by law to such owners, a contemplated sale or conveyance of the lands under the waters of the lake by the trustees of the internal improvement fund may be enjoined at the suit of such riparian owners, even though the state in its sovereignty capacity is not specifically made a party to the suit.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 207; Dec. Dig. § 37.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Leon County; J. W. Malone, Judge.

Action by Elbert N. Mabry against N. B. Broward and others, as Trustees of the Internal Improvement Fund of the State of Florida. Decree for plaintiff, and defendants appeal. Affirmed in part, and reversed in part.

W. S. Jennings, L. R. Milton, and Park Trammell, Atty. Gen., for appellants. Fred T. Myers, for appellee.

WHITFIELD, C. J. The appellee filed in the circuit court for Leon county a bill in equity alleging, in brief: That township 2 north, of range 1 west, in Leon county, Fla., was surveyed by James Donelson by direction of the United States government in 1824 according to the system of surveying adopted and then in use by said government; that

within said township 2 and township 1 north, of range 1 west, lying to the south of township 2, was a natural lake designated on the plats of the survey as "Lake Jackson," by which name it has since been generally known and called; that in surveying said township the sections bordering on said lake were made fractional sections, and the line of the lake, where the said fractional sections border it, was meandered; that said lake was not at the time of the survey, and has never been, a navigable body of water; that sections 26 and 27 of said township 2 are, according to said survey, fractional sections bordering on said lake, and both said sections are shown by the official plat of said survey to be subdivided into lots; that section 27 is shown to comprise but two lots, numbered 1 and 2, which are stated on the plat to contain, respectively, 80 and 100 acres, but only lot 2 is shown to border on the waters of said lake; that section 26 is shown to comprise 7 lots, but only lot 5 of said section, which is stated on said plat to contain 103.50 acres, is shown to border on the waters of said lake; that in 1825 James Dickerson purchased from the United States at private cash entry lots 1 and 2 of section 27, township 2 north, range 1 west; that said lots, according to the official map in the Surveyor General's office, appear to be the whole of said fractional section 27, and patents were issued to Dickerson therefor by the United States in 1826, conveying to him and his heirs the said lands, by the designated lot numbers, according to the official plat of the survey of said lands returned to the Surveyor General's office, and without any reservation as to the submerged lands in front thereof; that likewise William Harris purchased and in 1826 received patents conveying to him and his heirs lot No. 5 of section 26, township 2 north, range 1 west, without reservation as to the submerged lands in front thereof; that in 1852, at the request of the Surveyor General, township 2 north, of range 1 west was resurveyed by Arthur Randolph, and a new meander line of Lake Jackson was made, by which additional lots 3, 4, 5, and 6 were added to fractional section 27, and an additional lot 8 was added to section 26; that the question of the title to the said additional lots of section 27, shown by the Randolph survey, was presented to the Secretary of the Interior on an application to pay for and receive a patent for the said additional lots of section 27, as shown by the Randolph survey, and the Secretary of the Interior decided that the successors in title to Dickerson were entitled under his purchase to a conveyance of all the lands embraced in the lots of the Donelson survey according to the field notes thereof upon payment for the full area embraced therein; that a patent was issued accordingly in the name of Dickerson for the additional said lots shown as being a part of fractional section 27 and intended to be

sold as part of lot 2 of said section; that at the time of the survey of 1824 the land fronted and bordered on Lake Jackson, and was bought and sold with reference to its frontage on said lake, as shown by the meander thereof; that under and by virtue of the said patents the title to the submerged lands in front of the upland described in said patents, to the middle of the said lake, passed to said Dickerson in fee simple; that likewise the patent issued to Harris conveyed title to the submerged lands in front of the uplands described in his patent to the middle of said lake in fee simple; that appellee is the successor in title thereto; that a patent had been issued in 1883 to the state of Florida under the swamp land grant act of Congress of September 28, 1850, covering the unsurveyed parts of sections 26 and 27 in township 2 north, of range 1 west; that the appellants, defendants below, hold in trust the title so attempted to be conveyed to the state; that the unsurveyed parts of sections 26 and 27 so patented to the state embraced the submerged lands in front of said lots in said sections 26 and 27 to the middle of Lake Jackson; that quite recently the waters of Lake Jackson have, from natural causes not fully known, almost entirely disappeared, and the lands originally submerged are now uncovered; that upon information and belief it is alleged that propositions have recently been made to the defendant trustees of the internal improvement fund to buy all of the unsurveyed lands aforesaid which front the upland acquired and owned by the complainant as stated, and the title to which from the shore to what was lately the middle of said lake is vested in complainant; that defendants are likely to sell said lands unless enjoined; that the said patent to the state did not pass title to the submerged lands, but is a cloud on complainant's title. Appropriate relief is prayed.

A demurrer to the bill of complaint, on grounds that complainant's title was not shown, was overruled, and defendants answered denying that the patents issued to Dickerson "conveyed title to lands beyond the lines fixed and established by said official surveys, plats, and field notes, and allege that such limitation, description, and boundary so fixed and established was a reservation on behalf of the United States government of the submerged lands in front thereof, lying between the boundary line so established and fixed and stated in said patents based upon said surveys and field notes, to and including the center or thread of the lake." A replication was filed. Subsequently the cause was submitted to the chancellor on an agreed statement of facts, stating, in brief: That Lake Jackson "was at the time of said survey a natural lake, a body of water of irregular shape lying partly in the two townships named. At mean water it will average not over two feet in depth, except in a few basins where the water may



be eight or ten feet deep. These basins are four or five in number, scattered over the lake at irregular intervals, and separated by long reaches of shallow water. They are of an average of four or five acres in extent, except the largest, which may reach ten or fifteen acres. The water, except in these basins, is thick with water grasses, and cattle from adjoining plantations graze all over it from hoof to belly deep. In several places there are fords across the main body and broadest portions of the lake which are used at all seasons by persons going back and forth between their plantations and Tallahassee, on horseback and in buggies and wagons. The lake can only be navigated at ordinary stage with flat-bottomed boats drawing from three to six inches of water, except in the basins mentioned; and in fact the only navigation is in boats, or bateaux of the character mentioned, in fishing and shooting water fowl. There are one or more subterranean outlets, or sinks, through which the waters of the lake at times escape, leaving the entire bed, except in a few of the basins mentioned, entirely dry, and at such times persons can walk dry shod over the whole bed of the lake. This situation existed at the time the bill in this case was filed, and when the negotiations for the sale of the unsurveyed portion of said lake charged in the bill were pending. The lake is partly surrounded by hills, and in time of excessive rains reaches a greater average depth than stated above as its mean depth; but the waters soon recede, and the lake returns to its normal condition. During ordinary low water the lake recedes to such an extent that corn is planted and grown on the bottom lands constituting a part of the bed of the lake, to a considerable distance from the shore, by the occupants of the uplands. The principal, and almost the only, use the waters of the lake are put to is for the grazing of cattle, and fishing and fowling. The conditions stated have practically been the same as far back as the memory of the oldest inhabitant familiar with the locality reaches." That in making said survey the lake was meandered. That lot 2 in said fractional section 27 and lot 5 in said fractional section 28 border on said lake.

The chancellor held that the patents to Dickerson and Harris conveyed title to the middle of the lake, and that the patent to the state is a cloud upon the appellee's title to the land between the meander line and the middle of the lake. A decree was entered accordingly, and the defendants appealed.

The question to be determined is whether, under the patents to Dickerson and Harris, they took title to the land to the middle of the lake. No question of accretion, alluvion, or reliction, or of public or of riparian rights in the use of the water, if any exist, is presented. The state in its sovereign capacity is not represented here; but, if it be found

that this lake is in fact navigable so as to vest the title to the bed of it in the state by virtue of its sovereignty, the relief asked by the complainant cannot be granted, though the complainant may be entitled to riparian rights as well as to easements in the lake in common with the public.

Under the common law of England, the crown in its sovereign capacity held the title to the beds of navigable or tide waters, including the shore or the space between high and low water marks, in trust for the people of the realm, who had rights of navigation, commerce, fishing, bathing, and other easements allowed by law in the waters. This rule of the common law was applicable in the English colonies of America. After the Revolution resulting in the independence of the American States, title to the beds of all waters, navigable in fact, whether tide or fresh, was held by the states in which they were located, in trust for all the people of the states respectively. When the Constitution of the United States became operative, the several states continued to hold the title to the beds of all waters within their respective borders that were navigable in fact without reference to the tides of the sea, not for purposes of disposition to individual ownerships, but such title was held in trust for all the people of the states respectively, for the uses afforded by the waters as allowed by the express or implied provisions of law, subject to the rights surrendered by the states under the federal Constitution. The rights of the people of the states in the navigable waters and the lands thereunder, including the shore or space between ordinary high and low water marks, relate to navigation, commerce, fishing, bathing, and other easements allowed by law. These rights are designed to promote the general welfare and are subject to lawful regulation by the states, and such regulation is subordinate to the powers of Congress as to interstate commerce, navigation, post roads, etc., and to the constitutional guaranties of private property rights. The trust in which the title to the lands under navigable waters is held is governmental in its nature and cannot be wholly alienated by the states. For the purpose of enhancing the rights and interests of the whole people, the states may by appropriate means grant to individuals the title to limited portions of the lands under navigable waters, or may give limited privileges therein, but not so as to divert them from their proper uses for the public welfare, or so as to relieve the states respectively of the control and regulation of the uses afforded by the land and the waters, or so as to interfere with the lawful authority of Congress. New states, including Florida, admitted "into the Union on equal footing with the original states, in all respects whatsoever," have the same rights, prerogatives, and duties with respect to the navigable waters and the lands thereunder within their borders as have the original thirteen states

of the American Union. Among these prerogatives are the right and duty of the states to own and hold the lands under navigable waters for the benefit of the people, as such prerogatives are essential to the sovereignty, to the complete exercise of the police powers, and to the welfare of the people of the new states as of the original states of the Union. The provision in Act Cong. March 3, 1845, c. 48, 5 Stat. 742, admitting Florida into the Union "on the express condition that (the state) shall never interfere with the primary disposal of the public lands lying within" the state, has reference to lands within the territorial limits of the state, the title to which was in the United States for its own purposes, as distinguished from lands held in trust for the people, such as lands under navigable waters, which passed to the state in its sovereign capacity to be held by it in trust for the people thereof, for the public purposes authorized by law subject to the power of Congress under the federal Constitution. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *City of Chicago v. Illinois Cent. R. Co.*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189, and notes.

After the United States acquired by treaty of cession from Spain the territory known as "East and West Florida," such territory was held subject to the Constitution and laws of the United States. Upon its admission into the Union, Florida has the same rights and duties of sovereignty that the original states of the Union have.

Whether a stream or body of water is navigable for useful public purposes is to be determined by the application of existing provisions and principles of law to particular facts of separate cases.

Where a stream or body of water is permanent in character, and in its ordinary natural state is in fact navigable for useful purposes, and is of sufficient size and so situated and conditioned that it may be used for purposes common to the public in the locality where it is located, such water may be regarded as being of a public character, and the title to the land thereunder, including the shore or space between ordinary high and low water marks, when not included in the valid terms of a grant or conveyance to private ownership, is held by the state in its sovereign capacity in trust for the lawful uses of all the people of the state in the water and the land, subject to lawful governmental regulation of such uses. Capacity for navigation, not usage for that purpose, determines the navigable character of waters with reference to the ownership and uses of the land covered by the water. Grants and conveyances of land bordering on navigable waters carry title in general to ordinary high-water mark when a valid contrary intent does not appear. Those who own land extending to ordinary high-water mark of

navigable waters are riparian holders who, by implication of law, and in addition to the rights of navigation, commerce, fishing, boating, etc., common to the public, have in general certain special rights in the use of waters opposite their holdings; among them being the right of access from the water to the riparian land and perhaps other easements allowed by law. These special rights are easements incident to the riparian holdings, and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law. Riparian rights arise by implication of law and give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights. See *Buckl v. Cone*, 25 Fla. 1, 6 South. 160; *State v. Gerbing*, 56 Fla. 603, 47 South. 353; *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 57 Fla. 399, 48 South. 643; *State v. Black River Phos. Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189; *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; *Mobile Dry Docks Company v. City of Mobile*, 146 Ala. 198, 40 South. 205, 3 L. R. A. (N. S.) 822, 9 Am. & Eng. Ann. Cas. 1229, and notes; *Hot Springs L. & M. Co. v. Revercomb*, 106 Va. 176, 55 S. E. 580, 9 L. R. A. (N. S.) 894; *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L. R. A. (N. S.) 745; 1 Enc. L. & P. 795 et seq.

When the sovereign grants or conveys the title to land under navigable water, such title passes subject to the public easements and to the riparian rights allowed by law.

Notwithstanding the allegation of the bill of complaint "that the lake was not at the time of the survey, \* \* \* and has never been, a navigable body of water," the allegations that it is "a natural lake" extending into different townships and being several miles in extent as shown by the plat, that the land was bought "with reference to its frontage on said lake," that in making the survey the lake was meandered and so platted, that recently the waters of the lake have, "from natural causes not fully known, almost entirely disappeared, and the lands originally submerged are now uncovered," and other circumstances, indicate that the lake is of considerable size and permanent in its character, and that the land in its ordinary state is the bed of a lake and not merely submerged with water so shallow or so situated and conditioned as to be not navigable for any useful public or common purpose located as it is in an agricultural region, where numerous plantations on the surrounding uplands are occupied.

In the agreed statement of facts, it is stated: That the lake was meandered as a body of water; that it extends into two townships, and is a natural lake that in mean water averages not over two feet in depth, except in certain places where it may

be eight or ten feet deep; that the lake can only be navigated at ordinary stage with flat-bottomed boats drawing from three to six inches of water; that the water at times escapes through subterranean outlets and the lake becomes dry; that portions of the bed adjacent to the shore are at times planted in crops; and that the lake is forded in places. The official plat of the survey shows the lake to be several miles in extent, and that the surrounding uplands are subdivided into small tracts for purposes of individual ownership.

From the allegations and admissions upon this record, it appears that, notwithstanding the shallowness of the water in portions and the uses at times made of its bed in places bordering on the shore, the permanency, size, location, character, and conditions of the lake are such that in its ordinary state it, or at least a large part of it, may be used for purposes of utility common at least to the people of the community in which it is located, and consequently that such waters may be regarded as being of a public character useful in ordinary conditions to numerous riparian owners, if not to the general public, for purposes of navigation, fishing, bathing, and other lawful uses, so that the title to the bed of the lake vests in the state in trust for all the people of the state.

The products of the community at least in some considerable measure may be transported upon the waters if so desired, and the waters are admittedly of considerable area and useful for general navigation in small boats containing persons engaged in pursuits either of business or pleasure. Whether the lake has been used for commercial purposes or not is immaterial, if it may be made useful for any considerable navigation or commercial intercourse between the people of a large area. The fact that the lake goes dry is unimportant, if in its ordinary state it is in fact navigable.

It appears from this record, read in the light of common knowledge, that the lands under the lake belong to the state in its sovereign capacity in trust for all the people of the state for the uses afforded by the waters under the laws of this state. This being so, the patent to the state under the act of September 23, 1850, conveyed no title to lands under the navigable waters that inures to the appellants here.

The trustees of the Internal Improvement fund, who have the disposal of the swamp and overflowed lands of the state, have no authority to convey the title to lands under navigable waters that properly belong to the sovereignty of the state. *State v. Gerbing*, supra.

The complainant, appellee here, may have riparian rights in the land and waters opposite his riparian holdings that the law will protect; but he appears to have no title to

the lands under the navigable waters. It is assumed that the meander line and the ordinary water line of the lake are the same.

The appellants, trustees of the Internal Improvement fund of the state, appear to have no title to or authority to sell the lands in controversy, and the appellee does not appear to have title to the land under the navigable waters of the lake; but, as the appellee appears to have riparian rights in the land in controversy, that portion of the decree enjoining the appellants from asserting any claim or title to the land, and from conveying or leasing, or from attempting to convey, lease, or otherwise to incumber the land is affirmed, and that portion of the decree canceling patents, and adjudging that the title to the lands between the meander lines of Lake Jackson in front of and bordering on the appellee's lands and the middle of the said lake is in the appellee, is reversed. The appellants will pay one half of the costs of this appeal, and the appellee the other half.

It is so ordered.

SHACKLEFORD and COCKRELL, JJ.,  
concur.

TAYLOR, HOCKER, and PARKHILL, JJ.,  
concur in the opinion.

#### BROWARD et al. v. SLEDGE.

(Supreme Court of Florida. Nov. 16, 1909.)

##### 1. STIPULATIONS (§ 3\*) — EFFECT — CONCLUSIONS OF LAW.

Conclusions of law drawn from the facts of a case are not affected by an agreement made by the parties.

[Ed. Note.—For other cases, see *Stipulations*, Cent. Dig. § 2; Dec. Dig. § 3.\*]

##### 2. TITLE TO NAVIGABLE WATERS.

This case is ruled by the principles and conclusions announced in the opinion in the case of *Broward v. Mabry* (filed this day) 50 South. 826.

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Jefferson County; J. W. Malone, Judge.

Bill by James A. Sledge against N. B. Broward and others, Trustees of the Internal Improvement Fund of Florida. From the decree, defendants appeal. Affirmed in part, and reversed in part.

W. S. Jennings, for appellants. T. L. Clark, for appellee.

SHACKLEFORD, J. The facts in this case and the principles of law applicable thereto are not materially different from those in the case of *Broward et al., as Trustees, v. E. N. Mabry* (decided this day) 50 South. 826, and the conclusion reached herein is the same as in that case. Conclusions of law drawn from the facts of a case cannot be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

affected by an agreement of the parties. That portion of the decree enjoining the appellants, trustees of the internal improvement fund of Florida, from selling or offering to sell, and from conveying, leasing, or in any way encumbering, the land comprising the bed of Lake Miccosukie, is affirmed; and that portion of the decree canceling patents and adjudging the title to the land between the meander line of the appellee's land and the middle of Lake Miccosukie to be in the appellee is reversed. The costs of this appeal will be assessed one-half to the appellants and one-half to the appellee.

It is so ordered.

TAYLOR, COCKRELL, HOCKER, and PARKHILL, JJ., concur.

WHITFIELD, C. J., took no part.

#### PELT v. STATE.

(Supreme Court of Florida. Nov. 30, 1909.)

#### 1. HOMICIDE (§ 45\*)—EXCUSABLE HOMICIDE—"SUDDEN AND SUFFICIENT PROVOCATION."

The repetition by an employé seated at the breakfast table of a remark that he would not, though ordered so to do, go out with his team before breakfast so long as his knife stayed with him, is not a "sudden and sufficient provocation" within the statutory definition of excusable homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 69; Dec. Dig. § 45.\*]

#### 2. HOMICIDE (§ 290\*)—DANGEROUS WEAPON—SUBMISSION OF QUESTION.

An appellate court cannot say that the trial court should have submitted to the jury the question whether a chair is a "dangerous weapon" when the chair was in evidence, the assailant was before the jury, the person killed thereby was a small man, and the effect of the blow with the chair was to crush the skull at the thickest part.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 595; Dec. Dig. § 290.\*]

#### 3. HOMICIDE (§ 250\*) — EVIDENCE — MANSLAUGHTER.

The evidence warranted the verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Jackson County; J. E. Wolfe, Judge.

J. O. Pelt was convicted of manslaughter, and brings error. Affirmed.

Price & Lewis and J. W. Kehoe, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

COCKRELL, J. Under an indictment for murder, J. C. Pelt was convicted of manslaughter and sentenced to a term of 17 years in the State prison. He assigns error here upon the refusal of the court to give requested instructions upon the theory of excusable homicide, as defined by statute.

Section 3204 of the General Statutes of 1906, omitting portions not here germane, reads: "Homicide is excusable when committed \* \* \* by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used, and not done in a cruel or unusual manner."

As to "heat of passion," the accused testified merely that he was angry at the time he struck the blow, a statement brought out upon the cross-examination. See *Hoffman v. State*, 97 Wis. 571, 73 N. W. 51. The "sudden and sufficient provocation" consisted of the repetition of a previous remark by an employé, seated at the breakfast table eating with knife and fork, that he would not, though ordered so to do, go out with his team before breakfast as long as his knife stayed with him, and at the same time making a motion to rise. The blow with a chair immediately followed, causing death within 24 hours.

The chair with which the killing was done was exhibited to the court and jury, and the evidence is without contradiction that Jack Coley, the deceased, was a small man about 5 feet tall, and weighed between 114 and 120 pounds. The accused was before the court and jury, who might reasonably draw inferences as to the relative sizes and strength of the two men, but the bill of exceptions is wholly silent as to the dimensions, weight, or other qualities of the chair, and also silent as to the physical condition of the accused. The blow was struck in anger upon the head of this small man so hard as to crush his skull at its thickest part, and we are at a loss to see how we can hold the court in error for failing to submit to the jury a question involving the likelihood or non of that chair so used producing death or great bodily injury. *Blige v. State*, 20 Fla. 742, 51 Am. Rep. 628.

To hold that an employer may be absolutely excused for braining to death an employé because he refuses or threatens to refuse under possible conditions to obey an order is abhorrent to all sense of the sacredness of human life, and finds no justification in the quoted statute. The accused on this slight evidence was given the benefit of a charge upon justification in self-defense, and, further than this, the court was not required to go. See *Lovett v. State*, 30 Fla. 142, 11 South. 550, 17 L. R. A. 703.

The evidence amply warranted the verdict, and the judgment is affirmed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and PARKHILL, JJ., concur.

HOCKER, J., absent.

(124 La.)

No. 17,941.

**HARRELSON v. WEBB.**

(Supreme Court of Louisiana. Dec. 13, 1909.)

**1. ACTION BY TRUSTEE IN BANKRUPTCY.**

Plaintiff sued defendant, the trustee in bankruptcy of a partnership, of which defendant was a member, and also of the individual members, for \$2,000, part of the purchase price of property sold in the bankruptcy proceedings, on which plaintiff claims a homestead right. The suit was brought in the state court by agreement.

**2. HOMESTEAD (§ 141\*)—DEATH OF HUSBAND—RIGHTS OF WIFE—"HEAD OF THE FAMILY."**

After the death of the husband, the mother is the "head of the family," and, if the husband had a homestead, it passes to his wife, as the widow may be the head of the family. Cyc. vol. 21, p. 468.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 261-270; Dec. Dig. § 141.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3225-3233; vol. 8, p. 7677.]

**3. HOMESTEAD (§ 147\*)—DEATH OF HUSBAND—MARRIAGE OF WIDOW—EFFECT.**

The widow does not lose her homestead by marrying an impecunious man, barely able to earn his own livelihood, for there may be more necessity than ever for a homestead. Nor does this second marriage destroy the rights of the decedent's family in his homestead. 21 Cyc. 569.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 282; Dec. Dig. § 147.\*]

**4. HOMESTEAD (§ 183\*)—CONDITION OF DEBTOR.**

The condition of the debtor, upon which the claim of homestead is based, is considered as of the date of the seizure, or the date when the claim is made. Garner v. Freeman, 118 La. 186, 42 South. 767, 118 Am. St. Rep. 361.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 183.\*]

**5. HOMESTEAD (§ 143\*)—PROPERTY HELD IN DIVISION—RIGHTS OF WIDOW AND CHILDREN.**

The homestead right is not affected by the fact that the property is held in division, and the widow in community, the head of the family, may be the homesteader of the fractional part which belonged to her husband, and the proceeds of the sale of this fractional part are owned by the mother and children, and are to be administered and disposed of as any other property owned by the mother and children. 21 Cyc. 568.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 270; Dec. Dig. § 143.\*]

**6. BANKRUPTCY (§§ 32, 399\*)—EXEMPTIONS—AMENDMENT OF SCHEDULES.**

The bankruptcy act (Act July 1, 1898, c. 541, § 6, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]) recognizes exemptions allowed by state laws, and, when the trustee agrees to submit the question of exemption to a state court, he must be held to waive the rules of the bankruptcy court, and a failure of the bankrupt to make a claim in the schedule will not necessarily be considered as a waiver. He can amend his schedule before distribution of his assets to claim exemption.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 32, 399.\*]

(Syllabus by the Court.)

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Wm. Campbell, Judge.

Action by Florence Hayes Harrelson against Rufus C. Webb. Judgment for plaintiff, and defendant appeals. Affirmed.

Smiths & Carmouche, for appellant. Story & Pugh, for appellee.

BREAUX, C. J. Plaintiff sued for \$2,000, part of the purchase price of property sold in bankruptcy proceedings on which she claimed a homestead right as widow of Edgar Barousse.

Edgar Barousse, the husband, departed this life.

She opened his succession and qualified as natural tutrix of their minor children, and had that part of the property owned by her and her minor children adjudicated to her by judgment of court in 1907.

At the beginning of their marriage, the plaintiff and her husband had no property. Their marriage was blessed with ten children, and they were fairly successful in accumulating property.

Of the ten children, four were minors, four were of age, and two were emancipated.

The property was held in common with her children.

The plaintiff was the owner of fourteen-twentieths of this property.

She soon afterward formed a partnership with her children of age and conducted the business of this partnership in the name of the "Estate of Barousse."

This partnership was not fortunate. It and the individual members of the partnership were forced into bankruptcy by its creditors.

Rufus C. Webb, the defendant, became the trustee in bankruptcy of the partnership and of the individual members.

The record informs us that the minor children have a claim secured by mortgage amounting, on November 30, 1908, to \$2,201.58, besides a small deposit of about \$200. As to whether they owned that amount at their father's death does not appear by the evidence.

Returning to the property on which plaintiff claims the homestead: The trustee obtained an order of court to sell it, and on the 16th day of November, 1908, sold it at a private sale, as authorized by the order, for \$4,300.

Prior to this sale—that is, in October, 1908—Mrs. Barousse protested against the sale on the ground that the property was her homestead.

She withdrew the protest by agreement of counsel and renewed her claim to her homestead on \$2,000 of the proceeds of the sale of the property.

This amount is in the hands of the trustee.

About the 15th of January, 1909, she filed a petition in the United States District Court

claiming her homestead against said \$2,000 in the hands of the trustee.

This suit was filed prior to the date that the petition in the present case was filed.

To the present suit of plaintiff, defendant trustee pleaded estoppel and an exception of no cause of action.

About the same time, without asking for a decision on the exception, he filed an answer of general denial, in which he reserved whatever rights he had under the exception.

The case was brought in the state courts in accordance with agreement between counsel for the trustee and the counsel for plaintiff.

The judge of the district court rendered judgment recognizing plaintiff's right to her homestead.

The defendant appealed.

The first proposition submitted by the trustee, appellant, is that, the plaintiff bankrupt having failed to make her claim for exemption within the time specified by the bankruptcy law, the right of exemption was waived.

We will first mention that the bankruptcy act recognizes exemptions allowed by state laws.

The trustee, having agreed with plaintiff to submit the question of exemption involved to the state court, must be held to have waived rules which he now seeks to invoke, which he asserts prevail in the proceedings in bankruptcy.

It is true that the bankrupt failed to claim a homestead in the schedule as required by section 6 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]).

This is not as fatal as the trustee contends. His construction of the bankruptcy act is somewhat narrow. He seeks to give to it a construction that would cause loss without good cause.

The fact is that the failure of the bankrupt to make his claim in the schedule will not necessarily be considered as a waiver. He may thereafter make claim therefor. *Brandenburg on Bankruptcy* (3d Ed.) 130, citing a number of decisions in support of his text.

The following also is pertinent:

A bankrupt can amend his schedule before distribution of his assets to claim his exemption. In *re Moran* (D. C.) 105 Fed. 903.

Similar views are expressed in *Re Osborne* (D. C.) 104 Fed. 781.

We pass to a consideration of the right of plaintiff to exemption under the state laws. She was the "head of a family" at the time of the sale by the trustee. She became the head of a family immediately after the death of her first husband. As head of the family, she opposed the sale of the property. She withdrew the opposition, and by agreement with the trustee reserved the right to claim a homestead after the sale of the property,

so that the defendant is in error when he says that she did not claim her homestead before the sale was made.

The article of the Constitution allows exemption to the bona fide owner who occupies the land on which he claims the right if "head of a family."

After the death of the husband, the mother is the head of the family. If he had a homestead, it passes to his wife.

After the death of Barousse, the husband, the minor children remained with the mother. They were under her care and protection and dependent upon her for support, despite the fact that each had a share of about \$500 in *gremio legis*. It could not be used for their support. The mother is under the natural obligation of supporting the children.

A widow may be the head of a family. 21 Cyc. 466.

After the property had been sold in the bankruptcy proceedings under the order of court, the mother remarried.

The contention of defendant is that by the marriage she forfeited her right to the homestead.

The proof is that the second husband of the plaintiff barely earns his own livelihood. The wife (widow) does not lose her homestead by marrying an impecunious man. There may now be more necessity than ever for a homestead.

In a majority of jurisdictions a widow by remarriage does not lose her homestead, nor does she thereby destroy the rights of the decedent's family in his homestead. 21 Cyc. 569.

We may as well state that by the terms of the agreement it appears that the property of the husband was held as a homestead which passed to the wife.

The homestead right continues in favor of the children, as well as in favor of the widow, after the husband's death. The property, or the proceeds of the sale, is owned by the mother and the children, and is to be administered and disposed of as any other property owned by mother and children. 21 Cyc. 566.

The defendant further urges that the property was owned in indivision.

Although the 160 acres of land claimed were owned in indivision with the heirs, that portion which was the property of the late E. Barousse, and which he occupied as a homestead, which homestead the wife and children inherited, as before stated, passed to the wife. She became the homesteader of the fractional right inherited.

In *Maxwell v. Roach*, 106 La. 123, 30 South. 251, the court held that the widow in community was the head of the family after the death of the husband, and that the homestead right was not affected by the joint ownership of the property. Besides, the question of the right of the tenant in common to the property is not involved. The other owners were

the children of plaintiffs herein. She can maintain a homestead exemption in a contest with the creditors. The homesteader is a third person. *Speyrer v. Miller*, 108 La. 208, 32 South. 524, 61 L. R. A. 781.

In *Lyons v. Andry*, 106 La. 357, 31 South. 38, 55 L. R. A. 724, 87 Am. St. Rep. 299, that view was reaffirmed.

The court said, in 106 La. 128, and in 30 South. 253:

"The fact that the surviving spouse, as widow in community, is owner of one-half of the property constituting the homestead, does not destroy the homestead right.

"Ordinarily, parties owning land in indivision, or, rather, a party owning an undivided interest in land, cannot claim the homestead exemption in the land held with others; but by special direction of the Constitution this does not apply to the surviving spouse."

This was the situation as relates to the plaintiff at the death of her husband. She held the property as surviving spouse, in community.

The trustee bases some of his contentions on the fact that there has been some change since the bankrupt was forced into bankruptcy; mainly that the wife remarried, as before stated.

We will state now, upon that subject, that the condition of the debtor is considered, as to homestead, at the date of the seizure or at the date that he claims his homestead.

The record does not disclose that there had been any change whatever in the affairs or the condition of the plaintiff at the date that she claimed her homestead in the bankruptcy court, nor at the date of the sale.

The homestead right is to be considered at the date of the seizure. *Garner v. Freeman*, 118 La. 186, 42 South. 767, 118 Am. St. Rep. 361.

The condition of things existing must be made to appear. *Garnier v. Joffrlon*, 39 La. Ann. 835.

In another decision it was held that article 244 of the Constitution makes a distinction between the head of a family and a person's being a father or mother, or person with persons dependent upon him for support.

The court said that the two classes are different. The head of the family is entitled to exemption whether he supports his wife or not. *Garner v. Freeman*, 118 La. 186, 42 South. 767, 118 Am. St. Rep. 361.

For reasons assigned, the judgment appealed from is affirmed.

(124 La.)

No. 17,845.

STATE v. SATCHER et al.

(Supreme Court of Louisiana. Nov. 29, 1909.)

1. CRIMINAL LAW (§ 1151\*)—APPEAL—REVIEW—DENIAL OF CONTINUANCE.

The matter of the continuance of a criminal case, whether on the ground that counsel

have not had time to prepare the defense, or on account of the absence of witnesses, is largely within the discretion of the trial judge, and his ruling will not ordinarily be reversed, unless manifestly arbitrary and prejudicial to the legal rights of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.\*]

2. CRIMINAL LAW (§ 730\*)—TRIAL—REMARKS OF COUNSEL.

Remarks made by a prosecuting officer, by way of argument, and of necessary answers, in reply to statements, or remarks, made by counsel for defendant, though otherwise improper, afford no ground for setting aside a verdict, particularly when it appears that the jury were instructed to disregard them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.\*]

3. CRIMINAL LAW (§ 1172\*)—TRIAL—REMARKS OF JUDGE.

Where the trial judge, complying with a request for instructions upon the subject, correctly informs the jury as to the penalty following a verdict of guilty, without capital punishment, and then adds, "Under the law of commutation for good time, under a verdict of guilty, without capital punishment, the term of imprisonment, claimed by some, and may be the rule, would amount to a period of 15 years"—there is no such error, to the prejudice of the defendant, found guilty, without capital punishment, as to call for the setting aside of the verdict.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.\*]

(Syllabus by the Court.)

Appeal from Fifth Judicial District Court, Parish of Jackson; George Wear, Judge.

Ed. Satcher and Frank McDay were convicted of manslaughter, and appeal. Affirmed.

Price & Price and Grisham, Oglesby & Stennis, for appellants. Walter Guion, Atty. Gen., and C. P. Thornhill, Dist. Atty. (J. E. Clayton and R. G. Pleasant, of counsel), for the State.

MONROE, J. Defendants, having been prosecuted for murder and convicted of manslaughter, present their case to this court by means of the bills of exception, which will now be considered, to wit:

Bill No. 1. To the refusal of the court to grant a continuance.

This bill recites that, when on Wednesday, July 21, 1909, the case was called for trial, counsel for defendants announced that they were not ready for trial, for the reasons that F. W. Price, one of the counsel, was not employed until the night of Monday, July 19th, and that the employment of the other counsel, O. M. Grisham, had not been perfected until Tuesday, July 20th, and that they had not had time to prepare themselves; that the indictment had been returned "out of term time, on last week"; that defendants were in jail, without money, and depended on their friends to find the necessary funds and employ counsel, and that due diligence had been used; that defendants had caused summonses to issue on July 19th for two witnesses—

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Fuller McIntosh, a white man, and Charley Smith, colored, and that the witnesses had not been served; "that they were absent, but could be had by next term of court;" that their evidence was material and necessary; and that defendants could not safely go to trial without it, "as more particularly shown by the motion for continuance, made part of the bill."

The bill further recites that the court overruled the motion for continuance, with the proviso that the state should admit that the witnesses, if present, would swear to what was set up in the motion, to which the state agreed, but the defendants further objected that they were entitled to the presence of the witnesses, if they could be had, which objection was also overruled.

The motion for continuance alleges that defendants' counsel have not prepared, and have not had time to prepare, for trial; that the indictment was returned on July 13th, the court not being then in session; that on Monday, July 19th, when the court opened for its regular session, defendants were arraigned, and that O. M. Grisham, one of their present counsel, represented them for that purpose, but stated that "he had not been employed in the case," which was then set down for July 21st; that from the time of their indictment until that of their arraignment they were in jail, in Vernon, 10 miles from a railroad, without money to employ counsel, and depending on the court to appoint counsel, or upon their relatives or friends to employ counsel; that on Monday night, July 19th, some of their relatives and friends employed F. W. Price, who lives in Ruston, in Lincoln parish, and that on Tuesday, July 20th, O. M. Grisham, who lives in Winnfield, was employed by other relatives and friends; that their said attorneys have not had time to prepare the case for trial; and that they have a good and valid defense.

The motion further alleges that defendants cannot safely go to trial on account of the absence of Fuller McIntosh, Charley Smith, and Will Goodwin, for whom they caused summonses to issue on July 19th, but who have not been summoned, and are not present; that each of said witnesses is necessary to the proper defense of the case; that they reside in the parish of Jackson; that they are not absent through any fault or contrivance of defendants, and that "they can, and will, be had present at the next term of the court." The motion further sets forth certain facts to which it is alleged that the witnesses will testify, and alleges that such testimony would be admissible and material. The motion is sworn to by the defendants, and we find in the record affidavits in support of it subscribed by the defendants' counsel, as follows, to wit: by O. M. Grisham, to the effect that he was employed to assist in the defense on Tuesday, July 20th; that, when he appeared for defendants on July 19th, it was only for the purposes of their arraignment, and for

the reason that some of their relatives had spoken to him about his employment in the case, and it was expected he would be employed during that day; that since his employment in the case he has not had any time to prepare the case for trial, only having been employed on yesterday (Tuesday, July 20th), and has not prepared the case for trial; that the affidavit is not made for the purpose of delay, but to the end that substantial justice may be done. By F. W. Price, to the effect that "he was only employed \* \* \* late Monday night, July 19th, at Ruston, Lincoln parish"; that since his employment he has not had time to prepare, and has not prepared, for the trial; and that the motion for continuance and the affidavit are not made for delay.

The judge a quo gives the following as his reasons for refusing to grant the continuance, viz.:

"The defendants were charged with having on April 3, 1909, murdered William Johnson, a negro, at Elmo, in Jackson parish, La., which is about eight miles from Vernon, and about eight miles from Ruston. They immediately fled from the scene of the killing, and went to Texas, but afterwards came back to Caddo Lake, in Caddo parish, where they were arrested, and afterwards incarcerated in jail, at Vernon, on June 23, 1909. Upon the finding of the coroner's jury on April 4, 1909, warrants were issued for the arrest of the defendants. The grand jury returned a true bill for murder against them, which was filed on July 13, 1909, and on the same day the sheriff served a copy of the indictment and of the venire on the defendants. The defendants were negroes, and lived on the plantation of Mr. Nat. Clinton, a white man, of means and influence, who it appeared, had from the very beginning interested himself in preparing their defense. Practically all of the witnesses lived on Mr. Clinton's place and all were negroes, except McIntosh and Ress. The trial disclosed a most thoroughly prepared defense. Mr. O. M. Grisham, one of the attorneys for the defendants, represented them in the arraignment on Monday, July 19, 1909; and in the argument on the motion for continuance he admitted that the question of his employment had been considered between himself, the defendants, and their friends during the previous week. It also developed during the trial that Mr. O. M. Grisham had gone to Elmo, the scene of the killing, during the week previous to the trial, and had there interviewed some of the most important witnesses for both the state and the defense. Mr. F. W. Price, another of the three attorneys for the defendants, admitted that he had been consulted the week previous with a view to employment by both the prosecution and the defense. The issues were very narrow, and the defendants were ably defended by experienced counsel, who during the trial showed great familiarity with the details of the defense. It also developed during the argument of the motion for continuance that the delay in employing counsel for defendants was not due to inability to do so, but to the desire to employ only the ablest attorneys, and there seemed to be some difference of opinion as to the choice of one attorney who was under consideration.

"Now, as to the absent witnesses, Fuller McIntosh and Charles Smith, the records of the court show that Fuller McIntosh has now pending against him four indictments for 'boot legging' whisky to those negroes and other persons on the night of the killing. He is a refugee from justice. His family have left the parish, and his whereabouts are unknown to the officers of the court. The district attorney admit-



ted that, if he were present, he would swear to all that defendants had set up in the affidavit attached to the motion for continuance. It developed on the trial that he was not at the scene of the tragedy, but that he was at home when William Johnson was killed. As to the absent witness, Charles Smith, he is a transient negro railroad hand. He testified before the coroner's inquest, and his testimony was on file in court. It was not as strong for the defendants as was the statement set out in the affidavit, which the state admitted he would swear to if present. But, in addition to all the above, several other witnesses for the defendants swore to every material fact set up in the affidavits attached to the motion for continuance, and there were several other eyewitnesses to the killing at court during the entire trial who were not put on the witness stand by either the state or the defendants. After the conclusion of the trial, the court is convinced that the defendants put their entire defense before the jury, that they suffered no injury by the overruling of the motion for continuance, and that they had a fair and impartial trial."

In the motion for new trial filed by the defendants, it is alleged that the court erred in not granting them a continuance on the motion and for the reasons contained therein, but there is no special reference to the matters set up in the motion, nor does there appear to have been any attempt to show by testimony that defendants sustained any injury by reasons of lack of preparation by their counsel or of the absence of the witnesses, McIntosh and Smith, or that they gave the proper addresses at which those witnesses could, and should, have been found, or that the witnesses were then obtainable, or could thereafter be obtained.

The crime with which defendants are charged is said to have been committed on April 3, 1909. They were arrested June 23d, and indicted July 13th, and their case was not set down for trial until July 21st following. It was their privilege immediately on being arrested to request the court to assign them such counsel as they desired (Rev. St. § 992), but the court was under no obligation to make the assignment until the request had been made. *State v. Romero*, 5 La. Ann. 24.

If, being unable to employ counsel, they had delayed requesting that counsel be assigned them by the court until the day fixed for the trial, they could not have pretended that they had exercised due diligence, or any diligence.

Upon the other hand, if, being able to employ counsel, they delayed doing so until the day fixed for trial, the same situation is presented; i. e., they could not pretend that they had exercised proper diligence, and it will be remembered in that connection that the trial judge says:

"It also developed during the argument of the motion for continuance that the delay in employing counsel for defendants was not due to inability to do so, but to the desire to employ only the ablest attorneys, and there seemed to be some difference of opinion as to the choice of one of the attorneys who was under consideration."

Considering the matter, then, either from the point of view that defendants were unable to employ counsel and were entitled, upon their request to that effect, to have counsel appointed to represent them, or from the point of view that they were able, whether through their relatives or otherwise, to employ counsel, the fact that until the night of July 19th no counsel had been regularly assigned or employed to take charge of their defense was due entirely to their own inaction, and (conceding for the moment that the counsel then employed did not have time to prepare their defense) the question which presents itself is whether a defendant in a criminal prosecution ought to be allowed by his own deliberate action to obstruct the administration of criminal justice, and to force a postponement of the trial of a case which ought to be tried. Considering the law and the rules of practice by which proceedings in court of justice are generally governed, the question thus propounded would ordinarily be answered in the negative. The defendant in such prosecution may, if he choose, dispense with counsel altogether, and undertake to conduct his own defense, but he certainly can have no right after neglecting or refusing to take legal advice up to the moment his case is called for trial, or within a short time before, to force a continuance on the ground that the counsel whom he then concludes to employ, or to accept, has not had time to prepare himself.

The state is, however, equally interested that those who are innocent shall not, as that those who are guilty shall, be punished for crime, and, by consensus of judicial opinion, a broad discretion is vested in the courts of the first instance, to the end that no citizen, however neglectful he may be of his own interest, shall be denied the opportunity, when prosecuted, of presenting his defense in a fair and impartial trial. The exercise of such discretion should however, be based upon accurate knowledge of the true situation, such as does not, and cannot ordinarily, reach the courts of last resort, and hence in such matters it is only where the ruling of the trial judge would work an injustice which is manifest, or, in other words, where the discretion is abused and the ruling arbitrary, that the appellate court will interfere. *State v. Wilson*, 33 La. Ann. 261; *State v. McCarthy*, 44 La. Ann. 323, 10 South. 673; *State v. Bridges*, 109 La. 530, 33 South. 589; *State v. Leary*, 111 La. 301, 35 South. 559; *State v. Golden*, 113 La. 800, 37 South. 757.

In the instant case we may use the language of our predecessors in this court in one of the cases above cited, to wit:

"We cannot for a moment suppose that had it been shown, when the motion for new trial was heard, that the continuance, which was asked and refused on the day of the trial, should have been allowed, or that the finding of the jury was contrary to law and evidence, and,

for either cause, that the accused did not have a fair and legal trial, the judge a quo would not, even on his own motion, have set aside the verdict and granted the prisoner a new trial. We must, and do, believe that, in acting as he has done, he has discharged his duties conscientiously and legally, and has done no injustice to the defendant." *State v. Wilsqn, supra.*

It may be remarked in conclusion on the subject of this bill that there is no attempt, even in the briefs filed on behalf of defendants, to controvert the statement of the trial judge to the effect that the witness McIntosh was a fugitive from justice and was not present at the homicide, and that the witness Clark was a transient railroad laborer, and, as we have already stated, there was no attempt on the hearing of the motion for new trial to show that the witnesses named could have been found then or thereafter, and the statement of the counsel in their brief that the sheriff had made no returns upon subpoenas issued to said witnesses is de hors the record; the statements in the motion for continuance and bill of exception being merely that the subpoenas had been issued and had not been served non constat, but that the witnesses were not to be found at the addresses given by the defendants. Upon the whole, we are of opinion that the points presented by the bill under consideration were not well taken.

Bill No. 2 was taken to the following remark, made by the district attorney in the course of his argument, viz.:

"I want to say to you that it seems to me that human life is wonderfully cheap in Jackson parish, especially if that human life is negro life."

Counsel for defendants objected, and "asked the court to have counsel confine his argument to the case, and took this, their bill of exception, and, having presented it to the counsel for the state, prayed the court to sign the same."

The district attorney added the statement:

"The language used by me \* \* \* was in reply to Mr. F. W. Price's argument to the jury \* \* \* that the killing of a bad negro was a benefit to the community, and that the killing of some negroes, killed at a church in Jackson parish cleared the atmosphere."

The statement of the judge is:

"The court instructed the jury to disregard and not consider any personal opinion that may have been advanced by either counsel, but simply to consider the testimony, as coming from the witnesses."

Bill No. 3 was taken to the remark:

"If a negro kills a negro, he usually graduates by killing a white man."

To which there was the same objection as in bill No. 2, followed by the same statement by the district attorney and the same ruling by the judge.

Bill No. 4 was taken to the remark:

"I pledge you, upon my honor and in the presence of high heaven, that I will never contend for the conviction of a man whom I believe to

be innocent, and that belief in this case is based on the law and the evidence."

A remark which the district attorney, in his addenda to the bill, says was made "in reply to the argument of O. M. Grisham, attorney for defendants," that the "blood thirsty attorneys for the state had left nothing undone to break the necks of, or to consign, the defendants to the state penitentiary."

The bill shows that the court "instructed the jury to disregard the argument of counsel, as to his personal belief in the matter, and instructed the counsel to refrain from expressing his personal opinion to the jury."

The remarks of the district attorney recited in the bills were legitimate answers to those attributed to defendants' counsel, and the court having instructed the jury, as requested, to disregard such remarks, as coming from either side, we find no sufficient reason for assuming that its instructions were not heeded.

The bills present no grounds for reversal. *State v. Romero*, 117 La. 1006, 42 South. 482; *State v. Young*, 114 La. 686, 38 South. 517; *State v. Jones*, 51 La. Ann. 106, 24 South. 594. "It has been broadly stated that a party can have no just grounds for complaint on account of remarks, improper in themselves, which have been necessitated by like remarks from the other side." 2 Enc. of Pl. & Pr. pp. 731, 732.

Bill No. 5 shows that, the jury having come into court and asked for further instructions upon the question of amount of punishment attached to each verdict they might render, the judge, after correctly instructing them as to the punishment attached to murder, murder without capital punishment, and manslaughter, added, further, "under the law of commutation for good time service, under a verdict of 'guilty, without capital punishment,' the term of imprisonment is claimed by some, and may be the rule, would amount to a period of fifteen years." He further added that, as to the sentence, that is a matter with which the jury has nothing to do, and "that whatever verdict they did find would be supported by the law and the evidence."

Thereupon counsel for defendants objected to the statement made by the judge to the jury, as set out above, and took this their bill of exception.

Defendants, charged with murder, were found guilty without capital punishment, and were sentenced to imprisonment at hard labor for life, and to the payment of costs, to which is added: "This judgment is subject to commutation for good time service according to law." Section 8, Act No. 112, p. 155, of 1890, as amended by section 3, Act No. 160, p. 305, of 1902, provides:

"That whenever any person has been \* \* \* sentenced to imprisonment for life, and who has served in the penitentiary 15 years of said sentence, and who has, during the 15 years, so

conducted himself as to merit the approval of the board of control, he may apply for commutation of his sentence, and, upon the approval of said board of control, the same shall be forwarded to the board of pardons, and, upon their approval, the same shall be forwarded to the Governor; provided, that no more than one convict, out of every five, confined to life imprisonment, shall be commuted in any one year; provided, that, in case of convicts under life sentence, admitted to the special class referred to in section 2, single commutation, given in section 2, may be deducted from the 15 years service and, to that extent, shorten the time in which he or she may apply for commutation under this section."

The meaning of the explanation given by the judge plainly was that, whilst the sentence upon a verdict of guilty of murder without capital punishment would be imprisonment at hard labor for life, the party so sentenced might, by good behavior, have his term of imprisonment shortened to 15 years; and we are unable to discover in what way the defendants were thereby prejudiced, the fact being, that under the last proviso of Act 160 of 1902 (above quoted), the term of imprisonment may be made even less than 15 years.

Finding no reversible error in the rulings complained of, the verdict and judgment appealed from are affirmed.

(124 La.)

No. 17,686.

**OZAN LUMBER CO. v. GOLDONNA LUMBER CO.**

(Supreme Court of Louisiana. Dec. 13, 1909.)

**1. SEQUESTRATION (§ 4\*)—GROUND.**

A sequestration of a sawmill plant by a pledgee presumably in possession will be dissolved where it is not shown that the defendant pledgor has ousted or attempted to oust the possession of the pledgee. The mere circumstance that the defendant has assisted in the procurement of a receivership, which was acquiesced in by the plaintiff, affords no ground for a sequestration after the termination of the receivership, especially where the receiver was also the agent of the plaintiff for the purposes of the pledge.

[Ed. Note.—For other cases, see Sequestration, Dec. Dig. § 4.\*]

**2. RECEIVERS (§ 135\*)—DUTIES—POSSESSION OF PLEDGED PROPERTY—RIGHTS OF PARTIES.**

The appointment of a receiver does not divest the possession of the pledgee, and the property pledged cannot be sold in the receivership for less than the secured debts, with interest and costs, without the consent of the pledgee; and where, under the contract of pledge, certain prices were to be paid for lumber delivered, the pledgee will not be permitted to purchase such lumber at lower prices from the receiver, without the consent of the pledgor.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 135.\*]

(Syllabus by the Court.)

Appeal from Eleventh Judicial District Court, Parish of Natchitoches; Samuel J. Henry, Judge.

Action by the Ozan Lumber Company

against the Goldonna Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed in part, and, as amended, affirmed.

Jack & Fleming, for appellant. Cunningham & Smith, for appellee.

LAND, J. On December 31, 1906, C. H. Haynes, doing business under the name of the Goldonna Lumber Company, executed his promissory note, payable six months after date, in favor of the plaintiff for \$8,924.78, and bearing 8 per cent. interest from date. On January 12, 1907, the defendant, in order to secure the payment of said note executed a certain written instrument by which he pledged, pawned, and delivered to one W. D. Taggart, representing the plaintiff, his sawmill, plant, oxen, wagons, lumber, and logs and other property. It was stipulated that all the lumber cut at the mill during the existence of the pledge should be subject thereto, and should be placed in possession of the said agent.

It was further stipulated that the defendant should operate the sawmill plant at his own expense, and should use the property pledged for that purpose, and that all the lumber sawed should be inspected as loaded on the cars and paid for at certain prices, payable part in cash and the balance by credit on the said note. It was further agreed that any advance that might thereafter be made on any lumber in pile should not exceed \$7.50 per 1,000 feet.

Under this contract, a large number of car loads of lumber were received by the plaintiff during the year 1907, for which the defendant received credits aggregating \$28,117.62 on the books of the plaintiff. Payments were made by drafts on each car load as inspected and received.

On December 23, 1907, M. C. Gunter, claiming to be a creditor of the Goldonna Lumber Company, applied to the district court for the appointment of a receiver. On January 6, 1908, on the petition of a large number of creditors of the said concern, the court appointed W. D. Taggart as receiver. At that time Taggart was in possession of defendant's sawmill plant, logs, lumber, etc., as agent of the plaintiff, under the aforesaid contract of pledge. Taggart in his administration as receiver sold at private sale 10 car loads of lumber to the plaintiff company.

On March 26, 1908, the said receiver obtained an order of court for the sale of all the property belonging to the Goldonna Lumber Company. At the same time the receiver filed a provisional account showing a balance of \$299.04 due him, and several hundred dollars of costs and expenses outstanding against the receivership.

On May 26, 1908, a creditor filed a petition, alleging that the Goldonna Lumber Company was not a corporation, but a private con-

cern, and praying that the order appointing Taggart as receiver be vacated.

On May 30, 1908, judgment was rendered annulling and avoiding said appointment.

Plaintiff company made no record appearance as a creditor in the receivership proceedings, but insisted on the appointment of its agent as receiver and acquiesced in his administration as such.

The present suit was filed on June 23, 1908, to recover an alleged balance of \$3,098.92 due on the defendant's note of date December 31, 1906, for \$8,924.76, and to enforce the pledge of date January 12, 1907. Plaintiff sued out a writ of sequestration, under which the property pledged was seized by the sheriff.

Defendant moved to dissolve the sequestration on the ground of the falsity of the affidavit, and reconvened for attorney fees and actual and punitive damages. This motion was tried with the merits, and on the final hearing was overruled.

Defendant for answer admitted the execution of the note and act of pledge, but denied all the other allegations of the petition.

Further answering, defendant specially denied certain debits on the account filed by the plaintiff, and set up certain credits in his own behalf, and prayed for judgment rejecting plaintiff's demands and dissolving the writs of sequestration, and for judgment in reconvention for \$500 on settlements of accounts, and for \$1,750 damages on account of the wrongful sequestration of his property.

The case was tried and there was judgment in favor of the plaintiff for \$1,354.30, with 8 per cent. interest from April 20, 1908, with maintenance of the writ of sequestration, and recognition and enforcement of the right of pledge on the property seized.

The plaintiff has appealed, and the defendant has joined in the appeal, and prayed for judgment as set forth in his original answer.

Plaintiff and appellant complains of the rejection of several items of the account annexed to the petition.

The item of "1/3 Taggart's salary, 10 months, \$333.33," was charged in a lump on December 30, 1907, and was clearly an afterthought. Taggart was the representative and agent of the plaintiff company under the contract of pledge, and took and held possession of all the property pledged for account of the plaintiff. Plaintiff employed Taggart and promised to pay him a salary of \$100 per month. The claim that the defendant verbally promised to pay one-third of this salary is affirmed by plaintiff's manager, and denied by the defendant. There is some parol evidence tending to corroborate the statement of the manager, but this is neutralized by the fact that during the 10 months no charge for one-third of the salary was made against the defendant. The explanation of this omission given by the manager is that he had it in his mind not to charge the defendant if he carried out his contract. This explanation is

entirely unsatisfactory from a business standpoint. We see no error in the rejection of this item.

The rejection of the item of car shortage, \$128.35, rests on the positive testimony of the defendant based on the receipts or invoices issued by the plaintiff's agent at the mill for car loads of lumber. The contract required the plaintiff to inspect the lumber as it was loaded on the cars, and then and there to pay for the same in full at a certain rate per 1,000 feet. Such inspection necessarily included both quality and measurement. Admitting that errors may be shown, there is no sufficient proof that the shortages charged are correct. The manager of plaintiff had no personal knowledge on the subject.

The next item rejected is two car loads of lumber charged back to the defendant on January 1, 1908, after the receivership proceedings had commenced. One of these cars was credited to the defendant on January 10, 1907, and the other on February 2, 1907, and they were paid for by plaintiff in the same manner as all the other car loads appearing on the account. Plaintiff's own books and defendant's testimony are sufficient to rebut the statement of the plaintiff's manager that his company had received the cars only as agent for the defendant.

It appears that both cars were invoiced in the name of the plaintiff at certain prices, and were shipped to the Beck Miller Company to fill orders previously received by defendant. By the terms of the contract of pledge, these orders were turned over to the plaintiff company, which was to reap any profits resulting from the transaction. It appears that plaintiff failed to collect from the consignee, and nearly a year afterwards claimed the right to charge back the price to the defendant. The testimony of the plaintiff's manager as to the objections of the consignee to paying for this lumber is the merest hearsay. We see no error in the rejection of this item.

The next item is one of \$979.11, representing the difference between \$5 per M and \$11 per M on 163,185 feet of lumber sold by the receiver Taggart to the plaintiff corporation about a week after the opening of the receivership.

It appears that the receiver under his powers of administration shipped and sold to the plaintiff company 10 car loads of lumber at prices ranging from \$5 to \$13 per M, while the pledge contract called for \$11 and \$15 per M. Defendant testified that he protested in vain against sales to plaintiff for less than the contract prices.

Article 3164 of the Revised Civil Code reads:

"The creditor who is in possession of the pledge can only be compelled to return it, but when he has received the whole payment of the principal as well as the interest and costs."

While creditors may force a judicial sale of the pledge, the property cannot be sold for

less than the pledgee's claim. *Bier v. Gautier and Godchaux*, 35 La. Ann. 206. Pledgor's cession of property does not affect pledgee's right of retention and sale. *Jacquet v. Creditors*, 38 La. Ann. 864. The receiver was also plaintiff's agent holding possession of the pledged property. It is manifest that the private sales by the receiver and agent to the pledgee in violation of the terms of the contract of pledge did not bind the defendant. The law in such cases requires a judicial sale in the receivership for a price not less than the pledgee's claim, or a judicial sale under a judgment obtained by the pledgee. Rev. Civ. Code, arts. 3164, 3165. The difference in prices was properly charged to the plaintiff.

Defendant's contention that plaintiff should also be charged with the remainder of the lumber sold by the receiver to third persons or not accounted for by the receiver is without merit. The defendant himself was privy to the appointment of the receiver. Plaintiff acquiesced, and successfully insisted on the appointment of Taggart, their own agent, then in possession of all the property included in the contract of pledge. Defendant's remedy, if any, was against the receiver for property unlawfully sold to third persons, or not accounted for.

The contention that the debit item of \$918 advanced on the purchase price of the Ewing timber should be stricken from the account is without merit. Conceding that it was a separate transaction, yet defendant admits that he has received credit in the account for 336,000 feet of this timber at the contract price of \$11 or \$15 per M. Defendant has therefore no just reasons for complaint on the score of imputation of payments.

The item of January 30, 1908, "To A. Hogg Expense Land Suit \$47.65," in plaintiff's account is not sustained by the evidence. Mr. Hogg does not testify to the correctness of the amount, and there is no evidence that defendant ever promised to pay said expenses. The matter of the suit concerned both parties, and Mr. Hogg's services in the premises were voluntary.

The demand of defendant for \$672 extra cost of hauling logs from the Ewing tract, and \$100 for extra roads and bridges, are not supported by the evidence. Even according to defendant's version these claims are founded only on plaintiff's vague promise to help him out.

The defendant's demand for \$125, being one-half of the expenses incurred by him in his attempt to purchase the Glen Harper timber lands, is also not made out by the preponderance of the evidence. Defendant bargained for the lands in his own name, and the plaintiff merely agreed to advance the money to purchase if an inspection should disclose a certain quantity of merchantable pine timber on the premises, a condition that never happened.

The defendant's last demand is for a credit

of \$284.80 for interest on \$3,560, and not credited in the account.

As the account stands, interest on all the credit items has been allowed. The judgment below struck out certain debit items, and allowed an additional credit of \$979.11 on the sales made by the receiver in January, 1908. Interest at 8 per cent. should be allowed on this item from January 15, 1908, to April 20, 1908, when the account was balanced.

The last question in the case is that of the dissolution of the sequestration. Plaintiff had a pledge on all the property of the defendant. Plaintiff as pledgee was presumably in possession of the property. The receivership did not divest that possession. The receiver was the agent of the pledgee. When the receivership terminated, such agent held possession for the plaintiff. The receiver was discharged on May 30, 1908. This suit was filed on June 23, 1908, and the sequestration is based solely on alleged fear and apprehension created by the receivership proceedings, procured by the defendant, and acquiesced in by the plaintiff.

When the receivership terminated, nothing prevented the plaintiff from keeping its agent in possession of the pledged property. Plaintiff did not do so, but elected to sue out a writ of sequestration at the expense of the defendant. The remedy of sequestration is applicable only to cases where the defendant is in possession of the property, real or personal. Code Prac. art. 269. A pledgee has no occasion for such a writ, unless the pledgor has ousted his possession. There is neither allegation nor proof of such an ouster in the case at bar, and the evidence shows that the defendant made no attempt to waste or dispose of the property.

The evidence shows no grounds whatever for the alleged apprehension and fear that the defendant would use his possession, if any he had for the purpose of wasting or disposing of the pledged property.

Our conclusion is that the writ should be dissolved with \$250 damages for attorney fees. The property was under seizure 17 days before it was bonded. There is no sufficient proof of any actual damages during this short period.

The affidavit for the writ was made by counsel in behalf of the absent officials of the corporation, and there is no evidence that the proceedings were actuated by malice or ill will.

It is therefore ordered that the judgment below in so far as it maintains the writ of sequestration with costs be reversed, and it is now ordered that the said writ be dissolved at plaintiff's costs, and that the defendant do have and recover of the plaintiff the sum of \$250 special damages for attorney fees. And it is further ordered that the said judgment on the merits be amended by allowing the defendant an additional credit of \$47.65, and also 8 per cent. per annum interest on the sum of \$979.11 from January 15 to April

20, 1908; and it is further ordered that the said judgment as thus reversed in part, and, as amended, be affirmed, and that the plaintiff pay the costs of appeal.

(124 La.)

No. 17,979.

### STATE v. SHOOTS.

(Supreme Court of Louisiana. Dec. 13, 1909.)  
CRIMINAL LAW (§ 1020\*)—APPEAL—SUPREME COURT—JURISDICTION.

This court is without jurisdiction of an appeal from an adverse judgment on a motion to set aside the forfeiture of an appearance bond of \$1,000 given in a prosecution where the offense charged is not punishable with death or imprisonment at hard labor, and no penalty has been actually imposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2578-2580; Dec. Dig. § 1020.\*]

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; Thomas M. Burns, Judge.

G. P. Shoots was convicted of selling intoxicating liquors, and he appeals. Dismissed.

M. I. Varnado, for appellant. Walter Gulon, Atty. Gen., and L. L. Morgan, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

MONROE, J. Defendant was prosecuted for retailing spirituous liquor without a license, and gave an appearance bond in the sum of \$1,000, which was declared forfeited upon his nonappearance when called for trial. He subsequently, through his attorney, moved to set aside the judgment of forfeiture, on the ground that there had been no order given by the judge fixing the amount of the bond, and he now appeals from an adverse judgment upon that motion. The state moves to dismiss the appeal for want of jurisdiction in this court. The motion must prevail. The appellate jurisdiction of this court extends to criminal cases in which "the punishment of death or imprisonment at hard labor may be inflicted, or a fine exceeding \$300 or imprisonment exceeding six months is actually imposed" (Const. art. 85), and this case presents neither of those conditions. It is intrinsically a civil proceeding, and, as the amount involved is less than \$2,000, it could be brought before this court by appeal under the jurisprudence, as it stands, only upon the theory that jurisdiction with respect to it would be attracted by appellate jurisdiction vested in this court with respect to the criminal prosecution in which it originated. But neither the punishment of death nor imprisonment at hard labor can be inflicted for the offense charged in the prosecution in question, nor has there been any sentence actually imposed, so that this court is not vested with any appellate jurisdiction

whereby the jurisdiction invoked can be "attracted." Marr's Cr. Jur. § 214; State v. Williams, 37 La. Ann. 200; State v. Toups, 44 La. Ann. 896, 11 South. 524; State v. Cox, 114 La. 567, 38 South. 456; Society v. Cage, 45 La. Ann. 1394, 14 South. 422.

The appeal is therefore dismissed.

(124 La.)

No. 17,960.

### STATE v. SMITH.

(Supreme Court of Louisiana. Dec. 13, 1909.)

1. CRIMINAL LAW (§§ 593, 603\*)—CONTINUANCE—AFFIDAVIT—GROUNDS—REMARKS OF JUDGE.

Defendant's first complaint is substantially that over his objection he was forced to trial when unprepared. To obtain a continuance, a motion for the same must be made in due form, and supported by affidavit. State v. Underwood, 44 La. Ann. 1114, 11 South. 823; State v. Perique, 42 La. Ann. 403, 7 South. 599; State v. Guillory, 45 La. Ann. 31, 12 South. 314.

Even had defendant's application been in due form, the delay which he was seeking to obtain was evidence to support an issue which he was not authorized to tender under the particular crime charged against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1323-1327, 1348-1361; Dec. Dig. §§ 593, 603.\*]

2. CRIMINAL LAW (§§ 755½, 1154\*)—APPEAL—REVIEW—ARGUMENTS OF COUNSEL—REMARKS OF JUDGE.

The exercise of the discretion of the trial judge in deciding in a criminal case as to how far a district attorney in his remarks to the jury was or was not within the bounds of legitimate argument is entitled to very great consideration by an appellate court. The trial judge knew (while the Supreme Court does not) the circumstances under which they were made and the likelihood or not of those remarks being legally prejudicial to the defendant. State v. Romero, 117 La. 1003, 43 South. 482.

The trial judge in his charge to the jury, while defining the crime of embezzlement with which defendant was charged, made use of an illustration of what an embezzlement was which it would appear brought defendant's case directly under the evidence. Defendant urges that by so doing the trial judge prejudiced the jury and commented on the evidence. It is not claimed that the illustration given was not legally correct. If it was, it was for the jury to determine whether under the evidence the defendant's case fell under it or not. The judge made no comment in the evidence. State v. Lenares, 12 La. Ann. 226; State v. Markham, 15 La. Ann. 498.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1765, 3059; Dec. Dig. §§ 755½, 1154.\*]

(Syllabus by the Court.)

Appeal from Ninth Judicial District Court, Parish of Madison; F. X. Ransdell, Judge.

Randall Smith was convicted of wrongfully converting a horse and a mule, and he appeals. Affirmed.

David M. Evans, for appellant. Walter Gulon, Atty. Gen., and Jeff B. Snyder, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## Statement of the Case.

NICHOLLS, J. The defendant was indicted for having feloniously and wrongfully used, converted to his own use, concealed and embezzled one horse and one mule, the property of George S. Yerger, which had been intrusted to him, the said Randall Smith, the tenant and employé of the said George S. Yerger, by virtue of his said employment.

The first complaint made by the defendant was his being over his objection compelled to go to trial. The bill of exception on that subject recites: That defendant having in his petition an order for a subpoena duces tecum commanding George S. Yerger and the Maxwell-Yerger Company, of which George S. Yerger was and had been manager ever since the organization of the said Mercantile Company, to produce in open court on the \_\_\_\_\_ day of \_\_\_\_\_ or any other day this cause may be continued, all books, papers, and documents, ledgers, journals, cash books, day books, counter blotters, time books, pay rolls, gin books, and account of sales of cotton and seed, and any other memorandas that are in possession of Geo. S. Yerger down to the 20th day of January, 1909. That the said cause was on motion of the state continued until the \_\_\_\_\_ day of \_\_\_\_\_ and hour of \_\_\_\_\_. That the said day and hour having arrived, and the state having announced its readiness for the trial, and the defendant, when asked by the court if he was ready, announced through his attorney that he was not ready for trial by reason of the fact that the said Geo. S. Yerger, who was the principal prosecuting witness, individually or as the general manager of the Maxwell-Yerger Company, had not obeyed the orders of this honorable court by not producing into open court on said day and hour all books, etc., as above mentioned.

That, on the contrary, the first item shown under date of January, 1904, was a balance of 160-odd dollars. That defendant having denied having had a settlement with the said Yerger or with the Maxwell-Yerger Company, of which Geo. S. Yerger was the general manager, and that there had been no account stated as between them, and that as a matter of right that the said defendant was entitled to an itemized account from the first transactions down to and including the 20th day of January, 1909, the day on which he is alleged to have embezzled a certain horse and mule, the property of Geo. S. Yerger.

But the court overruled the objection of the defendant going to trial on said day and hour, and refused to require the said Geo. S. Yerger, who was the principal prosecuting witness for the state in the indictment, and who is and was the general manager of the Maxwell-Yerger Company, to produce an itemized account from the incipency of their transactions down to the 20th day of January, 1909, and ordered the trial to proceed. In view of the premises, counsel for defend-

ant presented this his bill of exceptions, and, having submitted the same to the honorable district attorney, counsel for the state prayed the honorable court to sign it.

The second complaint of defendant is set out in bill of exception No. 2. In this bill it is declared that on the trial of the case the district attorney, while addressing the jury in his closing argument, made the following remarks:

"Gentlemen of the jury, if under the circumstances which exist in this case you by your verdict turn this man loose, then bear in mind that never again can any planter or business man in this parish accept a mule or horse in payment of debt."

Objected to by counsel for defendant for the reason that the remarks were highly improper, and had a tendency to prejudice the minds of the jury, which objection was overruled by the court, and the district attorney was ordered to proceed with his argument. Whereupon the district attorney continued by saying:

"Except that he will do so with a full knowledge that it is not a firm trade and that the debtor who had paid a debt in that manner has a perfect right to take the property and send it off or dispose of it as he pleases."

Whereupon counsel for defendant again interrupted him, and most strenuously objected to any such remarks being made to the jury, for the reason it was entirely unfair and had a tendency to prejudice the minds of the jury, especially as some members of the jury were merchants and planters. The court overruled both objections, and allowed the district attorney to proceed with his argument.

Whereupon counsel for defendant took his bill of exceptions, and, having submitted it to the district attorney, counsel prayed the court to sign same.

The third complaint is to a part of the charge of the court to the jury when in defining and explaining an embezzlement he said:

"For instance, if A. should employ B. to work for him, and give B. a mule and horse to do some plowing, and B., instead of doing the work, should take A.'s stock to Mississippi, and there convert them to his, B.'s, use, he would be guilty of embezzlement."

Whereupon counsel for defendant objected to this and reserved his bill of exceptions on the ground as that the court was commenting on the facts.

## Opinion.

In his per curiam to the first bill of exception the trial judge assigned as reasons for his ruling that "the books asked for were accounts of 1903." Those produced showed transactions between defendant herein and the Maxwell-Yerger Company and George S. Yerger as far as January 1, 1904. The horse and mule alleged to have been embezzled were shown to have been given to the Maxwell-Yerger Company about the first of

the year 1909. The court could see, therefore, no connection between the old accounts of 1903 which were never shown to have been objected to, but on the contrary, and therefore overruled defendant's motion to produce the accounts prior to 1904 between defendant and the Maxwell-Yerger Company.

The Supreme Court knows nothing of the facts of the case. From the statement of the judge, it would appear that George S. Yerger had obeyed to the extent deemed necessary by the court, the order given to him to produce the books, etc., called for; that a motion of the defendant to compel him to produce other documents than those which he had produced was made and overruled prior to the calling up of defendant's case; that, when the case was actually called up, the court considered that the papers which George S. Yerger had produced covered everything which defendant was authorized to submit to the jury, and anything beyond what was shown by the papers which were produced were irrelevant and unnecessary. If such was the case (as we are to presume it was), there was no ground for delaying the trial.

From the statements of the trial judge, coupled with the averments of the indictment, we think that the question of actual title to the horse and mule was not at issue before the court. If it was true, as alleged in the indictment, that defendant had recognized as a fact the ownership and possession of George S. Yerger, and had received possession of the same from him as stated in the indictment, defendant could not while holding possession under such circumstances conceal, part with, and dispose of them as he was charged with having done. As the case comes before us, defendant complains really that he should have been granted a continuance, and not been forced to trial as he was. Viewed from that standpoint, defendant's complaint is not well taken.

To obtain a continuance, a motion must be made in due form, or the refusal will not be disturbed on appeal. *State v. Underwood*, 44 La. Ann. 1114, 11 South. 823.

The motion must be supported by affidavit. *State v. Perique*, 42 La. Ann. 403, 7 South. 599; *State v. Guillory*, 45 La. Ann. 31, 12 South. 314.

In his per curiam to the second bill of exceptions, the trial judge stated that objection to the remarks of the district attorney was overruled because the court saw nothing improper in them, and did not consider that they would improperly influence the jury.

The exercise of the discretion of the district judge in this matter is entitled to very great consideration by the appellate court. The remarks of the district attorney in this case were doubtless within the bounds of

legitimate argument. *State v. Romero*, 117 La. 1003, 43 South. 482.

The judge knew the circumstances under which they were made, and the probable prejudicial effect of the same upon the jury. We do not.

The trial judge in his per curiam to the third bill of exceptions complaining of his charge to the jury said that he had said nothing about the evidence in the case—that he merely gave the portion of the charge objected to as an illustration of a similar offense to that charged.

It is not claimed that the illustration given by the trial judge to the jury in defining to them the crime of embezzlement and giving an example of an embezzlement in order to instruct them on that subject was not a legally correct illustration. If the charge was legally correct, the fact that the evidence in the case properly brought it under the illustration given cannot be urged as a comment by the judge on the evidence or as furnishing to the jury any conclusion on his part as to the guilt or innocence of the accused. Whether or not the defendant had brought himself under the evidence adduced within the doctrine of the case given as an illustration was left entirely to the jury to decide. *State v. Lenares*, 12 La. Ann. 226; *State v. Markham*, 15 La. Ann. 498.

The defendant moved for a new trial on grounds of which we have no knowledge from the record. The motion was overruled.

We find no ground for setting aside the verdict of the jury or reversing the judgment rendered thereon.

The judgment appealed from is therefore hereby affirmed.

(124 La.)

No. 17,563.

BABINGTON BROS., Limited, v. BARBER.  
(Supreme Court of Louisiana. Nov. 29, 1909.  
Rehearing Denied Jan. 3, 1910.)

1. TRIAL (§ 63\*)—RECEPTION OF EVIDENCE—REBUTTAL.

In a petitory action, it is incumbent upon the plaintiff to prove his title, and evidence to prove such title must be offered as evidence in chief. Failure on the part of the plaintiff to offer such evidence at the proper time cannot be corrected by his offer to prove a missing link in his chain of title under the guise of rebutting the evidence of the defendant.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 151; Dec. Dig. § 63.\*]

2. RECORDS (§ 17\*)—SUPPLYING DESTROYED RECORDS—EVIDENCE—SUFFICIENCY.

While the rules of evidence are relaxed to prove a deed which has been destroyed, still title to realty cannot be established by evidence of so uncertain a character as the record contains. Under Act No. 57, p. 92, of 1886, parol testimony is admissible to prove the contents of a public record destroyed by fire; but mere uncertain assertions and mere impressions of witnesses who fail to testify to a particular title, who give no dates, no price, and no cir-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



cumstances that go to prove that there was a sale, is not such evidence as will establish the existence of a deed now alleged to be destroyed.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 33; Dec. Dig. § 17.\*]

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; Thomas M. Burns, Judge.

Action by Babington Bros., Limited, against Orville R. Barber. Judgment for plaintiff, and defendant appeals. Reversed, and action dismissed.

Miller & McDougall, for appellant. Prentiss B. Carter and Magee W. Ott, for appellee.

**BREAUX, C. J.** This is a petitory action.

The plaintiff corporation claims to be the owner of the northeast quarter of northwest quarter, containing 39.61 acres, and the southeast quarter of northwest quarter, containing 30 acres, all containing about 100 acres.

The description above is followed in plaintiffs' petition by another description to amplify and explain the above description.

One of the links in plaintiffs' chain is missing, owing, as plaintiffs allege, to the burning of the courthouse and the destruction of their deed to the land.

In this deed Z. T. Magee was the alleged buyer from the defendant.

The defendant denies plaintiffs' claim to this land, sets up his own title, and asks to be recognized as its owner.

The principal question is whether defendant parted with his title by selling the land to Z. T. Magee.

Plaintiffs have a complete chain of title back to Magee.

The courthouse in question was destroyed by fire on March 17, 1897.

The first deed under which plaintiffs claim was dated in November, 1897.

After the plaintiffs had offered their title, they closed their evidence.

The defendant then offered his evidence. He proved that he held under a patent dated November 22, 1887, and that he was in possession of the land at different times.

The fact about possession, as relates to defendant, was that he had not been in possession for about seven years before this suit was brought. He went into possession about one month before this suit was brought.

After the defendant had offered his evidence, plaintiffs offered testimony to rebut the testimony of the defendant.

Objection was urged on the ground that it was not rebuttal testimony.

As relates to that testimony, the court sustained the objection, but admitted the testimony to the extent that it went to defeat defendant's title and disprove his possession; defendant having asked that his title be recognized.

In examination in chief, plaintiffs made no

successful attempt to prove that defendant, Barber, had sold the property in question to Magee. They rested their case after having introduced their chain of title, as said before, as far back as Magee, who was, as they allege, their vendor.

The defendant offered his patent from the state, and also evidence to prove his possession.

The plaintiffs then offered the testimony to complete their chain of title, which should have been offered in chief, as it was not rebuttal testimony, and for that reason we are of opinion that the judge's ruling was correct. That ruling was that plaintiffs' evidence would be heard, not to prove title, but exclusively in rebuttal.

Plaintiffs had alleged a complete chain of title. It was for them to prove that title. Having failed in that respect, they could not make up the failure by offering evidence under the guise of rebuttal to prove the missing link in their title.

The evidence in this case to prove alleged lost title to realty is of the weakest—even to prove a destroyed deed in regard to which the rules of evidence are relaxed. It consists of mere impressions of witnesses who failed to testify as to a particular title. No dates are given, no price; none of the circumstances go to prove that there was a sale. There was no proof of loss offered. It does not appear by the testimony that any of the witnesses ever saw a deed.

Title to realty cannot be eked out by evidence of so uncertain a character as that before us.

The Act No. 57, p. 92, of 1886, provides for the restoration of public records and other papers destroyed by fire, and under the terms of this act parol testimony is admissible.

While that testimony is admissible in proving a deed, it is still incumbent upon the one who wishes to prove it to produce satisfactory evidence. Mere uncertain assertions will not suffice.

Plaintiffs place reliance upon the fact that they satisfactorily proved title for a number of years and claim that title as *prima facie*.

Defendant testified that there was an agreement between him and Magee—he to sell, Magee to buy—of which Magee never availed himself. If the testimony of defendant is to be considered at all, there never was a sale passed by him to Magee. The following is a forcible expression upon the subject of contracts (Laromblere, p. 21, vol. 1, bottom of page):

"Parce qu'entre deux expressions contradictoires d'égale force il n'y a pas certitude du concours de volontés."

Have they contracted, is the question.

There is no correlation proven of offer and acceptance.

Defendant made a statement, it seems, to one or two of the witnesses, who testified in regard to the sale. As one of these witnesses testified: Sale of some 80 acres of land. Another witness knew something of a sale, but is equally as wanting in definitiveness.

Plaintiffs' chain (other than the asserted destroyed deed of sale) does not antedate that of defendant; and as relates to possession, as the issues are presented, it really has no great bearing, for in this petitory action it must be held that defendant is in possession.

The court, in *Lavergne v. Elkins*, 17 La. 220, said:

"It must be remembered that we consider there is a wide difference in cases where the contents of a lost original are endeavored to be proved by parol, and when its loss is to be supplied by a copy taken from a record not suspicious. In the former case we should require stronger evidence of the loss than in the latter."

Even before the United States' officers years ago, after the transfer of sovereignty from France to our country, when claimants were easily permitted to prove titles, more satisfactory evidence would have been required than can be found in this record.

The parties will have to resort to another suit. They may be more fortunate in the next. In any event, we are unable to whip this testimony into sufficient shape to make it the basis of a judgment recognizing the title to the lands in regard to which there should be some certainty.

Plaintiffs have not made out their case. There is sufficient evidence to warrant us in declining to recognize the claim of defendant to title.

For reasons stated, it is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided, annulled, and reversed. It is further ordered, adjudged, and decreed that plaintiffs' demand be dismissed as in case of nonsuit, and the defendant's is similarly dismissed. Plaintiff is condemned to pay the costs of both courts.

(124 La.)

No. 17,963.

STATE v. GILLAN.

(Supreme Court of Louisiana. Dec. 13, 1909.)

CRIMINAL LAW (§ 1019\*)—APPEAL—JURISDICTION OF SUPREME COURT.

The Supreme Court has no appellate jurisdiction in misdemeanor cases except wherein a fine exceeding \$300 or imprisonment exceeding six months has been actually imposed, or a municipal ordinance or law of this state has been declared unconstitutional.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1019.\*]

(Syllabus by the Court.)

Appeal from Twelfth Judicial District Court, Parish of Vernon; Don E. So Relie, Judge.

E. D. Gillan was convicted of selling intoxicating liquors, and appeals. Dismissed.

D. M. Sholars, for appellant. Walter Guion, Atty. Gen., James G. Palmer, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

On Motion to Dismiss.

LAND, J. The accused was prosecuted for selling intoxicating liquors without a license, and, having been found guilty, was fined \$150 and costs, or in default of payment, to be imprisoned in the parish jail for four months, subject to work on the public roads, as provided by law.

It appears that on the trial below the accused raised the question of the unconstitutionality of Act 40, p. 40, of 1908, making a certificate from the United States internal revenue collector, showing that a liquor license had issued to the accused, prima facie evidence of guilt. The trial judge held that said act was constitutional. The accused excepted to the ruling and appealed from the sentence.

The state has moved to dismiss the appeal on the ground that the Supreme Court has no appellate jurisdiction of the cause.

The motion must prevail. In misdemeanor cases this court has no appellate jurisdiction except where a fine exceeding \$300 or imprisonment exceeding six months has been actually imposed, or a municipal ordinance or law of this state has been declared unconstitutional. Const. 1898, art. 85.

Appeal dismissed.

(124 La.)

No. 17,898.

DAIGLE et al. v. OPELOUSAS, G. & N. E. RY. CO.

(Supreme Court of Louisiana. Dec. 13, 1909. Rehearing Denied Jan. 3, 1910.)

COUNTIES (§ 154\*)—PARISHES—PUBLIC AID TO CORPORATIONS—"WARD."

Under article 270 of the Constitution of 1898, the police jury is without power to order an election for special taxes in aid of a railway enterprise in a justice of the peace ward forming a part of a regular parish ward. The "ward" mentioned in said article is the political subdivision of the parish commonly called a "police jury ward."

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 231-236; Dec. Dig. § 154.\*]

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Action by Edward Daigle and others against the Opelousas, Gulf & Northeastern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lewis & Lewis, for appellant. Story & Pugh, for appellees.

LAND, J. Plaintiffs, as property owners and taxpayers, entitled to vote, seek to an-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nul a certain special tax of five mills, for ten years, claimed to have been voted by a majority of the taxpayers of the Third justice ward of the parish of Acadia, in aid of the defendant railroad company.

The election was held in June, 1905, and the returns were promulgated by the police jury of the parish of Acadia. The taxes were not to be levied until after the completion and operation of the defendant's railroad through said Third justice ward.

The railroad was completed and operated in the year 1907, and the special tax was extended by the assessor on the rolls of 1908 at the request of counsel for the defendant corporation. It is admitted, however, that the police jury never passed any ordinance levying said special tax for the year 1908.

Plaintiffs, who had either voted against or opposed said special tax, paid the same under protest to avoid a sale of their property, and then instituted the present suit to annul and avoid said special tax as illegal and unconstitutional, and to restrain its collection.

It is alleged that Act No. 202, p. 483, of 1898, to carry into effect article 270 of the Constitution of 1898, is unconstitutional, because said act provides for the imposition of a special tax in aid of railroad enterprises when carried by a majority in number and amount of those voting, while said article requires a majority of all the property taxpayers in number and amount entitled to vote at the election.

It is further alleged that article 270 of the Constitution of 1898 in authorizing an election for voting special taxes in parishes, wards, and municipalities does not include "a justice of the peace ward" forming only a part of a police jury ward.

Sundry alleged irregularities and nullities are set forth in the petition as to the conduct and result of the election.

The defendant pleaded the limitation of three months provided by section 2 of Act No. 106, p. 140, of 1892, and that the plaintiffs were estopped by voting at the election and inducing others to vote thereat, and by having delayed their suit until long after the defendant's railroad was completed and in operation through the same ward and its entire length.

Reserving the benefit of their pleas, the defendant company answered, pleading the general issue, and averring that relying on the result of the election as promulgated, and on the good faith of the taxpayers of the Third justice ward, and of other wards and municipalities which had voted similar taxes, respondent went to work and constructed and completed its road from Melville to Crowley, and, acting on the presumption of the legality of said special taxes, had incurred an indebtedness exceeding \$1,000,000, to secure which mortgage bonds had been issued and had passed into the hands of innocent third parties.

There was judgment in favor of the plain-

tiffs, and the defendant company has appealed.

The judge below held that the special tax purported to have been voted was null and void, because the police jury had no authority in law to order an election for such tax in the Third justice of the peace ward of the parish of Acadia, and also held that Act No. 202, p. 483, of 1898, as amended by Act No. 23, p. 26, of 1904, was unconstitutional, null, and void, as being in conflict with article 270 of the Constitution of 1898.

The first question in the case is whether the police jury of the parish of Acadia had the power to order the tax election in the Third justice ward. The solution of this question depends on the construction of the word "ward" as used in article 270 of the Constitution of 1898, which reads as follows:

"Art. 270. The General Assembly shall have power to enact general laws authorizing the parochial, ward and municipal authorities of the state by a vote of the majority of the property taxpayers in number entitled to vote under the provisions of this Constitution, and in value, to levy special taxes in aid of public improvements or railway enterprises; provided, that such tax shall not exceed the rate of five mills per annum, nor extend for a longer term than ten years; and provided further, that no taxpayer shall be permitted to vote at such election unless he shall have been assessed in the parish, ward or municipality to be affected for property for the year previous."

This article names three political subdivisions of the state each represented by some authority capable of levying and collecting taxes.

In the case of a police jury ward, this authority is necessarily the police jury composed of members elected from the different wards of the parish. Hence the "ward" mentioned in the said article is the political ward, bearing the same relation to the parish that the parish bears towards the state. It is to be noted that the article places the "ward" on the same plane as the parish and municipality, and names it as second in the order of importance. In other words, the ward referred to is one which may include a village, town, or city.

The Constitution of 1898 uses the word "ward" in several other articles, and it is evident from the context that the police jury ward is intended.

Article 96 provides for the abolition of the office of justice of the peace in wards containing cities of more than 5,000 inhabitants. Article 197 requires the applicant for registration to state the precinct and ward in which he resides, and articles 210 and 222 uses the term "ward" in association with the state, parish, and municipality in connection with the election and motion of officers. Article 231 refers to cases in which aid had been voted prior to 1898 by any parish, ward, or municipality to any railroad not then constructed. It is to be noted that by Act No. 153, p. 191, of 1894, the Legislature authorized special elections in any parish,

parish ward, city, or incorporated town in aid of railway enterprises. Article 231 evidently refers to aid voted under the said statute.

Article 232 of the Constitution of 1898 empowers any parish, municipal corporation, ward, or school district to levy special taxes under certain conditions. Article 243 provides that the same rules relating to the collection of state taxes and tax sales shall also apply to the collection of parish, district, municipal, board, and ward taxes.

And article 291 authorizes police juries to levy special taxes for road and bridge purposes on "the property of the parish or any ward thereof" when voted by the taxpayers of the ward or parish.

It follows that the "ward" mentioned in article 270 of the Constitution of 1898 is the political entity and taxing district known as the "police jury ward." Article 225 of the Constitution provides that:

"Taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax."

Hence the police jury is without power to levy a ward tax on a part of the taxable property in a ward.

Act No. 202, p. 483, of 1898, to carry into effect article 270 of the Constitution of 1898, does not authorize special elections for special railroad taxes in a part of a ward or a part of a parish or a part of a municipality, but treats each of these three political subdivisions as a whole in the matter of such taxation. The first section requires the written petition of one-third of the property taxpayers of the ward entitled to vote therein.

Now, what is a justice of the peace ward? It is the territory over which a magistrate exercises his judicial functions. Such territory may be, as in the instant case, a part of a ward, or a part of two wards, or coterminous with a particular ward. A justice of the peace ward is the smallest judicial district, and has no more connection with taxation than any other judicial district. The term "ward," as applied to the territorial jurisdiction of a court, is a misnomer. Bouvier says that the term "now indicates a subdivision of a city." Black gives a like definition, and adds, "for purposes of police, sanitary regulations, prevention of fires, elections," etc. We have such wards in our towns and cities for similar administrative purposes. But the same term is used in this state to indicate political subdivisions of a parish similar to the "towns" or "townships" in our sister states possessing in a greater or less degree powers of local self-government. Black.

As "the power to tax is the power to destroy," the power delegated by the Constitution should be strictly construed, and cannot be extended by mere inference and implication. In order to exercise the taxing power, whether general or special, the dis-

trict to be affected must be fixed, and the taxation must be equal and uniform throughout its territorial limits. Article 270 fixes three taxing districts under the names of the parish, ward, and municipality. As a parish tax, whether general or special, cannot be levied on a part of a parish, so a ward or city tax cannot be levied on a part of a ward or city. The enabling act of 1898 makes no provision whatever for the levy of special taxes on a part of the property in a parish, ward, or city. Section 7 of Act No. 202, p. 484, of 1898, provides in express terms that the special taxes shall be levied and collected "upon all taxable property within said parish, ward or municipality." These words *ex vi termini* exclude the separate taxation of a part of the property in such political subdivisions.

While, as a matter of logic, the whole includes every part, this proposition is not true where the organic law requires taxation to be equal and uniform throughout the territorial limits of the authority levying the tax. If, as must be conceded, the word "ward" as used in the Constitution is broad enough to include a police jury ward, the taxation must be equal and uniform throughout the limits of the ward.

After a thorough consideration of the case, we reach the conclusion that the term "ward," as used in article 270 of the Constitution, means nothing more or less than the well-known political subdivision called a "police jury ward." There is no warrant for extending the term to any other kind of wards.

If this conclusion be correct, the police jury of the parish was absolutely without authority to order the election, and the situation is the same as if no election had been held, and prescription is not applicable. *Esteves v. Board, etc.*, 121 La. 991, 46 South. 992. In *Dimmick v. Opelousas, G. & N. E. Ry. Co.*, 123 La. 123, 48 South. 767, the court drew a clear distinction between a suit contesting an election and a suit to annul a tax voted at a void election. If a void election cannot be cured by prescription, it cannot be cured by the mere inaction of taxpayers.

There can be no ground of equitable estoppel against the plaintiffs, who from the beginning opposed the tax, and most of whom voted against its imposition.

If the conclusion on this branch of the case be correct, it is useless to consider the other questions raised by counsel and discussed by them with much learning and ability in oral arguments and briefs.

For the reasons stated, the judgment is affirmed.

PROVOSTY, J. (dissenting). Barring a deference in the qualification of the voters, article 270 of the Constitution of 1898 is a re-enactment of article 242 of the Constitution of 1879, which authorized "parochial,

ward and municipal authorities" to levy taxes in aid of public improvements and railway enterprises. At the adoption of the Constitution of 1879, Act No. 57, p. 87, of 1877, was in force, which provided (section 2, page 88) that the parishes shall "district their parishes into police jury wards and shall at the same time district these police jury wards into one or more justice of the peace wards." A review of our election laws and other statutes will show that the justice of the peace ward has always been, and is to-day, a territorial subdivision well known in our legislation. Now, why the Constitution should be held to have meant police jury wards, and not every territorial subdivision known by the name of ward, I cannot imagine. If only police jury wards were intended, and not wards in general, why not have said police jury wards, instead of wards in general. It looks to me very much as if the majority opinion was amending the Constitution.

The idea of this provision of the Constitution is simply to enable the people of any locality to tax themselves in aid of any particular public improvement or railway enterprise in which they are interested. Now, to suppose that, in carrying out this idea, the localities thus authorized to tax themselves cannot be circumscribed otherwise than along the lines of the political subdivisions of the state, is to fall into a fundamental error:

"It is not essential that the political districts of the state shall be the same as the taxing districts." Cooley, *Taxation* (3d Ed.) p. 238.

If police jury wards had a government, or "authorities," of their own that could hold the election and levy the tax, I could understand that article 270 had to be restricted to police jury wards, and not include justice of the peace wards, for the justice of the peace ward is not thus autonomous; but the police jury ward is no more provided with a government, or "authorities," of its own than the justice of the peace ward is. Both kinds of wards are governed by the same police jury, and are both alike purely and simply territorial subdivisions. A police juror is not an officer of the ward in which he has been elected, but of the entire parish. He has no more authority in the ward in which he has been elected than in any other ward, or than any one of his colleagues has.

The justice of the peace ward is as definitely circumscribed, or delimited, as the police jury ward is, and by the same law. Why, then, should it not be just as suitable for being adopted as a taxing district as the police jury ward is; and, if so, what peremptory reason is there for holding that the Constitution did not intend to adopt it as a taxing district, in carrying out the idea of enabling localities to tax themselves in aid

of public improvements in which they are interested? Such a thing might be that a territorial subdivision legally delimited as a justice of the peace ward was interested in a particular improvement in which the other parts of the parish were not. In such a case (and it is the case at bar) why should not that locality be allowed to tax itself, when it is legally known as a ward and the Constitution in express terms authorizes wards to tax themselves?

The fact that the territory within a justice of the peace ward might be included within that of a police jury ward, and would be subject to double the tax authorized by article 270, if both wards voted the tax, appeared to me to be a formidable objection, until I reflected that such double taxation is entirely possible and legal under article 270 when the territory of a municipality is included in that manner within that of a police jury ward.

Granting, however, that the parochial authorities of Acadia parish should have known, when they held this election, that the Constitution does not mean every kind of ward, when it authorizes wards to levy taxes, but means only police jury wards, are not the plaintiffs estopped from urging this error, after they have reaped the benefit of it by the construction of the railroad in aid of which the election was held? I think they are. 16 Cyc. 768; *Guillory v. Avoyelles R. Co.*, 104 La. 15, 28 South. 899.

(124 La.)

No. 17,964.

### STATE v. BOUVY.

(Supreme Court of Louisiana. Dec. 13, 1909.  
Rehearing Denied Jan. 3, 1910.)

#### 1. JURY (§ 66\*)—JURY COMMISSION—MEETING—ABSENCE OF MEMBERS.

Failure to notify a member of the jury commission of a meeting of the commission, when such commissioner cannot be found, after the exercise of reasonable diligence, does not invalidate the proceedings of the meeting, if there is a quorum, and such failure does not render null and void acts done by a jury drawn at said meeting.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 284; Dec. Dig. § 66.\*]

#### 2. JURY (§ 66\*)—JURY COMMISSIONERS—ACTION—"VACANCY"—ABSENCE.

There can be no legal action of the jury commission when there is a vacancy so that all the members cannot be notified. *State v. McClendon*, 118 La. 792, 43 South. 417. But the statute does not refer to absence, and so absence cannot be held equivalent to a vacancy in the commission.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 284; Dec. Dig. § 66.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7259-7264.]

#### 3. JURY (§§ 72, 82\*)—SUMMONING—BYSTANDERS—DISCRETION OF SHERIFF.

The trial judge has the right to direct the sheriff to summon talesmen from "among the bystanders near the courthouse, or at some distance from the courthouse," and when the judge

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gives no instructions, except as to the number, the sheriff may exercise a reasonable discretion as to the place from which he summons the talesmen, if he acts in good faith, and the exercise by him of such discretion, when his motive is not impeached, is not ground for setting aside a verdict. Neither is he obliged to summon every man he meets, provided his motive for exercising his discretion is fair and impartial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 340-342, 348; Dec. Dig. §§ 72, 82.\*]

**4. JURY (§ 82\*)—SUMMONING TALESMEN—BYSTANDERS—NUMBER.**

If the judge orders the sheriff to summon 100 talesmen, and he summons 111, and the 11 are afterwards discharged, this oversight does not prejudice the rights of the defendant, and affords no ground for setting aside the verdict.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 348; Dec. Dig. § 82.\*]

**5. JURY (§ 103\*)—QUALIFICATIONS—OPINION.**

In order to render a juror incompetent, he must have a fixed opinion that will preclude his giving an impartial verdict. *State v. Johnson*, 33 La. Ann. 889. The question of competency is left largely to the discretion of the trial judge, and the fact that a talesman says that he has a fixed opinion, and shortly thereafter says that he will be governed by the law and evidence, is not ground for setting aside the verdict, when the trial judge has held such talesman competent to serve as a juror.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 461-479; Dec. Dig. § 103.\*]

**6. CRIMINAL LAW (§ 1153\*)—REVIEW—DISCRETION—CROSS-EXAMINATION.**

The latitude of the cross-examination is a matter within the discretion of the trial judge, and, unless abused, this discretion will not be interfered with. *State v. Haab*, 105 La. 230, 29 South. 725.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3004; Dec. Dig. § 1153.\*]

**7. HOMICIDE (§§ 190, 194\*)—EVIDENCE—BELIEF OF DEFENDANT.**

The belief of the defendant that the deceased had formed an intention to take his life is not admissible, unless there is proof of an overt act on the part of the deceased. *State v. Jackson*, 33 La. Ann. 1087; *State v. Labuzan*, 37 La. Ann. 489. There must be proof of an overt act to admit testimony of threats. *State v. Swift*, 14 La. Ann. 827.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 399-413, 417; Dec. Dig. §§ 190, 194.\*]

**8. CRIMINAL LAW (§ 695\*) — RECEPTION OF EVIDENCE — OBJECTIONS — RULINGS — GROUNDS.**

The failure of the prosecuting officer to state fully the grounds of his objection to the admission of testimony, when not objected to by opposing counsel, or the failure of the judge to state fully his reason for excluding such testimony, is not fatal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1636; Dec. Dig. § 695.\*]

**9. CRIMINAL LAW (§ 384\*)—WITNESSES (§ 318\*)—RECEPTION OF EVIDENCE—REMOTENESS.**

The court may exclude testimony deemed relevant to the issue, if it appears to be too remote, and the objection of the accused that the judge refused to let him testify that he was out on bail after the termination of his first trial on the charge is without merit and no ground for a reversal of the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 848; Dec. Dig. § 384.\* Witnesses, Cent. Dig. § 1064; Dec. Dig. § 318.\*]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Iberville; Calvin K. Schwing, Judge.

Fablan F. Bouvy was convicted of manslaughter, and he appeals. Affirmed.

M. C. Scharf, Schwing & Levy, and C. S. Hebert, for appellant. Walter Guion, Atty. Gen., J. H. Morrison, Dist. Atty., and A. L. Grace (R. G. Pleasants, of counsel), for the State.

**BREAUX, C. J.** The defendant, Fablan F. Bouvy, was indicted by the grand jury of Iberville parish for the alleged murder of Fred. S. Van Ingen in that parish on the 23d day of October, 1908.

He was put on his trial. The jury did not agree. It was discharged and a mistrial entered.

The case was reassigned, and on the 5th day of April, 1909, he was put on his trial a second time and was convicted of manslaughter, and his punishment was assessed by the trial judge at nine years in the penitentiary.

He reserved nine bills of exceptions. Two of these bills present the same points and are argued by appellant as one bill of exceptions.

**Statement of the Case.**

The defendant and Van Ingen, the deceased, were acquaintances. They were in the city of Alexandria.

On October 22, 1908, Miss Rhorer also was there, having left Plaquemine that day for Alexandria.

There was a reason for the presence of defendant, as stated by him later.

Between 7 and 8 o'clock in the evening, Van Ingen and Miss Rhorer were married.

Defendant was not at the marriage.

On the following morning, October 23, 1908, the three, the bride, the husband, and the defendant, boarded the train, also an uncle of the bride. The young husband was on his way to New Orleans; the bride and her uncle on their way to Plaquemine, her home town.

The defendant did not at any time in Alexandria or on the way to Plaquemine speak to Mr. or Mrs. Van Ingen.

The bride sat near her husband. On the same side of the coach, and facing Van Ingen, sat the uncle, and on the opposite side of the coach, also facing Van Ingen, about three or four seats away, sat the defendant.

About 4 or 5 o'clock in the morning, Van Ingen arose to get his satchel, which was behind the seat of the uncle, and returned with it to his seat and was in the act of opening it when the accused drew a pistol and warned the deceased not to open the satchel. The deceased did not heed the warning. Simultaneously the scream of the bride was heard and the report of a pistol. De-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rendant had fired the fatal shot. The days of Van Ingen were numbered.

## 2. Bill of exceptions:

The different grounds of defense are considered in their order.

Absence of a commissioner was the first objection raised. That objection was that no legal and valid meeting of the jury commission was held by reason of the fact that one of the commissioners was not notified to be present at the meeting, and was not present.

This commissioner, Mr. Louis Desobry, was absent from the parish. He was a passenger on a steamboat going up the river to some place in Arkansas.

The facts are that, August 14, 1909, a notice to attend a meeting of the jury commission on the 16th day of September, 1909, was left by the deputy sheriff in the hands of the deputy cashier at the bank of which he was the cashier.

During the commissioner's absence, there was no one at his residence during the day.

We are of opinion that the quorum by whom the jury was drawn was not illegal for want of the fifth commissioner. There were present four commissioners who had been duly notified by the clerk of the district court.

All needful within the bounds of reason had been done to notify the absent member. It was not known when he would return.

True, all members of the jury commission should be notified to attend the meeting, but failure to notify a member who cannot be found does not have the effect of rendering null and void the jury drawn by the remaining commissioners present.

It was decided by this court: If there is a vacancy in the membership so that all cannot be notified, there can be no legal action taken by the meeting of the commissioners. *State v. McClendon*, 118 La. 792, 43 South. 417.

It does not follow when there is no vacancy, and all has been done possible to notify an absent member, that the proceedings of the commissioners are of no validity.

There should be no vacancy under the terms of the statute. But this does not apply to an absent commissioner. Absence is not vacancy. The statute does not refer to absence, and we do not think that we should supply it and hold that absence is equivalent to vacancy.

It is within the discretion of the trial judge to make an appointment of a commissioner; but, if he chooses to retain the services of a commissioner who is temporarily absent, it is his concern. He may wish to retain a faithful commissioner in that position, although absent when the meeting of the commissioners is held.

We hold that the failure to notify an absent commissioner who cannot be reached is not good ground to set aside the proceedings.

It was not necessary for the other commis-

sioners to postpone their meeting to an indefinite day in order to await the return of the absent commissioner, particularly as they did not know when he would return. They also had certain rights. One of them was that they could not be held to the necessity of returning from day to day to the courthouse until the return of the absent commissioner or until too late to draw the jury for the jury term.

The defendant was not prejudiced by the absence of the jury commissioner. There is no rule or principle requiring the setting aside of a verdict on the ground urged. It did not work injury.

## 3. Talesmen:

The defendant filed a motion to quash the venire of talesmen summoned by the sheriff after the regular venire had been exhausted. The trial judge refused to sustain the motion.

The judge has the authority to direct the sheriff to summon talesmen from "among the bystanders, from near the courthouse or at some distance from the courthouse," to quote from the statute.

The judge gave no particular instruction when he issued the order to summon talesmen. He fixed the number to be summoned at 100.

The sheriff testified that he was prompted by a desire to summon talesmen from among whom there would be found a sufficient number of competent jurors to serve on the jury.

Those who were in or resided near the courthouse during the former trial, it was assumed by him, had heard the witnesses, and possibly the argument of counsel, and had in all probability fixed views in regard to the case.

It is evident that there was no design on the part of the sheriff to violate the statute, and that the defense had no good ground under the law to complain.

There was no violation of the spirit of the statute—not even of its letter.

The statute does not require that the sheriff shall select talesmen from any particular locality. As to him, the law is silent. Of course, he must obey the orders of the judge. If the judge does not issue an order as to the place to summon talesmen, he may exercise some discretion. There is no necessity of his selecting talesmen just as he chances to meet them and all whom he happens to meet. If he in good faith summons jurors at some distance from the courthouse for reasons stated, and there is no testimony in the least questioning his motive, the act cannot be construed into grounds sufficient to annul and set aside the finding of the jury. If he summons jurors from one ward instead of another, this of itself gives rise to no good cause of complaint. In the same way he is not obliged to summon every man he meets, provided he is fair and impartial.

The parish of Iberville is large. It has

a numerous population. There are, we infer, at least 1,500 citizens from among whom the jurors are selected.

The right of a defendant in a criminal case is to be tried by a jury of his peers, taken from the body of citizens in the locality in which he resides.

If the sheriff is impartial in summoning the required number, it leaves to defendant scant ground of complaint on that score.

Four of the jurors were selected from the regular venire. There is no complaint as to these four. The remaining eight jurors were also regularly selected.

#### 4. One hundred eleven, instead of one hundred, talesmen:

The next complaint of defendant is that the sheriff was ordered by the trial judge to summon 100 talesmen, but that instead he summoned 111 jurors.

Upon discovering that the number was too large by 11, the sheriff informed the 11 that they were not wanted.

This was not an illegality. It is one of those acts that may happen; an oversight giving rise to no prejudicial consequences.

The judge who was aware of all the facts and circumstances did not sustain the motion of defendant to set aside the jury's verdict. He did not think that there was good ground to set aside the verdict on that account.

Good faith of the sheriff is one of the essentials that he showed. A larger number than ordered cannot be fatal to the proceedings.

#### 5. Examination on voir dire:

The court refused to allow two challenges for cause and one peremptory challenge by defendant against the qualifications of three talesmen examined upon their voir dire.

The grounds of the challenges for cause were that the jurors on examination on their voir dire said at first that they had a fixed opinion. They did not persist or insist that the opinion was such as to disqualify them from rendering an impartial verdict.

After further examination, the trial judge was of the opinion that they were competent.

The selection of jurors and their competency is left largely to the discretion of the trial judge according to the decided trend of authorities upon the subject.

It is urged by the defense that there was marked inconsistency on the part of these jurors, and that they thereby proved themselves incompetent to serve. That at one time they expressed themselves as having a fixed opinion, and very shortly thereafter they were quite willing to be governed by the law and the evidence.

We are all aware that persons frequently change their minds in a very few moments, particularly when called upon to perform a new duty, to which they are not accustomed.

The decisions sustain the ruling of the trial judge.

There must be a deliberate opinion formed—an opinion that will render a juror incompetent to render an impartial verdict. *State v. Brette*, 6 La. Ann. 652; *State v. Johnson*, 33 La. Ann. 889.

#### 6. On cross-examination of a witness:

Another objection was urged by the defense and overruled by the court. It was urged while the defense was cross-examining one of the state's witnesses. This witness was questioned about the "grip" before mentioned, as to what had become of it. He was also questioned as to what disposition had been made of the body of Van Ingen; whether members of the wife's family called to see it; if they accompanied the body to Alexandria to be buried; if his widow called to see the body.

The facts are: One of the members of the family accompanied the body to Alexandria. The young wife had collapsed. The physician advised her to remain at her home.

This evidence was sought, the defense contended, to test the credibility, memory, and veracity of the witness.

The court ruled that, under the pretext of testing the credibility, memory, and veracity of the witness, it is not permissible to question him about matters irrelevant and inadmissible.

The trial judge heard all the testimony and held that the testimony on cross-examination was irrelevant.

There is necessarily here a question of fact. There must be some measure observed in cross-examination. The trial judge has discretion in the matter.

In *State v. Kane*, 36 La. Ann. 153, the court said that the latitude of cross-examination must be limited by the discretion of the judge, and that no precise rule could be laid down to govern his discretion.

This discretion will not be interfered with unless abused. *State v. Haab*, 105 La. 230, 29 South. 725.

We read the whole testimony excluded. It is in the transcript and is part of the bill of exceptions.

We must say that, after having read it, it did not occur to us that the trial judge erred.

#### 7. Alleged overt act—aggressor—threats:

The court confined the testimony to the proof of facts immediately connected with the homicide.

The defense sought to prove anterior facts and circumstances, such as threats, although the bill of exceptions does not prove that defendant was in imminent danger.

We will here insert our narrative of the facts defendant offered to prove by his own testimony:

We recall from the testimony that there were unfavorable reports regarding Miss Rhorer, to whom both of the young men were paying attentions. The deceased, while under the influence of liquor, said to defendant



that he had accomplished the ruin of the daughter, "ravished her" were the words used by Van Ingen, the defendant said. He said that he admonished the deceased; that the deceased replied that he had had similar experience before and knew how to get out of such trouble. Thereupon the defendant said to him that he would tell the young girl's father. The answer of the deceased was:

"If you do, I will kill you."

Thereafter the defendant informed the father, and the latter called in another relative of the family. The defendant also was present. The daughter was in Plaquemine, Van Ingen in Alexandria. The scene changed to Alexandria. Miss Rhorer and the relative, who had been called upon by the father in his distress we infer, repaired to Alexandria. The defendant accompanied them in order to face the deceased. The latter heard of his presence in Alexandria. The result was that Miss Rhorer and Van Ingen were married between 7 and 8 o'clock in the evening, as before stated.

The details of the shooting have been stated above.

The foregoing is a substantial statement of the testimony which the defendant offered to introduce, but which the court properly excluded.

The objection of the state was that the testimony was irrelevant and immaterial; the purpose of defendant was to prove that Van Ingen was greatly aroused because of the necessity in which he found himself to marry the girl whom the defendant said he had traduced, and that defendant, in consequence, had a right to expect that his life was in danger when he saw the deceased in the act of opening his grip in the car, as before mentioned.

We can only say that in our opinion the evidence was not admissible. The belief of defendant that the deceased had formed a design to take his life without an overt act was not admissible. *State v. Bradley*, 6 La. Ann. 554; *State v. Jackson*, 33 La. Ann. 1087; *State v. Labuzan*, 37 La. Ann. 489.

There must be proof of an overt act in order to admit testimony of threats. *State v. Swift*, 14 La. Ann. 827.

But granted the facts as stated by defendant; he never at any time appears to have in the least feared Van Ingen. When Van Ingen made a damaging disclosure to him, he said, "I will inform the father," and here followed the threat in question by Van Ingen that he would kill him if he did. The defendant did tell the father, as he said he would. When he was requested to go to Alexandria and face Van Ingen and tell him of the ruinous statement, he accompanied the relative to that place.

After the marriage he accepted a pistol and armed himself. He boarded the same train and sat in front facing Van Ingen some three or four seats away. When Van Ingen

was in the act of opening his grip, the defendant fired.

We do not find the overt act alleged.

The points are brought up together; the testimony of threats and the testimony to prove the overt act and the testimony to prove who was the aggressor.

We take it, although the facts are all related in one bill of exceptions, that an offer was first made to lay a foundation; that is, to prove the alleged overt act.

Considered from that point of view, the testimony was not admissible. There was no proof of an overt act and no sufficient testimony to prove who was the aggressor.

As relates to the alleged aggressor: The homicide occurred on a passenger train within view of witnesses who testified. The attempt of the defendant to contradict witnesses by his own testimony has every appearance of the irrelevant and immaterial.

The cases of *State v. Lindsay*, 122 La. 375, 47 South. 687, *State v. Rideau*, 116 La. 249, 40 South. 691, and *State v. Barksdale*, 122 La. 790, 48 South. 204, are not in point; the facts of the case in hand are different.

#### 8. Irrelevant and immaterial:

The defense urged that the state, having objected on the sole ground of irrelevancy and immateriality, and the trial judge having excluded the testimony, his ruling must be considered only from the view point of irrelevancy and immateriality; that it cannot be considered that he excluded the evidence on any other ground.

True, the better practice of the state in prosecuting is to particularize fully the objection raised, in order that the defense may have full notice of the objection to the admissibility of testimony. But this applies to the prosecuting officers. If these officers are not specific enough, or do not urge their points fully, it may give rise to objection by opposing counsel. The trial judge should pass upon the objection.

We are not informed that any objection was urged at the time.

But the trial judge is not bound by objection of counsel; he may go beyond the objections. He is not to be controlled by either counsel for the state or the defense. It is true, he also should state his reasons for excluding the testimony. But if he does not his failure in this respect is not fatal.

Let us leave this point and consider for a moment the objection of irrelevancy and immateriality from the view point of the defense, which was that only the issue of irrelevancy and immateriality was before the court. There was no error in this respect even from that point of view. The trial judge had decided to exclude facts not directly connected with the homicide; not to admit anything that he considered too remote to be admitted. In this respect the general rule is that the court can pass upon the mate-

riality vel non of the testimony, and to him it is left in great part to determine if the testimony is too remote to be admitted, and if irrelevant and immaterial. *State v. Brown*, 111 La. 172, 35 South. 501.

In *State v. Napoleon*, 104 La. 166, 28 South. 972, the court was not impressed by the testimony of the defendant, who sought to prove by his own testimony a hostile demonstration. The court in that case thought that the witness in his own behalf had assumed too much of a burden. His evidence was characterized as irrelevant, immaterial, and insufficient.

In *Steven's Digest of Law*, p. 6, there is the following:

"The court may exclude evidence of facts, though deemed relevant to the issue, if it appears to him to be too remote to be material to all of the circumstances of the case."

Even if we were to hold with the defense, according to learned counsel, that the question was exclusively whether the testimony was irrelevant and immaterial in the respect stated, the defense would still have to show that the deceased was the aggressor, or that he made a hostile demonstration.

This the defense has failed to do. If it had, it would appear in the bill of exceptions. It was incumbent upon the defense to recite the facts in this respect if the defendant had made a hostile demonstration or had shown himself the aggressor.

The defendant complained because he was not permitted by the court to testify in his own behalf; that after the first trial of his case he had been admitted to bail and was then out on bond.

This learned counsel states was for the purpose of establishing his status as a witness.

The evidence was not admissible for the purpose for which it was tendered.

Besides, doubtless, the jurors must have known that he was out on bond; it was common knowledge in the community.

No attempt was made to impeach the witness in the way that witnesses are impeached. His character for veracity was not at issue.

The objection is without merit.

We leave the record impressed by this case. A young man, barely on the threshold of manhood, is the defendant. The hasty and desperate acts of men sometimes lead to deep misery and untold suffering to themselves and cause distress and sorrow to families and friends.

We have considered the points pressed upon our attention. They lead us to the one conclusion, as follows: That, the law and the evidence considered, it is ordered, adjudged, and decreed that the sentence and the judgment appealed from be, and the same are hereby, affirmed.

(124 La.)

No. 17,668.

STATE ex rel. HINDS et ux. v. LEONARD, Clerk and Recorder, et al.

(Supreme Court of Louisiana. Dec. 13, 1909. Rehearing Denied Jan. 3, 1910.)

COURTS (§ 224\*)—CRIMINAL LAW (§ 1020\*)—APPEARANCE BOND—JUDGMENT—JURISDICTIONAL AMOUNT.

Relators seek to compel the recorder of mortgages to cancel the inscriptions of two judgments, for \$250 each, obtained by the state against their author in title, as surety upon appearance bonds, given by persons charged with larceny, which judgments, as inscribed, operate as mortgages upon property which relators have acquired. The district court denied their application, and they have appealed.

Held, if the proceeding be regarded as civil in character, this court is without jurisdiction of the appeal, because the amount involved is less than \$2,000. If it be regarded as criminal, for the purposes of jurisdiction and in the sense that an appeal lies, if appeals would lie in the prosecutions in which the bonds referred to were forfeited, it does not appear that appeals would lie in those prosecutions, and (assuming that appellate jurisdiction in those matters would attract such jurisdiction in this, a point on which we express no opinion) parties who are dissatisfied with the decrees of inferior tribunals must exhibit affirmatively their right to an appellate interference. The court, therefore, ex proprio motu, orders this appeal to be dismissed.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 608-618; Dec. Dig. § 224;\* *Criminal Law*, Cent. Dig. §§ 2578-2580; Dec. Dig. § 1020.\*]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; A. J. Murff, Judge.

Mandamus by the State, on the relation of L. E. Hinds and wife, against F. A. Leonard, Clerk and Recorder, and another, to compel the cancellation of certain judgments, etc. From a judgment denying relators' application, they appeal. Dismissed.

T. F. Bell, Jr., for appellants. J. M. Foster, Dist. Atty., for appellees.

MONROE, J. Relators, L. E. Hinds and his wife, acquired certain real estate in Shreveport—L. E. Hinds by purchase, and Mrs. Hinds by inheritance—from M. A. Boynton, and, finding recorded against it two judgments in favor of the state of Louisiana, each for \$250, rendered against their author as security on certain appearance bonds, given by persons charged with petit larceny, and recorded January 13, 1894, they applied to the district court for a writ of mandamus to compel the recorder to cancel the inscriptions, on the ground that the judgments are prescribed; and they made the district attorney a party defendant in the proceeding. The recorder and the district attorney answered that prescription does not run against the state.

The judge a quo, after hearing, gave judgment denying relators' application, and in so doing considered the question whether

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the proceeding should be regarded as civil or criminal in character, and adopted the latter view, for which counsel for relators contended, and which was opposed by counsel for defendants.

If the proceeding is civil, this court has no jurisdiction of the appeal, since the amount involved is less than \$2,000. If the proceeding is in its nature criminal, the jurisdiction does not appear, for the appellate jurisdiction of this court extends "to criminal cases, on questions of law, alone, whenever the punishment of death or imprisonment at hard labor may be inflicted, or a fine, exceeding \$300, or imprisonment, exceeding six months, is actually imposed" (Const. art. 85); and the record does not show that either of those conditions is presented in the cases on which relators rely for the maintenance of the appeal.

Thus it is assumed that this court may exercise the jurisdiction invoked, upon the theory that this is a proceeding growing out of the forfeiture of certain appearance bonds, given in criminal prosecutions, and that such jurisdiction is "attracted" by that which might be exercised with respect to those prosecutions. Upon the face of relators' petition, however, it merely appears that the defendants in those prosecutions were charged with "larceny"; but the value of the property said to have been stolen is not stated, and the offenses may or may not be punishable by imprisonment at hard labor, as they may or may not belong in one or the other of the grades of larceny established by law (Act No. 107, p. 162, of 1902, § 5). If they are not punishable by imprisonment at hard labor, this court has no apparent appellate jurisdiction with respect to them (since they are not punishable with death, and no sentence whatever has actually been imposed), and hence no such jurisdiction is "attracted" with respect to the present proceeding (even assuming that it would be attracted if the appellate jurisdiction quoad the prosecutions were made apparent, a point concerning which we express no opinion). *State v. Williams*, 37 La. Ann. 200; *State v. Toups*, 44 La. Ann. 896, 11 South. 524; *State v. Cox*, 114 La. 567, 38 South. 456. "Parties who are dissatisfied with the decrees of inferior tribunals must exhibit affirmatively their right to an appellate interference." *Dame v. Gass*, 11 Mart. (O. S.) 205; *Cason v. Chaney*, 3 La. 269; *Hall, Tutrix, v. Sanders, Adm'r*, 3 Rob. 10; *Police Jury v. Fontaine et al.*, 11 Rob. 476; *Succession of Tompkins*, 12 Rob. 110; *Plique v. Bellome*, 2 La. Ann. 293; *McDonogh v. Derbigny*, 2 La. Ann. 956; *Spangenberg v. Bigelow*, 3 La. Ann. 70; *McDonogh v. Nugent*, 4 La. Ann. 28; *New Orleans v. Apken*, 36 La. Ann. 419; *Hite et al. v. Hinsel & Tallieu et al.*, 39 La. Ann. 113, 1 South. 415. The matter not appearing to be within its jurisdiction, this court can

no more review the ruling of the district court upon the disputed question of the character of the proceeding than upon any other point, and hence cannot assume the proceeding to be civil in character and transfer the appeal to the Court of Appeal.

It is therefore ordered by the court, ex proprio motu, that the appeal herein be dismissed.

(124 La.)

No. 17,604.

GRIGSBY CONST. CO. v. COLLY (HAMILTON et al., Interveners).

(Supreme Court of Louisiana. Dec. 13, 1909. On Application for Rehearing, Jan. 3, 1910.)

1. ACCOUNT, ACTION ON (§ 7\*)—EVIDENCE. Amount claimed, balance on open account, is due plaintiff.

[Ed. Note.—For other cases, see *Account, Action on*, Dec. Dig. § 7.\*]

2. ATTACHMENT (§ 63\*)—OWNERSHIP OF PROPERTY—TRANSFER.

The writ of attachment took nothing. It was not proven that the property attached belonged to defendant.

[Ed. Note.—For other cases, see *Attachment*, Dec. Dig. § 63.\*]

3. PRINCIPAL AND AGENT (§ 101\*)—CONTRACTS—ALTERATION—AUTHORITY OF AGENT.

The reconventional demand of defendant was not sustained by sufficient testimony. He failed in the attempt at proving that his contract with the company was changed. The alleged agent, by whom it was stated that the change in contract was made, was not the agent of plaintiff.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 101.\*]

4. FRAUDULENT CONVEYANCES (§ 299\*)—TRANSFER OF PERSONAL PROPERTY—SALES.

The testimony did not satisfy the court that the property seized was defendant's.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 299.\*]

5. DETERMINATION OF CAUSE ON APPEAL.

Judgment on main demand—open account—affirmed.

Judgment annulled as relates to reconventional demand.

Affirmed as relates to interveners.

(Syllabus by the Court.)

6. ATTACHMENT (§ 30\*)—GROUNDS.

Where defendant, a railroad subcontractor largely indebted to plaintiff, was on the eve of his departure for Texas, where he proposed to reside permanently, having practically completed his work for plaintiff and started to work for another company, promising to pay his indebtedness, which promises he failed to keep, and had stated to plaintiff's manager that he was going to take his outfit to Texas on a rice farm, there were sufficient grounds for attachment.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. § 80; Dec. Dig. § 30.\*]

Monroe and Provosty, JJ., dissenting.

Appeal from Twelfth Judicial District Court, Parish of Vernon; Don E. So Relle, Judge.

Action by Grigsby Construction Company against A. C. Colly, in which A. Hamilton and another intervened. From a judgment

in favor of defendant on a demand in reconvention and dissolving plaintiff's attachment, and in favor of interveners, plaintiff appeals. Judgment in favor of defendants in reconvention and against plaintiff reversed, and judgment dissolving the attachment and in favor of interveners affirmed.

C. Evans Hardin and James R. Monk, for appellant. J. W. Baker, for intervening appellees.

**BREAUX, C. J.** The Grigsby Construction Company sued the defendant, A. C. Colly for \$3,191.50, with interest.

The following is the itemized account upon which the suit is based:

To amount carried forward.....	\$15,027 24
Credits by final estimates rendered by engineer on J. & E. Railway on secs. 57 & 58 as follows:	
30,100 yds. of earth at 17 per cu. yd.	
2.7 acres grubbing at \$100 per acre	270 00
By final estimate on secs. 67, 68, 69, 38,352 cu. yds. of earth at .15 per cu. yd.....	5,742 80
7.34 acres grubbing at 75 per acre..	550 50
By refund of freight of G. C. & F. on outfit from Fort Worth to De Ridder .....	155 00
Balance due G. C. Co.....	\$ 3,191 50
Interest to be added from June 2, 1907.	

Plaintiff sued out a writ of attachment and averred grounds provided in the Code of Practice.

Defendant denied all indebtedness to plaintiff. He furthermore reconvened, claiming that, instead of his being indebted to plaintiff, plaintiff is indebted to him in the sum of \$7,525, instead of the \$5,742.80 allowed for labor upon sections 57 and 58 on the J. & E. Railway, at the rate of 25 cents per cubic yard; the amount of earth removed being, as defendant alleges 30,100 cubic yards.

Defendant avers that by contract with plaintiff he became its employé under the promise and agreement that he was to be paid a reasonable amount for his work in sections 57 and 58. The defendant also averred, as stated before: That the mileage work in these sections performed by him for plaintiff is worth 25 cents per cubic yard. That plaintiff agreed with him to transport his outfit, from a point named in Arkansas to De Ridder, Calcasieu, to be used in construction work by him, free of charge; that for this he was allowed a credit of \$150.44 when he was entitled to a credit of \$875.07. He objects also to a small item of \$4, which he says should not have been charged to his account.

From these data, defendant deduces that the plaintiff company is indebted to him in the sum of \$1,867.23, instead of his being indebted to plaintiff in the sum which plaintiff claims, and for this balance he asks for judgment in his reconventional demand.

A. Hamilton intervened in the suit and claimed a part of the outfit attached and seized as his own; alleged that he obtained it from defendant for a valuable consideration on the 21st day of March, 1907, prior to

the date of the seizure under the writ of attachment. He asked for judgment recognizing him as owner and asked to have his right reserved to damages in a separate suit.

To this suit in intervention, the plaintiff company filed an answer averring that the intervenor is not the owner of the property; that the written title which intervenor sets out is a mere simulation for the purpose of defrauding it from recovering the amount due as before stated.

J. A. Hamilton, another intervenor, claimed part of the property attached. He also asked for judgment recognizing him as owner.

Plaintiff answered this intervention also on about the same grounds as the answer to the intervention of A. Hamilton, the first intervenor.

The court rendered judgment against plaintiff rejecting its demand and for defendant for the sum claimed by him in his reconventional demand.

The court dissolved the writ of attachment and recognized title of intervenors to the property.

#### Writ of Attachment.

The right *vel non* of the plaintiff to an attachment is the first question that presents itself.

As against the defendant, there was a *prima facie* showing for an attachment. The defendant was on the eve of his departure for Texas, where he proposed to reside permanently. The facts and circumstances sustain the plaintiff's allegations in so far as the defendant is concerned.

The manager of plaintiff company testified that defendant had practically completed his work for plaintiff and had gone to work for another company, promising to pay, promises which he failed to keep. Defendant furthermore told him that he was going to take his outfit to Texas on a rice farm.

To another witness defendant said that he was on his way to Beaumont to engage in rice farming.

The attempt made at rebutting this testimony does not amount to a rebuttal of the *prima facie* showing made for an attachment.

We reiterate, as relates to defendant, there was ground sufficient for an attachment. In the nature of things it cannot extend further than the defendant and his property, if any he has.

Of this later.

Defendant virtually admitted the correctness of plaintiff's account inserted above, except a small item of \$4.

The questions involved are questions of fact and require for decision an analysis of the testimony.

The first witness was the manager of the Grigsby Construction Company by whom the

contract for construction and grading and road was let to defendant some time in June, 1906. He refers particularly to contract work in sections 68 and 69 at 15 cents per cubic yard, and states that it was really more than it was worth.

With reference to the claim of defendant for transportation over railways of defendant's outfit from where it was in Arkansas to De Ridder, he said that there was no agreement to transport this freight over the Gulf, Colorado & Santa Fé, on which he allowed defendant free transportation in accordance with agreement. The defendant had paid the amount. It was refunded to him as set out in the statement above.

Another difference between plaintiff and defendant is about the change of the profile work. There were two of these profiles, one P. 1, and the other P. 2.

Defendant's contention is that P. 2 was substituted for the first, and that the work was done under P. 2, much to his disadvantage, and that when he discovered the change in the profiles he objected and said he would not do the work under the second profile.

The manager of plaintiff company testified that there was no material difference between the two profiles. He stated that the defendant made no complaint until the work was about completed.

The defendant differs very much from the manager upon that subject. He says that after he had objected an agent of the plaintiff, known as a "line rider," directed him to take up the work and complete it; that he would be paid, not the 15 cents per cubic yard, but the value of the work.

This refers particularly to sections 57 and 58.

The manager of the plaintiff company testified, in answer to that contention of the defendant, that it was not customary with the Grigsby Construction Company, or any other company well managed, to make a contract with a subcontractor and stipulate that he will be paid a reasonable amount for his work.

This manager says that the defendant never informed him that it was his intention to make such a claim; that they thought all along that he was working for 15 cents per cubic yard. He testified that the man known as the "line rider," John Connerly, had no authority whatever to enter into any such contract and change the price from 15 cents per cubic yard to 20 cents.

The superintendent of the plaintiff company next testified. He in the main corroborates the manager. He says with reference to sections 57 and 58 that about the time defendant finished his work in sections 67 and 68 he offered to let him do the work at the Cravens Yards, which he desired to complete, at 17 cents per cubic yard, the same price that the plaintiff company was getting from the Gulf, Colorado & Santa Fé, its contractee, and that he was to receive \$100 per

acre for doing "grubbing" work instead of \$75.

With reference to the other work, he states that it was well paid at 15 cents per cubic yard.

The father of the superintendent as a witness corroborates the son. He was present at some of the conversation held and testified about to the same effect as his son.

Another witness was a merchant by the name of Martin, who testified about expressions of defendant in regard to the necessity of taking advantage in order to protect one's self when working for railroad companies.

There is no necessity of dwelling further upon the evidence of plaintiff's witnesses. They in the main sustain its demand.

The defendant was the first witness to testify in his own behalf. He specially referred to his agreement with Connerly. His evidence is in conflict with that of the manager and the superintendent. Taking it all in all, after careful consideration, we arrive at the conclusion that it could not serve as a basis for judgment for the amount which he claims.

He, we presume, is an active man; possibly devoted to his work, but wanting in power of observing closely.

He testified that there was what is known as "hard pan" and other elements in the earth.

Other witnesses have testified that there was no hard pan about it; only earth to be removed.

Contractors who employ subcontractors do not stipulate to pay for value of the work.

The defendant in making such a claim is not sustained by custom, and he is not sustained by the weight of the testimony of the case.

Defendant himself had worked in constructing railroad beds for some nine years, never without stipulated price.

He did not know with any degree of accuracy what was meant by roadbed measure, and when he was informed that it meant the actual earth taken out of the cuts and the actual earth put in the fills, whether the same earth is put in the fills that is taken out of the cuts or not, his reply was that he "could not exactly say."

He may have the knowledge very active men in such work possess and may not have given himself concern about definitions or measurements.

We have not found it possible to give it controlling weight.

Other witnesses do not agree with him in regard to the extent and value of the work. He has not sustained his cause by sufficient evidence.

It will be borne in mind that he was plaintiff in reconvention, and throughout the onus of proof was with him.

Defendant also failed to sustain his claim for free transportation of his outfit from Saline River, in Arkansas, to De Ridder, La. He paid the amount originally and has not

made out his claim for reimbursement, on the ground that he was to have free transportation.

The manager at the time wrote to him that he could not get any transportation over any road except the Santa Fé. This allegation is sustained by a letter of the manager to the defendant.

He was provided with free transportation over the Santa Fé; that was the extent of the agreement.

We have arrived at the conclusion that plaintiff has proven the amount claimed in its petition except \$4, and that defendant has not sustained his claim in reconvention.

This brings us to the interventions.

There were two filed; one by J. A. Hamilton, and another by A. Hamilton, alleging themselves as owners of the property seized.

The sale made by defendant to A. Hamilton of a part of the outfit was for \$4,000, partly cash and part in an amount which had been previously advanced to defendant. It is dated March 21, 1907.

The writ of attachment was issued on the 20th of June, of the same year.

The sale to J. A. Hamilton was made on the 15th day of December, 1906, for the amount of ———.

Suit was instituted and the attachment levied on June 20, 1907.

Both sales were recorded in the recorder's office in Calcasieu parish, and in the mortgage office in the home county of the interveners in Texas.

One of the interveners is the father-in-law, and the other the son-in-law, of the defendant.

The defendant, while he was at work for the plaintiff, stated to the civil engineer of plaintiff that he was not the owner of the outfit.

The defendant at about the time of these sales, and shortly thereafter, stated that he was about to change his occupation, leave subcontracting and take up the cultivation of rice instead.

He did make the change shortly thereafter.

The interveners testified that the horses and mules and other property they bought were on their farms and were used in making crops since the attachment. Prior to the attachment, they leased the outfit to the defendant.

There is evidence showing that the amount of rent was paid. There were some slight omissions in regard to the payment, which we do not consider of great consequence in the case.

Plaintiffs testified as to their ability to buy the property. Their statement in this respect does not seem to have been questioned at all. They swore that they could find use for the property which they bought.

We infer from the testimony that they are well to do farmers.

While it is true that the defendant in conversation would occasionally speak of the outfit while it was in his possession as his

property even after the sale, as he was the lessor of this property he could well use these words without prejudicing the rights of the interveners as owners. Men who have charge of property are prone to use the word "mine," and that is particularly true if they are lessees of the property.

There is no testimony showing that defendant ever at any time stated to the employees of the plaintiff company that he was the owner. On the contrary, in conversation with one of the officers, an engineer who had something to do with directing the work on which defendant, Colly, was engaged as subcontractor, he said to him that he was not the owner of the property.

We infer that the expression "my property" was used in a general way in talking.

The plaintiff advanced supplies to defendant. It could have asked information of the defendant upon the subject of his property and regarding his ability to pay. Nothing of the kind was done.

Besides, there was no certainty at the date the property was sold that defendant would be indebted to the plaintiff at the end of the contract. There was an open account between them. Plaintiff made advances against which defendant was allowed credit for his work. Suddenly, about the end of the contract, plaintiff awoke to the necessity of instituting attachment against property which the testimony shows had been sold.

The fact that these parties are related is not necessarily proof of unfairness or fraud. Relatives may trade among themselves upon legitimate basis.

We have considered the details testified to by witnesses. Taken as a whole, we are of opinion that these sales should not be annulled by us.

The learned judge of the district court saw the witnesses while they were testifying, observed them. Weight must be given to his opinion.

Regarding the reconventional demand, which we have just rejected. It may be thought by defendant that the opinion of the district judge should have equal weight as relates to the amount he claims and which was allowed by the district judge, and that we should allow the amount which he found to be due.

This does not necessarily follow. The matter of the profiles to which we have referred present questions independent of witnesses. So, also, the change from one profile to another. The first contract and then the second contract which defendant claimed was substituted to the first present questions to which we gave special attention. Our opinion was arrived at without reference to the finding heretofore.

To return to these sales for a moment: transactions which end in sales sometimes present nice questions.

In this instance the two sales depend entirely upon facts.

As to part of the case relating to these sales, after reflecting over the testimony, the conclusion reached by us agrees with the opinion of the judge of the district court. We have not been able to agree with him in regard to the reconventional demand.

For reasons stated, it is ordered, adjudged, and decreed that the judgment appealed from is annulled, avoided, and reversed. It is further ordered, adjudged, and decreed that plaintiff recover of defendant, A. C. Colly, judgment for the sum of \$3,191.50, less \$4 charged in error, with 5 per cent. interest on the balance from judicial demand. It is further ordered, adjudged, and decreed that defendant's demand for \$1,800 be rejected. It is further ordered, adjudged, and decreed that plaintiff in intervention A. H. Hamilton have judgment against the Grigsby Construction Company adjudging and decreeing all the property described in his intervention as his. It is further ordered, adjudged, and decreed that the writ of attachment sued out be dissolved and set aside, and that intervenor be maintained and quieted in his possession of the property seized in said writ, reserving to the intervenor the right to sue for damages if any such right he has.

It is further ordered, adjudged, and decreed that the Grigsby Construction Company as between it and this intervenor pay all costs of both courts.

It is further ordered, adjudged, and decreed that plaintiff in intervention A. Hamilton do have and recover judgment against the Grigsby Construction Company adjudging and decreeing all the property described in his petition as belonging to this intervenor, that the writ of attachment sued out be dissolved and set aside, and that intervenor be maintained and quieted in his possession, reserving to him action for damages, if any right he has.

As between plaintiff and intervenors, plaintiff to pay all costs of both courts. On the main demand between plaintiff and defendant, the defendant is condemned to pay costs of both courts.

MONROE and PROVOSTY, JJ., dissent from the judgment in favor of the intervenors.

#### On Application for Rehearing.

LAND, J. Plaintiff has filed a petition for a rehearing on the ground that the court erred in affirming the judgment in favor of the two intervenors. We have carefully reviewed the pleadings and the evidence.

Each of the intervenors has a written title to the property claimed by them, respectively, signed by the defendant, the acknowledged owner at the time, and it is also shown by written evidence that at the date of the attachment the defendant held possession of the property as the lessee of the intervenors. The only attack by the plaintiff on these

titles in its pleadings is that both were mere simulations, and that no consideration passed between the parties.

Conceding that the continued possession of the vendor creates a prima facie presumption of simulation, this presumption is rebutted by the testimony of the two intervenors and of the defendant that the property was actually sold and paid for as stated in the bills of sale, and was actually leased to the defendant for valuable consideration. The character of these three witnesses was not impeached in the court below, and the trial judge gave credit to their sworn statements. The fact that one intervenor is the father-in-law, and the other intervenor is a brother-in-law, of the defendant, is, at most, a mere suspicious circumstance.

J. A. Hamilton purchased on December 15, 1906, more than six months before this suit was instituted. He testified that he paid for the property, and the defendant testified to the same effect. We find in the record no direct evidence to the contrary.

A. Hamilton, the father-in-law, a rice planter of means residing in the state of Texas, testified that he loaned the defendant \$2,000, which was paid to one Reib on account of the purchase price of the property in dispute, and that after the defendant obtained a bill of sale of the same intervenor purchased the property, paying an additional sum of \$1,100. The record shows a bill of sale of the same 19 head of mules, etc., from the Grigsby Construction Company by C. E. Reib, to the defendant, of date March 2, 1907, for the price of \$3,250, the receipt of which is acknowledged. On March 21, 1907, the defendant transferred the same property by bill of sale to the intervenor. From what source did the defendant derive the money he paid to the plaintiff company on March 2, 1907, if not from his father-in-law?

We are not prepared to say, on the face of the cold record before us, that the three parties to these bills of sale have testified falsely. In the nature of things, the trial judge, who saw and heard the witnesses, is in a far better position than we are to judge of their credibility.

Rehearing refused.

(124 La.)

No. 17,938.

OGLESBY v. TURNER et al.

(Supreme Court of Louisiana. Dec. 13, 1909.  
Rehearing Denied Jan. 3, 1910.)

PLEADING (§ 228\*)—WILLS (§§ 111, 457\*)—ACTION IN NULLITY—PLEADING—DISMISSAL.

Plaintiff sued the defendants to have declared null and void a nuncupative will by public act which had been probated in the district court, where the action in nullity was instituted on certain named grounds, which were alleged to be apparent on the face of the instrument.

Before issue joined defendants excepted that

plaintiff's petition disclosed no cause of action. The district judge, on trial of the exception, discussed each asserted ground of nullity, and, finding none well grounded in law, so declared, sustained the exception, and dismissed the suit. Plaintiff appealed, claiming that the district judge had disposed of the case on its merits when it was not at issue. The course pursued by the trial judge was justified. There was no attack made by defendants upon plaintiff's pleadings. They were explicitly set out; but, assuming the facts to be as alleged by plaintiff, the facts as so alleged did not carry as a consequence the nullity of the will.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 228; \* Wills, Cent. Dig. § 269; Dec. Dig. §§ 111, 457.\*]

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Neill, Judge.

Action by Joseph H. Oglesby against Emmeline Turner and others. Judgment for defendants, and plaintiff appeals. Affirmed.

D. Caffery, Jr., and H. D. Smith, for appellant. Borah & Himel, for appellees.

#### Statement of the Case.

NICHOLLS, J. In plaintiff's petition he alleged: That Mrs. Amanda Delmas, widow of John T. Delmas, departed this life at her home on Hope Plantation, near the town of Patterson, parish of St. Mary, state of Louisiana, on the 5th day of August, 1909, leaving a succession consisting of real and personal property, moneys in bank, etc., amounting to some \$50,000. That by olographic will, perfect in form, and dated the 2d day of August, 1886, he is the universal legatee of the said Mrs. Amanda Delmas, deceased. That on or about the 9th day of August, 1909, there was presented to the honorable court for probate a pretended nuncupative will by public act by Miss Emmeline Turner, a resident of the city of New Orleans, state of Louisiana.

That under said pretended will the said Miss Emmeline M. Turner, after certain special bequests, is made the universal legatee of Mrs. Amanda Delmas, deceased. That the said pretended nuncupative will by public act is utterly, and upon its face, null and void, for failure to comply with the requirements and legal forms in the confection of such documents. That said will was never signed by the alleged testatrix, witnesses, or notary, who pretended to act in the construction of the same, but that the signatures only appear at the end of what the notary terms a codicil, and after the conclusion of the will proper and the turning aside of the notary to this so-called codicil, and without the completion of the will proper.

That the will is absolutely void for other legal defects fatal to its maintenance, which will be pointed out upon the trial of this suit.

The premises considered, petitioner prayed for the citation of the various legatees named in said alleged will, and that the document

filed for probate by the said Miss Emmeline Turner, and which pretends to be the last will and testament of the said Mrs. Amanda Delmas, deceased, be declared illegal, invalid, and no will, and that the parties named as legatees thereunder be decreed to take nothing by virtue of the same, and as to all the property, real and personal, rights, credits, rents, income, moneys in bank, and other profits of petitioner, that in due course of law he be placed in possession of the same, and that there be a full accounting of all the property belonging to said succession. And petitioner prays for costs and general and equitable relief.

On September 1, 1909, several of the defendants appeared and prayed for oyer of the alleged olographic will. The court ordered plaintiff to produce the same. The defendants, on September 6, 1909, appeared and declared that they did so before pleading to the merits and solely for the purpose of filing the exception they then filed, excepting to plaintiff's petition on the ground that the same disclosed no cause of action. They prayed that their exception be maintained and plaintiff's suit be dismissed and rejected.

The minutes of September 16, 1909, contained the following entry:

"Exception of no cause of action, fixed for today, taken up, argued, and submitted. In this case it is agreed between counsel that 'both wills be considered by the court as a part of this record in this exception and that' counsel for either side shall have the right to have copies made of any other document in the record No. 3,340 (Probate) succession of Mrs. Amanda Delmas, Deceased, and (have?) same filed in the present suit, and that the same shall form and constitute a part of this record."

The minute entry, as found in the transcript, is mostly typewritten; but the words "both wills be considered by the court as part of this record in this exception and that" are in writing.

The reason assigned for this condition of the minutes is that the typewritten portion of the minutes was the original entry, but it was amended or corrected by order of the judge when read out.

In his certificate to the transcript the district court certifies that:

"It contains a true and correct abstract of the minute entries of said (this) case," and "a true and correct copy of the last will and testament of Mrs. Amanda Delmas, deceased, as filed in her succession, No. 3,340 of the probate docket of said court, and of the last will and testament of said deceased as is in the possession of the plaintiff in said suit, both of which said wills having been copied by me, said clerk, and made a part of the transcript by consent of the attorneys therein."

The present suit was filed in the district court under the number 12,518 of the docket of that court under the title "Joseph H. Oglesby v. Miss Emmeline M. Turner et al."

The succession of Mrs. Amanda Delmas



(widow of John T. Delmas) was opened in the district court of St. Mary under the "number 3,340" of the probate docket of that court, and was entitled "Succession of Mrs. Amanda Delmas, Deceased." In the last-mentioned proceeding the alleged last will and testament in nuncupative form by public act of the deceased (that which is attacked in the present suit) was presented for probate, probated, and ordered executed. When the exception of no cause of action filed by the defendants herein was taken up for trial, the fact that the will which was attacked, while probated in the Court, had not been filed in the present proceeding, was noticed, and an attempt was made by the defendants to have the two causes consolidated; but plaintiff's counsel objected, and the agreement between counsel, which is referred to in the minutes, was entered into.

The exception of no cause of action was then taken up and tried. The trial judge sustained the exception of no cause of action and dismissed plaintiff's suit. In doing so he took up the different grounds set up for the nullity of the will, discussed them separately, and declared them not to be well taken.

The plaintiff excepted to his doing so, and, as we understand, insists that he should have limited himself to declaring either that the exception of no cause of action was "overruled," or "was sustained and the suit dismissed." Plaintiff urges that he should not have taken up the different grounds for nullity, passed upon their merits, and announced that they had no legal merit. Plaintiff says that the case was before the court purely on an exception that it was not at issue, and that the trial court had no right or authority under that condition of affairs to pass upon the merits of the controversy.

#### Opinion.

In his brief plaintiff's counsel uses the following language:

"On taking up the exception defendants' counsel proposed to consolidate the proceedings in the succession of Mrs. Amanda Delmas with the action of nullity, and to this proposition plaintiff's counsel in the action of nullity objected, upon the ground that the exception of no cause of action which was then on trial depended solely upon the allegations of the petition for its determination. Counsel for defendants then requested that for the purpose of having the Supreme Court inspect said will, in case it so desired, the nuncupative will be allowed to be attached to the transcript which would go to the Supreme Court. It was finally agreed between counsel that both wills and such other documents as counsel would agree upon should be transcribed from the succession record and attached to the transcript which would go up to the Supreme Court upon the action of nullity then pending on the exception of no cause of action. This agreement was placed in the minutes as counsel had agreed, though the documents which were to go up to the Supreme Court for inspection were not yet selected, and had nothing whatever to do with the trial of the exception of no cause of action. After the judge had decided the exception, counsel for exception,

observing that the judge's reasons were based mainly upon the nuncupative will, which was to be attached to the transcript as above set forth, inspected the minutes in person and found therein the interlineation in the handwriting of the judge which will be found in the transcript. Plaintiff's counsel remonstrated with the judge and with counsel for the defendants relative to the said interlineation; but they insisted that the same had been made in open court and that plaintiff's counsel was present at the time. If he was present, he had no recollection of the said interlineation having been made in his presence, and his attention was only called to the same after he heard the judge read his reasons for judgment. No steps were taken by plaintiff's counsel to correct the matter of the interlineation, because he knew that the fate of the exception of no cause of action must depend upon the allegations of the petition alone, and that no amount of evidence could affect the determination of the exception.

"In reading the reasons of the judge for the judgment appealed from it will be seen that he has considered the merits of the case, and not the exception of no cause of action. This was impossible, because the cause was not at issue; nothing but the exception of no cause of action being before the court. \* \* \* In this connection, and as bearing out the statement of the plaintiff's counsel that the two wills were simply attached to the transcript for inspection and formed no part of the record, counsel calls the attention of the court to the fact that neither of those papers bear the file mark of the clerk. The clerk knew that the papers were not to be used on the trial below nor on appeal, and has simply attached them to the transcript."

Counsel refer the court to *Goldsmith v. Virgin*, 122 La. 831, 48 South. 279; *Boulligny v. Gary*, 21 La. Ann. 642; *Shelmerdine v. Duffy*, 4 Mart. (N. S.) 34; *De La Croix v. Gaines*, 13 La. Ann. 179; *Hiestand v. New Orleans*, 14 La. Ann. 138; *Bank v. St. Landry Bank*, 50 La. Ann. 528, 24 South. 14; *Frank v. Magee*, 49 La. Ann. 1251, 22 South. 739.

In his reasons for judgment the trial judge says:

"The case comes before the court on an exception of no cause of action. On the trial of the exception counsel for plaintiff and defendant agreed that the testament in the Succession of Mrs. Amanda Delmas, No. 3,340 of the probate docket, should be considered by the court in deciding his case as a part of the record in this suit for its annulment. \* \* \* The testament in contest—which counsel have consented shall be considered by the court in deciding this exception as a part of the record—only proves the truth of the allegation on which it is now sought to be annulled. \* \* \* The only causes of nullity urged are said to be apparent on the face of the testament. \* \* \* The whole case turns upon the simple question whether a so-called codicil and addition to the will (as the notary terms it) was a separate and distinct act or was a continuation of the will itself. The case is as fully presented for decision on this exception of no cause of action as it could be upon the merits, and it is not necessary to consider the will before the court, though the attorneys have consented that it is to be considered by the court."

The exception of no cause of action which is advanced against plaintiff's action of nullity in this case is not directed at any defect in the pleadings. They are not attacked herein. The allegations of the petition are recognized as being fully sufficient for the purposes of this action. The grounds for nullity which

are relied upon are clearly and distinctly set out. Plaintiff and defendant both understand what the issues before the court in respect to the testament which is attacked are. The attack which defendants make against plaintiff's cause of action is leveled at the want of legal force of the grounds which are assigned as leading up to and carrying with them as a consequence the nullity of the will on which the defendants base their rights. Defendants say in effect:

"Granting that every ground for nullity exists as is alleged by you, none the less the will stands in law as a valid will. We do not admit, however, the correctness of the conclusions of law which you draw from your allegations. The conclusions of law which are to be drawn from your allegations are matters to be determined by the court on the trial of this exception. There are no matters of fact left open for decision by the court. You ground your action of nullity of the testament on the face of the testament. It is proper that the grounds of nullity which you now set up should be presently and finally disposed of.

"The defendants were warranted in presenting their exception of no cause of action before issue joined, and to have it decided, whether the particular grounds of nullity set up for attaching a will would be sufficient (if existing as stated to be by the attacking party) and (as asserted to be) apparent on the face of a will," to carry with them as a consequence the nullity of a will.

If as a question of law they would not, we think the court acted properly in so announcing and in dismissing the suit. We can see no good reason why the judgment of the court should be set aside and the cause remanded to be put at issue by the defendants, to be then thrown out of court for want of a cause of action. There was no issue of fact left open to be submitted and to be disposed of by the trial court. When counsel of appellant was asked on the appeal by a member of the court what question of fact was left open for decision below, he replied that he had alleged "that the will had not been signed," and he should be allowed to prove that fact. It was not alleged as a fact that the signature of the testatrix was not affixed to the instrument, but that as affixed it was not legally signed. The agreement between counsel as to bringing into the record of the present suit papers which had been filed and acted on in the probate proceedings in the Succession of Amanda Delmas, to be herein considered by the court, evidently had some object or purpose; if the present proceedings had been filed and docketed as a part of the succession proceedings, it seems to have been assumed that the trial judge could have taken judicial notice of the probated will in acting on the exception of "no cause of action," and it was for the purpose of placing matters into that situation without consolidating the two suits that the agreement was made.

We do not think that the allegation in plaintiff's petition "that the will is absolutely void for other legal defects fatal to its maintenance, which will be pointed out on the trial

of this suit," is any reason why the trial court should not have acted on the exception of no cause of action on the allegations as they stood.

Plaintiff had no legal right to keep the defendants in court in order to meet grounds to be pointed out and until such grounds of action should be set up in manner and form and time as he might thereafter elect to do. As a matter of fact he suggested and pointed out no legal defects other than those alleged.

Plaintiff has no right to remand the case to enable him to file amended pleadings.

In his reasons for judgment the trial judge, as has been stated, has taken up and discussed the different grounds of nullity alleged by the plaintiffs. The copy of the testament, which is attacked as null, which is attached to the transcript, is as follows:

"Ne Varietur. Aug. 9, 1909.

"[Signed] Charles A. O'Neill,  
Judge 23rd Judl. Dist. Court.

"State of Louisiana.

"Parish of Orleans.

"City of New Orleans.

"Be it known that on this sixth day of the month of May, Nineteen hundred and one (1901); ..... Before me Edmund J. Murphy, a Notary Public, duly commissioned and qualified in and for the parish of Orleans, City of New Orleans, State of Louisiana, aforesaid,

"Personally came and appeared

"Mrs. Amanda Delmas, widow of John T. Delmas, and residing in St. Mary Parish, Louisiana; at my Notarial Office No. 642 Commercial Alley in this City .....

"..... And the said Mrs. Amanda Delmas declared unto me Notary that she wished me to receive, in my official capacity her last will and Testament ..... Whereupon I, said Notary immediately proceeded to write down the last will and testament of said Mrs. widow Amanda Delmas, as the same was dictated to me, Notary by her, in the presence of George P. Crane, Thomas J. Kelley and Junior Chauvin, all three competent witnesses of lawful age, residing in this city and parish, as the same was dictated unto me, Notary by said Mrs. widow Amanda Delmas, (Widow) in the manner following, to wit .....

".....I declare that my name is Amanda Hughes. I am the widow of John Theodore Delmas; I reside on my plantation property, near Patterson, in the Parish of St. Mary, Louisiana; I have been married but once and have no children living; my father and mother are both dead.....I give and bequeath to Mrs. Margaret Oglesby, wife of Joseph H. Oglesby of Sea Girt, New Jersey, the sum of Two Thousand Dollars.....I give and bequeath to Mrs. Lillian S. Clarke, wife of Louis S. Clarke of St. Mary Parish, Louisiana, the sum of two thousand dollars.....I give and bequeath to Mrs. Sarah E. Gooch, my niece wife of William Gooch of St. Mary, Parish of Louisiana the sum of four thousand dollars.....I give and bequeath to my nephew William E. Turner of New Orleans, Louisiana, the sum of one thousand dollars.....I give and bequeath to my nephew Edwin Turner, of New Orleans, Louisiana, the sum of five hundred dollars.....I give and bequeath to my niece Emmeline M. Turner of New Orleans, Louisiana, the sum of four thousand dollars.....I give and bequeath to Sam Radcliffe, one of my plantation hands one hundred dollars.....I give and bequeath to Wesley Radcliffe and to Abe Johnson also plantation hands the sum of fifty dollars to each.....I have in

my possession a bed room set (furniture) and a parlor set (furniture) the property of Mrs. Margaret Oglesby and I desire in the event of my death that same be turned over to her..... All the balance and residue of my estate of which I may die possessed of whatsoever nature and kind movable and immovable, I give and bequeath to my said niece Emmeline M. Turner of New Orleans, Louisiana.....

"I hereby nominate and appoint my said niece Emmeline M. Turner of New Orleans, La., and Louis S. Clarke of St. Mary Parish, La., my joint testamentary executors with seizin and possession, and without bond or security whatsoever; my said joint executors not to receive any commission whatever.....

".....I hereby revoke any and all wills or testaments I may have made previous to the foregoing and declare this as my last will and testament.....

".....Thus was the foregoing will dictated unto me, Notary by the testatrix in the presence and hearing of said witnesses, and I have written the same in their presence and in that of said testatrix as it was dictated to me, Notary and by the testatrix in the presence of and hearing of said witnesses and having read the said will to said testatrix.....

In the presence and hearing of said witnesses in a loud and intelligible voice, she declared unto me, Notary, that she perfectly understood the same and persisted therein.....

"Thus done and received at the place and on the day and date first above written at the hour of three thirty o'clock P. M. and signed by said testatrix the witnesses and me, Notary, the whole being done at one time, without interruption or suggestion, discontinuance or turning aside to other acts.....

".....And at the moment of signing the testatrix declared unto me, Notary, in the presence and hearing of said witnesses, that she desired in addition to the bequests already made to give and bequeath and does hereby bequeath to St. Joseph's Catholic Church at Patterson, Louisiana, Five hundred dollars to be used exclusively for the purpose of keeping her tomb now in the Catholic Cemetery next to said church, in good condition and state of preservation..... Thus was the foregoing codicil and addition to this will dictated to me Notary by said testatrix in the presence and hearing of said witnesses and I have written the same in their presence and in that of said testatrix as it was dictated to me Notary, by the Testatrix in the presence and hearing of said witnesses; and having read the said codicil to said testatrix in the presence and hearing of said witnesses in a loud and intelligible voice, she declared she perfectly understood said codicil and addition and persisted therein..... Thus done and received at the place and on the day and date first before written at the hour aforesaid, and signed by said testatrix the said witnesses and me, Notary, the whole being done at one time, without interruption, suggestion, or discontinuance or turning aside to other things or acts.

"[Original signed]..... Amanda Delmas...

"..... Junior Chauvin...

"..... George D. Crane...

"..... T. J. Kelley...

"..... E. J. Murphy, Not. Pub.

"I hereby certify the above and foregoing to be a true and correct copy of the original will and testament of record and on file in my office.

"In faith whereof I have hereunto signed my name and affixed my official seal at New Orleans, this tenth day of May, 1901.

"[Signed] E. J. Murphy, Not. Pub.

"Ne Varietur. Aug. 9, 1909.

"Charles A. O'Neill.

"Judge 23rd Judl. Distr. Court.

"Recd. & Filed Aug. 9th., 1909.

"[Signed] W. S. Ostheimer, Dy. Clk."

The district judge disposes of the different grounds assigned by the plaintiffs for the nullity of the testament as follows:

"The plaintiff charges that the writing of the so-called codicil or bequest in favor of the church after completing the will, all but the signatures, as far as it went, gave rise to two distinct violations of the legal requirements, viz.: First, that the writing of the codicil was a turning to another act, before the completion of the will; and, second, that the codicil or bequest in favor of the church, coming in as it does between the main body of the will and the signatures, separates the signatures from the principal part of the will and makes them refer only to the codicil.

"The plaintiff's counsel have submitted the following authorities on the manner of disposing of this exception, viz.: Bank v. Bank, 50 La. Ann. 528 [24 South. 14], Bouligny v. Gary, 21 La. Ann. 642, and Frank v. Magee, 49 La. Ann. 1250 [22 South. 739]. These authorities simply hold that, in determining whether a plaintiff has alleged a cause of action, the allegations of his petition must be taken as true; and if any one of his allegations entitles him to any relief, the court must overrule the exception without being required to designate which allegation expresses the cause of action. There can be no dispute of these principles of law, and the exceptors apparently do not contest them.

"In support of their argument that the plaintiff has a cause of action his learned counsel submit the following authorities, viz.: Seghers, Attorney for Absent Heirs, v. Antheman, Executor, 1 Mart. (N. S.) 83, Langley's Heirs v. Langley's Executors, 12 La. 117, Shannon v. Shannon, Executor, 16 La. Ann. 9, Succession of Mary Carroll, 28 La. Ann. 388, and Succession of Aglaé Armand, 43 La. Ann. 310 [9 South. 50, 26 Am. St. Rep. 183].

"In the first of the cases cited—that is, Seghers v. Antheman, Executor, 1 Mart. (N. S.) 83—the point decided was that, 'when the notary states that he wrote the will without turning aside to other acts,' it is not necessary to add, 'without interruption.' There is nothing else in that case which bears any closer upon the point in controversy here. In the next case cited—that is, Langley's Heirs v. Langley's Executors, 12 La. 117—a nuncupative will was held to be null, 'where one of the witnesses was not present when the will was dictated, but it was read to the testator by the notary in the presence of all the witnesses, and they all signed with the testator and notary.' In the present case there is no allegation that one of the witnesses was not present when the will was dictated, and I cannot see where the case cited has any application.

"In the next two cases cited, namely, Shannon v. Shannon, Executor, 16 La. Ann. 9, and Succession of Mary Carroll, 28 La. Ann. 388, the point decided was that the codal requirement with regard to the nuncupative will is imperative that: 'This testament must be signed by the testator. If he declares that he knows not how or is not able to sign, express mention of his declaration, as also of the cause that hinders him from signing, must be made in the act.'

"In one of these cases cited the notary's declaration was: 'The said testator, being too weak to sign his name, has made his mark.' And in the other case the notary declared: 'The testatrix, being illiterate, has made her mark.' The court held that neither of these wills contained a proper mention of the testator's declaration of his own inability to sign and that the notary's declaration could not supply the declaration of the testator himself. The court fails to see where either of these cases has any application to the point in controversy in the present case.

"In the next and the last case cited by the

plaintiff's learned counsel (that is, Succession of Aglaé Armant, 43 La. Ann. 310 [9 South. 50, 26 Am. St. Rep. 183]) the issue decided was that the proper and natural place for the signature of the testator or testatrix, in an olographic will, is at the conclusion or end of the will; and it was held that the testatrix's name, written in her own handwriting, in the caption or heading of the will, thus "Testament d'Aglaé Armant," was not intended as a signature to the will, and the will was held invalid for want of the signature of the testatrix. The proper and natural place for the testatrix's signature to any statement is at the conclusion or end of the instrument. The plaintiff's allegation or complaint in this respect is 'that the signatures of Mrs. Delmas, the testatrix, witnesses, and notary, only appear at the end of what the notary terms a codicil, and after the conclusion of the will proper and the turning aside of the notary to this so-called codicil, and without the completion of the will proper. It follows that if this so-called codicil and addition to the will, as the notary calls it, is to be considered as another and distinct act from the will itself, then the signatures are at the end or conclusion of the will proper. But, if the so-called codicil and addition to the will—the bequest to the Catholic Church—is to be regarded as a continuation of the will itself, then the signatures are properly placed at the conclusion or end of the one act and the writing of this additional bequest did not amount to a turning aside to another act.

"The learned counsel for the plaintiff argued that the term 'codicil,' used by the notary, designates this last bequest as a separate act, and not as a part of the one will. The notary did not use the term 'codicil' alone, but styled the additional bequest a 'codicil and addition to this will.' But, if the notary had used the term 'codicil' alone, he would have been using a term which is synonymous with the word 'bequest' or 'disposition.' Our Civil Code uses the word 'codicil' as synonymous with the word 'disposition' or 'legacy' thus: 'No disposition mortis causa shall henceforth be made otherwise than by last will or testament. Every other form is abrogated. But the name given to the act of last will is of no importance, and dispositions may be made by testament under this title or under that institution of heir, of legacy, codicil, donation mortis causa, or under any other name indicating the last will, provided that the act be clothed with the forms required for the validity of a testament, and the clauses it contains, or the manner in which it is made, clearly establish that it is a disposition of last will.' Rev. Civ. Code, art. 1570.

"If this little bequest in favor of the church were called upon to define itself, it might answer all legal requirements by saying, 'Dei dono sum quo sum.'

"The French commentators recognize that it is permissible for the notary to receive an additional bequest dictated by the testator after reading the will to the testator without vitiating the act as a whole, provided the notary then reads also the additional bequest, for example:

"De la il résulte que si, après avoir lu le testament le notaire y ajoutait une nouvelle disposition dictée par le testateur, sans en donner lecture, le testament serait nul tout entier." Baudry-Lacantinerie & Colin's Civil Right, vol. 11, p. 97, par. 2055.

"Of course, as the notary in the present case did read the additional bequest, 'nouvelle disposition dictée par le testateur,' the law in this respect is complied with, and there is no attack upon the testament for want of reading of the additional bequest.

"Fuzier-Herman, p. 700, No. 241: 'En d'autres termes un testament est nul en entier, lorsque après la mention de la lecture, il la trouve disposition ajoutée, et qu'il n'est pas fait mention

de la lecture de cette addition au testament.' 'Lorsque des dispositions additionnelles suivent la mention de la lecture ces dispositions doivent être accompagnées d'une mention particulière de lecture.' D'Alloz, Nouveau Code Civil, vol. 11, c. 5, art. 972, p. 619, par. 508.

"And read in volume 5, p. 416, in paragraph 432:

"C'est ce qui arrive lorsque après la mention de la lecture le testateur ajoute quelque disposition. Il faut alors donner lecture de cette addition en présence des demoins et faire mention expresse de cette lecture faite de quoi le testament serait nul en toutes ses dispositions; car un testament se compose de toutes les dispositions dictées par le testateur et du procès verbal redigé par le notaire."

"The additional bequest made by Mrs. Delmas in favor of her church after the notary had read her will as far as it was then done and completed cannot be reasonably considered foreign to the act then in hand or a turning aside to another act. The continuity of the language—I. e., 'And at the moment of signing the testatrix declared unto me, Notary,' etc.—forbids such a construction.

"The case of Lawson v. Lawson, reported in 12 La. Ann. 604, seems to cover the point precisely, viz.:

"As to the conditional bequest in favor of Harrison, erroneously styled a codicil, although the attention of the testator was called to the subject by an interrogatory put to him after the main dispositions of the will were made, we are unable to say that it was foreign to the legitimate business in hand.' The same may be said of Mrs. Delmas' bequest in favor of her church, styled a 'codicil,' which was dictated and written after the main dispositions of the will were made. There being no dispute about the fact upon which the plaintiff founds this action of nullity, and the only issue being the legal or illegal consequences of the fact, the suit was very properly submitted on this exception of no cause of action. The court considers the exception well founded, and the suit must be dismissed as to the exceptors."

We think that on the trial of the exception of no cause of action the trial judge was authorized to consider and decide whether grounds such as those set up by the plaintiff would, if existing as alleged by him, carry with them as a consequence and result the nullity of a will, and on holding that they would not he was warranted and justified in sustaining the exception and dismissing the suit. The conclusions of law reached by the district court in this case were correct, and the judgment appealed from herein is affirmed.

McLENDON v. STATE. (No. 14,143.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

CRIMINAL LAW (§ 636\*)—CONDUCT OF TRIAL—  
PRESENCE OF ACCUSED.

Where accused, on a trial for homicide, during a suspension of the trial, was at his request taken from the courtroom, and during his absence the trial was resumed, and an important witness for the state examined, there was fatal error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1466, 1468, 1473; Dec. Dig. § 636.\*]

Appeal from Circuit Court, Amite County; M. H. Wilkinson, Judge.

James McLendon was convicted of murder, and he appeals. Reversed.

Price & Whitfield and R. S. Stewart, for appellant. J. B. Webb and Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. During the trial of this case, and while the state was introducing its evidence, the case being an indictment for murder, there was a temporary suspension of the trial, in order that the jury might go to the closet down in the courtyard. The defendant, who was in custody of the sheriff and in jail during the entire trial, and at the time asked to be carried to the closet, was carried down out of the courthouse to the courtyard, and there waited, in charge of the sheriff, until the jury vacated the closet. He was then carried into the closet, and the jury, in charge of the bailiffs, immediately returned to the courtroom. Immediately upon the arrival of the jury in the courtroom, the court proceeded with the trial, and the district attorney proceeded with the examination of the state's witness, Jacobs, and continued his examination until he was perhaps one-half through with the testimony of this witness; the appellant during all this time being absent from the courtroom in the custody of the sheriff, in the closet down in the courtyard, something over 200 feet from the courthouse itself. The witness Jacobs was a most vital witness, an eyewitness, and was detailing the fight and all the attendant circumstances during this absence of the appellant. When this witness had gotten about half through with his testimony, the sheriff brought appellant back into the courtroom.

In the recent case of *Sherrod v. State*, 47 South. 554, 20 L. R. A. (N. S.) 509, we made a careful review of all the decisions in this state and elsewhere on this subject, and attempted to set this matter at rest for the future in this state. It is perfectly idle to go over that ground again.

The error is manifestly fatal, the judgment is reversed, and the cause remanded.

#### DEWEES v. BOSTICK LUMBER & MFG. CO. (No. 14,238.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

##### 1. EVIDENCE (§ 183\*)—BEST EVIDENCE—LOSS OF ORIGINAL EVIDENCE.

On an issue as to the delivery of goods on orders, it was error not to permit defendant, who testified that he had received such orders, that they had been burned, and that he had made diligent and unavailing search for them, to state their contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 612-637; Dec. Dig. § 183.\*]

##### 2. LIMITATION OF ACTIONS (§ 46\*)—ACCRUAL OF CAUSE OF ACTION.

Where installments of goods were delivered on 60 days' time, the 3-year statute of limitations would not begin to run against the account until 60 days after delivery of the last installment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 248; Dec. Dig. § 46.\*]

##### 3. EVIDENCE (§ 408\*)—RECEIPT—PAROL EVIDENCE.

A receipt in full is open to explanation by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.\*]

##### 4. PAYMENT (§ 35\*)—RECEIPT.

A writing read, "Received of \* \* \* in all to date," followed by various sums, and a witness testified that it was not a receipt in full, and it was shown that the party who received it wrote a receipt in full, which the one who gave it refused to sign. *Held*, that the writing did not amount to a receipt in full, but was a mere statement of payments.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 15; Dec. Dig. § 35.\*]

Appeal from Circuit Court, Neshoba County; J. R. Byrd, Judge.

Action by the Bostick Lumber & Manufacturing Company against A. Dewees. From a judgment in favor of plaintiffs, on appeal from a judgment of a justice of the peace dismissing the action, defendant appeals. Reversed and remanded.

The Bostick Lumber Company purchased from A. Dewees certain lumber with which to fill a contract. The lumber was sold on 60 days' time, and was delivered at various dates ranging from October 21, 1905, to February 16, 1906; most of it being delivered on written order. There was a dispute between the parties over the settlement, and Dewees gave appellee the following receipt: "Feb. 15, 1906. Received of the Bostick Lumber & Manufacturing Company in all to date: By check, \$350.00; Mdse., \$30.95; Mdse., \$70.80; and one check, \$169.32. Total, \$620.78. Feb. 15th, 1906." On December 19, 1908, Dewees bought from appellees certain cabinet mantels for \$65, and testifies that he stated at the time that he did not expect to pay for them, but would credit appellees' account with that amount. On March 25, 1909, appellees brought suit against Dewees in a justice's court for \$65, the purchase price of the mantels. Dewees appeared on April 7th following and filed a set-off, claiming that the appellees still owed him \$153. The justice of the peace allowed the set-off and dismissed the suit. On appeal to the circuit court there was a peremptory instruction for appellees. On appeal the action of the court in granting the peremptory instruction, and in refusing to allow proof of the contents of the orders for the lumber sold appellees by appellant, who testified that they had been destroyed by fire, is assigned as error.

Flowers, Fletcher & Whitfield, for appellant. Baskin & Wilbourn, for appellee.

**WHITFIELD. C. J.** The court erred in not allowing the contents of the orders for lumber to be introduced in evidence. The appellant had stated that he had received these orders in writing, and that they had been burned, and that he had made diligent search for the same, and could not find them. It was further testified, and not denied anywhere in the record, that the lumber was sold on 60 days' time; the lumber constituting the offset of the defendant.

This suit was filed March 25, 1909; the summons was served April 1, 1909; the offset was filed April 7, 1909. The account began October 21, 1905, and ended February 16, 1906. If, therefore, it was true, as testified, that the lumber was sold on 60 days' time, the last items of the account would be due 60 days after February 16, 1906; that is to say, on April 14, 1906. Under the 3-year statute of limitations, therefore, the one here pleaded, the account would not have been entirely barred until April 14, 1909, and yet the court gave a peremptory instruction in this case to find for the plaintiff. It is difficult to understand why the court gave this peremptory instruction, unless it be, as seems probable, that the court understood the receipt, of date February 16, 1906, to be a receipt in full. That receipt, however, on its face, shows that it is a mere summary of payments, and not a receipt in full. One of the witnesses expressly testified it was not a receipt in full. But, if it was, on its face, a receipt in full, it was open to explanation. It appears, further, from the testimony, that Bostick wrote a receipt in full, which Dewees refused to sign, and that Dewees then wrote and signed this receipt, the one offered in evidence. It was, of course, therefore, error to give the peremptory instruction on this state of case.

Reversed and remanded.

**WILLOUGHBY v. YAZOO & M. V. R. CO.**  
(No. 14,207.)

(Supreme Court of Mississippi. Jan. 10, 1910.)  
Appeal from Circuit Court, Yazoo County;  
W. H. Potter, Judge.

Action between W. F. Willoughby and the Yazoo & Mississippi Valley Railroad Company. From the judgment, Willoughby appeals. Affirmed.

Henry, Barbour & Henry, for appellants.  
Mayes & Longstreet, for appellee.

**PER CURIAM.** Affirmed.

**FLETCHER v. WIENER.** (No. 14,166.)  
(Supreme Court of Mississippi. Jan. 10, 1910.)

Appeal from Chancery Court, Carroll County;  
J. F. McCool, Chancellor.

Action between Rosa Harris Fletcher and W. B. Wiener. From the judgment, Fletcher appeals. Affirmed.

Percy Bell and E. J. Bogan, for appellants.  
H. B. Greaves, for appellee.

**PER CURIAM.** Affirmed.

**HOBART et al. v. VICKSBURG MFG. & SUPPLY CO.** (No. 14,234.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

Appeal from Circuit Court, Warren County;  
John N. Bush, Judge.

Action between J. H. Hobart, trustee, and others, and the Vicksburg Manufacturing & Supply Company. From the judgment, Hobart and others appeal. Affirmed.

McLaurin, Armistead & Brien, for appellants.  
Brunini & Hirsch, for appellee.

**PER CURIAM.** Affirmed.

**YAZOO & M. V. R. CO. v. RECTOR.**  
(No. 14,018.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

Appeal from Circuit Court, Coahoma County;  
Sam C. Cook, Judge.

Action by Mrs. Rosebud A. Rector against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mayes & Longstreet, for appellant. J. W. Cutrer, for appellee.

**PER CURIAM.** Affirmed.

**ROWELL v. STATE.** (No. 14,266.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

Appeal from Circuit Court, Covington County;  
R. L. Bullard, Judge.

Charlie Rowell was convicted of disturbing public worship, and appeals. Affirmed.

W. L. Cranford, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM.** Affirmed.

**MIERS v. STATE.** (No. 14,295.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

Appeal from Circuit Court, Carroll County;  
G. A. McLean, Judge.

W. E. Miers was convicted of larceny, and appeals. Affirmed.

S. E. Turner, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM.** Affirmed.

**TATE v. STATE.** (No. 14,001.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

Appeal from Circuit Court, Coahoma County;  
Sam C. Cook, Judge.

Sam Tate was convicted of murder, and appeals. Affirmed.

Maynard & Fitzgerald, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

**PER CURIAM.** Affirmed.

**LINDSEY v. STATE.** (No. 14,287.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

Appeal from Circuit Court, Jasper County;  
J. R. Byrd, Judge.

Charley Lindsey was convicted of murder, and appeals. Affirmed.

J. L. Thompson and Sharbrough & Corley, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

#### DAY v. STATE. (No. 14,077.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.

Jim Day was convicted of crime, and appeals. Affirmed.

Will De Lay, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

#### HAMILTON et al. v. STATE. (No. 14,294.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

Appeal from Circuit Court, Jackson County; W. H. Hardy, Judge.

Charles Hamilton and William Grant were convicted of crime, and they appeal. Reversed and remanded as to Grant, and affirmed as to Hamilton.

Denny & Denny and Hibbler & Ford, for appellants. Geo. Butler, Asst. Atty. Gen., for the State.

MAYES, J. The testimony wholly fails to connect William Grant with the crime charged, and as to him the case is reversed and remanded, but is affirmed as to Charles Hamilton.

#### PRALL v. PRALL.

(Supreme Court of Florida. Nov. 30, 1909.)

##### 1. JUDGMENT (§ 584\*)—RES JUDICATA.

Where a final judgment or decree has been rendered by a court having jurisdiction of the subject-matter and of the parties, it is binding on the parties and their privies; and such final judgment or decree is a bar to another suit or action between the same parties for the same subject-matter. This principle of law is enforced by the courts, so that parties may not be vexed more than once for the same cause, and that there may be an end to litigation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063-1097; Dec. Dig. § 534.\*]

##### 2. JUDGMENT (§ 572\*)—RES JUDICATA—JUDGMENT ON DEMURRER.

Where a final judgment or decree is rendered for the defendant on demurrer, the plaintiff is estopped from maintaining a similar or concurrent action or suit for the same cause upon the same grounds that were disclosed in the first suit or action, for the reason that the judgment determines the merits of the cause as presented by the pleadings affected by the demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1048; Dec. Dig. § 572.\*]

##### 3. JUDGMENT (§ 572\*)—RES JUDICATA—JUDGMENT ON DEMURRER.

Where a demurrer to a pleading is sustained because essential allegations of fact were omitted from the pleading, a final judgment on the demurrer concludes the parties and their privies only as to the sufficiency of the facts as alleged to state a cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1048; Dec. Dig. § 572.\*]

##### 4. JUDGMENT (§ 572\*)—RES JUDICATA—JUDGMENT ON DEMURRER.

In general, a final judgment on demurrer is not a bar to a second suit or action for the same cause between the same parties as an estoppel by judgment because of the former adjudication, where the pleadings in the second suit or action supply the essential allegations omitted from the first suit or action, though the conduct of the parties in not presenting the case when an opportunity was afforded may under special circumstances operate as an estoppel in pais. Conclusions of law are not admitted by demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1047-1049; Dec. Dig. § 572.\*]

##### 5. JUDGMENT (§ 713\*)—RES JUDICATA.

Where the second suit is upon the same cause of action and between the same parties as the first, the final judgment in the first suit upon the merits is conclusive in the second suit as to every question that was presented, or might have been on the pleadings presented and determined in the first suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.\*]

##### 6. JUDGMENT (§ 713\*)—RES JUDICATA—MATTERS NOT LITIGATED.

When the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the first suit operates as an estoppel in the second suit only as to every point and question that was actually litigated and determined in the first suit, and the first judgment is not conclusive as to other matters that might have been, but were not, litigated or decided.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.\*]

##### 7. JUDGMENT (§ 715\*)—RES JUDICATA—IDENTITY OF CAUSES OF ACTION.

The test of the identity of causes of action for the purpose of determining the question of res adjudicata is the identity of the facts essential to the maintenance of the actions. It is of the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment. If there is any uncertainty as to the matter formerly adjudicated, the burden of showing it with sufficient certainty by the record or extrinsically is upon the party who claims the benefit of the former judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1245; Dec. Dig. § 715.\*]

##### 8. DIVORCE (§ 171\*)—DECREE—RES JUDICATA.

Where a suit for divorce is upon the ground of "habitual indulgence by defendant in violent and ungovernable temper," it is not a bar as an estoppel by judgment to a second suit between the same parties as plaintiff and as defendant for divorce on the grounds of "extreme cruelty by defendant to complainant" and of "willful, obstinate, and continued desertion of the complainant by defendant for one year," where different facts are alleged. The conduct of the plaintiff in prosecuting the divorce proceedings does not appear to operate as an estoppel in pais as to the second suit.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 554-558; Dec. Dig. § 171.\*]

##### 9. DIVORCE (§ 171\*)—DECREE—RES JUDICATA.

While the welfare of society demands exemption from unnecessary and vexatious divorce litigation, the principles of res adjudicata should not be so applied as to prevent one determination of every distinct cause of action under the statutes authorizing divorces for specific and separate species of misconduct.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 554-558; Dec. Dig. § 171.\*]

**10. APPEAL AND ERROR (§ 874\*)—APPEAL FROM INTERLOCUTORY ORDER—REVIEW.**

Where the appeal is not from a final decree, but only from an interlocutory order or decree, errors assigned on other interlocutory orders not specifically appealed from will not be considered by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3530; Dec. Dig. § 874.\*]

**11. APPEAL AND ERROR (§ 193\*)—REVIEW—SUFFICIENCY OF PLEADING.**

Where it appears to the appellate court that a bill of complaint does not state a cause of action, the court may make appropriate orders with reference to such defective pleading, even though the question of the sufficiency of the pleading is not in any way presented to the court for its action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1226; Dec. Dig. § 193.\*]

**12. DIVORCE (§ 12\*)—GROUNDS.**

It is not the policy of the law to grant divorces for postnuptial causes short of marital infidelity when such causes do not in fact render one of the parties incapable of performing the duties incident to the marriage status. The law authorizes the severance of the matrimonial union only when the conduct of one of the parties renders it impracticable for the other to further perform the marital duties.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 22; Dec. Dig. § 12.\*]

**13. DIVORCE (§ 90\*)—PLEADING—BILL OF COMPLAINT.**

In a suit for divorce, the bill of complaint should contain allegations of all facts essential to the cause of action and to the plaintiff's right to maintain the suit.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 283; Dec. Dig. § 90.\*]

**14. DIVORCE (§ 91\*)—DOMICILE OF COMPLAINANT—PLEADING AND PROOF.**

In divorce proceedings in the courts of Florida on grounds other than for adultery committed in this state, the bill of complaint must contain an allegation, and there must be proof, that the plaintiff has "resided two years in the state of Florida before the filing of the bill"; and, where no such allegation appears in the bill of complaint, the plaintiff is not entitled to maintain the suit.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 287-289; Dec. Dig. § 91.\*]

**15. DIVORCE (§ 27\*)—"EXTREME CRUELTY"—WHAT CONSTITUTES.**

The extreme cruelty that constitutes the statutory ground for divorce is such conduct by the husband or wife towards the other consort as will endanger his or her life, limb or health, or as will cause a reasonable apprehension of bodily hurt. The injury or danger of injury may be mental or physical, but it must be of such a character as to render it impracticable for the complainant to discharge with reasonable safety his or her marital duties. Mere inconvenience, unhappiness, or incompatibility of temperament or disposition, rendering the marriage relation between the parties disagreeable or even burdensome, will not authorize a decree of divorce for extreme cruelty.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 62; Dec. Dig. § 27.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2630-2634.]

**16. DIVORCE (§ 37\*)—GROUNDS—DESERTION.**

The mere refusal of a wife to accord to the husband the marital privileges lawful only to the husband is not of itself such a desertion of the husband as to authorize him to secure a di-

vorice on the statutory ground of willful, obstinate, and continued desertion for one year.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 127; Dec. Dig. § 37.\*]

(Syllabus by the Court.)

En Banc. Appeal from Circuit Court, Hillsborough County; J. B. Wall, Judge.

Bill by John M. Prall against Emma L. Prall. Decree for plaintiff, and defendant appealed. Affirmed, and remanded for further proceedings.

See, also, 56 Fla. 521, 47 South. 916.

On December 21, 1908, John M. Prall brought in the circuit court for Hillsborough county, Fla., a suit in equity for a divorce from his wife, Emma L. Prall. In the amended bill of complaint it is alleged: That the couple were married April 3, 1895, at Ft. Dodge, Iowa. That they lived together in Iowa and two children were born to them. That during their married life till he finally separated from her the complainant was a faithful and devoted husband. That during their residence in Iowa the wife "became enamored with a strange religious sect and a devotee at its altar. \* \* \* That from the time of her conversion to the belief of this sect the defendant began to be estranged from the complainant because of his inability to join her in the adoption of the tenets of this religion." That to please her he moved to Estero in Lee county, Fla., where the sect was established. That the wife "further yielding to the doctrine of this sect, which holds as one of its beliefs that the members of the sect or union are married in Christ, and are not properly married to any one, withdrew herself from all marital relations with complainant, abjuring him in every way and telling him that his approaches were obnoxious to her. That she refused to \* \* \* allow complainant the privileges of a husband. That during this time the respondent became more and more undutiful in her relations towards complainant, being enraged with complainant on account of his refusal to submit all of their property to be community property with the said religious society as aforesaid. That she constantly chided him upon his sinfulness, and sought to estrange his children from him. Moreover, complainant says that respondent ceased in every way to render services to him as a wife, and, instead of extending to him courtesy and respect due a husband, maligned him and abused him in the presence of their children, seeking by her conduct to compel complainant to withdraw himself from her. That this state of affairs continued for a period of more than one year, and up to about October 10, 1907, and constituted extreme cruelty on the part of the defendant towards complainant, and constituted willful, obstinate, and continued de-



section of complainant by defendant for a period of more than one year, and that the several matters herein charged so prayed upon complainant's mind that he became sick and discouraged with life, and was unable to discharge the duties of citizenship, and his associations with the said respondent became repulsive to him, and that upon the said day aforesaid complainant withdrew himself from respondent and from their home, and that he has not since that time lived or cohabited with her. That at the time of their said separation your orator delivered to said respondent all of the property purchased by them in the said town of Estero and all the fruit of their labors during the year he had lived there, and that the said respondent accepted the same in full discharge of all of his liabilities by way of dower or otherwise to her. That at this time she claimed she never would live with him as his wife again, or cohabit with him, and that he had full power and privilege to return to the world and secure a divorce or any other proceeding in accordance with the ways of the world, as will more fully appear by letters written to your orator by the said respondent, copies of which are hereto attached and marked Exhibits 'A' and 'B,' and prayed to be made parts of this your orator's bill. That, in reliance upon the terms of their separation in believing himself justified in seeking a divorce, your orator did on the 10th day of December, A. D. 1907, file in the circuit court of the county of Hillsborough a bill for divorce upon the ground of violent and ungovernable temper, to which said bill the said respondent signed the answer and swore to the same, in order that your orator might not be taxed with the costs of making service through the sheriff. That thereafter the said respondent interposed no contest in the said suit, waiving by her said answer all her right to take testimony or contest the same, and that thereupon, the 2d day of December, A. D. 1908, a decree of divorce was granted your orator. Moreover, your orator says that subsequently to this time, but within the period of six months after the rendition of the court's decree, the said respondent made demand upon your orator for additional moneys and property, and, upon your orator's refusal to give her the same, entered an appeal in your orator's suit for divorce and upon which appeal the decree of the circuit court was reversed for want of sufficient proof and no opportunity allowed your orator to amend, and hence your orator has been compelled to file his original bill herein.

"Exhibit A.

"Tampa, Fla., Nov. 11-07.

"I hereby relinquish all my rights as the wife of Mr. J. M. Prall. That so far as I am concerned he is at perfect liberty from now henceforth to do whatsoever his judg-

ment dictates in regard to signing of legal documents, marriage, etc., regardless of me.

"[Signed]

Emma L. Prall."

"Exhibit B.

"Nov. 30th, 1907.

"Dear Bro. John:

"I beg to acknowledge receipt of your letter of the 27th inst. I will say that I agree to the terms of divorce specified therein. I trust that you will have the matter put through with expedition.

"Emma L. Prall."

The amended bill of complaint was demurred to on the grounds that it does not state a cause of action, and that the matters alleged had been formerly adjudged. The demurrer was overruled, and the defendant filed the following plea:

"That on the 10th day of December, 1907, the above-named complainant, John M. Prall, filed in the circuit court of the Sixth judicial circuit of the state of Florida in and for Hillsborough county, on the chancery side of said court, his bill of complaint against the defendant, alleging that she had been guilty of an indulgence of a violent and ungovernable temper towards the complainant, and praying for a divorce from this defendant; that on the 12th day of December, 1907, the judge of said court entered the decree of said court granting the said complainant, John M. Prall, a divorce from the defendant, Emma L. Prall, the said court being a court of competent jurisdiction; that on the 9th day of June, 1908, the said defendant, Emma L. Prall, entered her appeal from said decree to the Supreme Court of the state of Florida; that the said Supreme Court of the state of Florida by its order and decree dated the 11th day of December, 1908, reversed said decree, and by its decree and mandate dismissed said cause, and thereby finally adjudicated the same; that subsequent to the final adjudication of said cause and, to wit, on the 21st day of December, 1908, the said complainant, John M. Prall, instituted this suit against the said defendant, Emma L. Prall, praying that he be granted a decree of divorce from this defendant; that on the 5th day of April, 1909, he filed his amended bill of complaint against this defendant setting forth various reasons why he should be granted a decree of divorce from the defendant; that the said amended bill of complaint shows that all of the matters and things complained of by the said complainant in said amended bill of complaint, if true, happened, took place, occurred, and were committed and done by this defendant prior to the said 10th day of December, 1907, when he filed his bill of complaint in this court against this defendant, and on which bill of complaint was based the decree of divorce from this defendant which said decree was reversed by the Supreme Court of the state of Florida, and the

said bill of complaint dismissed, and that the said amended bill of complaint shows that the matters and things therein complained of were within the knowledge of the said complainant at the time he filed his said bill of complaint on the 10th day of December, 1907, which was dismissed by the decree of the Supreme Court of the state of Florida, and thereby finally adjudicated. Wherefore this defendant says that the matters and things alleged by and complained of by the complainant in said amended bill of complaint are res adjudicata, and this defendant prays that she may be hence dismissed, with her costs in this behalf unjustly expended."

This plea of res adjudicata was overruled, and the defendant appealed solely from the order overruling the plea. The errors assigned are the overruling of the demurrer to the bill of complaint and the overruling of the plea of res adjudicata.

M. G. Gibbons, for appellant. E. B. Drumright, for appellee.

WHITFIELD, C. J. (after stating the facts as above). Where a final judgment or decree has been rendered by a court having jurisdiction of the subject-matter and of the parties, it is binding on the parties and their privies, and such final judgment or decree is a bar to another suit or action between the same parties for the same subject-matter. This principle of law is enforced by the courts, so that parties may not be vexed more than once for the same cause, and that there may be an end to litigation. 24 Am. & Eng. Ency. Law (2d Ed.) 713; *Lake v. Hancock*, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159; 11 Current Law, 1537; 9 Current Law, 1423; 7 Current Law, 1750; 2 Andrews' Am. Law, par. 764.

Where a final judgment or decree is rendered for the defendant on demurrer, the plaintiff is estopped from maintaining a similar or concurrent action or suit for the same cause upon the same grounds that were disclosed in the first suit or action, for the reason that the judgment determines the merits of the cause as presented by the pleadings affected by the demurrer. But, where a demurrer to a pleading is sustained because essential allegations of fact were omitted from the pleading, a final judgment on the demurrer concludes the parties and their privies only as to the sufficiency of the facts as alleged to state a cause of action. In general a final judgment on demurrer is not a bar to a second suit or action for the same cause between the same parties as an estoppel by judgment because of the former adjudication, where the pleadings in the second suit or action supply the essential allegations omitted from the first suit or action, though the conduct of the parties in not presenting the case when an opportunity was afforded may under special circumstances operate as an estoppel in pais. Conclusions of law are not

admitted by demurrer. See *Gould v. Evansville & C. R. Co.*, 91 U. S. 526, 23 L. Ed. 416; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1, 3 Am. & Eng. Ann. Cas. 773; *City of North Muskegon v. Clark*, 62 Fed. 694, 10 C. C. A. 501, 22 U. S. App. 522; *Harrington v. Harrington*, 189 Mass. 281, 75 N. E. 632.

Where the second suit is upon the same cause of action and between the same parties as the first, the final judgment in the first suit upon the merits is conclusive in the second suit as to every question that was presented or might have been presented and determined in the first suit. When the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the first suit operates as an estoppel in the second suit only as to every point and question that was actually litigated and determined in the first, and the first judgment is not conclusive as to other matters that might have been, but were not, litigated or decided. The test of the identity of causes of action, for the purpose of determining the question of res adjudicata, is the identity of the facts essential to the maintenance of the actions. It is of the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment. If there is any uncertainty as to the matter formerly adjudicated, the burden of showing it with sufficient certainty by the record or extrinsically is upon the party who claims the benefit of the former judgment. *Fulton v. Gesterding*, 47 Fla. 150, 36 South. 56; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Am. & Eng. Ann. Cas. 314; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1, 3 Am. & Eng. Ann. Cas. 773; *Draper v. Medlock*, 122 Ga. 234, 50 S. E. 113, 69 L. R. A. 483, 2 Am. & Eng. Ann. Cas. 650; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *De Sollar v. Hanscome*, 158 U. S. 216, text 221, 15 Sup. Ct. 816, 39 L. Ed. 956; *Thompson v. Bushnell Co.*, 80 Fed. 332; *Rogers v. Higgins*, 57 Ill. 244.

The first suit between the parties was for a divorce upon the statutory ground of "habitual indulgence by defendant in violent and ungovernable temper." While the trial court granted the divorce upon the allegations and proofs, this court, on appeal, held the allegations of facts to be insufficient to state a case of action, as the conclusions of law stated in the bill of complaint were not sustained by the facts alleged, and also held that the proofs were insufficient to warrant a decree of divorce. The bill was ordered to be dismissed. The decree in the former suit is therefore conclusive only as to the material facts alleged and shown therein. *Prall v. Prall*, 56 Fla. 521, 47 South. 916. See, also, *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910, and authorities there cited.

This second suit between the same parties as plaintiff and as defendant is for a divorce upon the statutory grounds of "ex-

treme cruelty by the defendant to complainant," and of "willful, obstinate, and continued desertion of the complainant by the defendant for one year." It is consequently not for the same cause of action. The material facts alleged in the first suit, in so far as they affect this suit, are that for some time past "the defendant seemed to grow tired of her condition in life and surroundings, having become very irritable, quarrelsome, and otherwise disaffectionate to complainant, continually finding fault with" him. "Matters grew worse, the defendant on divers occasions indulging in outbursts of temper, abusing complainant unmercifully until on or about October 10, 1907, complainant's life became a burden, instead of a pleasure, at which time he left his home, and has never returned." "Wherefore charges the defendant with having been guilty of an indulgence of a violent and ungovernable temper towards" complainant. The only proof was the complainant's testimony that "my wife continually displayed a violent and ungovernable temper towards me, until on or about the 15th day of October, without any provocation whatever, my wife flew into a violent rage of temper, abusing me for everything imaginable. I then turned over all my property to her. \* \* \* I then left. My home had become such on account of my wife's display of temper that my life was a burden to me. I lived with her until I became fully convinced that I could stand it no longer. I at all times treated her with kindness and affection, providing for her the best my circumstances and condition in life would permit."

By reference to the bill of complaint set out in the statement it will be seen that the facts here alleged are not in substance the same as those alleged in the first suit as above stated, and also that the decree here sought is upon grounds different from those of the first suit. This being so under the principles above stated, the plea of *res adjudicata* was properly overruled. It does not now appear that the conduct of the plaintiff operates as an estoppel in pais to prevent the prosecution of this suit for divorce.

While the welfare of society demands exemption from unnecessary and vexatious divorce litigation, the principles of *res adjudicata* should not be so applied as to prevent one determination of every distinct cause of action under the statutes authorizing divorces for specific and separate species of misconduct. See *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 772.

The appeal herein is taken solely from the interlocutory order overruling the plea of *res adjudicata*. Therefore the assignment of error based upon the order overruling a demurrer to the bill of complaint cannot be considered. Where the appeal is not from a final decree but only from an interlocutory order or decree, errors assigned on other interlocutory orders not specifically appealed from

will not be considered by the appellate court. *City of Miami v. Miami Realty L. & G. Co.*, 57 Fla. 366, 49 South. 55.

Where it appears to the appellate court that a bill of complaint does not state a cause of action, the court may make appropriate orders with reference to such defective pleading, even though the question of the sufficiency of the pleading is not in any way presented to the court for its action. See *City of Jacksonville v. Massey Business College*, 47 Fla. 339, 36 South. 432; *Florida Packing Ice Co. v. Carney*, 49 Fla. 203, 38 South. 602, 111 Am. St. Rep. 95.

It is not the policy of the law to grant divorces for postnuptial causes short of marital infidelity when such causes do not in fact render one of the parties incapable of performing the duties incident to the marriage status. The law authorizes the severance of the matrimonial union only when the conduct of one of the parties renders it impracticable for the other to further perform the marital duties. *Hickson v. Hickson*, 54 Fla. 556, 45 South. 474.

In a suit for divorce the bill of complaint should contain allegations of all facts essential to the cause of action and to the plaintiff's right to maintain the suit. *Hancock v. Hancock*, 55 Fla. 680, 45 South. 1020, 15 L. R. A. (N. S.) 670.

The statute expressly provides that in order to obtain a divorce, except for adultery committed in this state, the complainant must have resided two years in the state of Florida before filing the bill. Section 1926, Gen. St. 1906. There is no allegation in the bill of complaint of the prerequisite two years' residence in this state of the complainant to authorize the complainant to maintain this suit. *Beekman v. Beekman*, 53 Fla. 858, 43 South. 923; *Donnelly v. Donnelly*, 39 Fla. 229, 22 South. 648; *Gredler v. Gredler*, 36 Fla. 372, 18 South. 762.

The extreme cruelty that constitutes the statutory ground for divorce is such conduct by the husband or wife towards the other consort as will endanger his or her life, limb or health, or as will cause a reasonable apprehension of bodily hurt. The injury or danger of injury may be mental or physical, but it must be of such a character as to render it impracticable for the complainant to discharge with reasonable safety his or her marital duties. Mere inconvenience, unhappiness, or incompatibility of temperament or disposition, rendering the marriage relation between the parties disagreeable or even burdensome, will not authorize a decree of divorce for extreme cruelty. *Hancock v. Hancock*, 55 Fla. 680, 45 South. 1020, 15 L. R. A. (N. S.) 670, and authorities cited; *Williams v. Williams*, 23 Fla. 324, 2 South. 768; *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769, 9 Am. & Eng. Ann. Cas. 1083, and notes.

The facts alleged in this amended bill are not sufficient to constitute the statutory

grounds of "extreme cruelty by defendant to complainant" authorizing a divorce. Nor do the allegations warrant a decree of divorce on the statutory ground of "willful, obstinate, and continued desertion of complainant by defendant for one year." See *Hancock v. Hancock*, *supra*, and authorities cited; *Crawford v. Crawford*, 17 Fla. 180; *Palmer v. Palmer*, 36 Fla. 385, 18 South. 720; *Phelan v. Phelan*, 12 Fla. 449.

The mere refusal of a wife to accord to the husband the marital privileges lawful only to the husband is not of itself such a desertion of the husband as to authorize him to secure a divorce on the statutory ground of willful, obstinate, and continued desertion for one year. In this case the husband alleges that he "withdrew himself from respondent and from their home, and that he has not since that time lived or cohabited with her." 14 Cyc. 612; 9 Current Law, 999; 9 Am. & Eng. Ency. Law (2d Ed.) 765, 769; *Fritz v. Fritz*, 138 Ill. 436, 28 N. E. 1058, 14 L. R. A. 685, 32 Am. St. Rep. 156, and notes; *Anonymous (Watson v. Watson)* 52 N. J. Eq. 349, 28 Atl. 467; *Segelbaum v. Segelbaum*, 39 Minn. 258, 39 N. W. 492; *Padelford v. Padelford*, 159 Mass. 281, 34 N. E. 336; *Southwick v. Southwick*, 97 Mass. 327, 93 Am. Dec. 95.

The order overruling the plea of *res adjudicata* from which the appeal was taken is affirmed, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

All concur, except HOCKER, J., absent.

## PYLES v. PIEDMONT MT. AIRY GUANO CO.

(Supreme Court of Florida. Dec. 7, 1909.)

### 1. TRIAL (§ 56\*) — EXAMINATION — REPETITIONS.

In an action upon an indorsement of a promissory note, where a defense is that the note was indorsed by inadvertence, and the defendant is permitted to testify that, at the time he wrote certain letters in evidence recognizing his liability on the indorsement, he thought he was bound and had not consulted an attorney, and that he then thought and believed he was bound, it is not error to refuse to allow the defendant to again testify as to his belief that he was liable and had not consulted an attorney when he wrote the letters.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 131, 132; Dec. Dig. § 56.\*]

### 2. TRIAL (§ 25\*)—RIGHT TO OPEN AND CLOSE.

In the absence of a statute or rule upon the subject, where the plaintiff has anything to prove in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and conclude the argument to the jury belongs to the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 47, 48; Dec. Dig. § 25.\*]

### 3. TRIAL (§ 25\*)—ARGUMENT TO JURY—RIGHT TO OPEN AND CLOSE.

If the plaintiff would succeed on the pleadings alone, the defendant may begin and conclude the argument; if the defendant would succeed, then there is something for the plaintiff to prove at the outset, and the plaintiff may begin and conclude the argument to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 47, 48; Dec. Dig. § 25.\*]

### 4. TRIAL (§ 25\*)—ARGUMENT TO JURY—RIGHT TO OPEN AND CLOSE.

Where there are several issues, and the plaintiff has anything to prove under any one of them in the first instance, in order to recover, the right to open and close the argument is with him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 47, 48; Dec. Dig. § 25.\*]

### 5. TRIAL (§ 25\*)—ARGUMENT TO JURY—RIGHT TO OPEN AND CLOSE.

In every case where the general issue or a general or special denial is pleaded, the right to open and close is with the plaintiff, for then he has something to prove in the first instance, no matter what may be the nature of the controversy, or what special defenses may be set up.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 47, 48; Dec. Dig. § 25.\*]

### 6. TRIAL (§ 25\*)—ARGUMENT TO JURY—RIGHT TO OPEN AND CLOSE.

In an action on a promissory note, where there is a common count and a plea of the general issue, the plaintiff must prove something in order to recover, and consequently has the right to open and conclude the argument to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 47, 48; Dec. Dig. § 25.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action by the Piedmont Mount Airy Guano Company against Samuel R. Pyles. Judgment for plaintiff, and defendant brings error. Affirmed.

R. B. Bullock, for plaintiff in error. R. McConathy, for defendant in error.

WHITFIELD, C. J. The Piedmont Mt. Airy Guano Company, a corporation, brought an action against Samuel R. Pyles in the circuit court for Marion county upon an indorsement of a note for \$1,142.80, dated July 1, 1904, given by George Close to the plaintiff below.

Among the defenses interposed was that the notes sued on became mixed and mingled with other notes made to the defendant, and the indorsement "was a result purely of accident, mistake, and inadvertence," and the defendant "did not then have any intention whatsoever of signing the said note."

At the trial the plaintiff produced the note dated July 1, 1904, signed by George Close, with the defendant's indorsement thereon. The defendant put in evidence a contract dated November 20, 1903, between the plaintiff and defendant, by which the defendant was appointed the agent of the plaintiff to sell its fertilizers, the defendant "to make full settlement on or before July 1, 1904. In cash or

in notes of the purchasers, resulting from sales of the fertilizers, indorsed by" the defendant.

George Close testified that he did not buy fertilizers from the defendant during the years 1903, 1904, but that he bought from Mr. C. Waite, the general manager of the plaintiff company. He further testified: "I gave a note in part payment of these fertilizers. It is the note sued on in this case. At the time I gave same it did not have the signature of defendant, Pyles, on it, and I was surprised to know he was on it when I heard of it." The defendant testified: "That his indorsement upon the note sued upon was purely and absolutely accidental. That it was not his intention to sign same. Coming from his country home into Ocala and entering his office, his attention was called to a batch of notes secured by mortgages, representing in part the sales of fertilizers made by him for the plaintiff under his contract with plaintiff. That his bookkeeping and the details of this business was looked after by Dr. J. C. Boozer for him, and as he came into his office the said Boozer called his attention to the notes. They were laying on his desk face downward, and that in signing these notes the note (Close note) sued on was among the number, and he picked up his pen and wrote his name across all notes there so spread out, not knowing that this note was among them. That several months had elapsed since the sale to Close, and at the time the circumstances of that sale being an exception did not present itself to him. That he did not know that it was in the package until the transaction had been over two months. That he presumed that Dr. Boozer, who drew up the note and collected the cash payment from Close, remitted to the company for it, and also sent the note into the house. Had he known the Close note was in the batch, he certainly would not have signed it, because there was no reason why or obligation under the contract on my part to sign same. That he was in no sense a party to the sale of the fertilizers to Close; the same having been sold directly to Close by Maj. Waite, the general manager."

Dr. Boozer testified: That he assisted the defendant with his business. That "he knew Mr. Close very well. That the note sued on—the part written in pen and ink—is in his handwriting. That he knows the circumstances under which the note was indorsed by the defendant. That he had a number of notes that had not been collected, and it was about time to send them to the company. That he placed them on the desk face downward, and said to defendant, 'here is a batch of these fertilizer notes that ought to be gotten off to-day if possible,' and thereupon Capt. Pyles picked up his pen and indorsed them in this manner, and I picked them up and forwarded them to the company; the Close note being in the batch. That, at the time of spreading out the notes on the desk

for the defendant to sign, he did not make any explanation to Pyles. All were piled up, as already stated, and that he presumed that Pyles would go through them. \* \* \* That Pyles' instructions under this contract were to take security even on smallest sales, and that he endeavored to observe such instructions. That Pyles was to receive compensation for representing Mr. Waite in the delivery of the fertilizers to Mr. Close. He had to employ a man to go down and check it out and several other details. He had to reimburse parties for their services. That this arrangement was made in his office, but he cannot tell date it was so made, and that he does not know whether Pyles got same compensation on the sale of Close as he got on sales to others or not, and that he made out the statement handed him and sent it to the company, which said statement is of the business between plaintiff and defendant and contains as an item of credit to the defendant, 'To note Geo. Close \$1,142.30.'

C. Waite, in rebuttal for the plaintiff, testified, in effect, that he made the sale to Close at the suggestion of defendant as a matter of policy, and that the defendant received compensation for the sales to Close. The following letters were introduced by the plaintiff:

"Ocala, Fla., Oct. 24/04.

"Piedmont Mt. Airy Guano Co., Baltimore, Md.—Dear Sirs: Yours of the 11<sup>th</sup> was awaiting my return and note contents—that bank failed to advise me till a day or two since of the matter of Tooley's being with them. I notified Tooley to be prepared to meet the note. He came to see me about the tenth of the month and plead that you gave him until 1st Novr, and he would pay \$100.00, and by 1st Decr. pay the bal. with accumulated interest, etc. To this I replied that I had no control over the matter, but would submit his proposition to you. Tooley is a poor man, and I hope you will extend to him this favor, and I will look after the collection of his and all your other claims, and in such cases as required will employ such counsel as will render best service in foreclosing, etc., however, you may write me fully what you think of doing and I will be governed accordingly.

"As to the George Close note, say his note is good without additional security, he is an honest and able man to pay; and, with my indorsement I feel that you are amply secured—as to Geo. Close beg to say I hope you will be able to sell him his goods for next season, as he is all O. K.

"Please let me hear from you soon.

"Yours very respectfully,

"S. R. Pyles."

"Ocala, Fla. July 31st/05.

"Piedmont Mt. Airy Guano Co., Baltimore, Md.—Dear Sirs: As I wrote you, Mr. Close made a failure. This is true. I have worked diligently with him to get security, in this I have failed utterly, so I have caused suit to be instituted. I employed C. L. Sistrunk as

attorney to represent your claim. I expect that I will ultimately have this to pay which I will do when it is found that I cannot cause him to pay. I think however, to get judgment against him he will likely borrow of his relatives and settle. I will do in the premises as I think best, and will push the matter to a settlement as rapidly as possible, and advise you when I have accomplished something.

"Am very sorry for this unexpected trouble and delay in our settlement. No one could have reasonably expected such a complete failure with one who heretofore was so successful. However the best is being done and you may rest easy. Yours very truly,

"S. R. Pyles."

The defendant being recalled, after some objections, testified: "That at the time he wrote the letters of date, respectively October 24, 1904, and July 31, 1905, he thought he was bound and had not consulted an attorney, and he did not consult an attorney till time that action was taken against Mr. Close on the note sued on. That up to this time he thought and believed he was bound. That he then consulted with one attorney at law."

It is not necessary to state other evidence adduced. Other questions asked the defendant as to his belief of his liability on the indorsement when he wrote the letters, and whether he consulted counsel after the letters were written, were excluded. The defendant reserved exceptions and assigns errors on the rulings. In view of the testimony of the defendant on these points admitted in evidence, as above stated, there is no reversible error in the rulings complained of.

Error is assigned on the rulings of the court that the plaintiff have the opening and conclusion of the argument.

In the absence of a statute or rule upon the subject, where the plaintiff has anything to prove in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and conclude the argument to the jury belongs to the plaintiff. The unvarying test to be applied is which party would, upon the pleadings and record admissions and without any proof, be entitled to a verdict. If the plaintiff would succeed on the pleadings alone, the defendant may begin and conclude the argument; if the defendant would succeed, then there is something for the plaintiff to prove at the outset, and the plaintiff may begin and conclude the argument to the jury.

Where there are several issues, and the plaintiff has anything to prove under any one of them in the first instance, in order to recover, the right to open and close the argument is with him.

In every case where the general issue or a general or special denial is pleaded, the right

to open and close is with the plaintiff, for then he has something to prove in the first instance, no matter what may be the nature of the controversy, or what special defenses may be set up. 1 *Thomp. on Trials*, par. 228 et seq.; *Abbott's Trial Brief*, 395; *Brunswick & W. R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513, and exhaustive note.

In this case the action is on a promissory note; but there is a common count and a plea of the general issue, which requires the plaintiff to prove something at least before he can recover. Therefore the court properly ruled that the right to open and conclude the argument to the jury was with the plaintiff.

No other points are argued, and, no errors appearing, the judgment is affirmed.

All concur, except HOCKER, J., absent.

#### CITY OF PENSACOLA v. JONES.

(Supreme Court of Florida. Dec. 14, 1909.)

##### 1. MUNICIPAL CORPORATIONS (§ 755\*)—DEFECTIVE STREETS—INJURIES TO PEDESTRIANS—CITY'S LIABILITY.

Under the statutes of this state (Gen. St. 1906, § 1017) municipal corporations have the power to regulate and control the grading, construction, and repairs of all streets, pavements, and sidewalks in such municipalities, respectively, and as a result of this power they are required to exercise reasonable diligence in repairing defects in streets and sidewalks after the unsafe condition thereof is known, or ought to have been known, to them, or to their officers having authority to act for them; and the municipality is liable in damages for negligent non-performance of this duty.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1589; Dec. Dig. § 755.\*]

##### 2. MUNICIPAL CORPORATIONS (§ 757\*)—DEFECTIVE STREETS—REPAIRS—DUTY OF ABUTTING OWNER.

Where a statute authorizes the city to require abutting owners "to construct uniform and substantial sidewalks around their several lots, and to keep the same in repair," it does not relieve the city of its duty "to exercise reasonable diligence in repairing defects in \* \* \* sidewalks," or its liability for negligence in the discharge of this duty.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1592; Dec. Dig. § 757.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 816\*)—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—PLEADING.

In an action to recover damages from a municipality for injuries received because of defects in a sidewalk, where it is alleged that the city "had possession and control of" the "street and the sidewalks thereon," and "knowingly, wrongfully, and negligently suffered the sidewalk" "to become and remain in a defective and unsafe condition for many weeks before" the injury, and the particular defects are stated, and it is alleged "that the defendant knew or should have known that said defective sidewalk existed for many weeks before and at the date of the injury," such allegations necessarily import that the "sidewalk was not reasonably safe."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1712, 1713; Dec. Dig. § 816.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**4. MUNICIPAL CORPORATIONS (§ 816\*)—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—PLEADING—NEGLIGENCE.**

Where the allegations of a declaration show that a city was negligent in not keeping its streets in repair, it is not necessary to allege additional negligence in not keeping the streets lighted so as to warn pedestrians of danger caused by the negligence of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1712, 1713; Dec. Dig. § 816.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Action by James M. Jones against the City of Pensacola. Judgment for plaintiff, and defendant brings error. Affirmed.

John B. Jones, for plaintiff in error. Wm. C. Monroe, for defendant in error.

WHITFIELD, C. J. The defendant in error recovered a judgment in the circuit court for Escambia county against the city of Pensacola for injuries received because of a defective sidewalk in the city. On writ of error it is urged that the declaration is fatally defective, because it does not allege that the city "owned or constructed the alleged defective sidewalk," or that the "sidewalk was not reasonably safe," or that "the defendant failed to have the defective and unsafe places in the sidewalk properly guarded or lighted so as to warn pedestrians of danger." Under the statutes of this state, municipal corporations have the power to regulate and control the grading, construction, and repairs of all streets, pavements, and sidewalks in such municipalities respectively, and, as a result of this power, they are required to exercise reasonable diligence in repairing defects in streets and sidewalks after the unsafe condition thereof is known, or ought to have been known, to them, or to their officers having authority to act for them; and the municipality is liable in damages for negligent nonperformance of this duty. Section 1017, Gen. St. 1906; *City of Daytona v. Edson*, 46 Fla. 463, 34 South. 954.

The statute authorizes the city to require abutting owners "to construct uniform and substantial sidewalks around their several lots, and to keep the same in repair"; but this does not relieve the city of its duty "to exercise reasonable diligence in repairing defects in \* \* \* sidewalks," or its liability for negligence in the discharge of this duty.

It is alleged that the city "had possession and control of" the "street and sidewalks thereon," and "knowingly, wrongfully, and negligently suffered the sidewalk" "to become and remain in a defective and unsafe condition for many weeks before" the injury complained of. The particular defects caused by broken or missing boards are stated, and it is alleged "that defendant knew or should have known that said defective sidewalk existed

for many weeks before and at the date of the injury." These allegations necessarily import that the "sidewalk was not reasonably safe." If the city was negligent in not keeping the streets in repair, it was not necessary to allege additional negligence in not keeping the streets lighted so as to warn pedestrians of danger caused by the negligence of the city.

No other questions are argued.

The judgment is affirmed. All concur, except HOCKER, J., absent.

**COX v. STATE.**

(Supreme Court of Florida. Dec. 14, 1900.)

**1. HOMICIDE (§ 189\*)—ASSAULT WITH INTENT TO KILL—EVIDENCE—PREVIOUS QUARREL.**

Testimony going into the merits of a previous quarrel is properly rejected.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 398; Dec. Dig. § 189.\*]

**2. WITNESSES (§ 319\*)—TENDER—PROBABLE BIAS.**

Before, one is tendered as a witness, testimony as to his probable bias is incompetent.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 319.\*]

**3. HOMICIDE (§ 192\*)—ASSAULT TO KILL—DEFENSES—EVIDENCE.**

When the original aggressor in a difficulty defends upon the ground that he had honestly sought to evade actual injury by retreat, superinduced by the sudden dislocation of his shoulder, it is permissible for him to prove, by a physician the condition of his shoulder, and the consequent likelihood of the truth of the statement.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 192.\*]

**4. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.**

The court may refuse this instruction: "By a verdict of not guilty you do not necessarily mean that the defendant in truth and in fact is not guilty of the charge, but such verdict may mean that the prosecution has failed to produce sufficient evidence to convince you beyond a reasonable doubt of the defendant's guilt, or it may mean that upon consideration of all the evidence you are not convinced beyond a reasonable doubt and to a moral certainty of the defendant's guilt."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**5. ASSAULT AND BATTERY (§ 54\*)—AGGRAVATED ASSAULT.**

The statement by one armed with a knife, placing a hand upon another, "If you draw a pistol or a knife, I will cut your throat," may or may not constitute an aggravated assault, dependent upon other circumstances; the condition annexed not being such as neither party can control or alter.

[Ed. Note.—For other cases, see *Assault and Battery*, Dec. Dig. § 54.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Gadsden County; J. W. Malone, Judge.

Hardy Cox was convicted of aggravated assault and he brings error. Reversed.

W. H. Ellis and R. H. Buford, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

COCKRELL, J. Cox was indicted of an assault with a deadly weapon with intent to murder F. W. Smith, and was convicted of an aggravated assault.

As the case is reversed, we need not consider the assignment based upon the refusal of a continuance.

There was no error in overruling a question propounded to the witness F. W. Smith if he had not gone into Cox's yard. There had been testimony by Smith as to a previous difficulty between him and Cox, and the question tended merely to the merits of that previous quarrel, which was not an issue.

There was also no error in refusing questions asked this witness as to rivalry and ill feeling between Cox and one Brocken. It is suggested that it tended to discredit Brocken as a witness by showing bias and prejudice. A sufficient reply to the suggestion is that Brocken had not then become a witness.

The defendant, having testified to facts tending to show he was the original aggressor in the fight, proceeded to testify further that he had sought to retreat before real harm was done, being induced thereto by the dislocation of his left shoulder, which rendered him incapable of sustaining the combat, and that Smith, upon seeing the retreat and the disabled condition, renewed the attack, whereupon the defendant, thinking himself in danger of great bodily harm, cut Smith with a knife. To bolster up this theory of self-defense, he called as a witness a physician and propounded this question, "Do you know whether or not Hardy Cox has any permanent or chronic injury to his left shoulder?" which question was rejected upon the objection that it was irrelevant and immaterial. We think the question should have been answered. The account of the shoulder jumping out of place upon the slight force used here, coming as it did from the mouth of a most interested witness, called loudly for corroborative evidence, and its prompt tender should not have been declined. The court charged the jury upon the theory of self-defense by an original aggressor who had in good faith abandoned the difficulty, but by refusing to receive the physician's testimony to a large extent deprived the accused of the defense.

We find no further error in the record.

The defense requested this instruction: "By a verdict of not guilty you do not necessarily mean that the defendant in truth and in fact is not guilty of the charge, but such verdict may mean that the prosecution has failed to produce sufficient evidence to convince you beyond a reasonable doubt of the defendant's guilt, or it may mean that upon consideration of all the evidence you are not convinced be-

yond a reasonable doubt and to a moral certainty of the defendant's guilt." This was refused, but the court charged *inter alia*: "The defendant is presumed to be innocent of these several offenses, and that presumption continues throughout every stage of this trial until overcome by evidence which satisfies you of his guilt beyond a reasonable doubt." Also: "And if you have a reasonable doubt of the defendant's guilt, you should give him the benefit of such doubt and acquit him."

No authority is cited in support of the requested instruction, and we do not care to ingraft it upon our system of jurisprudence. Our juries are well advised generally that the state must prove by evidence adduced upon the trial every material fact constituting the crime as charged, else the defendant should be acquitted, and to this effect was the jury in this case specifically instructed.

The court refused to instruct: "If you believe from the evidence that the defendant crossed the street to meet Smith, and had an open knife in his hand, and placed his hand upon Smith's shoulder, and said, 'If you draw a pistol or knife, I will cut your throat,' then the court charges you that these facts alone do not constitute aggravated assault." The theory for the instruction is that the condition destroyed the threat; that the words explain away the act. But the authority cited, 2 Bishop's New Criminal Law, par. 36, does not sustain it. The illustrative conditions there given are such as neither party can control or alter. Moreover, in the instant case the statement was so interwoven with other facts and circumstances as to render it improper so to segregate it, and it was for the jury to say whether there was a real or apparent attempt to do personal violence.

The judgment is reversed. All concur, except HOCKER, J., absent.

#### NORMAN et al. v. BEEKMAN et al.

(Supreme Court of Florida. Nov. 30, 1909.

Headnotes Filed Jan. 7, 1910.)

#### 1. EJECTMENT (§ 26\*)—PLEADING—EQUITABLE PLEAS.

Pleas on equitable grounds to an action in ejectment, praying that the interest of a feme covert plaintiff be charged in equity with an agreement in writing respecting the lands, ineffective to convey the legal title, are properly stricken.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 26.\*]

#### 2. EVIDENCE (§ 343\*)—DOCUMENTARY EVIDENCE—DEEDS—CERTIFIED COPY.

A certified copy of a deed of conveyance executed in 1885 by a Florida corporation, under its corporate seal, signed by its president, and acknowledged by him before a proper officer, is admissible, even though attested by but one witness.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 343.\*]



**8. TAXATION (§ 765\*)—TAX DEED—OFFICIAL SEAL—NECESSITY.**

A tax deed executed in 1904 by the clerk under a private scroll is invalid, and the placing of the official seal to the certificate of recordation indorsed upon the instrument is not an attaching of the official seal to its execution.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1524; Dec. Dig. § 765.\*]

**4. EJECTMENT (§ 85\*)—PLEADING AND PROOF—VARIANCE.**

Proof that the lands in controversy are the separate property of the married woman is not a variance in an action of ejectment by "V. B., joined by her husband, J. B.," even though the declaration concludes that the "plaintiffs claim title."

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 85.\*]

**5. EJECTMENT (§ 109\*)—EVIDENCE—AFFIRMATIVE CHARGE.**

Where the defendants in ejectment, who fail to object to the introduction of deeds that may be incomplete by reason of exceptions not definitely located, fail to connect themselves with any title, paper or possessory, or suggest a better title elsewhere, the affirmative charge for them may be refused.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 312; Dec. Dig. § 109.\*]

**6. EJECTMENT (§ 127\*)—RECOVERY OF MESNE PROFITS—DAMAGES.**

In the statutory action in ejectment, the plaintiff may recover the land in controversy, together with mesne profits, which latter include damages for waste and dilapidation.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 127.\*]

**7. EJECTMENT (§ 132\*)—DAMAGES.**

In ejectment the damages allowed are those in actions of trespass vi et armis, not trover and conversion.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 132.\*]

**8. EJECTMENT (§ 132\*)—DAMAGES—INJURIES TO FREEHOLD.**

In ejectment the injury is to the freehold, and the true measure of damages is the injury done to that freehold, whether by withholding the profits thereof from the freeholder or the waste and dilapidation committed thereon.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 444-452; Dec. Dig. § 132.\*]

**9. EJECTMENT (§ 135\*)—DAMAGES—CUTTING AND REMOVING WOOD.**

In determining in ejectment the amount of damages for cutting and removing wood, the jury are not limited to the value of that actually cut and removed; they may and should also consider the effect which the cutting has had upon the place wasted. In ascertaining this it is competent to show the difference in value of the lands before and after the commission of the waste and incidentally the market value of the turpentine taken.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 459, 460; Dec. Dig. § 135.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Pasco County; J. B. Wall, Judge.

Action by Viola P. Beekman and John C. Beekman against J. B. Norman and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Glen & Himes and J. A. Hendley, for plaintiffs in error. Macfarlane & Davis, Geo. W. Dayton, and K. I. McKay, for defendants in error.

**COCKRELL, J.** This is an action in ejectment brought by Viola P. Beekman, joined by her husband, for the recovery of certain lands lying in Pasco county, together with mesne profits and damages for strip and waste by reason of turpentineing the trees. Pleas of not guilty and not in possession were interposed, as also pleas upon equitable grounds and a special plea setting up the nature of the possession; demurrers and motions to strike these latter pleas were interposed and sustained; and separate errors are assigned upon the striking of the pleas on equitable grounds.

The first of these pleas avers, in short: That the lands in controversy are the separate statutory property of the plaintiff Mrs. Beekman; that in August, 1901, she entered into an agreement in writing with one Flanagan for the benefit of her said property, whereby she undertook to sell him the timber on the land, the consideration being Flanagan's agreement to redeem the lands from tax sales and to deliver the tax receipts and certificates then held; that the defendants acquired their rights through the said Flanagan and are exercising the rights of turpentineing thereunder; and they pray that the lands "be charged in equity with the said agreement, or the uses, rents, and profits thereof sequestered to the end that the said agreement may be properly charged in equity against said premises. The writing was neither sealed, witnessed, nor acknowledged, and it is admitted the legal title did not pass. The relief sought by this plea is strictly affirmative, not merely a setting forth of equitable grounds why the plaintiff should not recover possession, and if admitted would go rather to the measure of damages than to the right of action. *Smith v. Love*, 49 Fla. 230, 38 South. 376; *Pensacola Lumber Co. v. S. I. Co.*, 50 Fla. 244, 39 South. 789.

The other plea on equitable grounds was properly stricken for the same reason.

At the trial the plaintiffs put in evidence as a link in their chain of title a certified copy of deed executed in 1885 by a Florida corporation, under its corporate seal, signed by its president, in the presence of one witness; the acknowledgment being made by the president before a proper officer. Objection was made to its introduction upon the ground that it was not executed in the presence of two witnesses, and the question is now fairly before us for decision.

In *Margarum v. J. S. Christie Orange Co.*, 37 Fla. 163, 19 South. 637, a doubt was entertained as to the necessity for witnesses in deeds of conveyance by a corporation organized under the act of 1868, and in Interna-

tional Kaolin Co. v. Vause, 55 Fla. 641, 46 South. 3, we said passim: "It would seem that the deeds of corporations are not required to be witnessed by subscribing witnesses, but that our statute recognizes the doctrine universally obtaining that corporations in such matters speak and act through their corporate seal."

The thirtieth section of chapter 1639, p. 125, Laws 1868 (the general corporation act) reads: "It shall be lawful for any corporation to convey lands by deed sealed with the common seal of said corporation, and signed by the president, or presiding member, or trustee of said corporation, and such deed when so executed shall be recorded by the recorder in the county clerk's office of the county where the land lies in like manner with other deeds and no further proof shall be deemed necessary to commit the same to record." At the time and for 50 years prior to the passage of this act, the statutes avoided deeds of conveyance, not having two subscribing witnesses, and also provided for acknowledgment by the "party or parties" before designated officers or proof by a subscribing witness, and we can read the act of 1868 only as dispensing with the necessity for witnesses and acknowledgment. The Legislature may well have concluded there was less danger of forgery of corporation's seal than of an individual's signature and so dispensed with the necessity of witnesses. In construing a very similar act in *East Coast Lumber Co. v. Ellis-Young Co.*, 55 Fla. 256, text 258, 45 South. 826, we held that witnesses were not essential to the validity of a deed executed by the trustees of the internal improvement fund.

The question mooted in the *Margarum Case*, supra, recurs, what effect did the subsequent act of 1873 (Laws 1873, p. 13, c. 1939), bearing the title "An act providing for the acknowledgment of deeds and other conveyances of lands," have upon chapter 1639? The restrictive feature of the title was pointed out by this court in 1882, and a section of the act, not here involved, was declared not embraced therein. *Carr v. Thomas*, 18 Fla. 736. There has, moreover, been a legislative interpretation of the effect of the later act, as appears by the first revision of our laws. In the Revised Statutes of 1892 we find part of section 30 of chapter 1639 re-enacted and transferred to the title of alienation by deed, being section 1955 of that revision, which reads: "Any corporation may convey lands by deed, sealed with its common seal and signed in its name by the president or chief executive officer of the corporation." But the provision in the original act as to record without acknowledgment has been eliminated. The revisers, with legislative approval, evidently construed the act of 1873 as covering only the acknowledgment of the deed for record and not interfering with the previous special provision or to the manner of executing a deed

of conveyance by a corporation. There may, too, be some significance in the change of the words "party or parties" used in the original act of 1868 (Comp. Laws 1839, p. 202) to the word "persons" used in the first section of the act of 1873, and further in the fact that in the legislative revision this first section, declaring how deeds shall be executed, is entirely ignored, and resort is had solely to the act of 1828.

We are clear that chapter 1939, providing for the acknowledgment of deeds generally, which has no repealing clause, should not by implication be held to repeal the special charter law of corporations, authorizing them to convey lands by deed, sealed with the common seal and signed by the prescribed officer.

It is suggested by counsel that the attestation of the deed is no part of its execution, citing 13 Cyc. 557, and that the act of 1868 refers only to execution. The statement in that publication is based upon cases decided in Minnesota and Oregon holding that the legal title, as between the parties, passes, though the deed be not witnessed. In other states, however, the statute of frauds required only the signature of the grantor, and the provision for witnesses is found in the recording acts; while with us the same section making, signing, sealing, and delivery prerequisite to the passing of the legal title makes the attestation of two subscribing witnesses equally and alike a prerequisite, and we can see no reason for separating two acts in point of dignity or importance, nor impute to the Legislature knowledge of the existence of one and ignorance of the other, in so important, widely known, and time-tried legislation.

The court did not err in overruling the objection.

We think, however, the court did err in admitting a tax deed, introduced as a supplemental or auxiliary source of title. The deed is executed by "H. H. Henley, Clerk. Ct. Ct. Pasco County, Florida," and sealed only by the word seal written within parentheses; no official seal being attached to the execution of the instrument, while on the back of the instrument, and far removed from this signature, his official seal is attached to the statement that the instrument was by him recorded. The instrument was signed in January, 1904, and the testimonium clause in the skeleton form for tax deed set forth in chapter 5113, p. 28, Laws 1903, concludes: "Have executed this deed and have hereunto set my official signature and seal at \_\_\_\_\_ in the county of \_\_\_\_\_, state of Florida, on this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 19\_\_\_\_. (Seal.) Clerk of Circuit Court, \_\_\_\_\_ County, Florida"—omitting attestation. It is contended the act calls for the official signature, but not the official seal. This construction is at best but a narrow one and seems to be conclusively settled by the general law then and for

many years theretofore on the statute books, now Gen. St. 1906, § 590, providing that all tax deeds "shall be signed by the clerk of the circuit court, shall be witnessed as other deeds, and the seal of the circuit clerk attached thereto, and shall be acknowledged or proven as other deeds"; the seal to be attached as part and parcel of the execution of the deed, not indiscriminately nor to an accidental and incidental statement upon a deed that some subsequent act has been done by an officer, an act affecting neither the execution nor acknowledgment.

At the close of the testimony, the defendants requested the affirmative charge, upon the idea that the plaintiffs had not proved title. Two theories are urged as supporting the right to this charge.

It is insisted that the title, if proven, was in the wife alone and not jointly in the husband and wife. We find no variance here. The action is prosecuted by "Viola P. Beekman, joined by her husband, John C. Beekman," thus clearly indicating that the lands are claimed as the separate property of the wife, and that the husband joins therein merely to assume the responsibility for the costs of the litigation and to subject to adjudication whatever of right under the laws of Florida, may be cast upon the husband as such, and the statement of the declaration that "the said plaintiffs claim title" is controlled by the character in which they bring the action. No defendant could possibly be misled by this language, and it is the ordinary and usual manner in Florida of bringing actions in ejectment for the wife's separate estate. The statute authorizing married women to sue in their own names is permissive only, not mandatory, and does not destroy the former practice of joining the husband, should he so desire.

It is further urged the defendants were entitled to the affirmative charge because of certain exceptions, not definitely located in a deed from James F. Keeney to Charles P. Keeney, the former husband of the plaintiff, and from Cora M. Keeney to the same Viola. The defendants had failed to introduce any evidence to connect themselves with the Keeney or any title, paper or possessory, nor do they appear to have offered any objection to these deeds as being incomplete, nor was suggestion made that a better title might be elsewhere. Under these conditions we think a prima facie case had been made out, and the peremptory instruction for the defendants was properly refused.

It may be that, if properly brought to the attention of the court and jury, the admissions of the defendants in their verified pleas filed in this case would act as an estoppel, and the plaintiffs would not be forced to go back of the title there referred to; but of this we express no fixed opinion.

There is serious difficulty upon the measure of damages allowed. The case was submitted upon the theory that the defendants

were willful trespassers and to be penalized to the highest value of the turpentine that might have been produced from the trees during their occupancy.

It is first urged that the statutory inhibition against joining replevin and ejectment with each other or with other causes of action, Gen. St. 1906, § 1389, forbids the recovery in ejectment for the trespass upon the land. The applicability of the statute, however, will be governed by what the statutory action of ejectment includes within itself. Under Gen. St. 1906, § 1968, the plaintiff in ejectment recovers "the land in controversy, together with mesne profits"; but it is insisted that under the statute rental value only can be recovered. In *Ashmead v. Wilson*, 22 Fla. 255, this court undertook to settle the practice, noting the apparent discrepancy between the allowance of mesne profits by the words of the statute while the form of the declaration prescribed therein looked rather to a claim for use and occupation, but it was declared that the object of the statute was to do away with the necessity of bringing two separate actions and to provide for a final settlement, both as to the land and damages for the detention thereof, in one action; and further that in an action for mesne profits damages for waste and dilapidation could be recovered. While it may be true that this declaration may not have been essential to the decision of that particular case, yet it has stood unreversed and unquestionable, so far as our opinions show, for more than 20 years as the deliberate view of the court upon the comprehensiveness of the action of ejectment. It is in line with modern tendencies towards simplification of the practice. So far as we can see, no one can justly complain of the settlement of the whole controversy in the one action, and the practice there declared is again adopted as the proper construction of the statute. In the declaration before us the plaintiff specifically asked for damages for waste and dilapidation, putting the defendants directly on notice, and the pleading is not here questioned.

In the *Ashmead Case*, however, the damages to be allowed are those in actions of trespass vi et armis, not trover and conversion, and it was error to submit the cause to the jury to find damages as in trover. The case relied on by the defendants in error (*Wright v. Skinner*, 34 Fla. 453, 16 South. 335), as also its basic predecessor (*Wooden-Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230), were in trover, and the rule of damages is industriously confined to that class of actions. Here the injury is to the freehold, and the true measure of damages is the injury done to that freehold, whether by withholding the profits thereof from the freeholder or the waste and dilapidation committed thereon. We adopt the rule found in 4 *Sutherland, Damages*, 1034: "In general, this damage (for

waste) is the amount the estate is diminished thereby in value. In determining the amount of damages for cutting and removing wood the jury are not limited to the value of that actually cut and removed; they may and should also consider the effect which the cutting has had upon the place wasted. The damages are equal to the solid and permanent injury to the inheritance." To ascertain what that injury may be, it is competent to show the difference in value of the lands before and after the commission of the waste, and incidentally the market value of turpentine at the time and place may enter into that calculation. Improper management may have produced a low return from turpentine gathered, and the true owner should not be charged with this mismanagement. The lands here involved were apparently wild lands with little or no rental value, and practically the sole basis for damages is the depreciation in their value caused by the turpentine operations. There was no evidence of good faith on defendant's part, nor do they claim any diminution of the damages on that ground.

What we have said will probably prevent error on another trial, and further discussion of the assignments of error is not deemed necessary.

The judgment is reversed.

WHITFIELD, C. J., and PARKHILL, TAYLOR, and SHACKLEFORD, JJ., concur.

HOCKER, J., absent, concurred in the opinion as prepared.

#### MAYER v. KORNEGAY et al.

(Supreme Court of Alabama. Nov. 10, 1909.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 130\*)—EJECTMENT BY—LANDS OF INTESTATE—NECESSITY.

An administrator may, in certain cases as provided by statute, maintain ejectment against the heirs or strangers to recover the lands of his intestate, but only when it is necessary for the purposes of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 539; Dec. Dig. § 130.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 129\*)—RIGHTS AND POWERS—LANDS OF INTESTATE.

An administrator has no estate in or title to the lands of his intestate, but only the right and power, given exclusively by statute, to intercept the rents in certain cases for certain purposes, and to recover the land for this purpose, and to sell it if necessary to pay the decedent's debts, or he may in certain cases sell for distribution among the heirs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 533; Dec. Dig. § 129.\*]

#### 3. EXECUTORS AND ADMINISTRATORS (§ 130\*)—LANDS OF INTESTATE—RIGHT TO RECOVER.

An administrator cannot recover the lands of his intestate from the heirs, who are the

legal owners, without showing the necessity, or the contingency, or the happening of the event for which the statute authorizes him to maintain such action.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 537-540; Dec. Dig. § 130.\*]

#### 4. EXECUTORS AND ADMINISTRATORS (§ 129\*)—LANDS OF INTESTATE—ASSUMPTION OF CONTROL—TRESPASS.

Where an administrator attempts to assume the control of the lands of his intestate, without the necessity or contingency provided by statute arising, he is a trespasser as against the heirs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 533, 535; Dec. Dig. § 129.\*]

#### 5. EXECUTORS AND ADMINISTRATORS (§ 272\*)—DEBTS OF DECEDENT—CHARGE UPON THE LAND.

Debts of a decedent are not necessarily a charge upon his land, since they may be barred by limitations or the land be exempt from debt.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1052; Dec. Dig. § 272.\*]

#### 6. EXECUTORS AND ADMINISTRATORS (§ 272\*)—DEBTS OF ADMINISTRATOR—CHARGE UPON THE LANDS.

Debts contracted by an administrator are never a charge upon the lands of his intestate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1052; Dec. Dig. § 272.\*]

#### 7. EXECUTORS AND ADMINISTRATORS (§ 272\*)—DEBTS—CHARGE UPON THE LAND.

Debts, to be a charge upon the lands of an intestate, must have been incurred by the decedent, and be in excess of the value of his personal property.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1052; Dec. Dig. § 272.\*]

#### 8. EXECUTORS AND ADMINISTRATORS (§ 272\*)—DEBTS OF DECEDENT—HOW PAID—REAL AND PERSONAL PROPERTY.

Lands cannot be applied to the debts of a decedent, if the personal property is sufficient to pay the debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1052; Dec. Dig. § 272.\*]

#### 9. EXECUTORS AND ADMINISTRATORS (§ 343\*)—DEBTS OF DECEDENT—NECESSITY FOR APPLYING REAL PROPERTY—BURDEN OF PROOF.

The burden of proof is upon the administrator to show a necessity for applying the lands of his intestate to the payment of the debts, or to bring him within the conditions or provisions of the statute, which provides the cases where a decedent's lands may be applied to the payment of his debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1440; Dec. Dig. § 343.\*]

#### 10. EXECUTORS AND ADMINISTRATORS (§ 349\*)—PROBATE COURTS—JURISDICTION—JUDGMENT—CONCLUSIVENESS.

Where the probate court has decided that certain debts were not a charge upon the lands of a decedent, and that a sale was not necessary, it being for this purpose a court of competent and full jurisdiction, its judgments or decrees on this subject, if not appealed from, are final and conclusive.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1450; Dec. Dig. § 349.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Ejectment by Morris Mayer, as administrator of Allen Kornegay, against Thornton Kornegay and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The following is the agreed statement of facts: That Morris Mayer duly qualified as the administrator of Allen Kornegay, and letters of administration were duly issued to him out of the probate court of Marengo county, Ala., on the 30th day of June, 1896. That Allen Kornegay died seised and possessed of, and was the owner of, the lands sued for in the complaint. That said Morris Mayer has made no settlement of his administration, and that said Allen Kornegay's estate owes debts. That the defendants are heirs at law of said Allen Kornegay. That the following named persons are the heirs at law, and the only heirs at law, of the said Allen Kornegay, and that they are joint owners or tenants in common of the lands described in the complaint, and own interests therein as follows: Thornton Kornegay, over 21 years of age, and owns an undivided one-sixth interest in said land; Polly Kornegay, over 21 years, and owns one-sixth undivided interest; Julia Kornegay, over 21, and owns one-sixth undivided interest; Eveline Kornegay, of full age, but of unsound mind, and owns one-sixth undivided interest; Eliza Allen, over 21, and owns one-sixth undivided interest; Eliza Kornegay, over 21, and owns one-twelfth undivided interest; Cheney Kornegay, over 21, and owns one-twelfth undivided interest. That it has been regularly adjudicated on a petition by plaintiff, to which defendants were parties, by the probate court of Marengo county, Ala., that said lands could not be subjected to the payment of debts of the estate of Allen Kornegay, and that no new debts have arisen since the adjudication. That none of said heirs of Allen Kornegay have requested or desired any partition of said lands, or any sale of them for division among the heirs. That said estate of Allen Kornegay is ripe for a final settlement, except that there are certain alleged debts due by it, being the same debts as to which the probate court has regularly held in a proper proceeding that said lands could not be sold to pay them. That said Morris Mayer has no right, title, or interest in said lands, except as such administrator, and no right to recover the same, except for purposes of administration, if any such there be.

Taylor & Hearing and C. K. Abraham, for appellant. J. M. Miller and De Graffenried & Evins, for appellees.

MAYFIELD, J. This is a statutory action in the nature of an action of ejectment, brought by appellant, as administrator, against appellees, the heirs of the intestate, to recover the lands of such intestate. The

case was tried by the court without a jury on an agreed statement of facts, which the reporter will set out in the report of this case. The court rendered judgment for the heirs, and against the personal representative. From that judgment the administrator appeals.

An administrator may, in certain cases, as provided by statute, maintain ejectment against the heirs or strangers to recover the lands of his intestate. However, he can only maintain such action when necessary for the purposes of administration. He can only recover against the heirs by showing the necessity, and such state of facts as is provided by statute. He has no estate in or title to the lands. He only has the right and power, given exclusively by statute, to intercept the rents in certain cases for certain purposes, and to recover the lands for this purpose, and to sell the same if necessary to pay debts of decedent, or he may, in certain cases, sell for distribution among the heirs. He cannot recover the lands from the heirs, who are the legal owners, whatever may be his rights as against strangers, without showing the necessity, or the contingency, or the happening of the event for which the statute authorizes him to maintain such action. Without this necessity or contingency provided for, he is a trespasser as against the heirs in attempting to assume to control the lands.

Debts of the decedent are not necessarily a charge upon the lands. The debts may be barred by the statute of limitations, or the lands may be by law exempt from such debts. The debts contracted by the administrator are never a charge upon the lands. They must be debts incurred by the decedent, and they must be in excess of the value of the personal property. The lands cannot be applied to the debts of the decedent so long as there is personal property sufficient to pay the debts.

The burden of proof is upon the administrator to show the necessity, or to bring himself within the conditions or provisions of the statute. While it is shown by the statement of facts that "the estate of decedent owes debts," it is not shown that the debts are such as to be a charge upon the lands. They may have been incurred by the administrator, or may be barred by the statute of limitations. It is not shown that they are a charge upon the lands.

It also appears that it had been already judicially determined by the probate court of the proper county that these debts were not a charge upon the lands; that the lands could not be sold for the purpose of paying the debts. The probate court, for this purpose, is one of competent and full jurisdiction, and its judgments or decrees on this subject, if not appealed from, are final and conclusive as to this question.

All the questions involved in this case are discussed and decided in the cases of Lee

v. Downey, 68 Ala. 101, Banks v. Speers, 103 Ala. 444, 16 South. 25, and Owens v. Childs, 58 Ala. 113. On these authorities, and what is said above, the judgment must be affirmed. Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

**MAXWELL & DELEHOMME v. MOORE.**  
(Supreme Court of Alabama. June 17, 1909.  
On Rehearing, Dec. 16, 1909.)

**1. WORK AND LABOR (§ 14\*)—NONPERFORMANCE—QUASI CONTRACT.**

Where plaintiffs abandoned their contract to paint defendant's house when approximately 15 per cent. of the work was unperformed, plaintiffs could not recover on a quasi contract for the work and materials furnished.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 33; Dec. Dig. § 14.\*]

On Rehearing.

**2. CONTRACTS (§ 303\*)—ABANDONMENT—EXCUSE.**

Plaintiffs, having contracted to paint defendant's house, were not justified in abandoning the work when 15 per cent. of it remained unperformed, by information from defendant's agent that he would have nothing more to do with the contract, owing to a dispute between the agent and defendant, and that plaintiffs should get defendant's confirmation of any further work and materials furnished by them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1424-1433; Dec. Dig. § 303.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by Maxwell & Delehomme against Terry L. Moore. Judgment for defendant, and plaintiffs appeal. Affirmed.

Fitts & Leigh, for appellants. R. H. & R. M. Smith, for appellee.

**McCLELLAN, J.** The contract here involved was for the furnishing of the material and the work and labor to apply it in painting a house for defendant (appellee). The contract was not fully performed by plaintiffs—on the contrary, was abandoned by them when approximately 15 per cent. of it was unperformed. The common counts, as here, cannot, under such circumstances, be employed to recover upon a quantum valebat or quantum meruit for the outlay made by plaintiffs. Carbon Hill Co. v. Cunningham, 153 Ala. 573; 44 South. 1016; Martin v. Massie, 127 Ala. 504, 29 South. 31, and authorities therein cited.

The judgment is affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

On Rehearing.

**PER CURIAM.** The insistence of the movant for rehearing, that full performance of

the contract was prevented by Biggers, as the representative of Moore, was necessarily considered and decided on the original hearing. and the ruling that plaintiff had abandoned the contract was made in denial of the matter now urged as the reason for rehearing. The evidence, in this connection, shows only that Biggers informed plaintiffs of his (Biggers') purpose to have nothing more to do with the contract, and advised plaintiffs to get Moore's confirmation of further work done or material furnished by them; and it readily appears that this attitude of Biggers' was the result of disagreement with Moore. No act or word of Moore's is shown from which it could be concluded that Moore did or said aught to justify plaintiffs in failing or refusing to fully perform the contract.

The rehearing is denied.

**BANK OF WAYNESBORO v. HEALING SPRINGS MERCANTILE CO. et al.**

(Supreme Court of Alabama. June 30, 1909.  
Rehearing Denied Dec. 16, 1909.)

**1. PARTNERSHIP (§ 213\*)—ACTIONS—DENIAL OF PARTNERSHIP.**

In a suit against defendants, individually and as partners, on a note signed by a company name, by one defendant as manager, and indorsed by the other, special pleas, denying the partnership, and alleging the company was an individual business, owned by one defendant and managed by the other, were wholly insufficient; those attempting to deny the partnership not being even colorable as a defense to the suit against them individually.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 409; Dec. Dig. § 213.\*]

**2. CORPORATIONS (§ 672\*)—FOREIGN CORPORATIONS—FAILURE TO FILE ARTICLES AS DEFENSE TO SUIT.**

In a suit by a bank on a note executed to it by defendants, a plea that it was a foreign corporation, that the note was executed and delivered in this state, and that plaintiff had not then complied with the law as to filing a copy of its articles of incorporation, so as to entitle it to do business in the state, was wholly insufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2646; Dec. Dig. § 672.\*]

Appeal from Circuit Court, Washington County; Samuel B. Browne, Judge.

Assumpsit by the Bank of Waynesboro against John F. Loper and another, individually and as partners doing business as the Healing Springs Mercantile Company. From a judgment for defendants, plaintiff appeals. Reversed.

The pleas were as follows: (1) The general issue. (2) "The defendants say that at the time of the matters and things complained of in the complaint they were not partners doing business under the firm name and style of Healing Springs Mercantile Company." (3) "That the said note upon which the cause of action was founded was not ex-

ecuted by them as alleged in the complaint, or by any one authorized to bind them in the premises, and they make oath that this plea is true." (4) "That defendant M. A. J. Loper did business at the time of the matters and things complained of in the complaint under the name of the Healing Springs Mercantile Company, and that the defendant John F. Loper was merely acting as a servant or agent of the defendant M. A. J. Loper in executing the note claimed upon in this complaint." (5) "That plaintiff was at the time of the making of the note sued upon a foreign corporation, and that the said note was executed and delivered in this state; and defendants further aver as negative matter that the plaintiff had not complied with the laws of the state of Alabama, so as to entitle the plaintiff to do business in this state, in that it had not (at the time of the said transaction with the defendant in the matter of the execution and delivery of said note) filed with the Secretary of State of the state of Alabama a certified copy of its articles of incorporation or association."

Motion was made to strike the pleas, because frivolous, and demurrers were interposed thereto, raising practically the same grounds, all of which were overruled. The following replications were then filed to the pleas: (1) "That defendant herein is estopped to deny the existence of the partnership as herein set out, since he has held himself out as a partner in said business, or permitted himself to be held out as a partner in the said copartnership firm of Healing Springs Mercantile Company, and plaintiff herein, in reasonable reliance upon the honest belief of such partnership, has dealt with him as such partnership and member of the copartnership firm of Healing Springs Mercantile Company." (2) "That defendant herein is estopped to deny the existence of the partnership as herein set out, since she has held herself out as a partner in such business, or permitted herself to be held out as a partner in said copartnership business of the Healing Springs Mercantile Company" (and concludes as replication above set out). (3) "That the said defendants did expressly or by culpable silence permit themselves to be held out as partners, on account of which plaintiff did, in ignorance of the true relationship of said defendants, loan or furnish money to said defendants on the faith of the said partnership, to the injury of plaintiff as claimed in his complaint." Demurrers being sustained to these replications, other replications were filed, setting up various acts of copartnership, including suits in the courts, and other acts and doings showing the relation of the partners, to all of which demurrers were sustained. The facts are as stated in the opinion.

Granade & Granade, for appellant. Frederick G. Bromberg, for appellees.

MAYFIELD, J. Appellant sued appellees as individuals and as a partnership. The suit was upon a promissory note, signed by the partnership, per one of the defendants as manager, and indorsed by the other. The suit was begun by attachment. The defendants admitted the execution of the note as above described. Defendants filed pleas denying the partnership, but alleging that Healing Springs Mercantile Company was an individual business, owned by one M. A. J. Loper, and managed by John F. Loper. Appellant filed replications to these pleas, setting up that the parties by their acts had estopped themselves from denying the existence of the partnership or their liability as partners. Demurrers were sustained to these replications. Trial was had upon the special pleas and the general issue.

The undisputed evidence showed that plaintiff was entitled to the general affirmative charge. The trial court, however, excluded all the plaintiff's evidence, and gave the general affirmative charge for the defendants. Upon what theory this could have been done it is impossible to conceive. The special pleas of defendants were wholly insufficient. Those attempting to deny the partnership were not even colorable as a defense against the defendants individually. The plea setting up that plaintiff was a foreign corporation was wholly insufficient as an answer to the complaint. If the pleas had been good, the replications, as the evidence indisputably shows, would have been a perfect answer to the pleas.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., concur.

MOBILE LIGHT & R. CO. v. HARTWELL. (Supreme Court of Alabama. Nov. 18, 1909.) STREET RAILROADS (§ 110\*)—COLLISION WITH AUTOMOBILE—COMPLAINT—SUFFICIENCY.

A complaint alleging that defendant so recklessly and wantonly conducted itself in the control of its electric street car as to be the proximate cause of a collision between the car and plaintiff's automobile was not demurrable, as not showing that defendant was guilty of negligence or of any reckless or wanton act constituting the proximate cause of plaintiff's injuries.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. § 110.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by Guy J. Hartwell against the Mobile Light & Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Count 3 was as follows: "Plaintiff claims of the defendant \$500 damages, for that here-

tofore, to wit, on the 9th day of March, 1907, defendant was operating a certain car by means of electricity upon and along a railway on St. Francis street in Mobile, Alabama, and so recklessly and wantonly conducted itself in and about the management and control of said car as to be the proximate cause of a collision between said car and an automobile operated by plaintiff, whereby said automobile was damaged in the amount above claimed."

The following demurrers were interposed to said count: "(1) Because it does not appear therefrom that the defendant was guilty of any negligence, or that it was guilty of any reckless or wanton act which constituted the proximate cause of the plaintiff's injuries. (2) Because the allegation of said count that the defendant so recklessly and wantonly conducted itself in and about the management and control of said car as to be the proximate cause of said collision proceeds upon the hypothesis that it would constitute a reckless and wanton wrong to be the proximate cause of a collision, regardless of circumstances, and it is not equivalent to an allegation that the defendant was guilty of recklessness or wantonness which proximately resulted in the collision."

The following pleas were interposed: (1) The general issue. (2) "And for further plea in this behalf the defendant says: That the plaintiff was himself guilty of negligence, which proximately contributed to the alleged injury, in this: That he undertook to run his automobile across the defendant's track upon which defendant's car was approaching without first stopping, looking, and listening for the approach of a car." (3) "That he negligently undertook to cross the defendant's track with his automobile ahead of an approaching car in such close proximity thereto that there was danger of a collision if the defendant's car continued to approach at the same speed at which it was then running" (heading same as 2, down to and including the words "injury, in this," where they first occur therein). (4) Same as 1, down to and including the words "alleged injury, in this," with the addition: "That plaintiff undertook to cross defendant's track with his automobile in front of an approaching car when he knew, or by the exercise of reasonable diligence would have known, of the approach of said car, and that there was danger of a collision if the said car continued to approach at the same speed at which it was then running."

The following charges were refused to the defendant: General charge as to the first count, and the general charge as to the second count.

Gregory L. & H. T. Smith, for appellant.  
Inge & Arnubrecht, for appellee.

DOWDELL, C. J. The third count of the complaint, added by way of amendment, was

not open to the grounds of demurrer interposed, whatever of defect, if any, it might otherwise have possessed.

Issue was joined on the defendant's pleas of contributory negligence. The evidence without conflict established the pleas, and the court should have given the two written charges requested by the defendant.

The complaint rested upon the initial negligence of the defendant. There was no issue, in the pleading or otherwise, of subsequent negligence after discovery of peril; nor was there any proof of such.

For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

#### ALLEN et al. v. BROMBERG et al.

(Supreme Court of Alabama. June 30, 1909.  
Rehearing Denied Dec. 16, 1909.)

#### 1. FRAUDS, STATUTE OF (§ 103\*)—AGREEMENT TO MAKE MUTUAL WILL—EVIDENCE THEREOF.

That parties make mutual wills does not show an agreement to do so, and the wills themselves cannot furnish any memoranda of the contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 103.\*]

#### 2. FRAUDS, STATUTE OF (§ 106\*)—SALE OF REAL ESTATE—MEMORANDUM OF CONTRACT.

The memorandum of a contract for the sale of real estate, required by the statute, must show the contract, either on its face or by reference to some other writing, so that it can be understood without recourse to parol proof.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 211; Dec. Dig. § 106.\*]

#### 3. FRAUDS, STATUTE OF (§ 75\*)—VALIDITY OF VERBAL AGREEMENT TO MAKE SIMILAR WILL.

A verbal agreement between a husband and wife to execute similar wills disposing of real estate was void under the statute of frauds (Code 1907, § 4289, subd. 5), invalidating parol contracts as to the sale of land, so that she had a right, after his death, to revoke a will made pursuant thereto, and make another.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 132; Dec. Dig. § 75.\*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by F. G. Bromberg and others against Edward P. Allen, executor of Mary B. Johnson, deceased, and others, to enjoin the probate of the will of defendant Allen's testatrix. From a decree for plaintiffs, defendants appeal. Reversed, and bill dismissed.

Sullivan & Stallworth, for appellants.  
Frederick G. Bromberg, for appellees.

SIMPSON, J. This case was before this court, at a previous term, on motion to dismiss the bill, and the facts will be found fully stated in Allen et al. v. Bromberg et al., 147 Ala. 317, 41 South. 771.



It is claimed by the appellees that the court, on that occasion, decided that the agreement by Mary B. Johnson with her husband, Frederick Johnson, to make a certain disposition of her property by will, was valid and binding. A reference to that case will show that the appeal was from a decree overruling a motion to dismiss the bill for want of equity, and to dissolve the injunction, and a decree was here rendered dissolving the injunction and dismissing the bill for want of equity, on the ground that the bill sought to enjoin the probating of the will last made by said Mary B. Johnson, which could not be done. The court, however, stated the general principle that a person may make a valid agreement to dispose of property by will; "but the theory on which the courts proceed is to construe such agreement, unless void by the statute of frauds or other reason, to bind the property," etc. Page 321 of 147 Ala., page 772 of 41 South. It will be seen that the court expressly refrained from deciding the most important point in this case, to wit, whether the agreement contended for was void under the provisions of the statute of frauds.

It has been declared, with regard to wills of personal property made mutually by agreement between the parties, that after the death of one of the parties, having complied with his agreement, the other party cannot revoke his will. *Dufour v. Perlara*, 1 Dickens' Reports, 419; *Stone v. Hoskins*, L. R. [1905] 194 (in this case it is not specifically stated that only personal property was involved, but it is presumed, as no question of the statute of frauds was raised); *Izard v. Middleton*, 1 Desaus. (S. C.) 116. There are also cases, where one of the parties to mutual wills has reaped the fruits of the will of another, he cannot revoke his will made mutually, even though it relates to lands. These are based upon the performance by one party of his part of the contract, which principle, as will be shown, does not apply under our statute of frauds and decisions. *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528. Others place it upon the ground that the partial or entire performance was of such a nature that it would operate as a fraud upon the party performing to deny relief; others again on the principle that a trust was imposed on the land, which cannot be done under our statute by parol. *Korminsky v. Korminsky*, 2 Misc. Rep. 138, 21 N. Y. Supp. 611; *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218; *Heath v. Heath*, 18 Misc. Rep. 521, 42 N. Y. Supp. 1087. There are other cases where the will partook of the nature of a contract, and the statute of frauds was complied with, by placing the devisee in possession at the time of making the will, and he performed his part, in which it was held that the will could not be afterwards revoked. *Smith v. Tuit*, 127 Pa. 341, 17 Atl. 995, 14 Am. St. Rep. 851; *Tuit v.*

*Smith*, 137 Pa. 35, 20 Atl. 579; *Smith v. Pierce*, 65 Vt. 200, 25 Atl. 1092 (there was really no acceptance in this case); *Bird v. Pope*, 73 Mich. 483, 41 N. W. 514.

Our statute specifically provides that parol contracts relating to the sale of lands or any interest therein are void, unless the purchase money or a portion thereof be paid, and the purchaser placed in possession (Code 1907, § 4289, subd. 5); and our court has uniformly held that both of these requisites are necessary, in order to take the contract out of the operation of the statute. *Heflin v. Milton*, 69 Ala. 354, and cases cited in Code; also, *Thompson v. New South C. Co.*, 135 Ala. 630, 637, 638, 34 South. 31, 62 L. R. A. 551, 93 Am. St. Rep. 49. In a case where, by a verbal agreement, the defendant had agreed not to erect, or allow to be erected, a warehouse at a certain landing, if complainant would purchase the adjoining land, erect a warehouse, and store freight free of charge, all of which was done, it was held that this performance did not take the contract out from the operation of the statute of frauds, and that a court of chancery could not enforce the contract. *Clanton v. Scruggs*, 95 Ala. 279, 10 South. 757. The reasoning of the court is that even in this extreme case where the party had acted on the faith of the contract, performing his part so as to place himself in a position which could not be retracted, the party could not be estopped from setting up the statute, at least unless the promise was made fraudulently, with no intention of performing it, and the court does not commit itself even to that proposition (page 283 of 95 Ala., page 758 of 10 South.).

In the Court of Appeals of Kentucky it was insisted that a joint will was invalid, because it destroyed the power of revocation. The court held it valid, but said, "To make an irrevocable will would be the creation of an instrument unknown to the law," and went on to state that either party could revoke it after the death of the other. *Hill v. Harding*, 92 Ky. 79-80, 17 S. W. 199, 437. An agreement between A. and B. by parol that each would make a will of real estate in favor of the other is void within the statute of frauds. *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573; *Swash v. Sharpstein*, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796; *Hale v. Hale*, 90 Va. 728, 19 S. E. 739. "A verbal promise to make a will devising land to the promisee, in consideration of his present conveyance of land to the promisor, is void under the statute of frauds." *Manning v. Pipplin*, 86 Ala. 357, 364, 5 South. 572, 11 Am. St. Rep. 46; *Manning v. Pippen*, 95 Ala. 537, 541, 542, 11 South. 56.

The case of *Bolman et al. v. Overall et al.*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107, is relied upon by the appellees in this case. In addition to the fact that the later cases, above cited, are clear and specific to the point, that decision was based on the wording

of the paper itself; the court saying: "But it is also a contract, in essence and fact, being executed, as stated on the face of the paper, 'in consideration of past and future treatment,' etc. The purpose of the bill, as we construe it, is not to enforce the parol agreement, in which the deceased agreed to bequeath to complainants all the property she might own at the time of her death, but rather to enforce the modified agreement, as evidenced by the written instrument purporting to be a will. No question can properly arise, therefore, as to the influence of the statute of frauds." Pages 454, 455 of 80 Ala., page 625 of 2 South. (60 Am. Rep. 107). The fact that parties make mutual wills does not show that there was any agreement to do so (Edson v. Parsons, 85 Hun, 263, 32 N. Y. Supp. 1036; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265); and as said in the Hale Case, supra, the wills themselves cannot furnish any memoranda of the contract. "Neither alludes to any contract or refers to any other writing; and the established rule is that the memorandum of a contract for the sale of real estate, required by the statute, must show, either on its face or by reference to some other writing, the contract between the parties, so that it can be understood without having recourse to parol proof." Page 731 of 90 Va., page 740 of 19 S. E.

It results that, if there was a verbal agreement in this case, it was void under the statute of frauds, and Mrs. Johnson had a right, after the death of her husband, to revoke the former will and make another one. The decree of the court is reversed, and a decree will be here rendered dismissing the bill.

Reversed and rendered.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

ATLANTIC COAST LINE R. CO. v. SAUNDERS HARDWARE CO.  
(Supreme Court of Alabama. Nov. 11, 1909.)

APPEAL AND ERROR (§ 1092\*)—REVIEW—DECISION OF INTERMEDIATE COURT—DISCRETION—COSTS.

Under Code 1896, § 2831, relating to certiorari, and providing that all questions of costs shall rest in the discretion of the court, the taxation of costs by the circuit court on certiorari to review the judgment of a justice of the peace was within the court's discretion, and not subject to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4320; Dec. Dig. § 1092.\*]

Appeal from Circuit Court, Henry County; A. A. Evans, Judge.

The Atlantic Coast Line Railroad Company appeals from a judgment of the circuit court on certiorari to review the judgment of a justice of the peace in an action between ap-

pellant and the Saunders Hardware Company. Affirmed.

John R. Tyson and P. A. McDaniel, for appellant.

SIMPSON, J. This case was removed by certiorari from the justice of peace court to the circuit court, and the only assignment of error relates to the action of the circuit court in taxing the costs against the petitioner (appellant). The matter of taxing costs in such cases, is within the discretion of the circuit court, and not revisable here. Code 1896, § 2831; L. & N. R. Co. v. Solomon, 138 Ala. 151, 34 South. 1025.

The judgment of the court is affirmed.  
Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

SLEDGE v. WESTERN UNION TEL. CO.  
(Supreme Court of Alabama. Nov. 23, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 68\*) — MESSAGES — DELIVERY — DELAY — MENTAL ANGUISH.

The sender of a social message, directing the addressee to meet the sender at a railroad station, cannot recover damages for mental anguish, owing to delay in delivering the message, resulting in a failure of its purpose.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.\*]

2. TELEGRAPHS AND TELEPHONES (§ 69\*) — MESSAGES—DELAY IN DELIVERY—PUNITIVE DAMAGES.

Where plaintiff, a young lady, sent a telegram to her sister, whom she expected to visit, asking the sister to "meet me at the train," and the purpose of the message failed because of the telegraph company's delay in delivery, plaintiff could not recover punitive damages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 71; Dec. D.g. § 69.\*]

3. APPEAL AND ERROR (§ 1067\*)—INSTRUCTIONS—PREJUDICE.

Where plaintiff was not entitled to recover punitive damages, the refusal of the request to charge on that subject was without prejudice to her.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

Appeal from Circuit Court, Hale County; B. M. Miller, Judge.

Action by Octavia Sledge against the Western Union Telegraph Company for damages for failure to promptly deliver telegram. Judgment for defendant, and plaintiff appeals. Affirmed.

The message was addressed to Mrs. R. C. Jones, a sister of Miss Sledge, and directed her to meet her at the depot at Woodstock at a certain time. The message was not delivered until the day after. It was shown in the evidence that from the place where passengers got off the Alabama Great Southern

train at Woodstock to Mrs. Jones' front porch was 197 feet, and a slight decline all the way. For the pleading, etc., in this case, see the former report of same in 153 Ala. 291, 45 South. 59. The charges referred to in the opinion are as follows:

"(1) I charge you, gentlemen of the jury, that in determining whether the agents or servants of the defendant were guilty of wanton disregard of the rights of the plaintiff it is not necessary to believe or find from the evidence that any agent or servant of the defendant intentionally injured the plaintiff by failing to transmit or deliver the message; but if you believe from the evidence that any agent, servant, or employé of the defendant wantonly failed to transmit or deliver such message, then you may impose punitive damages, although you may believe that no agent, servant, or employé of defendant had any intention or desire to injure defendant."

"(4) I charge you, gentlemen of the jury, that if you believe the evidence in this case you must return a verdict of 25 cents; and if you further believe from the evidence that the agents, servants, or employés of defendant, or any of them, charged with the duty of transmitting or delivering said message, made no effort to transmit said message in a reasonable time, you may assess punitive damages in such sum as you think proper, but the total damages awarded must not exceed \$1,000."

De Graffenried & Evins, for appellant.  
George H. Fearons, Thomas E. Knight, and Campbell & Johnson, for appellee.

ANDERSON, J. This is the second appeal in this case, and, as held in the former decision of the court (153 Ala. 291, 45 South. 59), the plaintiff was not entitled to recover damages for mental anguish, and the trial court did not err in striking this claim from the complaint. Nor do we think that the plaintiff was entitled to punitive damages under the evidence. The telegram was a "Meet me at the train," or what has been termed a mere social message, and falls within the rule laid down in the Westmoreland Case, 151 Ala. 319, 44 South. 382, and is unlike the line of cases cited and followed in the case of Western Union Co. v. Crowley, 48 South. 381. We do not think that the mere fact that the agent at Greensboro knew that plaintiff was a young lady was of itself enough to differentiate this case from the Westmoreland Case, supra. Moreover, the proof shows that he sent the message as far as Montgomery within eight minutes after the receipt of same, and the delay was caused by operators or agents who could not have been apprised, by the face of the message, of any emergencies that might arise out of a failure of the sendee to meet the plaintiff at Woodstock station upon her arrival.

Since the trial court could have charged out punitive damages, the refusal of charges 1 and 4, requested by the plaintiff, if error, which we do not decide, was error without injury.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and EVANS, JJ., concur.

### WEBB v. JONES et al.

(Supreme Court of Alabama. Nov. 24, 1909.)

#### 1. EASEMENTS (§ 14\*)—RIGHT OF WAY—SERVITUDE.

Where the habendum of an executors' deed provided that the executors reserved the right of egress and ingress over the land conveyed to and from certain lands belonging to the estate, the provision created a servitude of a right of passage over the lands conveyed, whether the provision operated as a reservation or exception.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 40; Dec. Dig. § 14.\*]

#### 2. EASEMENTS (§ 3\*)—CONSTRUCTION—APPURTENANT OR GROSS.

Executors held in their official capacity title to certain land in trust, part of which was inaccessible to a highway, except over the balance of the land, which they conveyed by deed, reserving to them a right of egress and ingress over the land conveyed to and from such other lands. Held, that such provision was not an easement in gross, creating a void personal right in the executors, but created an easement appurtenant to the reserved land, under Code, § 3306, providing that every estate in lands is to be taken as a fee, though words necessary to create an estate of inheritance are not used, unless the contrary clearly appears.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 10; Dec. Dig. § 3.\*]

#### 3. EASEMENTS (§ 61\*)—OBSTRUCTION—RIGHT TO SUE.

Where the owner of a servient estate subject to an easement of a right of way obstructed complainants' use thereof, and threatened to continue to absolutely prevent a further use of the right of way, which might ripen into a legal right to maintain the obstruction, complainants were entitled to sue to enforce their easement, notwithstanding the dominant estate had been let to tenants for agricultural purposes.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 134-137; Dec. Dig. § 61.\*]

#### 4. EASEMENTS (§ 61\*)—OBSTRUCTION—DEMAND.

Where defendants had erected a wire fence along the entire line between the dominant and servient estates, thereby preventing all use of a right of way by complainants and their tenant, and had notified the tenant that they denied his right to use the way and would prevent such use in the future, a demand that defendants open the way was not essential to the maintenance of a suit by complainants to enforce their easement.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 133; Dec. Dig. § 61.\*]

#### 5. SPECIFIC PERFORMANCE (§ 114\*)—PLEADING—EASEMENTS—DESCRIPTION.

Where a deed reserved a right of way to and from certain lands belonging to the estate of deceased lying west of the lands conveyed,

and the lands were accurately described in the bill to enforce the demand, it being alleged that they were the only lands belonging to the estate lying west of the lands conveyed, the dominant estate was sufficiently described to entitle the court to decree specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 363; Dec. Dig. § 114.\*]

**6. SPECIFIC PERFORMANCE (§ 127\*)—ENFORCEMENTS—EASEMENTS—RIGHT OF WAY.**

Where a servient tenant denied the dominant tenant's right to the use of a way under an easement reserved in a deed, which was clearly appurtenant to the dominant estate, it was the duty of the court to enforce specific performance by establishing the right, defining the tract, and enjoining disturbance of the way, if it had not been previously fixed either by deed or act of the parties.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 406–411; Dec. Dig. § 127.\*]

Appeal from Chancery Court, Marengo County; Thomas H. Smith, Chancellor.

Bill by V. M. Jones and others against John C. Webb for the establishment and perpetuation of a right of way. Decree for complainants, and defendant appeals. Affirmed.

Pettus, Jeffries & Pettus and Henry McDaniel, for appellant. Reese & Reese, Daniel Partridge, Jr., and A. D. Pitts, for appellees.

SAYRE, J. Henry W. Reese left a will by which he appointed Henry F. Reese, his son, and Henry Withers, his son-in-law, his executors and trustees to perform the trusts created thereby, and devised to them the land described in the bill in trust for his children, with power to sell at discretion. The bill is filed by the parties named in their capacities as executors and as individuals; they with Virginia M. Jones, and the children of Mrs. Withers, deceased, constituting the parties complainant and all the devisees under the will. In the year 1900 the executors, by a deed executed in pursuance of the power given them by the will, conveyed the land to Mrs. Kelly, under whom the defendant, appellant here, claims by mesne conveyances. In the habendum there were these words: "The party of the first part (meaning the executors) expressly reserves the right of egress and ingress over the above land to and from certain lands belonging to said estate which lie westerly of the lands herein sold." The bill is filed against Webb to have a reasonably convenient way of egress and ingress over the lands defined, established, and perpetuated by the orders and decree of the chancery court.

The controverted rights of the parties depend upon the purpose and effect of that clause of the deed quoted above. Whether that clause operated as reservation or as exception, there can be no reason to doubt that it fastened the servitude of a right of passage over the land now the property of the defendant. *Webb v. Robbins*, 77 Ala. 176;

*Jackson v. Snodgrass*, 140 Ala. 365, 37 South. 246. Nor is it an objection to the easement that it arises out of the deed made by executors in the execution of their trust. *Washburn on Easements*, 261. But the appellant contends that the clause must be held to take effect as a reservation; the end of this argument being that, since a reservation operates as the creation of a new right issuing out of the land conveyed, the absence of words of inheritance qualifying the reservation must in reason coerce the court to the conclusion that the easement so created is an easement in gross, or personal to the executors. And, further, the argument along this line takes the form of an assertion that the reservation by the executors of a right personal to themselves is a breach of trust, and therefore void. Upon the assertion that the easement reserved, if valid for any purpose, was personal to the executors, is grounded also the contention that there is a misjoinder of the other parties complainant.

We assign no overshadowing influence to the fact that the clause in question was cast in the form of a reservation. The prime purpose of all interpretation is to arrive at the intention of the parties to the instrument under examination. It is true that the bias of presumptive construction must incline ordinarily against a grantor, whose office it is to speak. *Jacobs v. Roach*, 49 South. 576. But the learning in respect to the distinctions between reservations and exceptions is artificial, and so apt not to be observed in the preparation of deeds that at this time the courts construe a reservation as an exception, and vice versa, in order to give effect to the obvious intention of the parties. *Bowen v. Conner*, 6 Cush. (Mass.) 132; *Winthrop v. Fairbanks*, 41 Me. 307; *White v. N. Y.*, etc., R. R. Co., 156 Mass. 181, 30 N. E. 612. "As an exception may be created by words of reservation, little reliance can be placed upon the language used in determining whether the right is by way of exception or by way of reservation." *Claffin v. B. & A. R. R. Co.*, 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638: Form, then, must be brushed aside when once the court, looking through form to substance, is able to discern clearly the real purpose and intent of the parties. Looking to the condition of the estate granted and the surroundings of the parties (*Salisbury v. Andrews*, 19 Pick. [Mass.] 250; *Clark v. Devoe*, 124 N. Y. 120, 26 N. E. 275, 21 Am. St. Rep. 652), there can be no real difficulty in reaching the conclusion that the grantors intended to secure an easement of passage over the land which should be appurtenant to the land retained.

The tract retained, in favor of which the servitude was stipulated, was bounded on the west and south by the estate of another owner, and by creeks and sloughs which made

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

egress and ingress on those sides impracticable, if not impossible. The land conveyed to appellant's predecessor in title lay along the north and east. Van Dorn and Demopolis were the nearest market places, and these points had been reached by roads leading across the land conveyed to the public road between Van Dorn and Arcola. The vendors were in the execution of powers granted to them in trust for themselves and other devisees of the late owner. Presumptively they were acting for the trust estate as an entirety, and not merely for their personal advantage. If, as appellant contends, the reservation of a right of way personal to the executors would have been a breach of trust on their part, this must be a circumstance which would incline the court to hold the easement appurtenant, and not in gross. Moreover, the value of the tract retained depended upon its accessibility from the public road. It was clear that the tract retained would be wholly inaccessible, unless the grantors and their successors in title were to have the right to use some way over the tract conveyed. Under these circumstances it is difficult to believe that the parties intended to stipulate for an easement personal to the executors. On the contrary, the reasonable conclusion arising naturally out of the situation is that the easement was reserved for the benefit of the adjacent land retained.

And this consideration is conclusive to the same effect. Section 3396 of the Code provides that every estate in lands is to be taken as a fee simple, although the words necessary to create an estate of inheritance are not used, unless it clearly appears that a less estate was intended. In *Karmuller v. Krotz*, 18 Iowa, 352, tenants in common entered into a deed of partition which contained this clause: "It is also further distinctly understood that the said John Krotz should have the privilege of a road through the land of the said, Bernhart, so as to enable him to take the nearest and best road to Dubuque." Judge Dillon, speaking for the court, and noting that by a statute of that state the term "heirs" or other technical words of inheritance were not necessary to create and convey an estate in fee simple, held that words of inheritance were not necessary to make the right of way contracted for appurtenant to the land, and that it was appurtenant, and not a personal privilege merely.

On the authority of *Walker v. Clifford*, 128 Ala. 67, 29 South. 588, 86 Am. St. Rep. 74, the appellant contends that it appears from the bill that complainants have a reversionary interest only in the alleged dominant estate, and cannot, therefore, maintain their bill to enforce a right of way appurtenant to that estate—that a bill for that purpose must be exhibited by the tenant. To us it seems that the case relied upon is easily distinguishable on its facts from the case at bar, and that the principles declared give sup-

port to the bill in this cause. In the case referred to different parts of a building had been let by the owner to different tenants. One tenant, by keeping a door closed, denied and obstructed the right of the other to pass through a part of the building occupied by the first. The landlord filed his bill to enforce the claimed right of way, basing his equity on the fact that the maintenance of the closed door would impose liability upon him under his contract with the tenant who claimed to be suffering by the obstruction. Relief was denied on the ground that the obstruction of the alleged easement worked no injury to complainant's reversion, though there were peculiarities of the case which probably contributed to the result. Here the landlord is denied access to his own estate, and its present as well as prospective value is impaired by an asserted right on the part of the appellant which, unless interrupted by a decree, will in the course of time ripen into a legal right to maintain the obstruction. It can be no sufficient answer to the bill to say that the tenant also may have a right. The obstruction is, on the averments of the bill, not only a wrong to the tenant's possession, but to the right of the complainants to have ingress and egress for the purpose of hauling timber, as the bill complains, or, as might have been added, for any other such legitimate purpose as may take an owner to farmlands occupied by his tenants, and is an injury to complainants' reversionary interest as well, in that it impairs the salable value of the estate. In *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338, sustaining the equitable jurisdiction to protect the due enjoyment of easements, it was considered that "to deny to the owner of land suited for agricultural purposes, all access to it is to take so much from the general wealth of the community, and is, therefore, an indirect injury to the public, as well as a direct wrong to the individual proprietor."

Nor will it do to say that the nuisance may be abated before the determination of the lease. Thus in England, where the doctrine of ancient lights prevails, an action was maintained by a reversioner for the obstruction of a window, an ancient light, whereby a room was rendered dark, uncomfortable, and unfit for habitation, although it was shown that the obstruction might easily be removed in the course of two or three days. So for obstructing the flue of a chimney, and for diverting a stream of water whereby the soil was impoverished, and for obstructing a way whereby the enjoyment of premises is rendered inconvenient. *Tinsman v. Railroad Company*, 25 N. J. Law, 255, 64 Am. Dec. 415. So, here, we do not doubt that complainants may maintain their bill, notwithstanding they may have let the dominant estate, or some of it, as the bill avers, to tenants for agricultural purposes.

Further demurring, the appellant contends

that the bill should have shown a demand by the complainants before bill filed to be permitted to use the way secured by the deed. The averment of the bill is that appellant has erected a wire fence along the entire line between the dominant and the servient estates, thereby preventing all mode of ingress and egress to and from complainants' property retained, and has notified the tenant of complainants now occupying their land that he denies and will continue to deny and prevent the use of any way over his land, and is obstructing and preventing, or attempting to obstruct and prevent, orators, their agents, servants, employes, and contractors, from going on said land, and thereby preventing or attempting to prevent them from removing the timber from complainants' land. On these facts it would seem that a demand for an open way would be useless, and the rights of the complainants are just what they would be, had the making and refusal of such demand been alleged. *Lide v. Hadley*, supra. We cannot infer, from anything appearing on the face of the bill, that appellant has denied the right of complainants to a way on the ground that the servitude imposed in practice has been in excess of that secured by the stipulation. The excess of burden here referred to by the appellant is not an excessive use of any way, but the use of a number of ways, whereas the reservation was of "a right of egress and ingress over the land" sold to appellant. The maps appended to the bill show subsidiary roads leading over and about the appellant's land; but they show two main roads leading from the same, or very nearly the same, point on the line between the lands belonging to the respective parties, over the land conveyed to appellant, and to different points on the Van Dorn and Arcola road, and the averment is that these roads had been in common use by persons living on complainants' land for 30 years before the deed to Mrs. Kelly, and since. It is not necessary at this time, when the hearing is upon the bill only, to determine whether the reservation secured to the appellees the right to use both these roads, or, indeed, to use either in preference to another to be laid off possibly in better accord with the reasonable convenience of both parties; but we do not understand that under the circumstances detailed as to the use of these roads, or even in the absence of any common use covering a long period, the use of both by the appellees would justify the appellant in a denial of their right to the use of either, although it should be determined that appellees have a right to a way only, and not to both the roads heretofore commonly used. We accordingly rule that those grounds of demurrer which take the point that the appellees seek to impose an excessive and unreasonable burden on the appellant's land were properly overruled.

One other point is briefly argued by appellant. He insists that since the appellees were, at the time the deed was made, owners of both the dominant and servient estates, it was essential to the validity of the easement reserved that the dominant estate be clearly described, for otherwise the grantee might have his estate made servient to the lands not contemplated at the time of the reservation and wholly different from the lands for the benefit of which the reservation was made. In other words, the contention is that the contract is so uncertain that the court cannot undertake to decree a specific performance. We think, however, that the bill is sufficient to relieve the court of apprehension on that score. The deed reserves a way to and from certain lands belonging to the estate of Henry W. Reese, deceased, which lie westerly of the lands therein sold. These lands are accurately shown in the bill, and the averment is that they are the only lands belonging to said estate which lie westerly of the land conveyed to appellant. That is sufficiently certain which can be made certain.

Finally, if the way or ways to which the appellees became entitled by virtue of the reservation in the deed were not then fixed by the situation and condition of the respective estates and the use of the ways before and after the date of the deed, the right to have a way was none the less reserved, and in view of the unqualified denial of the right it seems clear, on the averments of the bill, that it will be the duty of the court to enforce specific performance by establishing the right, defining the track, and enjoining the disturbance of the way. *Lide v. Hadley*, supra.

It only remains to be said, further, that we are of opinion that the demurrer to the bill was properly overruled, and that, in consequence, the decree of the chancery court must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

#### JONES v. BARKER.

(Supreme Court of Alabama. Nov. 9, 1909.)

#### 1. HIGHWAYS (§ 158\*) — OBSTRUCTIONS—COMPLAINT—SUFFICIENCY.

A bill to abate an obstruction on a roadway, which alleges that the way is a public way by reason of adverse user for 40 years, that the roadway was dedicated for a public highway, and that the roadway is a way of necessity, because furnishing to complainant the only way to market without going at least two miles out of the direct way, shows equity in complainant as against a demurrer.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 431; Dec. Dig. § 158.\*]

#### 2. EQUITY (§ 232\*)—PLEADING—DEMURRERS.

Where the equity of a bill rests on several grounds, one or more of which is sufficiently al-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

leged, demurrers addressed to the bill as a whole, and not testing the equity as to any particular ground, are properly overruled, though there is doubt as to the sufficiency of the averments as to some of the grounds.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 508; Dec. Dig. § 232.\*]

Appeal from City Court of Selma; J. W. Mabry, Judge.

Suit by Joan Ferguson Barker against Edwin Carlisle Jones to remove obstructions across a roadway. From a decree overruling demurrers to the bill, defendant appeals. Affirmed.

The chancellor's decree is as follows: "Complainant predicates his right to the use of the roads in question on three distinct grounds: First, by prescription; second, by reason of its having been dedicated to the public; and, third, as a way of necessity. An easement by prescription may be acquired by an individual or by the public, and so may a highway be established by a prescription; but the user on which the title and right is predicated must have been adverse to the owner of the soil, not merely permissive, and must have been continuous and uninterrupted for a period of 20 years. And the mere user of land for road purposes, involving as it were ordinarily no injury to the owner, carries with it no presumption of adverse claim or claim of right to use the road. And in the absence of facts and circumstances to the contrary, such user will be presumed to have been permissive merely. [Authorities cited here.] The bill avers that the road is a public highway; that it was known for over 40 years as Long or Race street, and among other things avers that it has been used by the public as and for a public road and highway for 30 years or more; that such use has been by the public exclusive, and was at all times open, notorious, adverse, and visible to all persons whatsoever; and that such use was by the public uninterrupted and continued, until obstructed by respondent as averred. The bill seeks to show that there has been a dedication of the road by reason of the land being platted into lots, and lots sold in reference to the road as thereon laid off; but its allegations in this behalf are insufficient. Its averments in substance are that the land over 40 years ago was platted and laid off into lots, and so shown by old maps of the town of Selma, and bounded by said Long or Race street, and lots were sold off and conveyances and deeds made, referring to and bounding the same by said streets; but there is no averment that the then owner platted the land, or made the maps, or sold the lots, or any of them [citing authorities]. I think the other facts averred in the bill, going to show a former dedication and its acceptance by the public, are sufficient. A dedication may be expressed, or it may be implied from conduct

or acts; it may be created by a single act, or by a series of acts; it may be created by a writing or orally. The bill avers that the Ferguson road has been continuously used by the public for about 40 years; that this road in the greater part of section 29 was really a street, and was known for over 40 years as Long or Race street, and is so marked and designated on a number of maps made of said tract, which maps have been promulgated by the makers thereof and used by the public; that said road was dedicated to the public; that a part of said road was dedicated to the public and opened to them by Hugh Ferguson, or the owner of said land prior to him, and a part of said land was dedicated to the public and opened to them by George O. Barker, or a prior owner of said land; that said road was accepted by the public and used by them for more than 30 years, and has been in continuous use by the public as a highway since it was so designated, up to the time of the obstruction complained of. [Authorities cited here.] There are other matters in the decree, not deemed necessary to be here set out.

A. L. McLeod, for appellant. Pettus, Jeffries & Pettus, for appellee.

MAYFIELD, J. The bill was filed by the appellee against the appellant to remove an obstruction from, over, and across a road or way leading to and from appellee's farm, which road or way crossed a part of appellant's farm, which adjoined that of appellee. The bill alleges the ownership of the respective farms by appellee and appellant and those under whom they claimed, and a use of such way by the public continuously for a long period, 30 or 40 years; that the way was known both as a road and a street, and was so used for 40 years by appellee, her tenants, and those under whom she claimed, as well as by the public; that this use was at all times open, notorious, adverse, and continuous; that the road in question led from appellee's farm to Selma, Ala., the market place of appellee's tenants and employes; that, with this road obstructed, appellee's only way to market was obstructed; that she could not get to market by any other practicable route, without going at least two miles out of the direct way; that, owing to the peculiar location of appellee's farm with regard to the obstruction, she suffers annoyances different in degree and kind from those suffered by the public in consequence of the obstruction.

The obstruction consisted of ditches and wire fences, placed across the road by appellant. A map and plat of the lands belonging to appellee, to appellant, and to their neighbors is attached as a part of the bill, showing the location of the roads and of the obstructions as to the lands in question. While there is not a perfect correspondence

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

between the location of the road as made by the averments of the bill and that as it appears from an inspection of the map attached, yet the difference is only such as might reasonably be expected from such descriptions. The difference is slight, and not at all material to the equity or the sufficiency of the bill in its averments. The bill is properly and confessedly drafted after the form of the bill in the case of *Cabbell v. Williams*, 127 Ala. 320, 28 South. 405. On the authority of that case, and that of *Cochran v. Purser*, 152 Ala. 354, 44 South. 579, the averments of the bill are sufficient.

The equity of the bill rests upon three grounds: First, prescription; second, dedication; third, right of way of necessity. The demurrers are addressed to the bill as a whole, and are not intended to test the equity as to any particular one of the three grounds. There may be doubt as to the sufficiency of the averments as to one of the grounds, but not as to all. The demurrers were therefore properly overruled.

We have not attempted to treat each phase of the bill separately, but only to determine the correctness of the decree from which the appeal is taken. The reporter will set out the opinion of the chancellor in the statement of facts, which opinion treats of the separate phases of the bill.

The decree of the chancellor is affirmed.  
Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

#### DUKE v. SOUTHERN HARDWARE & SUPPLY CO.

(Supreme Court of Alabama. June 30, 1909.  
Rehearing Denied Dec. 16, 1909.)

##### 1. MONEY LENT (§ 7\*) — TIME FOR PAYMENT — PRESUMPTIONS.

Where money is lent without any agreement as to the time of payment, the presumption is that it is due on demand.

[Ed. Note.—For other cases, see *Money Lent*, Dec. Dig. § 7.\*]

##### 2. MONEY LENT (§ 7\*) — EVIDENCE — SUFFICIENCY.

In an action to recover money lent, evidence held insufficient to show that there was any agreement that the money was not to be paid until defendant was able to pay.

[Ed. Note.—For other cases, see *Money Lent*, Cent. Dig. § 13; Dec. Dig. § 7.\*]

McClellan and Anderson, JJ., dissenting.

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Southern Hardware & Supply Company against H. Rowland Duke. Judgment for plaintiff, and defendant appeals. Affirmed.

The testimony sufficiently appears from the dissenting opinion. The following char-

ges were refused to the defendant: "(7) The court charges the jury that the burden was on the plaintiff to show that its claim is now due; and, unless the plaintiff has so reasonably satisfied you, you must find for the defendant. (8) The court charges the jury that, if they believe from the evidence that the money was loaned to the defendant with the understanding that he was to pay the same back when he got able, then you must find for the defendant, unless you further believe from the evidence that the defendant was able to pay this money back. (9) The court charges the jury that, if they believe from the evidence that the money was loaned to the defendant with the understanding that it was to be paid back to the plaintiff when the defendant got able to pay it back, then you must find for the defendant, unless the evidence reasonably satisfies you that the defendant is able to pay the money back. (10) The court charges the jury that if they believe from the evidence that the agreement between the parties was that the defendant should not pay this money back until he was able, then your verdict must be for the defendant."

Inge & McCorvey, for appellant. McIntosh & Rich, for appellee.

SIMPSON, J. When one man loans money to another, if nothing is said about the time of payment, the presumption is that it is due on demand. I do not find, in the record, any evidence tending to show that, at the time the money was loaned, there was any agreement that it was not to be repaid until the defendant was able. The statements of the witness Hardaway Young do not show any such agreement, but only a purpose to allow the defendant to pay as he could out of his salary, and, when defendant left their employment, he considered the money due.

The circumstances of the loan are clearly detailed, and show that at that time there was no agreement that the money was not to be paid until the defendant was able, and there was no controversy about the fact that there has been a demand made for payment. Consequently charge 7, requested by the defendant was misleading, and properly refused.

The judgment should be affirmed.

DOWDELL, C. J., and DENSON, MAYFIELD, and SAYRE, JJ., concur.

McClellan, J. (dissenting). My Brothers err, in my opinion, in their conclusion that there was no evidence adduced on the trial from which the jury might infer that the demand sued on should become due when defendant was able to pay. If such an inference was open to adoption by the jury, then charges 7 to 10, inclusive, should

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



have been given as requested by defendant, and their refusal was error to reverse. There can be no doubting the proposition that the actor on a money demand has the burden to show that his demand was due at the time he instituted his action. In this instance, it was, in my judgment, open to the jury to find from the evidence that the loan should become due when Duke was able to pay. This is demonstrable, I think, by the two quotations from the testimony offered for the plaintiff. The first: "When did that (having reference to the sums loaned defendant by the plaintiff) mature, Mr. Young, and become due? A. It matured at such time as he severed his connection—his agreement was to pay so much out of his salary; that was to bear interest from the dates of the advancements. Q. You say it became due from the date he severed his connection with the Southern Hardware & Supply Company. A. That is supposed to be the date." The witness then testified as follows: "That was on the 15th of March, 1907, and then all this money was due." This testimony, alone, denies the application of the presumption to which my Brothers give approval.

The witness Young further testified: "Q. Mr. Young, what was the agreement between you and Mr. Duke as to the payment of this amount? A. At the time he got the loan? Q. What length of time allowed him? A. He was to pay a certain amount out of his salary. Q. What pro rata? A. No special agreement as to any particular amount, certain amount. Q. He was to pay it back as he was able out of his salary? A. As he was able to pay, the assumption being—(here interrupted by counsel with, "I don't want any assumption)." To me it appears obvious that these were jury questions: Whether such an agreement was made to pay when able, or to pay out of his salary when able; and whether such agreement attended the loan or the arrangements for it.

Kraus v. Torrey, 146 Ala. 548, 40 South. 956, is a direct authority in favor of the validity of a condition to pay "when able." See, also, 1 Randolph's Com. Paper, § 111, and authorities in notes.

The judgment should, in my opinion, be reversed. Justice ANDERSON concurs in the views of the writer.

### SANDERS v. WILLIAMS.

(Supreme Court of Alabama. Dec. 16, 1909.)

#### 1. APPEAL AND ERROR (§ 719\*)—ASSIGNMENTS OF ERROR—RULINGS ON DEMURRERS.

Rulings sustaining demurrers to pleas cannot be considered, in the absence of assignments of error questioning the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2973; Dec. Dig. § 719.\*]

#### 2. INFANTS (§ 93\*)—AVOIDANCE OF CONTRACT—PLEADING.

The avoidance of a contract by an infant, to avail a party affected thereby, must be specially pleaded, under Code 1907, § 5331.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 279, 282; Dec. Dig. § 93.\*]

#### 3. INFANTS (§ 94\*)—AVOIDANCE OF CONTRACT—PLEADING.

In an action for breach of warranty in the sale of a horse, based on an outstanding mortgage which plaintiff paid, the defense that the mortgage was avoided by an infant, who executed it, was not comprehended in the general issue pleaded, and, not being specially pleaded, is not available.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 289, 290; Dec. Dig. § 94.\*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by Dan Williams against J. D. Sanders. From a judgment for plaintiff, defendant appeals. Affirmed.

Espy & Farmer, for appellant. B. F. Reid and R. D. Crawford, for appellee.

MCCLELLAN, J. Action, by appellee against appellant, for breach of warranty in the sale of a horse; the alleged breach consisting in the existence of an outstanding incumbrance upon the animal created by one Rolen, an original purchaser thereof from the Dothan Mule Company. The court sustained plaintiff's demurrers to pleas 2 and 3, and counsel for appellant insist, in brief, that this action was error. There are no assignments of error questioning such rulings. We must, accordingly, refrain from considering them. The only errors assigned are those predicated upon the giving of the general affirmative charge for the plaintiff, and, on the other hand, its refusal to the defendant. The trial was solely upon issues made by a general traverse of the allegations of the complaint.

The character and basis of the action has been indicated. Several questions are mooted and discussed in brief for appellant; but according to our view they cannot be treated and decided on this appeal, unless it can be said that the general issue alone affected to raise the same questions of law that the rulings on the demurrers raised. The filing of these pleas (2 and 3) clearly evidence the view of counsel that the matter of defense set forth in the pleas required special assertion, and were not comprehended in the general traverse, also pleaded. Independent of any influence of this fact, we will briefly consider the inquiry that the general issue embraced the matters of defense now argued in brief for appellant.

Rolen bought the horse from the Dothan Mule Company. He paid part of the purchase money in cash, and gave a mortgage, covering the animal, to secure the balance. Rolen was an infant at the time, and had not, when this suit was instituted, attained his majority. He sold the animal to defendant; the testi-

mony, as appears from the bill, which purports to contain all of the evidence, being entirely silent in respect to whether the sale was unconditional, or in express, implied, or otherwise, recognition of or subordination to the mortgage to the Dothan Mule Company. The defendant traded the mule to the plaintiff, warranting the freedom of the animal from incumbrance or lien. The mortgagee, under the terms of the mortgage and after its law day, demanded the horse of the plaintiff, who, to avoid seizure and sale, paid the mortgage debt. There seems not to have been, nor is there now, any contention that the registration of the mortgage was not legally effected.

It is urged for appellant that the sale of the animal by Rolan was an act of disaffirmance of the contract of mortgage, thereby rendering the instrument a nullity, and hence relieving the animal, in the hands of plaintiff, free from the charge thereof, and, in consequence, obviating the breach of warranty declared on in the complaint. Assuming for the occasion only that an infant, before attaining his majority, may avoid his contract, and also that an unconditional sale of the chattel evinces an intention to not be bound by the mortgage, and that such an act avoids the mortgage, we think there can be no serious doubt but that, in order to avail a party affected by the avoidance (granting for the argument that he may plead it), the matter must be specially pleaded. Our statute requires the special pleading of all matter of defense, unless reliance is put solely on a denial of the plaintiff's cause of action. Code 1907, § 5331. In many of our decisions the substance of the statute, in this regard, has been expressed in the terms: The general issue denies and puts in issue the truth of the averments of the complaint.

The complaint here, aside from other presently unimportant averments, alleges that the horse in question was incumbered with a mortgage to the Dothan Mule Company. The mortgage's legal execution and existence was not denied, except as that resulted from an act imputed to the mortgagor, subsequent to the execution of that instrument. The mortgage was valid, is the effect of the contention, until the mortgagor, an infant, disaffirmed and avoided his only voidable, not void, act. The plaintiff, in effect, says: "I was compelled to pay an incumbrance, a mortgage, resting upon the animal, and you assured me there was none." In reply the defendant would say: "There was such a mortgage, efficacious and valid, but the mortgagor exercised an election to avoid it; and hence I am excused from liability for breach of warranty on that account." Unquestionably the complainant's allegations, in that respect, were proven prima facie by the introduction of the mortgage duly executed. To avoid it the act of the mortgagor must be invoked, whereby is necessarily implied that a valid mortgage

did exist but an election availed of aborted it.

The basis of the act operating, it is insisted, the avoidance of the mortgage, was the infancy of the mortgagor. Infancy is, it is never now doubted, matter of special plea. If Rolan had been haled into court to answer the Dothan Mule Company's suit, either for the debt or to recover the horse, and Rolan had relied upon his minority to relieve him from the binding qualities of his contract, merely voidable, it is evident he must have pleaded specially his infancy. Can this defendant, asserting, in defense, that identical power given the infant, stand upon any higher ground, or enjoy a more liberal indulgence than the infant himself, could have enjoyed? We think not.

Since the defensive matters urged in brief were not specially pleaded, and were not comprehended in the general issue pleaded, the result must be an affirmance of the judgment below upon the only two errors assigned.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

### FALLEY v. FALLEY.

(Supreme Court of Alabama. Dec. 14, 1900.)

#### 1. WORDS AND PHRASES—"FILED."

A paper is "filed" when it is delivered to the proper official, charged with the duty of filing the paper and with making the appropriate indorsements thereon.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2764-2770.]

#### 2. DIVORCE (§ 160\*)—SUBMISSION OF CAUSE IN VACATION—REQUEST FILED.

Under Code 1907, § 3164 (Gen. Acts 1898-99, p. 118), providing that where a decree pro confesso is taken in divorce, and the cause is ready for submission, the solicitor shall "file" a written request with the register to deliver the papers in said cause to the chancellor and file his note of testimony, and the clerk shall deliver all papers in vacation to the chancellor, etc., a letter, written by solicitors for complainant in divorce, after default, to the register, requesting that, "after making out note of testimony, send it to us for submission in vacation. We will attend to having it submitted"—is a sufficient writing "filed" with the register to authorize a decree in vacation.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 160.\*]

#### 3. DIVORCE (§ 146\*)—DEFAULT DECREE—SUBMISSION IN VACATION—CUSTODY OF CHILDREN.

Under Code 1907, § 3164, authorizing uncontested divorce cases to be submitted and decided in vacation, which created an exception to the general rule that respondent must consent to having a case decided in vacation, that a complaint in an uncontested divorce case asked for the custody of children did not deprive the proceeding of its character as a divorce case under the statute, in view of Code 1907, § 3808, providing that on granting a divorce the court may commit and regulate the custody of children, etc.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 146.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Chancery Court, Crenshaw County; L. D. Gardner, Chancellor.

Suit by Susan Falley against Jeff Falley. From a decree for complainant, respondent appeals. Affirmed.

Parks & Rankin, for appellant. Foster, Samford & Carroll, for appellee.

MCCLELLAN, J. The decree appealed from granted appellee a divorce, and, as prayed in her bill, she was given the custody of the children of the union. The respondent made no defense to the bill, and decree pro confesso appears to have been regularly entered against him. Subsequent to the entry of this decree the solicitors of record for the complainant posted a letter addressed to the register, and it was promptly received by him, noting the inclosure therewith of the testimony taken in support of the averments of the bill, and also requesting him to make out a note of the testimony in the cause. The letter then proceeds: "After making out note of testimony, send it to us for submission in vacation. We will attend to having it submitted. \* \* \*" The note of testimony recites, preliminarily, the submission of the cause in vacation. By the act approved December 14, 1898 (Gen. Acts 1898-99, p. 118), now Code 1907, § 3164, the submission of, and adjudication in, divorce cases in vacation was provided; certain conditions being laid upon the power and right to so submit and adjudge. It is now objected for appellant that this decree is null, because no such written request was filed with the register as the cited statute required.

The only stipulation with respect to the mode of expression of the desire for submission in vacation is that it shall be in writing and shall be filed with the clerk. The legal term "file" has been treated here in *Phillips v. Beene's Adm'r*, 38 Ala. 248, and it was then ruled, and with obvious correctness we think, that a paper was filed when it was delivered to the proper official charged with the duty of filing the paper and with making the appropriate indorsement thereon. It is evident that the act of affixing the proper indorsement on the paper is a duty to be performed by the officer, and with a failure of the officer to seasonably and properly indorse the paper the party delivering it cannot be prejudiced. He has done all that is required when he delivers the paper to the proper official. *Phillips v. Beene's Adm'r*, supra. The register and chancellor took this paper to be a "request" within the statute. By no sort of construction can the paper be read otherwise than as evincing the desire of complainant's solicitors of record that the cause be submitted in vacation. It so declares. It is true the paper does not follow the language of the statute in respect of a request to deliver the papers in the cause to the chancellor; but it is requested that the papers be sent to complainant's solicitors for submission in vaca-

tion, and the assurance is given that they would attend to the submission. We think it would be rather too narrow, in view of the object the statute intends to conserve, to require the request thereunder to pursue the statute's language. Whether the register sent the papers in the cause to the chancellor by one means or another cannot, we think, be important. That he might do so by hand, as well as by post or express, is clear. If so, he can certainly effect the purpose through solicitors in the cause. While we feel impelled to sustain the decree on this point of attack, it cannot be denied that the better practice under this statute (section 3164) would be to make the "request" provided more formal than was here done.

It is further objected that the decree is erroneous because, without the consent of the respondent, a submission in vacation cannot be properly effected except in divorce cases, and the custody of children being involved, in addition to the marriage relation, the submission was abortive; the respondent not consenting. This contention is responded to for appellee by the citation of Code 1907, § 3808, wherein it is provided that, "upon granting a divorce, the court" may commit and regulate the custody, education, etc., of the children of the marriage as therein stipulated. It is insisted for appellant that the statute does not commit the exercise of the powers enumerated by the chancellor, but contemplates their exercise by the court as distinguished from him. And in support of this contention attention is called to the fact that section 3808 was in existence many years before the act of 1898-99 was passed. By express provision of Code 1907, § 3164, a decree in a divorce case, rendered in vacation in accordance with its terms, is as binding and final as if rendered in term time. The effect of this provision forbids, in such cases, any distinguishing between the court and the chancellor. The act of the latter is the act of the former in uncontested divorce cases. Accordingly the inquiry is thus resolved: Did the inclusion of the averment and prayer for relief in respect of the custody of the children of the marriage then being sought to be annulled deprive the proceeding of its character as a "divorce case," as provided in section 3164?

We do not think the statutes should be given a construction that would require an affirmative response to the stated inquiry. The disposition of the children of a dissolved union is too intimately related to the major act of dissolution to permit the limitation of the term "divorce cases" to those only where dissolution was the sole prayer of the bill. In the anonymous case reported in 55 Ala. 428, noting the treatment of chancery's jurisdiction in respect of the disposition and protection of children in *Hansford v. Hansford*, 10 Ala. 561, among other of our decisions (see, also, 14 Cyc. p. 804), this power of disposition

and protection is accorded, in discussion, an intimacy and relation to the marriage state that leaves us no room for real doubt that "divorce cases" comprehends, in relative legislation, the disposition and protection of the offspring as naturally incident to the power of dissolution of the marriage relation. If the contrary view was adopted, we would impute to the Legislature the very improbable purpose to favor in submission and adjudication a cause for divorce not involving the disposition of offspring, and of denying to another cause involving such disposition that favor. If a substantial reason for such a discrimination appeared, more hesitation in construing the statute as we do might arise. But it is hardly imaginable that the lawmakers intended to hinder in adjudication the minor question, viz., the disposition of the offspring, and to favor the speedy decision of the major, viz., that of dissolution of the marriage state.

Aside from these considerations, our conclusion accords, we think, with the general legislative policy to give the opportunity for more prompt judgments in uncontested divorce cases; whereas, if the contrary view was approved, the delay in such cases between terms of court would ensue from the mere fact that offspring were sought to be affected by the judgment dissolving the marriage relation. In short, under these statutes, "divorce cases" include those causes where dissolution and the usual incidents thereof are sought in an appropriate bill.

The decree is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### TOUART v. RICKERT.

(Supreme Court of Alabama. Nov. 10, 1909.)

#### 1. DEEDS (§ 78\*)—VALIDITY—FRAUD—QUESTION FOR JURY.

Where the recitals in the acknowledgment of a deed are contradicted by evidence that the grantor at the time of its execution was in a state of coma, and the attesting witnesses and notary public are dead, the validity of the deed is for the jury.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 648; Dec. Dig. § 78.\*]

#### 2. WILLS (§ 417\*)—PASSING OF TITLE—TIME.

The interest devised by will takes effect immediately on the death of testator, though the will is not probated until several years later.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 896; Dec. Dig. § 417.\*]

#### 3. LIFE ESTATES (§ 23\*)—PURCHASER FROM LIFE TENANT—TITLE ACQUIRED.

Code 1907, § 3385, providing that wills creating estates in remainder after an estate for life are void as against creditors of the life tenant in possession, after possession of five years by him, unless the will is recorded, etc., affords no protection to a purchaser from a life tenant in possession under a will as against the remainderman, where the purchase

took place before the expiration of five years' possession by the tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 43, 44; Dec. Dig. § 23.\*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Ejectment by Anna Rickert against Kate Touart. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

L. H. & E. W. Faith and Tisdale J. Touart, for appellant. Gregory L. & H. T. Smith, for appellee.

DOWDELL, C. J. This is a statutory action of ejectment to recover possession of certain real estate described in the complaint and situate in the city of Mobile. Both parties claim to derive title from the same source—from one Mary Rodrigues. The appellee, plaintiff in the court below, claims title as devisee under the will of said Mary Rodrigues, made in 1879, and admitted to probate in April, 1907, seven years after the death of said Mary, which occurred on August 25, 1900. The appellant, defendant below, claims title under two conveyances purporting to have been made by said Mary Rodrigues, both bearing date, August 23, 1900, and recorded in the office of the probate judge of Mobile county on August 24, 1900, one being made to W. J. Wall for one piece of land, and the other to Margaret Wall for the remaining land sued for, a deed of conveyance by said Margaret Wall and W. J. Wall to Louis Touart, bearing date in March, 1903, and the will of said Louis Touart, duly probated, devising the land to appellant. Margaret Wall was the sister and only heir at law of said Mary Rodrigues, and W. J. Wall was the only living descendant of the said Margaret, who died in March or April, 1906. The mother of the appellee, Anna Rickert, was a cousin of the said Mary Rodrigues.

There is no dispute that the land in question belonged to Mary Rodrigues on August 23d, the date of the several mentioned deeds. The validity of the two deeds of August 23d, introduced in evidence was a controverted question. These two deeds, as shown upon their face, were executed by the grantor's making her mark, and were attested by two witnesses, J. M. Henderson and J. G. Thomas, who subscribed their names as such. An acknowledgment of the grantor (in statutory form) before J. M. Henderson as a notary public, with notarial seal affixed, was also attached, of date of the execution of the deeds. The deeds were self-proving under the statute, and hence were introduced in evidence without further proof of their execution. Both of the attesting witnesses, Henderson and Thomas, the former being also the notary public who took the acknowledgment, were dead at the time of the trial.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The validity of the deeds was attacked upon the ground of fraud. The only two witnesses who testified as to the execution of the deeds were the appellee and her husband. They both testified that at the time of the signing of the deeds Mary Rodrigues, the grantor, was lying upon her bed in a state of coma, unconscious and recognizing no one; that J. M. Henderson, the notary public, went to her bedside, and, after having read over the deed to her, placed the pen in her hand, and, taking her hand in his, made her mark to the deed and then gently laid her hand down. They testified as to who were present in the room at the time, and that among those present was Dr. J. G. Thomas, the family physician, the same whose name is signed to the deeds as one of the attesting witnesses. This testimony was undisputed by any other witness testifying in the case.

On the theory that the testimony of these two witnesses was undisputed by the testimony of any other witness, the trial court, upon request in writing, gave the general affirmative charge in favor of the appellee, the plaintiff, which in effect instructed the jury that the deeds introduced in evidence were invalid, and consequently passed no title, and that for the reason that at the time of their execution the grantor was in a state of coma and not conscious of what was being done. If as a matter of fact the alleged grantor was at the time unconscious, being in a state of coma, then as a matter of law there was no execution by her. But whether or not she was in such a state or condition was a question for the determination of the jury, not solely upon the testimony of the appellee and her husband, but upon the whole evidence.

Under the rule laid down in the recent case of *Russell et al. v. Holman*, 156 Ala. 432, 47 South. 205, the certificate of the notary public, attached to the deeds, "was entitled to be considered by the jury as evidence of the facts recited therein." The facts recited in the certificate were unquestionably contradictory of the testimony of the appellee and her husband as to the unconscious state or condition of the grantor in the deeds, and if that case is to be followed there is no escape from the conclusion that the trial court in the present case committed error in instructing the jury affirmatively in favor of the plaintiff. Moreover, the testimony of the appellee and her husband involved the charge of fraud against the grantee, Margaret Wall, and J. M. Henderson, the certifying officer. In repelling the charge of fraud, it was competent for the jury to consider all of the circumstances attending the execution of the deeds, who were present, what was said and done, the publicity of the act, etc.; and in such case, where the whole evidence affords inferences pro and con as to the main fact,

it becomes a question for the jury, and the general charge should not be given for either party.

In this case the will under which the appellee claimed title was not probated until seven years after the death of Mary Rodrigues, the testatrix. Nevertheless the interest devised by the will to the appellee took effect immediately upon the death of the testatrix. This principle is clearly settled by the case of *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13. Section 1008 of the Code of 1896, which is the same as section 3385 of our present Code, affords no protection to a purchaser from the life tenant in possession under a will, as against the remainderman, before the expiration of five years of possession by such tenant. Whether a purchaser, as contradistinguished from a creditor, comes within the meaning and protection of the statute, it is not necessary to decide in this case. Here the life tenant had been in possession only three years at the time defendant's testator, Louis Touart, deceased, under whose will she claims as devisee, purchased from the life tenant. The statute certainly could not apply to him, and he took no greater interest by his purchase than the life tenant possessed. *Sheridan v. Schimpf*, 120 Ala. 475, 24 South. 940. Nor is the statute a statute of limitations, where the doctrine of a tacking of possessions to complete a bar would apply.

There is no merit in the contention of an estoppel growing out of the conduct of the plaintiff in accepting a deed from Margaret Wall to a distinct piece of land, because of the fact that the land was conveyed to Margaret Wall by a separate deed from Mary Rodrigues at the time the deeds assailed were made.

For the error in giving the affirmative charge at the request of plaintiff, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, McCLELLAN, and MAYFIELD JJ., concur.

MARTIN v. UNION SPRINGS & N. RY. CO.  
(Supreme Court of Alabama. Dec. 16, 1909.)

1. RAILROADS (§ 355\*)—TRESPASSERS—WALKING ALONG TRACK.

A person who, while walking along a path at the side of a railroad track, was killed at a point not at a crossing or in a street, was a trespasser.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1220; Dec. Dig. § 355.\*]

2. RAILROADS (§ 394\*) — INJURY TO PERSON NEAR RAILROAD TRACK—PLEADING—WANTONNESS.

Counts in a complaint for the death of plaintiff's intestate while walking along a path near a railroad track, not in a street or at a crossing, alleging that the path was commonly

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

used by persons as a footway, as was well known to defendant's employes, and that the engine was run backwards at night without any light, and concluding with the averment that defendant's employes knowingly and with reckless indifference ran the train with knowledge of the foregoing facts, and that the probable result would be to injure or kill some one, charged mere negligence, within the rule that, where a person injured was a trespasser, wantonness and willfulness must be shown to authorize a recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1338; Dec. Dig. § 394.\*]

**3. RAILROADS (§ 394\*)—INJURY TO PERSON NEAR TRACK—PLEADING—TRESPASSERS.**

*Held*, also, that the count was insufficient as a charge of simple negligence, since it failed to show that he was not a trespasser, to whom they owed no more than the duty of not injuring him after discovering his peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1331, 1338; Dec. Dig. § 394.\*]

**4. RAILROADS (§ 391\*)—INJURY TO PERSON NEAR TRACK—WANTONNESS.**

To operate a train through a town while it is dark at a speed prohibited by ordinance does not, without more, constitute that wantonness which is the equivalent of intentional wrong, and which would render the railroad liable for the death of a trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1329; Dec. Dig. § 391.\*]

**5. RAILROADS (§ 376\*)—INJURY TO PERSON NEAR TRACK—DUTY TO TRESPASSERS.**

A railroad only owed to a trespasser, killed while walking along the track, the duty not to have injured him after discovering his peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1276-1279; Dec. Dig. § 376.\*]

Appeal from Circuit Court, Bullock County; A. A. Evans, Judge.

Action by Cora Martin, administratrix, against the Union Springs & Northern Railway Company. From a judgment sustaining demurrers to counts of the complaint, plaintiff appeals. Affirmed.

Tom S. Fraser and R. L. Harmon, for appellant. Ernest L. Blue, for appellee.

SAYRE, J. This appeal brings into review the judgment of the court below sustaining demurrers to all counts of the complaint except the eighth, which was withdrawn. In counts 1, 2, 3, 4, 5, 9, and 10, it either distinctly appears, or the manner of allegation is such that it must be inferred, that plaintiff's intestate was killed by defendant's locomotive while walking along defendant's track, or along a path so close to the track as to be killed by the locomotive in its usual operation, in the town of Union Springs, at a point not in a street nor at a street crossing. Thus it appears in these counts that deceased was a trespasser. *Haley v. K. C., M. & B. R. R. Co.*, 113 Ala. 640, 21 South. 357. Recognizing this fact, the pleader in each of these counts attempts to render it innocuous to his cause by stating a case of intentional or wanton injury. The first count, to speak of it as a fair example of the rest, after averring that the path along which deceased was traveling

was commonly used by persons as a footway, so that many persons passed and repassed thereon daily, as was well known to defendant's employes and servants in charge of the train, and that the engine was run backwards at night and without any light in front, as it was going, concludes with the averment that defendant's employes and servants knowingly and with reckless indifference propelled the train along the track with knowledge of the foregoing facts, and knowing that the probable result of so running said train would be to kill or injure plaintiff's intestate or some other person. Some of the counts are embarrassed by other averments, as, for instance, the averment that the train was operated at a rate of speed in excess of the rate permitted by the laws and ordinances of the town; but none of the derelictions so charged amount to wantonness per se, nor does the cumulative averment of all of them amount to a charge of wantonness. The result is that the sufficiency of the counts may be tested on the statement made of them. The charge formulated in these counts is, not that the injury was willfully or wantonly inflicted upon plaintiff's intestate, without more, as was permissible under our system of pleading; nor is it that the employes in charge of defendant's train willfully, or wantonly, or with reckless indifference to consequences, did or omitted to do some act with knowledge and a present consciousness that the act or omission would, under conditions known to exist at the time, probably result in disaster; nor yet are facts alleged from which the inference of wantonness necessarily follows. In other words, everything alleged may consist with inadvertence or error of judgment, mere negligence; and the counts must in consequence be held to charge negligence only. *L. & N. v. Brown*, 121 Ala. 221, 25 South. 609; *L. & N. v. Mitchell*, 134 Ala. 261, 32 South. 735; *M. & C. v. Martin*, 117 Ala. 367, 23 South. 231.

This case does not fall within that class of cases, many of which have come here, and some of which are cited in our recent case of *M., J. & K. C. R. R. Co. v. Smith*, 153 Ala. 127, 45 South. 57, 127 Am. St. Rep. 22, in which it has been held that when the injury occurs at a public crossing or other place in a public highway where the frequency of its use renders it probable that the operation of a train at great speed, or without the observance of other precautions demanded by these conditions, may constitute wantonness, although the actual presence of persons in a position of peril may not be known to those in charge of the train. In such cases the intentional or recklessly indifferent disregard of a most imperative duty seems to have been treated in the decision of this court as the equivalent of wantonness. Possibly count 10 was intended to invoke the principle last

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

referred to, for it avers that the train was operated across and between Conecuh and Chunnenggee streets, both streets over which a large number of people were accustomed to travel on foot; but obviously this cannot avail the plaintiff, because his intestate met his death, not on either of those streets, but between them, as the count distinctly shows.

Counts 6 and 7 were also designed to state a case of wanton injury. But the pleader sets down the facts which are supposed to support the charge of wantonness. They fail to support it. To operate a train through a town, while it is dark, at a rate of speed prohibited by ordinance, does not, without more, constitute that wantonness which is the equivalent of intentional wrong. The conclusion which the pleader draws from these facts, that such operation of the train was wanton, is not to be sustained in law; for they are equally compatible with the conclusion that the train was so operated as the result of inadvertence or mere negligence. Nor can the counts be sustained as embodying a charge of simple negligence. They show necessarily that the plaintiff's intestate was on or in dangerous proximity to the track, and fall to show that he was not thereby a trespasser. Under these conditions there was no duty to keep a lookout for the deceased, but only the duty not to injure him after discovering his peril. *Gadsden & Attalla Railway v. Julian*, 133 Ala. 373, 32 South. 135; *Georgia Pacific v. Ross*, 100 Ala. 490, 14 South. 282; *Ensley Railway Co. v. Chewning*, 93 Ala. 24, 9 South. 458.

The trial court properly sustained demurrers to each and every count of the complaint. Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

### HUGHES v. ROSE.

(Supreme Court of Alabama. Nov. 18, 1909.)

#### 1. DEEDS (§ 96\*)—RECITALS—EFFECT.

The parties to a deed are bound by the recitals therein, but others are not.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 256-260; Dec. Dig. § 96.\*]

#### 2. HUSBAND AND WIFE (§ 193\*)—CONVEYANCES—JOINDER OF HUSBAND.

Where a deed recited that the grantor was a married woman, whose husband was a nonresident of the state, but the recitals did not show whether the grantor was a resident or nonresident, the objection to the deed, when offered in evidence, on the ground that it showed the grantor a married woman, was without merit; the requirement for the husband to join in the wife's conveyance not applying to nonresidents, under the provisions of Code 1907, § 4494.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 716-718; Dec. Dig. § 193.\*]

#### 3. EJECTMENT (§ 84\*)—ISSUES AND PROOF.

"Not guilty" being the only proper plea in ejectment, and any matter of defense being admissible thereunder, where the plea was "not

guilty," a deed through which defendant claimed was admissible, though dated after commencement of the suit.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 84.\*]

Appeal from Circuit Court, Butler County; J. C. Richardson, Judge.

Ejectment by Ella Hughes against T. L. Rose. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff was the daughter of Netta Mims, whose husband, George Mims, owned the land at the time of his death; but Ella Hughes was not George Mims' daughter. T. L. Rose claimed through a deed under Mary J. Anderson, and it was shown that Mary J. Anderson was the child of George Mims, deceased. The deed recites that "I, Mary J. Anderson, whose husband is a nonresident of the state of Alabama, and has abandoned her, do hereby grant, bargain, sell," etc. The deed appears to have been executed on the 15th day of April, 1908, and the suit was filed on the 17th day of March, 1908, and executed on the 24th day of that month.

Powell, Hamilton & Lane, for appellant. L. M. Lane, for appellee.

SIMPSON, J. This is a statutory action of ejectment, by the appellant against the appellee, in which the court gave the general affirmative charge in favor of the defendant.

The first assignment of error insisted on is to the action of the court in overruling the objections of the plaintiff to the introduction of the deed executed by Mary J. Anderson to T. L. Rose, the defendant. The first objection offered to the admission of said deed was that "said deed shows that the said Mary Anderson was a married woman." It will be noticed that it is not asserted that she was a married woman, thus calling for proof as to the fact; but the objection is based entirely on the recital in the deed. While it is true that the parties to the deed are bound by the recitals therein, and others are not (*Wood v. Lake*, 62 Ala. 489, 490; *Naugher v. Sparks*, 110 Ala. 572, 576, 18 South. 45), yet the recitals do not show whether the grantor was a resident or nonresident, and the requirement for the husband to join in the wife's conveyance does not apply to nonresidents. Code 1907, § 4494; *High v. Whitfield*, 130 Ala. 444, 30 South. 449; *Collier v. Alexander*, 142 Ala. 422, 38 South. 244.

The other objection, that the deed was dated after the commencement of this suit, is untenable, as, in the action of ejectment, "not guilty" is the only proper plea; and any matter of defense may be set up thereunder. *Etowah Mining Co. v. Doe ex dem. Carlisle*, 127 Ala. 663, 668, 29 South. 7; *Richardson v. Stephens*, 114 Ala. 238, 242, 21 South. 949; *Cooley v. U. S. Savings & Loan Co.*, 144 Ala.

538, 540, 39 South. 515. There was no error in overruling said objection. The proof was without conflict that Mary Anderson is the legal heir of George Mims.

There was no evidence which would justify the jury in finding that the plaintiff, or her mother, was in open, notorious, and continuous adverse possession of the lot in question for 10 years. The evidence adduced was wanting in description of the character of the possession, and as to its continuousness.

The judgment of the court is affirmed.  
Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

### CRAMTON v. RUTLEDGE et al.

(Supreme Court of Alabama. Nov. 16, 1909.  
Rehearing Denied Dec. 16, 1909.)

#### 1. POWERS (§ 33\*)—EXECUTION—INTENT.

Though no particular formality is required in the execution of a power, an intent to execute the power must be shown.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 110-120; Dec. Dig. § 33; \* Deeds, Cent. Dig. § 406.]

#### 2. POWERS (§ 43\*)—EXECUTION—TITLE ACQUIRED.

Under Code 1896, § 1046, providing that when an absolute power of disposition, not accompanied by any trust, is given to the owner of an estate for life, the estate is changed into a fee as to purchasers, a purchaser from a life tenant with power to sell must, to acquire the fee, show that he purchased from the life tenant, not only his estate, but the entire property, as the life tenant may exercise his discretion in selling the life estate only, leaving the remainder for those entitled thereto.

[Ed. Note.—For other cases, see Powers, Dec. Dig. § 43.\*]

#### 3. PARTITION (§ 109\*)—TITLE OF PURCHASER.

Where the proceedings commenced by a tenant for life with power to sell were merely to sell for partition her interest and the interest of a co-tenant in fee, without mentioning the power of sale, the deed in partition conveyed only the life tenant's interest and the interest of the co-tenant, and the purchaser became the owner in fee of the interest of the co-tenant in the estate and the owner of the life estate of the life tenant.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 109.\*]

#### 4. LIFE ESTATES (§ 8\*)—ADVERSE POSSESSION—TERMINATION OF LIFE ESTATE.

Where a purchaser became the owner in fee of an interest in real estate and the owner of a life estate, no question of adverse possession as against the remaindermen could arise before the death of the life tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.\*]

#### 5. TENANCY IN COMMON (§ 15\*)—ADVERSE POSSESSION.

The possession of one tenant in common is the possession of all, until there is an actual adverse possession, brought home to the knowledge of the other, or the possession of one is so open and notorious in its hostility and exclu-

siveness as to put the other tenants on notice of its adverse character.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.\*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Suit by T. J. Rutledge and others against F. J. Cramton. From a decree for plaintiffs, defendant appeals. Affirmed.

Fred S. Ball and J. M. Chilton, for appellant. Gunter & Gunter, for appellees.

SIMPSON, J. This case has been before this court twice before on appeal. See Rutledge et al. v. Crampton, 150 Ala. 275, 43 South. 822, and Cramton v. Rutledge et al., 47 South. 214, which cases are referred to for a statement of the facts of this case. Appellant earnestly contends for an overruling of the decisions in those cases, but after examining the same we are satisfied of their correctness. While it is true that no particular formality is required in the execution of a power, yet it is required that an intention to execute the power shall be shown.

Under the will of A. R. Bell, his widow did not take an absolute fee simple, but only a life estate, which the statute declares to be a fee simple, only in favor of creditors of and purchasers from the life tenant. Code 1886, § 1850; Code 1896, § 1046; Rutledge et al. v. Crampton, 150 Ala. 275, 43 South. 822, and cases cited. It necessarily follows that before a party can claim to be a purchaser, within the meaning of the statute, he must show that he has purchased from the life tenant, not only his or her life estate, but the entire property. The life tenant may exercise the discretion of selling either merely the life estate, leaving the remainder for those entitled to it, or of exercising the power given by selling the entire property.

The proceedings in the probate court, commenced by the life tenant, Mrs. Bell, were merely to sell for partition the interest of her co-tenant and her interest in the property. The deed made thereunder conveys only the interest which she held in the premises, and the only interest which she had in the property was a life estate, though there was attached to it a power, which she could execute or not, as she chose. When the proceedings make no mention of the power, and use no expression indicative of a desire to have sold any interest except that which was actually owned by Mrs. Bell at that time, and the deed specifically conveys only that interest, it is difficult to understand how that could be construed into an intention to sell, not only that which she owned, but that which she had the power to convey. In the case of Matthews v. McDade, 72 Ala. 378, 387, the deed was made



by the executor and trustee, and this court held that, as the proceeding in the probate court was void, the deed was made in pursuance of the power conferred by the will.

Only her life estate, then, passed to the purchaser, and during her life no question of adverse possession or laches could arise. The life estate terminated by the death of Mrs. Bell May 4, 1898. When Howard Bell purchased, under the original partition proceedings, he became the owner in fee of the interest of the estate of W. B. Bell, and the owner of the life estate of Mrs. Bell in the interest owned by her deceased husband, A. R. Bell. When the life estate fell in (May 4, 1893), his vendee, Pomeroy, became tenant in common with the remaindermen, the heirs of A. R. Bell. The possession of one tenant in common is the possession of all, as each holds for the benefit of the other, until there is an actual disseisin brought home to the knowledge of the other. 1 Wash. Real Prop. (3d Ed.) p. 566, §§ 417, 418.

So the question arises whether or not the evidence in this case shows such exclusive adverse possession by the respondent and those under whom he claims, and the knowledge of same so brought home to the complainants, as to create a bar by adverse possession. "The possession of one tenant in common is *prima facie* presumed to be the possession of all, and it does not become adverse to the co-tenants, unless they are actually ousted, or, short of this, unless the adverse character of the possession of one is actually known to the other, or the possession of the one is so open and notorious in its hostility and exclusiveness as to put the other tenants on notice of its adverse character." *Ashford et al. v. Ashford et al.*, 136 Ala. 632, 640, 34 South. 10, 96 Am. St. Rep. 82. In the case of *Jellerson v. Pettus et al.*, 132 Ala. 671, 32 South. 663, the partition, from which the adverse holding commenced, was made by deed *inter partes*, conveying the entire interest in the land to one of them, who went into immediate possession, to the exclusion of the others. The evidence in this case does not show such adverse possession as to oust the other tenants in common.

The decree of the court is affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

#### WEINACKER ICE & FUEL CO. v. OTT.

(Supreme Court of Alabama. Nov. 16, 1909.)

#### 1. MASTER AND SERVANT (§ 332\*)—INJURIES TO THIRD PERSON—QUESTIONS FOR JURY.

In an action against one engaged in the ice business for injuries to a child, who was pushed off an ice wagon by one attending the wagon, the question whether he was defendant's

agent, and, if so, whether he was acting within the scope of his authority, *held* one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274, 1275; Dec. Dig. § 332.\*]

#### 2. MASTER AND SERVANT (§ 302\*)—INJURIES TO THIRD PERSON — LIABILITY OF MASTER — SCOPE OF EMPLOYMENT.

Where the driver of an ice wagon had authority from his employer to employ assistance, and one employed by the driver pushed a boy off the wagon while he was standing on the step seeking to purchase ice, whereby he was injured, the master was liable, though the assistant was not in charge of the wagon, but was merely employed to deliver ice from it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217, 1218, 1221; Dec. Dig. § 302.\*]

#### 3. APPEAL AND ERROR (§ 1046\*)—CONDUCT OF TRIAL—REMARKS OF COURT—HARMLESS ERROR.

Where, in an action for injuries to a child, the court, on refusing a motion to exclude plaintiff's evidence, said: "This is a case where a young boy got his leg broken, and as questions such as those arising in this case are eternally coming up, this is a good case for the Supreme Court"—it was not reversible error; the court having instructed the jury that he withdrew the remark and that they must pay no attention to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134; Dec. Dig. § 1046.\*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Thomas Ott, by his next friend, against the Weinacker Ice & Fuel Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts are sufficiently stated in the opinion. Charge 13 was as follows: "I charge you, gentlemen of the jury, if you believe a person caused Thomas Ott to fall off defendant's wagon, not in charge of the wagon, and simply employed to deliver ice from the wagon, such acts are not within the scope of his employment, and they cannot find for the plaintiff." The remarks of the court referred to are as follows: At the time the motion to exclude all of plaintiff's evidence was refused, the court said: "This is a case where a young boy got his leg broken, and as questions such as those arising in this case are eternally coming up, this is a good case for the Supreme Court."

Inge & Armbrecht, for appellant. Webb & McAlpine, for appellee.

MAYFIELD, J. Appellant corporation was engaged in the making, selling, and delivering of ice in the city of Mobile. Appellant used large wagons in delivering the ice to its regular customers, and, in making these deliveries, sales were made from the wagons. Appellant contends that it employed only one driver to each of these wagons, and that the driver employed such assistance as he desired; but it appeared that one or two negro boys, besides the driver, attended the wagons of defendant, and assisted in the sale and

delivery of the ice from its wagons. The negro boy who is alleged to have caused the injury to plaintiff appears to have attended one of the defendant's wagons and to have assisted in the sale and delivery of ice for a year or more.

The plaintiff was a small boy, a mere child, and was sent to the defendant's wagon to purchase five cents' worth of ice. He asked the negro boy to sell him the ice. The boy paid no attention to his request, but proceeded to deliver a piece of ice to another customer. Plaintiff took his stand upon the back steps of the ice wagon to await the return of the negro boy, and when the latter returned plaintiff again asked him to sell him the ice. The negro boy, in reply, ordered the wagon to drive on, shoving plaintiff off the wagon, and as plaintiff fell his foot went between the spokes in the wagon wheel, which resulted in breaking his leg and otherwise bruising and injuring him. Hence this suit.

Defendant claimed that no liability was shown, in that there was no evidence to show that the negro boy alleged to have caused the injury was the agent or servant of the defendant, or, if there was any evidence of this fact, that it was not shown that he was acting within the line and scope of his authority or employment when he pushed plaintiff from the wagon, thus injuring him. It contends, in other words, that there was no evidence to show that the defendant corporation was responsible for the wrongful act of the negro boy, nor that it was liable to plaintiff for the injuries suffered by him in consequence of the wrongful act of the negro boy.

When plaintiff closed his evidence, defendant requested the court to exclude all the evidence, because no case had been made against defendant, for the reason stated above. The court overruled this motion, and defendant excepted. Again, after all the evidence for both plaintiff and defendant had been introduced, the defendant renewed its motion to exclude the plaintiff's evidence for the same reason, and for the further reason that defendant's evidence showed that the negro boy was not the agent of defendant, and it was not liable for his wrongful act. The court overruled this motion, to which ruling defendant excepted. The defendant then requested the court to give the general affirmative charge in its favor, which the court refused to do. These are the rulings chiefly relied upon by defendant for a reversal of the judgment, and they each raise practically the same question as applied to the particular facts and issues of the case.

Under the evidence in this case it was clearly a question for the jury to determine whether or not the negro boy alleged to have caused the injury was the agent of the defendant, and, if he was determined so to be, whether or not he was acting within the line and scope of his authority or employ-

ment when he caused the injury to plaintiff. It was not denied that it was the defendant's wagon, nor that the driver was its agent or servant, nor that it was engaged in the business of selling ice to the inhabitants of Mobile in this manner. And it was shown that the negro boy who caused the injury had been attending this particular wagon, assisting in this particular business of the defendant, thus openly serving the public in this capacity, for a year or nearly so; that plaintiff's mother was a patron of defendant, and had sent plaintiff to the wagon to buy ice; and that this negro boy, who had been for this length of time selling and delivering ice for defendant, and was so delivering at the very time of causing the injury, instead of selling and delivering the ice, as it was his habit and custom, if not his duty, to do, refused the request and offer of plaintiff, and answered by rudely pushing plaintiff off the wagon. All this happening in the presence of the driver, who is conceded to have been defendant's agent, it was certainly within the province of the jury to pass upon the questions of agency, the line and scope of the employment, and the liability of the defendant for the act; and we are not prepared to say that the finding of the jury as to these facts was erroneous.

While it is not to be supposed that the defendant company authorized the negro boy to thus injure plaintiff, or that it would tolerate such conduct on his part, if known, yet it does follow that if he was the agent or servant of the defendant, and was then acting within the line and scope of his authority and employment, the defendant is liable therefor. We repeat that under the evidence of this case these were clearly questions of fact for the jury, and not of law for the court; and the trial court properly submitted them to the determination of the jury under proper instructions, which seems to have been done.

The evidence did not support appellant's theory that the driver, U. S. Grant, was an independent contractor, and not the servant or agent of defendant, with authority to employ assistance. The evidence was in conflict as to the authority of Grant to employ assistance, and as to whether or not the managers of the defendant company knew of the employment by Grant of the assistants; but it was clearly open to the jury to find these facts against the contention of the appellant, and we are not prepared to say that they were in error in so doing. Under the rule announced in the case of *T. C. I. & R. R. Co. v. Hayes*, 97 Ala. 201, 12 South. 98, the defendant might be liable for the acts of the negro boy if the jury found the disputed facts in favor of plaintiff. The rules are correctly stated in the first two headnotes to the report of that case, as follows:

"1. Evidence of Contract of Employment.—Where a father was employed to load defendant's cars at a specified price per car,

and under directions of defendant's superintendent his minor son assisted him in the work, which was being done under the supervision of the superintendent, although the father received the pay for the work, and the son's name was not borne on the pay roll of defendant, the son was a servant of the defendant within the meaning of section 2590 of the Code.

"2. Master Liable for Acts of Fellow Servant.—When.—When a servant employs a third person to perform an act within the servant's employment, and injury results to another, the master is liable the same as though the servant employed no agent."

The question as to plaintiff's contributory negligence was likewise one for the jury, and, under the evidence in this case, their finding should not be disturbed.

Charge 13 was properly refused. It does not state a correct proposition of law. It was not necessary—to make the defendant liable—that the boy causing the injury was in charge of the wagon. The negro boy may have been acting within the line and scope of his employment, although he was not in charge of the wagon, and although he was employed to deliver ice from the wagon. There was evidence tending to show that Davis was, at the time of the injury, assisting in the management of the wagon.

There was no reversible error in the remark of the court complained of, especially after the court instructed the jury that he withdrew the remark, and that they must pay no attention thereto. While the remark of the court was not at all necessary, we see in it nothing so improper as to work a reversible error, considering it in connection with the court's subsequent attempt to deprive it of any possible effect.

There being no reversible error, the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

#### GERNERT v. LIMBACH.

(Supreme Court of Alabama. Nov. 18, 1909.)

##### 1. STATUTES (§ 209\*)—CONSTRUCTION—AMBIGUOUS TERMS.

A word or phrase, recurring in an instrument, statute, or Constitution, is often given a presumptive meaning by giving it, when used in an ambiguous sense, the same meaning it held previously in the instrument, statute, or Constitution; but this presumption is conditioned on the absence of the appearance of a contrary intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 286; Dec. Dig. § 209.\*]

##### 2. CHATTEL MORTGAGES (§ 250\*)—CONSTRUCTION—TIME OF MATURITY.

A chattel mortgage recited that the mortgagor was justly indebted to the mortgagee in a

stated sum, "as is evidenced by my two promissory notes bearing even date with this instrument and payable, respectively, on the 11th day of June, 1905 and 1906, \* \* \* with interest from date, and the payment of which note I am anxious and willing to secure. Now, therefore, in consideration of the premises, and to secure the punctual payments of each of the notes, \* \* \* I [here follows description of the property and habendum clause], upon condition, however, that if I pay each of the notes above described promptly at its maturity, then and in that event this conveyance is to be void; but in the event I fail to pay each of the said notes when due, then and in that event the said [mortgagee] is hereby authorized and empowered to enter upon and take possession of the above-described property, and \* \* \* to sell the said property, \* \* \* the proceeds of said sale to be applied as follows: \* \* \* (2) The amount with all accrued interest that may then be due upon said note. \* \* \*." Held, that the mortgage could be foreclosed on default in the payment of either of the notes secured.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 523; Dec. Dig. § 250.\*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Definue by Fred Gernert against F. Limbach. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The mortgage was as follows: "State of Alabama, Marengo County. Know all men by these presents, that I, F. Limbach, am justly indebted to Fred Gernert in the sum of \$1,457.16, as is evidenced by my two promissory notes, bearing even date with this instrument and payable, respectively, on the 11th day of June, 1905 and 1906, at the First National Bank of Linden, Alabama, with interest from date, and the payment of which note I am anxious and willing to secure. Now, therefore, in consideration of the premises, and to secure the punctual payments of each of the notes above described according to the tenor and effect thereof, I, F. Limbach [here follows description of the property and habendum clause], upon condition, however, that if I pay each of the notes above described promptly at its maturity, then and in that event this conveyance is to be void; but in the event I fail to pay each of the said notes when due, then and in that event the said Fred Gernert is hereby authorized and empowered to enter upon and take possession of the above-described property, and after having given notice for three successive weeks of the time, place, and terms of the sale, by publication once a week for three successive weeks in some newspaper published in Marengo county, to sell the said property in front of the courthouse door in Linden, Alabama, to the highest bidder for cash at public auction. The proceeds of said sale to be applied as follows: (1) To the payment and costs of expenditure necessary and incident to said sale, including a reasonable attorney's fee for conducting the same. (2) The amount with all accrued interest that may then be due upon said note. (3) The surplus, if any,

to be returned to the undersigned or his legal representative."

Williams Cunninghame, for appellant. Canterbury & Gilder and De Greffeuil & Evins, for appellee.

McCLELLAN, J. Detinue by a mortgagee to recover property described therein. The plaintiff's right to recover was rested upon his mortgage. The court, on objection, declined to permit the introduction of the mortgage upon the ground that its law day had not arrived, notwithstanding default in the payment of one of the two notes falling due at different dates had previously occurred, when action was commenced, and in consequence that under the terms of the mortgage the plaintiff had not the right to the immediate possession of the property at the time he instituted the action. This ruling was, of course, vital, and a nonsuit, with bill of exception, was taken. The reporter will set out the mortgage, omitting the description of the property and the habendum clause just preceding the condition in the instrument.

The parties had the right to conform their contract, in this particular as they chose. They could condition their respective rights to the possession of the property upon any one of the possible contingencies arising out of the payment, or default therein, of the two notes. It is the province of the court to ascertain their intention in the premises, and in so doing due weight and influence must be given the sound rule, announced in *Johnson v. Buckhaults*, 77 Ala. 276, that equivocal and ambiguous terms should be construed most strongly against the mortgagor. Much of the argument of counsel for both parties is devoted to the discussion of the meaning of the word "each," where it last occurs in the instrument. It may be conceded that the respective contentions of counsel, as to the abstract meaning of "each," find support in adjudications elsewhere. 3 Words & Phrases, p. 2299 et seq. The question here cannot depend in decision upon the abstract meaning of that word. In this instance, as always, the whole instrument must be taken into account in the ascertainment of the intent of the parties thereto; and, unless entirely unavoidable, every clause and provision of it must be given effect—an operation. The context is often, as it is here, a sure element of aid in determining with what meaning and intent even an ambiguous word was used by the parties. What a word means in one connection does not, of course, invariably indicate that a like meaning was intended to be taken from it in another. True, a word, recurring in an instrument, statute, or Constitution, is often given a presumptive meaning by the application of the familiar rule of according to the word or phrase, when used in an equivocal or ambiguous sense, the meaning that appears previously, in the instrument, statute, or Con-

stitution, to have been its definite and certain meaning. *State ex rel. Woodward v. Skeggs*, 154 Ala. 249, 257, 46 South. 268. But this is a presumption merely, and is conditioned upon the absence of the appearance of a contrary intent.

"Each" occurs three times in this mortgage, viz.: First, where it is recited that the consideration, in part was "to secure the punctual payment of *each* of the notes above described according to the tenor and effect thereof"; second, stating the condition, "if I pay *each* of the notes above described promptly at its maturity, then and in that event this conveyance is to be void"; and, third, "But in the event I fail to pay *each* of the said notes when due, then and in that event" the mortgagee was empowered to assume possession, or, conversely, the right of the mortgagor to the possession should cease. (Capitals and italics supplied.) As *first* employed, *each* was, obviously, intended to refer to both of the notes. The whole instrument shows it to have been the purpose to give and take, respectively, security for the whole debt evidenced by the two notes. But it is, also, just as evident that the security was intended, taken, and given to assure the "punctual payment" of the notes "according to the tenor and effect thereof"—namely, among other things, when they, respectively, matured. That is too clear for doubt. Accordingly, as *first* used, the word must be taken as qualified by the quoted sentence, and cannot without distorting the language, be interpreted as fixing a different period of maturity for the notes or of expressing any other purpose and intent than as assuring the punctual payment of both notes, when they, respectively, fell due. As next employed, the word is indissolubly associated and connected with a provision, in form a condition, for avoiding the conveyance if prompt payment of the notes was made at "its" maturity. Hardly could this idea have been more plainly expressed than it is expressed in the second use of "each": "If I pay the notes as and when each one of them falls due, this conveyance shall be void." Under this feature of the instrument prompt payment of both the notes at maturity was the assurance, and a failure to pay them as and when each one of them fell due avoided the nullifying of the instrument's effect. So, when we come to the construction of the *third* use of the word "each," we have a mortgage given to assure the "prompt," "punctual" payment of two notes on the dates of their respective maturing, and a condition therein that in order to avoid the instrument both notes must be paid as and when they respectively fell due. Accordingly, to this point, the contract of the parties would be breached if any one of the notes was not paid promptly, punctually, upon maturity. Promptness, punctuality, and that as expressly referred to the respective dates of maturity of the notes,

was of such importance, in the minds of the parties, that in one instance it was recited as of the motive for the instrument, and in another it was made a feature of the condition upon which hinged the avoidance of the effect of the mortgage. Following such a status of intent, common of course to mortgagor and mortgagee, they came to formulate the conditions under which the security, as recited and declared, should be available to the mortgagee. Two things, in the main, were thought necessary or desirable to this end, viz., possession, and a sale, by the mortgagee of the property described in the mortgage. They set down the former, evidently contemplated as immediately preceding the latter, as when *each* note was not paid *when due*. Should this be construed so as to postpone the right to possession, and to sell, until the last note has passed maturity and default in its payment made? The opinion is entertained that such was not the intent of the parties. If so it was, then the clearly expressed purpose to afford security for the prompt payment of the notes "according to the tenor and effect thereof" would be rendered wholly nugatory as to the first maturing note; for, if the security, as part of which foreclosure, including possession, essentially was, was available only after the last note had matured and default made, its quality to assure prompt, punctual payment of the first note when due would be entirely destroyed. In that event, though the necessity was to assure prompt payment when due, the mortgagor could delay 12 months without the mortgagee's having the power to enforce the payment which in plain language, the mortgagor had obligated his estate, and unmistakably declared his purpose, to assure on a day certain. If appellee's construction is adopted, conflicting provisions are created, or, at least, a provision of the instrument is denied force and effect. It is elementary that constructions so resulting should be avoided, if possible. Besides, as before indicated, the whole instrument abounds in indicia of a common purpose to secure and assure the prompt, punctual payment of the notes when they, respectively, matured; and, if the security be denied practical effect until a year after the date of maturity of the first note has passed, the value, the virtue, of the assured punctuality is destroyed. Furthermore, if the condition under consideration be that *both* notes shall meet default before possession could be taken, and the first was promptly paid, would not the condition be impossible of fulfillment, so as to authorize the mortgagee's assuming possession? Of course, such a construction would not be tolerated, because it would defeat the security intended to assure the prompt payment of the last note, whereas such was within the declared purpose and intent of the parties. If this is true, by the same token the security and assurance for the punctual payment of the first maturing note should not be *impaired* by a year's postponement. The perishable

part of the property covered by the mortgage might become valueless in the year to intervene between default on the first note and the maturity of the second.

But it is urged for appellee that the second direction as to the disposition or application of the proceeds of the sale bears out the intent that foreclosure, with its incidents, could not avail until after default in payment of the last note or until at least that date arrived. The second direction is not capable of that interpretation. The omission of a comma after the word "*amount*" made more easy the adoption, in argument, of the view and effect pressed for appellee. So punctuated, the meaning and effect of the direction is apparent. The expression, beginning with the words "*with all*," has reference to interest and not to the amount of the notes aside from that incident to them. The word "*then*" emphasizes the correctness of this interpretation. Furthermore, the second direction reinforces the argument that the intent was to foreclose for the entire debt, separated, doubtless for the convenience of the mortgagor, into two equal installments. If not so, it would not have been provided to include in the "*amount*" the "*accrued interest that may then be due upon said notes.*" If the first note had been paid at maturity, that feature of the direction would be without effect, for there would then be only one note in arrears, whereas in this second direction the reference is to "*said notes.*" We are aware, of course, that the employment of the singular, or of the plural, is not always final and, upon occasion, the one may be read in lieu of the other in arriving at the intent of the parties. We feel safe in taking the plural as it is written in this instance, where such an unmistakable intent to assure promptness in payments appears throughout the instrument.

Our conclusion in the premises finds support, we think, in substance, though not identical in point of fact, in the following adjudications here: McLean v. Presley, 56 Ala. 211; Johnson v. Buckhaults, 77 Ala. 276; Moody v. Atkins, 146 Ala. 684, 40 South. 305. Keith v. McLaughlin, 105 Ala. 342, 16 South. 886, is cited as opposed to the view entertained by us. The court there had under construction a mortgage, wherein, in the premises, the parties had fixed, in unambiguous terms, the law day of the mortgage as the "first day of October, 1882," the day of maturity of the second and last note. See Ford v. Lewis, 146 Ala. 190, 41 South. 144, where this distinguishing feature of Keith v. McLaughlin is noted. The court, hence, erred in the exclusion of the mortgage.

The other error assigned is predicated upon the overruling of plaintiff's demurrers to defendant's rejoinders to plaintiff's replications to pleas 3 and 4. These pleas proceed on the theory that default in payment of the first note did not operate to then mature the whole debt. We have held otherwise. In consequence, the pleas were faulty. If, of course,

the first note was paid, by services, etc., upon or before maturity, a fact not appearing as the pleas now stand, then plaintiff's right to the possession did not exist when the suit was instituted. We mention these matters as indicating the necessity to recast on the next trial the defenses, and hence the pleadings following. It is, therefore, unnecessary to deal with the last assignment of error.

The judgment is reversed, and the cause is remanded, for the error before noted.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAY-FIELD, JJ., concur.

C. W. ZIMMERMAN MFG. CO. v. DUNN  
et al.

(Supreme Court of Alabama. Nov. 11, 1909.)

1. ADVERSE POSSESSION (§ 79\*)—COLOR OF TITLE—VOID TAX DEED.

In trover for conversion of logs cut on land claimed by plaintiff under a tax deed, the tax deed, though void as a muniment of title, is admissible as color of title, in connection with evidence of actual possession, as explanatory of the good faith of the claim of ownership and the extent of the possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 462; Dec. Dig. § 79.\*]

2. EVIDENCE (§ 183\*)—BEST AND SECONDARY EVIDENCE—PREDICATE FOR ADMISSION OF SECONDARY EVIDENCE.

A copy of an instrument is inadmissible, without a proper predicate accounting for the absence of the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.\*]

3. EVIDENCE (§ 183\*)—BEST AND SECONDARY EVIDENCE—PREDICATE FOR ADMISSION OF SECONDARY EVIDENCE.

The testimony of one of the three grantees in a deed that he had once had possession of the original, and had searched for it, but could not find it, unaccompanied by proof that it was not in the custody of one of the other two grantees, is insufficient as a predicate for the introduction of a copy of the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 635-637; Dec. Dig. § 183.\*]

4. ADVERSE POSSESSION (§ 27\*)—ACTUAL POSSESSION—EVIDENCE—SUFFICIENCY.

In trover for conversion of logs cut on land claimed by plaintiff under a void tax deed, plaintiff testified that he had been in possession continuously for several years; that he went into possession under the tax deed; that the possession consisted solely in the facts that on one occasion he had the property surveyed, and on another occasion an agent sold cross-ties from the land; and that he had paid taxes on the land, but that he had not been on the land in person. *Held* not to show actual possession of the land, and hence not ownership of the timber, nor to justify a reasonable inference of general or special property in the logs.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 121, 122; Dec. Dig. § 27.\*]

5. EVIDENCE (§ 213\*)—COMPROMISE AGREEMENT—ADMISSIBILITY.

A statement, made and delivered by a party to the adverse party in an attempted compro-

mise of the matter in dispute between them, is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 745; Dec. Dig. § 213.\*]

6. EVIDENCE (§ 370\*)—LETTERS—GENUINENESS.

Before a letter, relevant and material, is competent evidence, its genuineness must be shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1563, 1564; Dec. Dig. § 370.\*]

Appeal from Circuit Court, Clarke County; Thomas W. Davis, Special Judge.

Action by William D. Dunn and others against the C. W. Zimmerman Manufacturing Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

See 151 Ala. 435, 44 South. 533.

Stevens & Lyons, Wilson & Aldridge, and R. W. Stoutz, for appellant. A. L. McLeod, for appellees.

DOWDELL, C. J. The complaint as originally filed contained a single count in trover, in code form, for the conversion of a specified amount of lumber. It was subsequently amended by adding a second count, in code form, for the conversion of a certain number of pine logs. The general issue was pleaded, and on this plea the case was tried.

It has been firmly settled in this court that in the action of trover there must be a concurrence of the right of property, general or special, and of possession, or the immediate right of possession, in the plaintiff at the time of the conversion. *Booker et al. v. Jones*, Adm'r, 55 Ala. 266-275; *Rees v. Coats*, 65 Ala. 256; *Beall v. Folmar, Sons & Co.*, 122 Ala. 414-418, 26 South. 1; *Moore et al. v. Walker*, 124 Ala. 190, 26 South. 984; *Johnson v. Wilson & Co.*, 137 Ala. 468, 34 South. 392, 97 Am. St. Rep. 52; *Stafsky v. Southern Railway Co.*, 143 Ala. 272, 39 South. 132; 1 Chit. on Pl. 148-151. In the case before us the rights of property and of possession at the time of the alleged conversion were sought to be proven by showing title to and possession of the land from which the pine logs were cut, and only in this way. Along this line the plaintiffs were permitted, against the objection of the defendant, to introduce in evidence the copy of a tax deed to two of the plaintiffs and a third person, as color of title under which the plaintiffs claimed to have entered into possession of the land. The original tax deed, though void as a muniment of title, would have been admissible as color of title in connection with evidence of actual possession—not as evidence of possession in itself, but as explanatory of the bona fides of claim of ownership and the extent of the possession. The copy, however, was inadmissible without a proper predicate accounting for the absence of the original. No sufficient predicate was here shown. There were three grantees named in the tax deed, either one of whom was as much the rightful and law-

ful custodian of the deed as the other. Evidence by one of the grantees that he had once had possession of the original, and had searched for it, but could not find it, without proof that it was not in the custody of one of the other two grantees, was insufficient as a predicate for the introduction of secondary evidence, and it was error to admit the copy in the present case on the showing that was made.

There was no attempt to show paper title to the land, such as would draw to it possession, but actual possession with claim of ownership. The only evidence along this line was that of the plaintiff, Dunn, who testified on his direct examination "that he and his coplaintiffs had been in possession of the lands in controversy continuously since 1890, and that they went into possession under tax deeds afterwards introduced in evidence." On his cross-examination this witness testified "that the possession of the plaintiffs consisted solely in the facts that upon one occasion, in the year 1890, he had the property surveyed, and that upon another occasion, in 1891 or 1892, Mr. Bolen, who is one of the witnesses in the case, acting as the agent of the plaintiffs, sold some cross-ties from said land; that witness was not present when said cross-ties were sold; that the plaintiffs have paid taxes on said land ever since 1890, and, except as is stated in cross-examination, the plaintiffs had done nothing to manifest possession of the land; and that they had no possession, except such acts as were testified to in cross-examination. Witness had never been on the land in person, but knows that the land mentioned in his testimony is the land described in the tax deed." This evidence fell far short of showing actual possession of the land, and hence any ownership thereof, or of the timber growing thereon. Nor was it sufficient to afford a reasonable inference to be drawn by the jury of general or special property in the pine logs alleged to have been cut therefrom.

The statement or memorandum, identified as having been drawn up by the witness Loran and delivered to the plaintiffs by Aldridge, and which was admitted in evidence against the objection of the defendant, was material only as a statement that the number of pine logs mentioned was cut from the particular land. On its face it showed that the mentioned logs were bought of the defendant by the plaintiffs, and tended to show a recognition by the plaintiffs of title to the same in the defendant. There was no pretense of a delivery under said purchase and a subsequent conversion by the defendant. On the cross-examination by the defendant of the witnesses testifying as to the making and delivery of the statement, the defendant sought to show that the same was made in an attempted compromise and settlement of the matter in dispute between the parties;

but the court refused to allow it to be done. In this the court was in error. If what was sought to be shown was true, then under the ruling of this court on a former appeal (151 Ala. 435-439, 44 South. 533) the instrument was not admissible.

The court also erred in admitting evidence as to the contents of the letter claimed to have been received by the witness Dunn from the president of the defendant corporation. Conceding that a sufficient predicate of loss was shown, there was no proof of the genuineness of the letter. Before the letter itself, if relevant and material, would be competent, its genuineness would have to be shown.

The rule as to the measure of damages was laid down on the former appeal. 151 Ala. 440, 44 South. 533.

It is unnecessary to treat other assignments predicated upon charges given and refused. The errors indicated, and what we have said in reference thereto, will prove a sufficient guide upon another trial.

Reversed and remanded.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

### BIBB COUNTY v. WARD.

(Supreme Court of Alabama. Nov. 24, 1909.)

CONVICTS (§ 13\*)—CONVICT LABOR—PROCEEDS—COUNTY'S LIABILITY.

Code 1896, § 5426, provides that, on conviction, judgment shall be rendered against accused that he perform hard labor for the county and that, if the costs are not paid, the court may impose additional hard labor for the county for such period, not exceeding 10 months, as may be sufficient to pay the costs at the rate of 30 cents per day, and may determine the time required to work out the costs at that rate, but that the convict must be discharged from the sentence against him for costs on the payment thereof, or any balance due, by the hire of such convict. *Held* that, where plaintiff was sentenced to hard labor for a specified number of days at 30 cents a day, less than 10 months, to pay a duly ascertained amount of costs on his conviction of an offense, and he worked for a convict contractor, who paid the county for his services \$1.08 a day, under a convict labor contract executed with the county commissioners, as provided by Code 1896, §§ 4520-4545, plaintiff's only right was to apply for discharge on payment of the costs at the contract rate; and hence the fact that he worked out his full time of service at the rate specified in the sentence did not entitle him to recover from the county the difference between such rate and the contract rate.

[Ed. Note.—For other cases, see *Convicts*, Cent. Dig. § 35; Dec. Dig. § 13.\*]

Appeal from Circuit Court, Bibb County; B. M. Miller, Judge.

Action by Ernest Ward, by his next friend, against Bibb County. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Lavender & Thompson, for appellant. D. W. Crawford, for appellee.

**DOWDELL, C. J.** This case was tried in the circuit court on an agreed statement of the facts. The court gave the general affirmative charge for the plaintiff, and refused a like charge to the defendant. The only two assignments of error on the record are based on these rulings of the court.

The appellee, plaintiff in the case, sued the county of Bibb in assumpsit "for money had and received for the use and benefit of the plaintiff." The money claimed in this action was proceeds arising from the hard-labor service of the plaintiff under conviction for a misdemeanor and sentence to work out the costs of conviction. The conviction and sentence was in all respects regular under the statute; the sentence being for a certain specified number of days at 30 cents per day, less than 10 months, to pay the duly ascertained amount of costs. Code 1896, § 5426. The plaintiff was hired to the Sloss-Sheffield Steel & Iron Company under a contract made with the county of Bibb, by said company, for the hire of convicts sentenced to hard labor for said county. The rate of the hire of said convict, under the terms of said contract, was \$1.08 per day. The plaintiff performed the hard-labor service under his sentence for the entire number of days specified in the sentence. The proceeds of his hard-labor service under the contract of hire was more than sufficient to pay the costs of his conviction, and after the payment of the costs out of the same the balance was paid into the treasury of the county. It is for this balance so paid into the county treasury—the difference between 30 cents a day, the rate fixed by the judgment of the court in the sentence, and \$1.08, as fixed by the terms of the contract of hire between the county and the Sloss-Sheffield Steel & Iron Company, the hirer—that the plaintiff sues, claiming same as money had and received for his use and benefit.

It is made the duty of the court or county commissioners, under the convict system (article 3, c. 139, p. 216, Cr. Code 1890), to make provision in reference to hard labor of county convicts, and to this end to enter into contracts for the hire of such convicts. The convict is no party to the contract, and can have no interest in the proceeds arising out of the same for hard-labor service performed, except as he may be affected by the provisions of section 5426 of the Criminal Code of 1896 when working out the costs of conviction. In the case before us the status of the plaintiff as a convict was fixed, not by the contract of hire, but by the judgment and sentence of the court trying him, as to his hard-labor service for the payment of the costs under the provisions of said section 5426. After providing for judgment to be

rendered for hard labor to pay the costs, specifying that the term for which he may be required to work shall not exceed 10 months, and fixing the rate per day at 30 cents for the discharge of costs, this section then further provides: "And such convict must be discharged from the sentence against him for costs on the payment thereof, or any balance due thereon, by the hire of such convict, or otherwise; and the certificate of the judge or clerk of the court in which the conviction was had, that the costs, or the residue thereof, after deducting the amount realized from the hire of the convict, have been paid, or that the hire or labor of the convict, as the case may be, amounts to a sum sufficient to pay the costs, shall be sufficient evidence to authorize such discharge."

It is on the quoted provision of the statute that the present action is sought to be maintained. That the hard-labor service performed by the plaintiff was under the judgment and sentence of the trial court, and hence involuntary on the part of the plaintiff, there can be no doubt. The plaintiff worked out his term of service, and at the rate per day specified in the sentence of the court. It is true that the proceeds of his hire, under the contract of the county with the hirer for the term of his service, were in excess of the amount fixed in the sentence; but there is nothing in the statute which contemplates the payment of such excess over to the convict. The statute merely provides for the discharge of the convict from the hard-labor service for the payment of the costs, under the conditions and circumstances mentioned in the statute. It is a matter of grace to the convict, to be enjoyed by him at his election and upon his action in the manner provided. There is no decision of this court directly in point on the question, but the principles laid down in the case of *Ex parte Pierce*, 89 Ala. 177, 8 South. 74, and in that of *Moore v. State*, 149 Ala. 66, 42 South. 996, have some bearing, and are, we think, persuasive to the correctness of the views we have expressed.

Our conclusion is that the circuit court erred in giving the general affirmative charge for the plaintiff, and in refusing a like requested charge to the defendant.

Reversed and remanded.

**SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.**

#### **PACE v. HANNAN.**

(Supreme Court of Alabama. Nov. 9, 1909.)  
**JURY (§ 28\*)—RIGHT TO JURY TRIAL—DEMAND—WITHDRAWAL—FAILURE TO OBJECT.**

Under Acts 1907, p. 569, § 16, requiring questions of fact to be tried by the court without a jury in all cases at law tried in the Mobile law and equity court, unless a jury is demanded, and section 12 (page 567), requiring

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



defendant to demur or plead within 30 days after service of summons, and authorizing a default on his failure to do so, where defendant defaulted, and did not object to plaintiff's withdrawal of his demand for a jury trial, the court could assess the damages, on such withdrawal.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 176, 184; Dec. Dig. § 28.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by Jessie W. Hannan against Thomas B. Pace. From a default judgment for plaintiff, and the execution of a writ of inquiry, defendant appeals. Affirmed.

Fitts & Leigh, for appellant. McIntosh & Rich, for appellee.

DOWDELL, C. J. This appeal is prosecuted from a judgment by default in the law and equity court of Mobile. The damages claimed being uncertain, a writ of inquiry was had before the court, by which the court ascertained the same. This judgment is assigned as error, the point taken being that it is shown by the record that the plaintiff, upon the suing out of the summons and complaint, demanded, under the act creating the court (Acts 1907, p. 569, § 16), a trial by jury, and that, she having done so, there could be no withdrawal of the demand without the consent of the defendant, and that consequently it was error for the court, instead of a jury, to assess the damages.

Section 16 of said act provides "that in all cases at law tried in said court, whether commenced by summons and complaint, attachment or otherwise, the issues and questions of fact shall be tried by the court without the intervention of a jury unless a jury be demanded by the plaintiff at the commencement of the suit, or by the defendant when he appears," etc. It is further provided in said section how the demand for a jury shall be made. Section 12 (page 567) of said act provides "that in all cases commenced in said court by summons and complaint, \* \* \* the defendant shall be required to appear and demur, answer or plead to the complaint \* \* \* within thirty days after the service of the summons upon him, whether such service be in term time or vacation; \* \* \* the defendant failing for more than the time herein above provided to appear and demur, or plead or answer, shall be held to be in default, and at any time thereafter, judgment by default \* \* \* may be rendered against him," etc.

In the present case the defendant failed to appear, and judgment by default was regularly rendered against him. There can be no question as to the regularity of the judgment by default. It was rendered pursuant to the provisions of section 12 of the act. The judgment recites that on a subsequent day of the term of the court, "this

day came the plaintiff by her attorneys, and it being shown to the court that the plaintiff did on a previous day of this term of the court obtain a judgment by default with leave to prove damages, and no trial by jury having been demanded by the plaintiff, this cause is tried by the court without the intervention of a jury, and the court after hearing the evidence renders judgment for the plaintiff for \$1,000," etc. There is an apparent conflict between the recital in the judgment entry and the indorsement of the summons as shown by the record as to a demand for a trial by jury by the plaintiff; but as both parties treat in brief and argument the recital in the judgment as being in fact merely a withdrawal of the previous demand by the plaintiff of a jury trial, we pretermitt any consideration of the question of conflict between the judgment entry and the other part of the record.

The appellant insists that the plaintiff's demand on the summons and complaint for a jury trial inured to his benefit and could not be withdrawn without his consent. This contention would have merit in it, if the appellant, defendant, had appeared, relying on the demand made by the plaintiff for a jury, and, for that reason, had suffered by his own opportunity for demanding a jury to pass. Such are the cases of *Allworth v. Interstate Consol. R. R. Co.*, 27 R. I. 106, 60 Atl. 834, *Warren v. Scudder-Gale Grocery Co.*, 96 Tenn. 574, 36 S. W. 383, and *Sherwood v. New York Telephone Co.*, 46 Misc. Rep. 102, 91 N. Y. Supp. 387, cited and relied on by counsel. The defendant was present in court and resisting the plaintiff's withdrawal of his demand for a jury. Here there was no objection to the withdrawal of the demand. The defendant was not present to object or consent. He was in default—which was in a sense a confession of plaintiff's cause of action. The facts clearly differentiate the present case from the cited cases.

The cases of *Wagon v. Turner*, 73 Ala. 197, *Warwick v. Brooks*, 67 Ala. 252, and *Manhattan Fire Ins. Co. v. Fowler & Co.*, 76 Ala. 372, cited by counsel, are without application. In those cases the court was without jurisdiction to try facts without the consent of both parties. Here that jurisdiction and power is conferred on the court by the statute, and no consent is required.

The defendant not appearing, and no objection being interposed to the plaintiff's withdrawal of his demand for a jury, we are of the opinion, and so hold, that the court's action was free from error.

The judgment will be affirmed.  
Affirmed.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

**JOHNSON v. FREDERICK.**

(Supreme Court of Alabama. Nov. 24, 1909.)

**1. FENCES (§ 6\*)—PARTITION FENCES—EXPENSE OF ERECTION—PROCEEDINGS—"IMPROVED LAND."**

Where an adjoining landowner had inclosed her lands with a wire fence, consisting of posts with four strands of wire attached thereto, and was using the land for a pasture for cattle, it was "improved land," within Code 1907, § 4247, providing that partition fences between improved lands shall be erected at the joint expense of the occupants.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 9-13; Dec. Dig. § 6.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3451, 3452.]

**2. FENCES (§ 15\*)—PARTITION FENCES—EXPENSE OF ERECTION—PROCEEDINGS.**

Code 1907, § 4247, provides that partition fences between improved lands shall be erected at the joint expense of the occupants. Section 4248 provides for proceedings to be taken in case the adjoining owners cannot agree as to the expenses, to determine the amount to be paid by each. *Held*, that the proceedings may be taken, though the moving party did not consult the other, before building the fence, as to the kind of fence to be built or probable cost of the same.

[Ed. Note.—For other cases, see Fences, Dec. Dig. § 15.\*]

**3. APPEAL AND ERROR (§ 1078\*)—ERROR WAIVED IN APPELLATE COURT.**

Assignments of error, not insisted upon in appellant's brief, are waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Certiorari by Mrs. Jane Johnson to review the action of a justice of the peace in proceedings instituted by Mrs. C. P. Frederick to compel Mrs. Johnson to pay a portion of the expense of erecting a partition fence. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

McIntosh & Rich, for appellant. Gordon & Irvington, for appellee.

**EVANS, J.** Mrs. C. P. Frederick, the appellee, erected a partition fence between her lands and the lands of Mrs. Janie Johnson, appellant, and, after having erected the fence, made demand upon the appellant to pay her part of the expense of erecting the same. They being unable to agree, the appellee, Mrs. Frederick, proceeded under section 4248 of the Code of 1907. The justice of the peace issued his order in writing to three disinterested freeholders of the precinct, in accordance with the statute, as admitted by the parties to this suit, to ascertain the amount to be paid by appellant to appellee. After doing these things required by the statute, the three persons so named made their report to said justice of the peace, ascertaining the amount to be paid by Mrs. Johnson to Mrs. Frederick. The amount so ascertained not

having been paid within 10 days after said report was made, the justice of the peace was about to issue execution as provided by the statute, when the appellant, Mrs. Johnson, obtained a writ of certiorari to the law and equity court of Mobile, and had the cause moved there for trial de novo. The complaint was there filed, as shown by the record, and defendant pleaded the general issue, with leave to give in evidence any matter that could be specially pleaded. The case was tried before Hon. Saffold Berney, judge of said court, without the intervention of a jury. The court rendered judgment for plaintiff, and defendant appealed to this court, and now assigns as error: (1) That "the court erred in allowing plaintiff to prove ownership of the property without the introduction of the deeds." (2) That "the court erred in rendering its final judgment against appellant in this case."

The first assignment of error is not insisted on in the brief of appellant's counsel, and we therefore treat it as waived. *Scarborough v. Borders & Co.*, 115 Ala. 436, 22 South. 180.

As to the second assignment of error, counsel for appellant insist that judgment should not have been rendered in favor of appellee for two reasons: (1) Because appellant was never consulted by appellee about building the fence, before building it, as to the kind of fence to be built, or the probable cost of the same, so that she might form any idea of how much money she would have to expend. (2) Because the lands of appellant were not improved lands within the contemplation of the statute, so as to make her liable for any portion of the price expended by appellee in erecting said fence. The undisputed evidence showed that the said lands of appellant and appellee joined for some distance. It is admitted by appellant that under the evidence the lands of appellee were improved lands as contemplated by section 4247 of the Code of 1907; but appellant insists that, under the proof, her lands were not improved lands as contemplated by said statute. The evidence upon this point was that appellant had inclosed her lands with a wire fence, consisting of posts with four strands of wire attached or tacked thereto, and was and had been using her said lands as a pasture for her cows and horses.

Although sections 4247 and 4248 of the Code of 1907 are very old statutes in this state, we fail to find any case where the question of what constitutes "improved lands," in the meaning of section 4247, has been discussed. The history of this legislation, as to the building of partition fences between lands of adjoining owners under certain conditions, and requiring the adjoining owners to pay for the same, seems to have had its origin in the colony of Massachusetts. There, and in other states of the Union where this legislation has been enacted, the term "improv-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed lands" has been held to mean lands appropriated by the owner and devoted to a particular use—used or employed to good purpose, or turned to profitable account. *Wjggin v. Baptist Society*, 43 N. H. 260, 261. We therefore hold that appellant, having fenced her land in and devoted it to the use of pasturage for her cows and horses, and thereby turned it to profitable account, made it improved land within the contemplation of section 4247 of the Code.

As to whether or not there was a legal duty resting upon appellee to consult appellant, before erecting said fence, as to the kind and costs of the fence to be erected, depends upon the proper construction of said section 4247 of the Code. As nothing to that effect is mentioned in the statute, and as there is no provision made as to what should be done in the event they could not reach an agreement as to the kind and cost of the fence to be built, and as the statute is entirely an equitable one and does not require that the expense shall be equally divided, and as the party building the fence under the circumstances took all the risk as to bad judgment in the kind and costs of the fence erected, and as the building of the fence, at the joint expense of both, was the right of either one of the adjoining owners, regardless of the objection of the other party, we fail to see any reason, in law, why the party desiring to build the fence should consult the other upon these matters except for her own protection. If the statute had required the other party to pay one-half of the costs of erecting the same, there would doubtless have been made some provision for consultation beforehand, and a way of deciding the kind and costs of the fence to be erected in case the parties could not agree thereon. On the other hand, the succeeding section, viz., section 4248 of the Code, provides what shall be done in case the builder of the fence and the adjoining owner cannot agree upon what the adjoining owner shall pay, and provides for viewers to go and see the fence, and examine the same, and make report what amount shall be paid to the owner erecting the same by the other party. It provides for just such a case as this.

We find no error in the ruling and judgment of the lower court.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

# JOHNSON v. NEW ENTERPRISE CO.

(Supreme Court of Alabama. Dec. 16, 1909.)

## 1. DETINUE (§ 16\*)—CLAIMS BY THIRD PERSONS—"PROCEEDINGS."

Under Code 1907, § 3792, authorizing a third person to interpose a claim to the property in detinue, and thereupon the same pro-

ceedings must be had as in other trials of the right of property, and section 6039, authorizing a person claiming to own the legal or equitable title to, or a paramount lien on, property levied on under execution or attachment, to contest his right to the property, a landlord, claiming a landlord's lien on crops grown on premises, may not interpose his claim in an action in detinue brought by the holder of the legal title conveyed by the tenant's mortgage on the crops, as the word "proceedings" signifies form, manner, or mode, and tokens a means, an instrument (quoting 6 Words and Phrases, p. 5632 et seq.).

[Ed. Note.—For other cases, see *Detinue*, Cent. Dig. § 25; Dec. Dig. § 16.\*]

## 2. DETINUE (§ 5\*)—TITLE AND RIGHT TO POSSESSION OF PLAINTIFF.

In detinue, plaintiff must show that he has a property right, general or special, in the chattel in controversy, and that he is entitled to immediate possession thereof; and a lienor or other equitable owner has no such title as will sustain detinue.

[Ed. Note.—For other cases, see *Detinue*, Cent. Dig. §§ 7, 8; Dec. Dig. § 5.\*]

## 3. ATTACHMENT (§ 1\*)—NATURE OF REMEDY.

In attachment, plaintiff seeks to subject the chattels to a satisfaction of his demand, and invokes judicial power to convert the chattels into a means of satisfaction thereof.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by J. B. Benson, doing business as the New Enterprise Company, against J. L. Jay and another, doing business as the Farmers' & Merchants' Warehouse, in which D. J. Johnson interposed a claim to the property. From a judgment for plaintiff, claimant appeals. Affirmed.

The plaintiff claimed under a mortgage executed to it by one E. B. Hughes in January, 1907, conveying the crops raised by him during that year. It was shown that the cotton was raised by Hughes and placed in the warehouse of defendant, on whom demand was made before suit was brought for the possession of the cotton. It was shown that E. B. Hughes raised the cotton, rented the land on which the cotton was raised from D. J. Johnson, and a mortgage was given by Hughes to Johnson in January, 1907; but it fails to appear that the Johnson mortgage was recorded, though the mortgage given the New Enterprise Company was recorded. The contention of the claimant was that his landlord lien was superior to any outstanding mortgage or other liens.

Espy & Farmer, for appellant. W. L. Lee, for appellee.

McCLELLAN, J. Counsel, in briefs, have reduced the controlling inquiry on this appeal to the single question: May a landlord lienor be a claimant in a trial of the right of property, and prevail thereupon, in an action of detinue instituted by an holder of the legal title, conveyed by mortgage, of crops grown upon the rented premises? As appears, the

inquiry involves a construction of Code 1907, §§ 3792, 6039.

The latter section (6039) contains the statute as written in the Code of 1886 and also the amendment thereof by the act approved February 28, 1887 (Acts 1886-87, p. 150), by which it was enacted that the "right of the trial to property shall [should] include any person who holds a lien upon or equitable title to such property." Theretofore, of course, the right to try the property in the personalty did not extend to lienors thereof or to those possessing equities therein. With this status existing, the former statute (section 3792) was enacted in 1889 (Acts 1888-89, p. 57), and became section 1484 of the Code of 1896. By the letter of section 6039, it applies only to personal property levied on under writs of execution or of attachment. In the last phrase of section 3792 it is provided: "And thereupon the same proceedings must be had as in other trials of the right of property." Accordingly, the final inquiry, on construction looking to the ascertainment of the legislative intent, is whether the quoted provision effected to confer upon a lienor or equitable claimant of personal property, for the recovery of which an action of detinue has been instituted, the right to invoke the court's determination of the rights thereto between the plaintiff and such lienor or equitable owner?

So far as the letter of the statute is concerned, it is apparent that "proceedings" is the key word in the statute on this occasion. If that word was employed with the purpose of expressing the legislative intent to confer on lienors or equitable owners the substantive right of contest created after the amendment, made in 1887, of the trial of the right of property statute, then, and of course, the court below ruled incorrectly in denying appellant the right to contest, in virtue of sections 3792 and 6039, the right to the chattels in question. On the other hand, if such was not the legislative purpose, as expressed by the provision quoted, the court's action was correct. A careful reading of the statute does not discover to us any indication of legislative purpose to use the word "proceedings" in any other sense than in common legal parlance it has. In that parlance "proceedings" usually signifies form, manner, or mode. It tokens a means, an instrument. 6 Words and Phrases, p. 5632 et seq, and decisions therein cited. Giving it that meaning, as must be done we think, the scope of the provision quoted finds its limit of intended effect in the form or mode of trial or practice, such as, among others, the formulation of the issue and burden of proof.

Leaving out of view the letter of the stat-

ute (section 3792), and omitting controlling and indicated significance to the word "proceedings," we cannot avoid the conclusion that the difference between the two classes of plaintiffs, one in execution or attachment, and, on the other hand, one seeking the recovery of the property in specie, afford strong reason to incline to the view that the Legislature, not having expressly conferred the right of trial of property on lienors or equitable owners, as it might, of course, have readily done, did not contemplate the effect appellant earnestly contends was intended by the law-makers. In both acts of enforcing rights through writs of execution and attachment the plaintiff's attitude and insistence is, and must be, that the property right in and the right to the possession of the personalty is not primarily in him, the plaintiff. In the detinue suit the plaintiff's attitude and insistence is, and must be, that he has a property right, general or special, in the chattel, and is entitled to the immediate possession thereof. In the former suit the actor's effort is to subject the chattel to the satisfaction of his demand, and in the latter the effort is to obtain possession of the chattel. In one the possession, as between the parties litigant, is the point of contention, and in the other judicial power is invoked, not to transpose the possession between the parties, but to convert the chattel into a means of satisfaction of a demand. In the light of these very different objects and effects, it is evidently more rational to conclude that the Legislature would allow the opposition of a lien or other equity to the subjection of the chattel through writ of execution or of attachment, than it would authorize the opposition of the lien or equity, in an action at law, to a detinue plaintiff's claim to the chattel itself. Furthermore, a lienor or other equitable holder has no such title as would sustain detinue, and a system, at law, would be at least incongruous that permitted one whose title was not sufficient to maintain detinue to defeat an action by one whose right to the possession of the chattel was superior. No irrational result follows this conclusion, for the landlord's superiority of right to have his demand satisfied out of the crop is not impaired, nor the certainty of its effectual enforcement jeopardized or impeded, whatever the adjudication between the mortgagee and the mortgagor in the detinue suit to which they are parties.

The court below applied the law, in this particular, as we understand it, and the judgment is affirmed.

Affirmed.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

**WESTERN UNION TELEGRAPH CO. v. PEAGLER.**

(Supreme Court of Alabama. Nov. 11, 1909.)

**1. EVIDENCE (§ 472\*) — OPINIONS — CONCLUSIONS.**

In an action for failure to deliver a telegram, plaintiff could only testify as to the circumstances under which a message was sent, and not that she suffered pain and mental anguish on account of "the dispatch"; that being a conclusion for the jury to draw, as plaintiff might have suffered anguish from some other cause.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 472\*.]

**2. TELEGRAPHS AND TELEPHONES (§ 68\*) — ACTIONS — DAMAGES — MENTAL ANGUISH — WHEN RECOVERABLE.**

Damages for mental anguish by nondelivery of a telegram cannot be recovered, where they are not clearly contemplated by the parties as the natural result of the breach of contract, though such damages are usually recoverable where the telegram is between close relatives and relates to sickness, death, etc., so as to obviously show that anguish would result from nondelivery.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. § 68\*.]

**3. TELEGRAPHS AND TELEPHONES (§ 68\*) — ACTIONS — DAMAGES — MENTAL ANGUISH.**

Plaintiff sent to her husband a telegram: "Mr. W. E. P.: Please let me hear from you at once by wire. [Signed] Mrs. W. E. P." The evidence did not show any urgency which a tracing message would not have met, so as to avoid a trip by the sender, taken on the sender's not answering, or that the former attempted to find out whether the message was delivered, or show that any mental suffering caused by its nondelivery would have been obviated by prompt delivery and answer. *Held*, that the parties could not be assumed to have contemplated mental suffering as a result of a failure to deliver, and the sender could not recover such damages in an action for nondelivery.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. § 68\*.]

**4. TELEGRAPHS AND TELEPHONES (§ 68\*) — NONDELIVERY OF TELEGRAM — MENTAL SUFFERING — ACTUAL DAMAGES.**

Damages for mental suffering, caused by the nondelivery of a telegram, are actual, not punitive, damages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. § 68\*.]

Appeal from Circuit Court, Wilcox County; B. M. Miller, Judge.

Action by Madie Peagler against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

George H. Fearsons, Campbell & Johnson, and Pettus, Jeffries & Pettus, for appellant. Miller & Miller, for appellee.

**MAYFIELD, J.** The action in this case was to recover damages for failure to properly send and deliver the following telegram: "Maplesville, Ala., Feb'y 8, 1907. Mr. W. E. Peagler, Camden, Ala.: Please let me hear

from you at once by wire. [Signed] Mrs. W. E. Peagler." The court instructed the jury that the plaintiff could not recover damages for any physical pain, or for any loss to her estate other than the cost of sending the message, together with interest, but declined to instruct them, on defendant's written request, that plaintiff could not recover damages for mental pain and anguish suffered on account of defendant's failure to deliver the message promptly, if they found that she suffered such damages on account of such failure, and also allowed the plaintiff to testify, over defendant's objections, that she did suffer such damages on account of such failure. The price paid for sending the message was 40 cents. The jury returned verdict for the plaintiff in the sum of \$300.

The evidence offered to prove damages for mental pain and anguish, in the form and manner in which it was offered and allowed in this case, we think was improper. The plaintiff should have been required to state the facts and circumstances attending the transaction, and not her conclusions that she suffered such pain and anguish on account of "the dispatch." While a witness may testify that he or a third party suffered pain, or even appeared to suffer pain, yet he cannot testify that he suffered it on account of given alleged cause. That is usually a conclusion for the jury to draw, from all the evidence. Moreover, the fact (if it be a fact) that she suffered such pain or anguish on account of the dispatch was not necessarily attributable to defendant's failure to properly send and deliver it, which was the sine qua non of liability for such damages, under the issues of this case. She might have so suffered because she sent it, or because it was not answered, or by reason of many other causes for which the defendant was not liable.

We do not think that this is a case for the recovery of damages for mental pain or anguish, even under the rules laid down by this court. It is not as strong a case, under the issues or proof, for such damages, as was Leland's Case, 49 South. 252, Northcutt's Case, 48 South. 558, Westmoreland's Case, 151 Ala. 319, 44 South. 332, Sledge's Case, 153 Ala. 291, 45 South. 59, Ayers' Case, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92, or Long's Case, 148 Ala. 202, 41 South. 965, in which cases such damages were held not to be proper. This court has laid down the rule as to when such damages are recoverable, and when not, in these cases, as follows: "Such damages, notwithstanding their elusive character, are actual; but they are ordinarily not the natural result of a breach, and thus not within the contemplation of the parties. In cases where they are not clearly contemplated, it would be dangerous and unfair in the extreme to allow them. When the message is between persons of a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

close degree of relationship, and relates to exceptional events, such as sickness or death, or such relations in which a failure to deliver obviously comprehends mental distress and anguish, we have allowed such anguish as an item of damages. But to extend as a natural result the allowance on other occasions 'would, in our judgment, tend to promote and encourage a species of litigation more or less speculative in its nature, and unjust and oppressive in its results.' \* \* \* In this case the message did not relate to matters which would bring within the contemplation of the parties to the contract the idea of mental anguish as a result from a failure to deliver, nor is there any proof in the case that any did result. We therefore hold that there was no right to recover therefor. We consider it a point of wisdom to restrict the allowance of damages for mental anguish for nondelivery of telegraphic messages to the occasions of sickness and death of the close relations in which it has been allowed."

While the dispatch in this case did probably show, on its face, the close relationship of husband and wife between the sender and the sendee, it did not show any case of sickness, death, or distress, or that any such damages would probably be suffered, by the sender or the sendee, on account of failure to deliver promptly. The parties did not have, and cannot be presumed to have had, in contemplation such damages as the result of the failure to deliver promptly. There was not shown, either in the message or by the evidence, any such degree of urgency as could not have been met by resort to a second message or to a tracer, which would have avoided the necessity of plaintiff's making the trip to Camden. It does not appear that plaintiff attempted to ascertain whether or not the message had been delivered, or the cause of the delay, or of her not receiving an answer. While she was not absolutely required to do all these things, in order to recover damages for the company's failure to perform, it does seem that common prudence would have dictated some such precaution, where the alternative was to suffer, as she claims to have suffered, and to undertake said trip. Furthermore, it does not appear that her suffering would have been alleviated or relieved by a prompt delivery or a prompt answer. It might have been increased thereby, so far as appears from this record.

The trial court properly ruled that no actual damages for physical pain, or expense, or wrong in making the trip to Camden, could be recovered; and certainly, if such actual damages could not be recovered, the kind of damages for mental pain and anguish, which is more or less speculative in its nature, should not be recoverable (though, of course, it is also actual, as distinguished from punitive, damages). The case at bar is clearly distinguishable from the South Carolina case

relied upon by counsel for appellee. *Willis v. W. U. Telegraph Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828. That case, with others similar, was distinguished by this court in *Leland's Case*, 49 South. 252.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

### LONG v. GRANT.

(Supreme Court of Alabama. Nov. 9, 1909.)

#### 1. LANDLORD AND TENANT (§ 90\*)—OPTIONS OF LANDLORD ON TENANT HOLDING OVER.

When a tenant holds over after expiration of his term, the landlord may either treat him as a trespasser or hold him to a continuance of the tenancy on the same terms.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 284-289; Dec. Dig. § 90.\*]

#### 2. TENANCY IN COMMON (§ 13\*)—OCCUPATION BY ONE CO-TENANT—EFFECT.

Each of two tenants in common holds for himself and his co-tenant, and the relation of landlord and tenant does not exist between them, though one be in actual occupancy of the lands, appropriating the proceeds.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 29; Dec. Dig. § 13.\*]

#### 3. TENANCY IN COMMON (§ 33\*)—LEASE OF PREMISES TO CO-TENANT.

Two tenants in common can enter into an agreement by which one becomes tenant of the other, and liable for rent.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 25; Dec. Dig. § 33.\*]

#### 4. LANDLORD AND TENANT (§ 90\*)—TENANT HOLDING OVER—PRESUMPTION OF CONTINUANCE OF TENANCY.

The presumption of the continuance of a tenancy, arising from a tenant remaining in possession, is rebuttable.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 284-289; Dec. Dig. § 90.\*]

#### 5. TENANCY IN COMMON (§ 13\*)—LEASE OF PREMISES TO CO-TENANT—TERMINATION.

Where one of two tenants in common, leasing his co-tenant's half of the land, distinctly notifies him he will not rent again on the former terms, and they fail to agree, his occupancy at the end of the term becomes, as it was before, possession for both.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 29; Dec. Dig. § 13.\*]

Appeal from Circuit Court, Barbour County; A. A. Evans, Judge.

Action by Eloise Long against J. A. Grant. From a judgment for defendant, plaintiff appeals. Affirmed.

C. S. McDowdell, Jr., and A. H. Merrill & Son, for appellant. G. L. Comer, for appellee.

SIMPSON, J. This is an action by the appellant (plaintiff) against the appellee (defendant) to recover rent claimed to be due. The plaintiff and defendant own the land for which rent is claimed as tenants in common.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On or about the 20th of December, 1905, the plaintiff rented her half of the land to the defendant for the year 1906; the rental being 12 bales of middling cotton. The contract was in writing, and was surrendered to the defendant on the payment of the rent in the fall of that year. Defendant planted oats on part of the land in 1906, which did not mature, and consequently were not harvested until 1907. He remained in possession of the land, and gathered a crop in 1907; but in the fall of 1906 the defendant sent the witness Holmes to the husband and agent of the plaintiff, who informed said husband that he would not rent the interest of the plaintiff for the year 1907 for the same rent, but would be willing to rent it for 8 bales. Said husband and agent returned as answer that he would not rent the interest of his wife for 8 bales; that he wanted the lands sold for division. This was the message delivered to the defendant. The court gave the general charge in favor of the defendant, which the appellant claims was error, invoking the principle of law that, when a tenant holds over after the expiration of his term, the option rests with the landlord either to treat said tenant as a trespasser or to hold him to a continuance of the tenancy on the same terms.

There is no controversy as to this principle. *Wolfe v. Wolff & Bro.*, 69 Ala. 549, 554, 44 Am. Rep. 526; *Robinson & Ledyard v. Holt*, 90 Ala. 115, 117, 7 South. 441. It is also true that each tenant in common holds for himself and his co-tenant, and that the relation of landlord and tenant does not exist between them, though one be in the actual occupancy of the lands, and appropriating the proceeds thereof. *Gayle v. Johnston*, 80 Ala. 396, 400. Tenants in common can, however, enter into an agreement by which one becomes the tenant of the other, and responsible for rent. *Evans v. English*, 61 Ala. 416, 427. So the question for decision is whether the mere fact that the tenant, who has rented his co-tenant's interest for one year, is conclusively presumed to continue the tenancy by remaining in possession of the premises.

The presumption is, as to any party, a rebuttable one (24 Cyc. 1014), and the reason given for raising the presumption is that the tenant cannot deny his landlord's title, and by remaining in possession he must necessarily be either a trespasser or, by the acquiescence of the landlord, a tenant upon the same terms as before obtained. The reason of the rule cannot apply to a tenant in common. He was in possession before the tenancy was created, and is entitled to remain in possession, as tenant in common, after the relation of landlord and tenant has terminated.

While it may be that a tenant in common, who, after having rented the interest of his co-tenant, should, without anything being

said, remain in the same exclusive occupancy after the termination of the term, would be presumed to have continued the tenant of his co-tenant, on the same terms, yet where he distinctly notifies the co-tenant that he will not rent again on the former terms, and they fail to agree on any terms, his occupancy, at the end of the first term, becomes, as it was before, the possession of one tenant in common for all. He could not give up the physical possession of the interest of his co-tenant without at the same time surrendering his own, which he is under no obligation to do.

The judgment of the court is affirmed.  
Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

CRONIN v. AMERICAN SECURITIES CO.  
(Supreme Court of Alabama. Nov. 18, 1909.)

1. BROKERS (§ 46\*)—COMPENSATION—TERMINATION OF CONTRACT.

Where the owner of land agreed to pay plaintiff a commission for selling it to a corporation that plaintiff might promote for the purchase, and while plaintiff was endeavoring to bring the deal about the owner withdrew the offer and sold the land himself, he was not liable for commissions; plaintiff's efforts not having in any way tended to the consummation of the sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 47; Dec. Dig. § 46.\*]

2. BROKERS (§ 40\*)—CONTRACTS—CONSIDERATION.

Where an owner of land revoked an agent's authority to sell, and told the agent that he would be taken care of as if he had made the sale, and the owner then made a sale through his own efforts, the promise to the broker was without consideration.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 40.\*]

3. BROKERS (§ 44\*)—REVOCATION OF AUTHORITY.

As a general principle, an authority to sell land may be revoked at any time before sale, and the owner will not thereby incur any obligation to the agent.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 45; Dec. Dig. § 44.\*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Action by T. P. Cronin against the American Securities Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The second count in the complaint is as follows: "The plaintiff claims of the defendant the further sum of \$3,500, for this, to wit: That the said defendant, being in the business of selling cemetery lots in the Greenwood Cemetery, in Montgomery, Alabama, employed the plaintiff as a salesman on commission, and during such employment in the early part of 1908 offered to sell in said

Greenwood Cemetery a body of about 50 acres of land for the burial of colored persons, to be known as the Lincoln Cemetery, and the proposition was to sell said 50 acres of land to a company or syndicate of persons, to be known as the Lincoln Cemetery Company, and plaintiff was employed and engaged to work up and obtain subscriptions for, and to have a syndicate formed for the organization of, such a company to make such purchase, with a view of its making sales of lots therein to persons desiring burial lots in such cemetery for colored persons. That plaintiff undertook such employment upon an agreement and understanding with defendant that he should have the exclusive employment in that behalf, and was to have a commission of 10 per cent. on the amount of the price at which the same was made, and plaintiff was especially to endeavor to induce a purchase of said land allotted and selected for said Lincoln Cemetery to an association of the colored population of Montgomery and vicinity, and plaintiff undertook said business and worked diligently at the same for several months in interviewing and interesting persons likely to engage in such purchase by organizing a company or association, and had drawn the attention of the public to the advantages of the proposed purchase, and had created a prevailing sentiment favorable to that end, and was progressing satisfactorily towards having formed an association to make such purchase, when the said defendant came to the plaintiff and told him to cease offering said land for sale for the present, as he was doing and had undertaken to do; that it had other parties who wanted to and would likely buy, and to let it negotiate with such parties and make the sale, and that it should make no difference to plaintiff; that he would be taken care of just as if he had made the sale. That thereupon plaintiff, in pursuance of said request, desisted from further offering of said land for sale. That defendant did make a sale of said lot of 50 acres, immediately after plaintiff desisted from his offering, at and for the sum of, to wit, \$35,000, whereby plaintiff became and was entitled to his commission of 10 per cent. thereon, but that defendant refused to pay, or any part thereof, to the plaintiff; to the damage of the plaintiff."

The following grounds of demurrer were assigned: "(1) Because it shows on its face that plaintiff was in the employment of the defendant as a regular salesman on commission, without averring that the contract afterwards alleged to have been made to the sale of the Lincoln Cemetery property was made by an officer of the said defendant company having authority to do so. (2) It shows on its face that plaintiff never made the sale for which he claims commission. (3) It shows on its face that the defendant made the sale itself of the property, and fails to aver that any officer of the company had any author-

ity to bind the defendant to pay commission on said sale to plaintiff. (4) It fails to aver that the agreement to pay the commission to plaintiff, though plaintiff did not make a sale, was in writing. (5) It fails to aver that any demand was made upon defendant for the amount sued for. (6) It shows that plaintiff was in the real estate business, without averring that he had paid his license for such business, as is required by law. (7) That the agreement was without consideration. (8) It fails to aver that plaintiff had given anything of value for defendant's promise to allow plaintiff commission on the sale of Lincoln Cemetery that defendant itself made. (9) It shows on its face that the agreement was without consideration and was a nudum pactum. (10) It shows that defendant, at any time before plaintiff effected a sale of the property, had the right to dismiss plaintiff and do whatever it pleased with the property. (11) It admits that plaintiff never effected a sale of the property. (12) It shows that the sale of the property made by the defendant was not the result or culmination of any work done by plaintiff. (13) It fails to aver that the sale made by defendant was brought about by any services rendered by plaintiff. (14) It shows that defendant's original agreement to pay plaintiff a commission was contingent upon plaintiff selling the property or procuring a purchaser therefor."

Gunter & Gunter, for appellant. Goodwyn & McIntyre, for appellee.

SIMPSON, J. This action was brought by the appellant against the appellee. All of the counts of the complaint, except count 2, were withdrawn. A demurrer to count 2 was sustained by the court, and upon this ruling the plaintiff was allowed to take a nonsuit, "with leave to assign said adverse ruling by the court for error on appeal." Hence the only question for consideration is the action of the court in overruling the demurrer to said second count of the complaint.

It is not denied that the general principle is that an authority to sell land may be revoked at any time before sale, and that the owner will not thereby incur any obligation to the agent. *Chambers v. Seay*, 73 Ala. 372. Appellant insists, however, that there were elements of contract in this case which differentiated it from the cases in which the courts have so held, and that, under the facts of this case, the plaintiff is entitled to recover the amount of commissions stipulated in the original agreement, as claimed in the second count of the complaint.

In the case of *Chambers v. Seay*, supra, this court, admitting the proposition that where an agent's authority is coupled with an interest it cannot be revoked, said: "To be irrevocable, it seems now well settled that the power conferred must create an interest in the thing itself, or in the property which is the subject of the power"—and held that



an interest in the proceeds of the sale did not constitute an interest in the property, saying further: "He had parted with no money, or other value, for the security of which the power of sale was conferred in the agreement. He had risked, in the venture of his agency, only his personal services and the expenses incidental to its execution. The undertaking to transport specimens of iron ore to England, and to advertise the lands there, may be embraced as a part of the ordinary expense to be incurred in the usual course of such employment. It is fair to presume that he risked this much in view of the large compensation to be reaped as commissions in the event of a successful sale" (page 378). The court goes on to intimate that, where an agent "has been prevented from effecting a sale by the interference of his principal," he may recover the value of his labor and expense, in a proper form of action; or "where the sale of the property is brought about by the advertisements or exertions of the broker or agent, etc.," he may recover his commissions (page 379). In the case of *Holland v. Howard Bros.*, 105 Ala. 538, 17 South. 35, the brokers were the procuring cause by which the purchaser was brought to the seller. In the case of *Worthington v. McGarry*, 149 Ala. 251, 42 South. 988, the broker agreed to procure certain options on lands and on the stock of a corporation, and did procure the options on the land, but claimed that he was prevented from securing the option on the stock by the defendant. This court held that the plaintiff could not recover compensation under the contract, but held that, when the performance by the plaintiff was prevented by the defendant, "the plaintiff was relegated to a suit for damages for a breach of the contract, or one on quantum meruit for services actually performed," and that "the plaintiff, upon a proper count, and upon proof of the value of his services in procuring the option as to the ore land, would have been entitled to recover; but it was error for the lower court to hold that under the written contract he was entitled to the price named therein for the obtaining of both options, when he only obtained one." Further authorities on this subject are collated in the case *Hutto v. Stough & Hornsby*, 47 South. 1031.

In the case now under consideration there is no pretense of interest in the property, within the meaning of the decisions. There is no claim that, but for the interference, the plaintiff would have closed the contract with the syndicate which he proposed to organize, and no allegation of the value of his services, or that they inured in any way to the advantage of the defendant, or tended in any manner to the consummation of the contract which the defendant made with another party. Said count claims distinctly, and only, the amount agreed to be paid un-

der the contract, and does not show any facts tending to prove a compliance with the terms of the contract. Under said contract, as originally made, if it could be called a contract at all, the plaintiff was not under any legal obligation to do anything, but could have abandoned the project, at any time, without incurring any liability, thus showing that there were no mutual obligations to constitute a contract. That being the case, when the defendant notified the plaintiff to cease his efforts to form a syndicate and sell, it was acting entirely within its rights, and, as the plaintiff had no irrevocable rights under the authority to sell, there was no consideration to support the vague assurance that "he would be taken care of, just as if he had made the sale."

There was no error in sustaining the demurrer to said count 2.

The judgment of the court is affirmed.  
Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

## GREEN v. SOUTHERN STATES LUMBER CO.

(Supreme Court of Alabama. Nov. 18, 1909.)

### 1. BROKERS (§ 65\*)—COMPENSATION—MISCONDUCT OF BROKER—INCONSISTENT RELATION.

The rule prohibiting a real estate agent from recovering compensation for selling property, where he was agent of both buyer and seller, applies unless both parties know of his inconsistent relation and consent thereto.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 49; Dec. Dig. § 65.\*]

### 2. WORK AND LABOR (§ 24\*)—ACTIONS—PROOF—VARIANCE.

A count for work and labor done on a certain date could not be sustained by proof of work done on any other date.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 44; Dec. Dig. § 24.\*]

### 3. BROKERS (§ 83\*)—ACTIONS FOR COMMISSION—ADMISSION OF EVIDENCE.

In an action for commissions for procuring a purchaser for realty, who, pursuant to an agreement with the owner, afterwards canceled the contract to purchase, a question to the purchaser claimed to have been procured, whether his habit was to abandon his obligations without notice, was properly excluded.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 85.\*]

### 4. CONTRACTS (§ 346\*)—ACTION—PROOF—VARIANCE.

Plaintiff must recover on the contract alleged.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1740; Dec. Dig. § 346.\*]

### 5. TRIAL (§ 234\*)—INSTRUCTIONS—EVIDENCE.

A charge that the jury must try the case on the evidence presented to them, and not on the attorneys' assertions, was not erroneous for failure to charge that they should try the case

on the law, as well as the evidence, and could not have misled the jury to plaintiff's injury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 234.\*]

**6. TRIAL (§ 237\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

While a charge that the evidence must preponderate in plaintiff's favor, to entitle him to recover, may be refused, it is not error to give it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 542, 548-551; Dec. Dig. § 237.\*]

**7. APPEAL AND ERROR (§ 216\*)—HARMLESS ERROR—INSTRUCTIONS—REQUESTS.**

A misleading charge cannot be complained of on appeal, where its misleading effect could have been obviated by an explanatory charge, which was not requested.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; \* Trial, Cent. Dig. § 629.]

Appeal from Circuit Court, Baldwin County; Samuel B. Browne, Judge.

Action by John M. Green against the Southern States Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Gregory L. & H. T. Smith, for appellant. James H. Webb, and Frank F. Stern, for appellee.

**McCLELLAN, J.** This case, in general outline, may be found stated in its report on former appeal. *Green v. Southern States Lumber Co.*, 141 Ala. 690, 37 South. 670.

The trial was had on counts 1, 2, and 3, the last added by amendment. The first rests the right to recover compensation—commissions—for services in respect of the sale of lands in Baldwin county, alleging, in extenso, the agreement to pay 10 per cent. commissions, and concluding to the effect, within the agreement, that plaintiff (appellant) obtained Jones and Foley as purchasers of the land. The second is the common count for work and labor done on February 11, 1902. The third declares on the breach of the agreement averred in the first count, and concludes with the allegation that, notwithstanding performance on plaintiff's part, Jones and Foley and defendant (appellee) by mutual consent canceled the contract of purchase.

The defense to all the counts, additional to general traverses of the allegations of each, was, we summarize, that in the transaction counted on plaintiff, without the mutual knowledge and consent of the parties, represented both parties, and hence lost any right to compensation in the premises. This principle was announced on former appeal, and from brief of counsel its abstract soundness is not controverted. But the plaintiff sought to avoid the defense by matter set up in several replications. All of these replications, save 4, 6, 7, and 8, filed October 30, 1907, fell in response to demurrer.

The pleas were well drawn within the principle before stated. The insistence in

brief that the seller's knowledge of, and consent to, where he is impelled by the broker or agent, the inconsistent relation occupied by the broker or agent, avoids the rule, cannot be approved. It is in direct contravention of the principle stated. It is the conduct and relation of the agent, involving trust and confidence not necessarily crystallized into contract with both parties, that precludes him from recovering for his services. He can only avoid its effect to deny him compensation by showing that both parties knew of his relation in the premises and, so knowing, consented to his acting in such inconsistent capacities. *Bollman v. Loomis*, 41 Conn. 581; *Rice v. Davis*, 136 Pa. 439, 20 Atl. 513, 20 Am. St. Rep. 931; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Holcomb v. Weaver*, 136 Mass. 265; *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553; *Meyer v. Hanchett*, 39 Wis. 419; *Strawbridge v. Swan*, 43 Neb. 781, 62 N. W. 199.

The second count, there can be no doubting, rests on the transaction of February 11, 1902—that counted on in the first and third counts. The averment in the second count of date of service was material, and the count could not be sustained by the proof of service on any other date; nor could a recovery thereunder be based upon service rendered on any other date. *Williams v. McKissack*, 125 Ala. 544, 27 South. 922; *M. J. & K. C. R. Co. v. Bay Shore Lumber Co.*, 48 South. 377. It need hardly be added that, to sustain count 2, it was, in practical effect, necessary to sustain counts 1 and 3, wherein the transaction of February was alone declared on. These observations answer the appellant's argument in respect to charges precluding consideration of, or a recovery on, the subsequent dealings in August, 1902, between defendant and Foley.

There is no merit in the two assignments predicated on the questions to the witnesses, plaintiff and Jones. The conduct, and attending circumstances, of plaintiff, with reference to the sale of the lands to the Chicago parties, was essentially within the issues raised by the pleas, in connection with the averments of the complaint. The question to Jones sought to inquire whether his habit was to abandon, without notice, his obligations. That fact, if so, had no possible place in the case.

Many of the 15 charges urged as error were justified under the view of the substantive law of the case before stated; others announced the correct rule that the plaintiff is always confined in recovery to the contract declared on; and still another instructed the jury that they must try the case on the evidence presented to them, and not on the assertions of the attorneys in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the case. The fact that the charge omitted to qualify the proposition to the effect that they should try the case under the law, as well as the evidence, did not render the giving of the charge error. The evident purpose of the charge was to inform the jury that the evidence, and not the assertions of the attorneys in the case, was the proper source from which to get the facts on which to try the case. The jury could not have been misled, to plaintiff's prejudice, by the charge.

The insistence that the charge dealing with the appropriateness, under conditions there defined, of the common count for work and labor done, was error, rests very largely upon an undue emphasizing of the word "the," as employed in the charge just preceding "appropriate." The charge announced a sound proposition of law, and it would be unwarrantably extreme to attribute to the charge an effect depending wholly upon an unnatural stressing of the word "the."

There are a school of charges in the record, assigned as error and assailed in brief, declaring, among other things, that the evidence must preponderate in plaintiff's favor in order to entitle him to a verdict. The more recent view prevailing here as to charges dealing with the preponderance of the evidence is that it is not error, on that account, to give such charges, but that they may be refused. *Birmingham R., L. & P. Co. v. Martin*, 148 Ala. 8, 15, 42 South. 618; *Callaway v. Gay*, 143 Ala. 524, 39 South. 277. The class of charges last mentioned were not erroneously given.

Charge A (so designated for convenience) was unquestionably misleading, when referred to those issues to sustain which defendant had the burden. However, this effect could and should have been avoided by an explanatory charge.

We have dealt with all of the assignments pressed in brief, and find no prejudicial error in them.

The judgment is affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

# DOBBINS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Alabama. Nov. 18, 1909.)

## 1. TELEGRAPHS AND TELEPHONES (§ 15\*)—OBSTRUCTIONS IN STREETS—NEGLIGENCE.

A telegraph company, leaving for many years in a street the sawed-off stump of a telegraph pole three feet high, is negligent, and is liable for injury to a pedestrian stumbling over it, unless he is guilty of contributory negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 9; Dec. Dig. § 15.\*]

## 2. TELEGRAPHS AND TELEPHONES (§ 20\*)—OBSTRUCTIONS IN STREETS—INJURIES TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

A telegraph company sawed off a telegraph pole three feet above the ground, leaving the stump on the side of a path across the street in common use. A pedestrian at night veered from the path, and stumbled over the obstruction, and was injured. He was familiar with the surroundings, and undertook to keep within the path by reference to a tree and telegraph pole seen by him on the same side of the street as the obstruction was, and the relation of which, in point of location, to the tree and telegraph pole, were known to him. Held not to show as a matter of law that he was guilty of negligence in failing to exercise proper care in walking on the path, or that he was negligent in selecting the path for his route.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 13; Dec. Dig. § 20.\*]

## 3. TELEGRAPHS AND TELEPHONES (§ 20\*)—OBSTRUCTIONS—INJURIES TO PEDESTRIANS—PLEADINGS.

In an action against a telegraph company, maintaining the stump of a telegraph pole in a street, for injury to a pedestrian stumbling over it while on a path across the street, a plea alleging that the pedestrian knew of the presence of the stump, and with such knowledge walked in the nighttime where it was, and where he could not see it, and collided with it, when by the use of ordinary care he could have walked past it by pursuing the ordinary path, alleges negligence in walking past the stump, and not in the selection of the general route across the street, and is sufficient as against a demurrer.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 13; Dec. Dig. § 20.\*]

## 4. TELEGRAPHS AND TELEPHONES (§ 15\*)—OBSTRUCTION IN STREETS—INJURIES TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

The fact that a pedestrian, who stumbled on the stump of a telegraph pole in a street, attempted to cross the street at night, when he could not see the stump before he collided with it, notwithstanding his knowledge of the surrounding circumstances, must be considered in determining whether he employed proper care.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 9; Dec. Dig. § 15.\*]

## 5. TELEGRAPHS AND TELEPHONES (§ 15\*)—OBSTRUCTIONS—INJURIES TO PEDESTRIAN—ASSUMPTION OF RISK.

Assumption of risk is not available as a defense in an action against a telegraph company for injuries to a pedestrian stumbling over the stump of a telegraph pole left in the street.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 9; Dec. Dig. § 15.\*]

Appeal from Circuit Court, Bibb County; B. M. Miller, Judge.

Action by A. P. Dobbins against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Plaintiff's right of action is grounded upon the fact that the defendant telegraph company left standing for several years in or near the sidewalk in the town of Centreville, Ala., the stump of a telegraph pole about

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

three feet high, which had been broken or cut off, and over which plaintiff tumbled and fell in endeavoring to cross from one side of the street to the other at night, all of which was appropriately set up in the several counts of the complaint.

Plea 7 is as follows: "Plaintiff himself was guilty of contributory negligence, which proximately caused his injury, in this: Plaintiff knew of the presence of said stump or post, and with said knowledge walked in the nighttime where said post was, and where he could not see said post, and collided his body therewith, when by the use of ordinary care and prudence he could have walked past said post, and by pursuing the ordinary path used by pedestrians, at the place where said post was, have avoided colliding with the same."

Plea A reads: "Plaintiff knew of the presence of said post, and with said knowledge attempted to walk during the nighttime, when it was so dark he could not see said post, in close proximity to the same, and without necessity therefor, there being a well-traveled crossing some distance, to wit, several feet, from said post, of which the plaintiff had knowledge, and which plaintiff knew was safe and secure for the passage of pedestrians; and in so deviating from the well-traveled way plaintiff thereby assumed the risk of being injured by coming in contact with said post."

Lavender & Thompson, for appellant. Denson & Denson, for appellee.

McCLELLAN, J. There can be no doubt that the act or omission of the appellee in leaving for many years, within the limits of a public street in the town of Centreville, an obstruction created by sawing off a telegraph pole three feet above the ground, was such negligence as to render it liable for injury to a traveler on the street, unless the traveler was himself guilty of negligence contributory to his injury. *Postal Tel. Co. v. Jones*, 133 Ala. 217, 32 South. 500.

The important question presented is whether the appellant was, as a matter of law, guilty of contributory negligence, barring his recovery, as was ruled below. The appellant insists that the inquiry of contributory negligence *vel non* was for the jury. We approve the contention of the appellant. This court, in *City of Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422, announced conclusions which, in our opinion, control the decision of the question on this appeal. There it was contended that because the plaintiff undertook to traverse, in the nighttime, a sidewalk in a public street, which had been rendered in part unsafe, and of which fact the plaintiff had knowledge, his act was *per se* negligent, and barred a recovery for injury resulting from his falling into the "washout." It appeared that the plaintiff was familiar with the defective condition of the sidewalk, and its location and character. It also appeared that the space between the inside line

of the sidewalk and the nearest thereto edge of the "washout" was seven feet. It was over this seven feet the plaintiff undertook to travel. After stating the well-known rule prevailing with us as to when contributory negligence *vel non* is, on the evidence, a question of law only, and hence for the court, and after adverting to the general doctrine that negligence is ordinarily a mixed inquiry of law and fact, it was held that the plaintiff was not, *prima facie*, guilty of negligence in ordering his course on the occasion as above indicated. The evidence showed, as in this case, that the course taken was one generally used by the public in traversing Bell street, and that, so far as that record revealed, no injury had attended such general use. The court there, very properly we think, accorded weight to the fact that the plaintiff was familiar with the situation with reference to the defect in the sidewalk, its location, and necessarily its danger, if he encountered it.

The circumstances of the case at bar require the application of the rulings made in *Wright's Case*. Here the familiarity of the appellant with the situation created by the "stump" left by the appellee in the street was proven conclusively. He had passed it for years. It was just to the side of a path leading, angling, across the street. The path was of common use by those having the purpose to cross that street and to go in the direction appellant was, on the occasion, headed. Had the appellant not veered from the path, he would not have collided with the obstruction. It was undisputably shown that appellant undertook to govern his steps, so as to keep the path, by reference to a tree and telephone pole, seen by him on the same side of the street as the "stump," and the relation of which, in point of location, to the tree and telephone pole, were known to him. He testified that he walked carefully—a care and caution employed, it was open to inference, at least, with the view to avoiding contact with the "stump." We cannot now, any more than could be done in *Wright's Case*, ignore the fact of appellant's familiarity with the situation in the street at that point, to the end that he can be pronounced negligent because of his act in attempting to cross the street, even in the nighttime, along the path. As stated, by remaining in the path he would not have encountered the "stump." It was in immediate consequence of his veering from the path that he did come in contact with the "stump." His negligence, if such it was, certainly did not consist in his selection of the route across the street, but, if culpable at all, "in the want of care exercised in walking, after he had made the selection." *Wright's Case*, *supra*. The familiarity of appellant with the situation at that point in the street might have had a natural tendency to afford a reasonable assurance, to the ordinarily prudent person likewise circumstanced, that he could

safely cross the street by the path, and avoid collision with the "stump." It is common knowledge, based on common experience, that a person may avoid an obstacle, even in darkness, by reliance upon memory of the location, relative, as well as in fact, of such obstacle. The unattended blind give frequent evidence of the practical operation of this faculty. But, while this is true, and should be given consideration in determining whether ordinary care has characterized certain conduct, it does not result that negligence may not be imputed, in point of fact, to one whose familiarity with a situation was of the greatest degree. The circumstances must control the conclusion, and the familiarity indicated is but one of them. Here the obstruction was small when compared to the street's surface in that immediate neighborhood, and was without the line of the sidewalk, as well as of the path. It might well be that an ordinarily prudent traveler, familiar with the status, would take the course appellant did, upon the reasonable assumption that he could effect his journey without collision with the obstruction. Unquestionably such conduct, under the circumstances here presented, cannot be pronounced *per se* negligent. Whether negligent or not, must be determined by the jury.

Counsel for appellee rely, in supporting the conclusion below, on the case of *McAdory v. L. & N. R. R. Co.*, 109 Ala. 638, 19 South. 903. It is further insisted that in *Montgomery Ry. Co. v. Smith*, 146 Ala. 316, 39 South. 757, the principle underlying the former case is approved in the ruling made upon charge 25 refused to that defendant. It is obvious that the ruling in the *McAdory* Case, wherein *Hix* was adjudged guilty of contributory negligence, forbidding a recovery by his personal representative, was upon the state of fact there involved. That the situation, known to *Hix*, giving rise to the requisite measure of care which he was held not to have exercised, was different from, and the hazard immeasurably greater than, that out of which appellant's injury grew, is apparent. *Hix* undertook, in the nighttime, to pass an abyss 15 feet wide and 30 feet deep. The court rested its ruling upon two theories, viz., that if he could by the exercise of ordinary prudence have seen the "cut," and omitted the exercise of that care, and was injured, he was negligent; or that if he undertook to pass the "cut," "in such dangerous proximity to it," when unable to see its limits, and was injured in consequence, he was negligent. The known hazard, as appears, led the court to declare and impose on *Hix* a care commensurate therewith. The object to be avoided by *Hix* was of magnitude, whereas the object here was of inconsiderable, relatively speaking, size. While *Hix* had passed the "cut" before, within the two weeks it had existed, and knew its location and depth, no such familiarity, as the

result of frequent passage thereby, as appellant here had, was shown to have been possessed by *Hix*. And, besides, it appeared that *Hix's* companion, just ahead of him, avoided the "cut," and it was observed that *Hix* might readily have seen and followed him, with the same safe result. This last circumstance has no counterpart in the record in hand. From these differentiating circumstances, we need hardly state that no departure from the doctrine or result attained in the *McAdory* Case is a consequence of the conclusion entertained on this appeal.

The *Smith* Case, referred to above in its treatment of charge 25, refused to defendant, does not assume to declare what is ordinary care in respect of the use of defective street. It does announce the general duty on the part of the traveler, but when such traveler has met the obligation in the exercise of ordinary care to avoid injury from the known defect is not undertaken to be stated. Certainly it was not the purpose of the court in the *Smith* Case to overrule *Wright's Case*, *supra*. The court, hence, erred in giving the general affirmative charge at the request of the defendant.

Plea 7 must be construed as imputing to plaintiff negligence—the nonexercise of ordinary care—in walking past the "stump," and not in the selection of the general route across the street. To sustain that plea, it must be so found by the jury from the facts and circumstances shown by the evidence. Whether he observed due care in walking by the "stump" on the occasion is not to be controlled, alone, in conclusion by the facts that the night was dark and that he could not see the post before colliding with it. They are factors, of course, to be considered in determining whether the care observed by plaintiff was of the character requisite. So interpreted, we hold the plea to be good against the grounds of demurrer assigned.

Plea A has no place in this case, and should be stricken on motion. Contributory negligence is the only other possible defense, aside from that made by a general traverse of the allegations of the complaint.

For the error stated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

FLEMING et al. v. LUNS福德 et al.  
(Supreme Court of Alabama. Dec. 16, 1909.)

1. CONTRACTS (§ 322\*)—ACTIONS FOR PRICE—ADMISSION OF EVIDENCE—ALTERATION OF CONTRACT—ALTERATION BY CONSENT.

In an action for the value of work and materials for the construction of a building, which were not included in the contract, consisting of the difference between the value of such work and materials and the value of work and ma-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

materials omitted pursuant to the contract provision permitting alterations, a question to plaintiff as to why the excavations were only 6 inches, instead of 18 inches, as called for by the contract, and the answer that an 18-inch excavation would have given a poorer foundation, and that one of defendants saw the deviation from the contract without objection, were admissible to show an alteration by defendants' agreement and acquiescence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 322.\*]

## 2. WITNESSES (§ 240\*)—EXAMINATION—LEADING QUESTIONS.

In an action for work and materials furnished in constructing a building, a question, "Didn't" plaintiff "refuse to pay you in full for your services on the ground that it was not first-class work?" was properly excluded as leading.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 837-851; Dec. Dig. § 240.\*]

## 3. DAMAGES (§ 123\*) — MEASURE — BREACH OF CONTRACT—CONSTRUCTION CONTRACT.

In an action for the value of work and materials for the construction of a building, which were not included in the contract, the measure of defendants' damages on the counterclaim for omitted work and materials, called for by the contract, was the difference in the value of the building constructed or work done and that contracted for, and hence evidence of the market value of the building constructed was properly admitted.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320-325; Dec. Dig. § 123.\*]

## 4. EVIDENCE (§ 242\*)—ADMISSIONS—DECLARATIONS OF AGENT—COURSE OF EMPLOYMENT.

Statements of the owner's architect, made while he was inspecting the building in order to advise the owner whether it had been constructed according to agreement, were binding upon the owner, and admissible in evidence, in an action by the contractor for the contract price, as declarations of the owner's agent, made while engaged in the work of his agency.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 893-907; Dec. Dig. § 242.\*]

## 5. WITNESSES (§ 248\*) — EXAMINATION — RESPONSIVENESS OF ANSWERS.

In an action for the value of work and materials for the construction of a building, in which defendant counterclaimed for omitted work called for by the contract, defendants' architect's answer to a question as to the difference in the value between the work and materials in a certain room as done and as required by the specifications was that the room was worthless so far as his purpose was concerned, and his answer to a question as to the difference in the value between material used in the construction of the building and the material used by the contractors was that the contract called for the best material and workmanship, neither of which was furnished, and that the building was damaged thereby about one-third of its cost. *Held*, that the answers were not responsive, and were properly stricken.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.\*]

## 6. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS—ABSTRACT CHARGES.

Abstract charges are not reversible error, unless it is apparent that the jury were misled thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Assumpsit by G. M. Lunsford and others

against P. T. Fleming and others. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

The tenth assignment of error is as follows: "The court erred in excluding, upon motion of the plaintiffs, the answer of witness Frank Lockwood, contained in his deposition, to a question asked him by defendant, which answer was all excluded, except the following: 'The work, generally, was inferior in every respect.' The question was: 'State what was the difference in the material used in the construction of the said building, and the material used by the contractors. State the difference in value.' Answer: 'The specifications called for all materials and workmanship to be of the best quality throughout, and the workmen to be capable in their different lines. There is no indication that either the best materials were used or that capable workmen were in charge of the erection of the building. I should say the building as a whole was damaged about one-third of its cost. The work, generally, was inferior in every respect.' All the answer but the last sentence was stricken on motion."

The following are the charges given: (1) "The court charges the jury that if, in the construction of the building, certain parts of the building according to the plans agreed were not constructed, and the jury believed from the evidence that said omissions were made by agreement between plaintiffs and defendants, and the jury further believe that defendants also agreed to pay for the work as done the original contract price notwithstanding the omissions, then defendants are not entitled to a credit on the contract price by reason of the omission." (2) "If the contract was by mutual consent changed or modified after its execution, and the defendants agreed to pay the original contract price for the building in question as the same was to be built under the changed contract, and they did pay as the price therefor the original contract price, and accept the house changed and different from the house contemplated in the original contract, then defendants are not entitled to the difference. If any there be, between what it would cost to build the house according to the original contract and what it would cost to build it according to the contract as so changed."

J. H. Wilkerson, R. H. Arrington, and Claude Riley, for appellants. J. F. Sanders and O. C. Doster, for appellees.

MCCLELLAN, J. This suit was instituted against appellants by appellees, and sought, as "original contractors," to recover a sum of money alleged to be due appellees on account of work done and materials furnished in the construction of a building, to be used as an infirmary, in Enterprise. The plead-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing was in short by consent, with leave to give in evidence "all testimony that might be legally introduced if the parties had filed special pleadings." All pleas were withdrawn under this arrangement.

All of the errors assigned, save two, complain of rulings on the admission and rejection of evidence. The difficulty of dealing with such assignments where the issues, below those made by the complaint, are not specifically defined, is apparent. There is a sense of uncertainty in considering in review grounds of complaint against rulings made where the issues are undefined. The practice of pleading in short by consent is time-honored, and no reflection upon it is intended; but the status giving rise to matters assigned as error is always desired to be fully known when the action below is assailed.

Gathered from the evidence, these seem to be the points of controversy, or rather the status out of which they have arisen: The plaintiffs' claim was for work and materials done and furnished by them, not included or embraced in the contract, for the building of the structure for defendants. This sum was to be arrived at by deducting from the value of this work and materials the sum or value of work and materials omitted in consequence of agreement of the parties, or resulting from alterations of the plans, etc., which the contract anticipated in provision therefor. The plaintiffs litigated their rights upon this idea, and also upon the theory that, in this action, the sum otherwise demandable by them could be tolled, if not absorbed, by deduction of the damages accruing to defendants because of the failure, unexcused, of the plaintiffs to perform the contract in the particulars not altered by mutual agreement or acquiescence of the parties. True, there is some indicia of a purpose by plaintiffs to refute any idea of willingness to submit plaintiffs' recovery to the influence of the last-stated theory; but, notwithstanding, that appears to have been the general trend of the trial, as that is indicated by both the parties litigant. We express no opinion upon the question of the propriety vel non of the course so mutually pursued. It is not a matter of inquiry here, in the light of the acts of the parties in this connection on the trial. On this state of evidence-made issues we review the rulings of the court below.

The contract called for 18-inch excavations for foundations, whereas not more than 6-inch excavations were made. Lunsford, one of the plaintiffs, was asked, when testifying, "Why were the excavations only 6 inches, instead of 18 inches?" The court properly allowed the question. If nothing more appeared in the bill, the question was immediately capable of eliciting a response within the contract provisions for alterations by agreement of the parties. When the answer came it tended to show that an 18-inch ex-

cavation would have offered a less sound foundation than one of 6 inches, and also that one of the defendants stood by and saw without objection this deviation from the letter of the contract. It was at least open to the jury to find from the answer that the defendants acquiesced in the change of foundation depth. Hence assignments 1 and 2 are without merit.

Pippin, defendants' witness, was asked, on his examination in chief, this question: "Didn't Lunsford, 'one of the plaintiffs, refuse to pay you in full for your services upon the ground that it was not first-class work?" The bill recites that objection (stating no ground) was made and the question was disallowed by the court. The question was leading, and we ascribe the action of the court to that as a sufficient reason to avoid error. On the issues made as stated, it is evident that proof of the market value of the building was properly admitted, since for the damages claimed by defendant, in the nature of counterclaim, the measure of the damages, ordinarily, is the difference in value of the building constructed or work done and that stipulated for in the contract. 6 Cyc. p. 113. Accordingly assignments 4, 5, and 6 cannot be sustained.

Lockwood was shown to be the architect of the building, and the statement of Lockwood, sought to be drawn from the witness Leath, was uttered, according to some of the evidence, while Lockwood was inspecting the building with a view to advising defendants, as their representative, whether the building had been constructed according to the agreement of the parties. He was the agent of the defendants on the occasion, was then engaged in the particular service for which he was employed, and his declarations so made were admissible and binding on his principals. 5 May. Dig. p. 549, subhead 571. Assignments 7 and 8 were without merit.

Lockwood, whose testimony was taken by deposition, was asked by defendants the difference in value between the work and materials in the "operating room" as done and that required by the plans and specifications. In response to this question the witness said, among other things, that "the entire operating room was worthless, so far as serving his purpose was concerned." This feature of the answer was stricken on plaintiffs' motion. It was, obviously, not responsive to the question—had reference to a matter entirely outside of it. The part stricken was properly so treated. Nor was there error in striking, in part, the answer mentioned in the tenth assignment. It was not responsive to the question. The question called for a comparison of value along the line of the interrogatory before stated, except as that difference related to the entire building. The answer was descriptive of the materials used and work done, but did not assume to state the value, the only matter asked for.

According to the insistence of counsel for appellants, charges 1 and 2, given for plaintiffs, were abstract. It is not reversible error to give abstract charges, unless it is apparent that the jury was misled thereby. 2 May. Dig. 564, 565. It is not so apparent here, even assuming that the charges were abstract, as counsel for appellant contends.

There is no error assigned. The judgment is affirmed.

Affirmed.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

#### ALLEN v. PIERCE.

(Supreme Court of Alabama. Dec. 14, 1900.)

#### 1. FRAUDULENT CONVEYANCES (§ 169\*)—VOLUNTARY CONVEYANCE—INTENT OF GRANTEE.

In an action to set aside a voluntary conveyance by a debtor to his wife, the intent of the grantee is immaterial.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 494, 520; Dec. Dig. § 169.\*]

#### 2. MORTGAGES (§ 390\*)—REMEDIES OF MORTGAGEE.

A mortgage creditor, as against the mortgagor, may sue in equity to foreclose, sue in ejectment to recover the land, or sue on his debt at law, and he may pursue all three remedies at the same time.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1150; Dec. Dig. § 390.\*]

#### 3. FRAUDULENT CONVEYANCES (§ 220\*)—REMEDIES—SECURED CREDITORS.

Where a mortgagee sues to set aside a conveyance of the debtor's property as fraudulent, a grantee in such conveyance has no right to complain as to the mortgagee's choice of remedies.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 626; Dec. Dig. § 220.\*]

#### 4. HUSBAND AND WIFE (§ 171\*)—WIFE'S SEPARATE ESTATE—VALIDITY OF MORTGAGE.

Under Code 1907, § 4497, forbidding a wife to become either directly or indirectly surety for her husband, a mortgage given on the separate estate of the wife to secure an indebtedness of the husband is void.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 678; Dec. Dig. § 171.\*]

#### 5. FRAUDULENT CONVEYANCES (§ 263\*)—REMEDIES—PLEADING.

In a proceeding to set aside a voluntary conveyance by a debtor to his wife, the creditor bringing the action alleged that the debtor had paid off and discharged existing liens on the property conveyed. *Held*, that this did not render the bill demurrable, as such statement tended to show an attempt to defraud creditors who had no lien upon the property conveyed, and equity would not permit such an expenditure at the expense of the other creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 771-773; Dec. Dig. § 263.\*]

#### 6. FRAUDULENT CONVEYANCES (§ 211\*)—ACTION TO SET ASIDE CONVEYANCE—RIGHT OF ASSIGNEE OF DEBT.

It is immaterial, in an action to set aside a conveyance by a debtor of his property to his wife, what consideration was paid by the com-

plainant for the debt which he holds, as he stands in the place of the assignor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 648; Dec. Dig. § 211.\*]

#### 7. FRAUDULENT CONVEYANCES (§ 206\*)—WHO MAY ATTACK CONVEYANCE.

If a debtor conveys his property to defraud future creditors, the conveyance is void as to both future and existing creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 629; Dec. Dig. § 206.\*]

Appeal from Chancery Court, Montgomery County; L. D. Gardner, Chancellor.

Bill by C. E. Pierce against Eliza B. Allen to set aside a fraudulent conveyance. Judgment overruling demurrers to the bill. Respondent appeals. Affirmed.

The bill alleges, in substance: That during the years 1903 and 1904 Charles A. Allen was possessed of considerable property and was conducting several kinds of businesses in the city of Montgomery, which required the use of considerable money; that the business was done under the firm name of Allen & Leak, but that Allen was the head of the firm and the only one having any property or credit, and that Allen used his credit for the conduct of his business and contracted large debts, up until about the month of May, 1904, but that during the whole period he was so conducting his business and had in view and contemplation its continuance; that the business was one which exposed him to great risks financially, from the fluctuations of the market value of the articles dealt in by him and his firm. (2) That during said period Allen was continually in debt, and that the proceeds of new debts contracted and new credits extended were used to take up the older debts, so that his indebtedness was continuing as in a running account, although it might be with different persons, and that during said years of 1903 and 1904 Allen, by himself or by his firm, carried on a continuous running account with the Union Bank & Trust Company, a banking corporation in the city of Montgomery, debits and credits being entered in the way of a continuous running account. Loans of money were made to him and his firm from time to time, and were renewed or extended, and new loans made; the old debts being taken up by deposit, or new loans. That in the month of May, 1904, while said business was conducted by Allen with said banking corporation, he obtained a loan of \$3,000 on his promissory note, due March 1, 1905, payable to said banking company, the said money so loaned being used to pay the older debts of said Allen, and to secure the payment of said loans Allen conveyed to said banking company a tract of about 250 acres of land. But orator avers that the land did not belong to C. A. Allen, but belonged to his wife, Eliza B. Allen, who was



in the possession of the same, and enjoying the rents and profits thereof, and that the said debt was the individual debt of C. A. Allen, for which his wife was not responsible, and that, although his wife joined in the conveyance with him to the said banking company, she did not thereby pass her right and title to the same to said trust company; and orator further avers that afterwards all the interest of said C. A. Allen and Eliza B. Allen in said 260 acres of land was sold to pay the decree in said cause in a suit in the city court of Montgomery in which the said C. A. Allen and Eliza B. Allen were parties. (3) That during said period of business of the said trust company and some time prior thereto, or during the month of May, 1904, the said C. A. Allen conceived and undertook a scheme of hindering, delaying, or defrauding his creditors, and particularly persons who might thereafter extend credit to him, including said trust company, and in pursuance of said scheme, by deed bearing date October, 1903, conveyed all the visible and tangible property to his wife, Eliza B. Allen, upon consideration of love and affection only. (A copy of the deed is attached as an exhibit.) It is further alleged that there was no ostensible change in the possession of said property upon the conveyance being made, and that the conveyance was withheld from registration until the 24th day of April, 1905, when it was hurriedly registered just in time to anticipate the rendition of judgments and liens thereof in suits pending against the said C. A. Allen; and orator avers that said deed was not executed and delivered on the day of its date, but long afterwards, and was antedated and held from delivery for the better carrying out of the fraudulent scheme of hindering, delaying, and defrauding creditors. (4) That the property so conveyed by Allen to his wife was at the date of delivery to her incumbered with liens for large amounts of money, and after such delivery became further incumbered for large amounts of money, the same being debts of the said C. A. Allen, and the amount of the incumbrance being about \$10,000; and, in order to protect said property conveyed in said deed for his said wife, Allen used \$10,000 or other large sum of his own money to pay said liens and incumbrances, some of which payments were made after the creation of the said debt to the said trust company, and all of which amounted to and were intended to be acts to hinder, delay, and defraud creditors of said C. A. Allen, including said trust company. That said Eliza B. Allen, being a volunteer, had no right to claim that the estate of said C. A. Allen left in his hands should be used to clear such property of said incumbrances, and the use of the money of said C. A. Allen for that purpose amounted to a new fraudulent conveyance of the date of the said respective transaction. That by said conveyances to said Eliza B. Allen the

said C. A. Allen divested himself of all of his property, leaving him an insolvent, carrying on business and contracting debts upon the apparent ownership of an estate when he had not a dollar. A transfer of the company's debt to orator, C. E. Pierce, is then alleged, and it is further alleged that orator recovered a judgment against Allen in the city court of Montgomery on the 25th day of March, 1907, for \$3,582.70, and on the 10th day an execution was issued on said judgment, placed in the hands of the sheriff of Montgomery county, and on the 12th day of August, 1907, returned "No property found," and that the judgment is still due and unpaid. It is then alleged that about three months prior to the filing of the bill C. A. Allen departed this life leaving no estate, and that no administrator has been appointed.

The prayer is for the appointment of an administrator ad litem on the estate of said C. A. Allen, and that such administrator, and Eliza B. Allen be made parties respondent, and that orator's debts be ascertained, and that the property described in the deed made in the exhibit be condemned to pay the debts, and that the conveyance to said Eliza B. Allen be declared to be fraudulent and void.

The demurrers were: "(1) That the bill shows that the debt alleged to be due complainant by C. A. Allen is secured by the mortgage, which was accepted as sufficient security, and can be realized thereon, and that the deed from Allen to his wife does not hinder, delay, or defraud him in collecting his debt. (2) The bill seeks to aid the cause of complainant against this defendant by setting up coverture of defendant, which is a matter personal to her, and which she can waive if she sees fit. (3) Being construed against the pleader, the bill shows that it was many months after the execution of the deed attached, and not until May, 1904, that Allen conceived and undertook a scheme to defraud his creditors. (4) The bill fails to show that any consideration was given by complainant for the assignment to him of the debt upon which this suit is based, or that at the time of the transfer he was not informed of the claim of this defendant under the deed. (5) The bill avers that the property conveyed to Eliza B. Allen was incumbered with large liens, which were discharged by C. A. Allen, but fails to specify such liens, either in character, amount, by whom held, or in any way sufficient to enable this defendant to answer the allegations intelligently. (6) The bill shows that the liens discharged were debts of C. A. Allen which he had a right to pay." There were other demurrers to certain parts of the bill, not necessary to be set out.

Marks & Sayre, for appellant. Gunter & Gunter, for appellee.

DOWDELL, C. J. The bill in this case is by a judgment creditor, after a return of

"No property found" on execution, to subject assets of the judgment debtor, in the hands of an alleged fraudulent grantee, to the payment of the judgment. The conveyance assailed is one by the husband to the wife, the expressed consideration being love and affection. The conveyance is a voluntary conveyance, and in such a case it is not necessary to allege and prove a fraudulent intent as to the grantee. It is sufficient to show such intent as to the grantor. *McFaddin v. McFaddin*, 134 Ala. 342, 32 South. 719; *McGehee v. Imp. & Trad. Nat. Bank*, 93 Ala. 196, 9 South. 734; *Seals v. Robinson*, 75 Ala. 371; *Pickett v. Pipkin*, 64 Ala. 520.

A creditor whose debt is secured by a mortgage is not confined, in his remedies for the collection of his debt, to the enforcement of his security, though the same may be ample to that end. As against his debtor the mortgagee of land has three remedies, any one of which he may pursue, or, as for that matter, he may pursue all three at one and the same time. He may file his bill in equity to foreclose the mortgage, sue in ejectment for the recovery of the land, and sue on his debt at law. *Duval's Heirs v. McLoskey*, 1 Ala. 708; *Roper v. McCook*, 7 Ala. 323; *Halfman v. Ellison*, 51 Ala. 549; *Tucker v. Adams*, 52 Ala. 258; *Micou v. Ashurst*, 55 Ala. 607; *Scott v. Ware*, 65 Ala. 183. Here the creditor, as he has the right to do, is pursuing the last of the above-named remedies, and against which a grantee in an alleged fraudulent conveyance by the debtor has no right to complain.

It is stated in the bill that the mortgage security held by the complainant was given for the debt of the husband and upon the separate estate of the wife. Such a mortgage is void (Code 1907, § 4497; *Richardson v. Stephens*, 114 Ala. 238, 21 South. 949, and other cases cited in brief of counsel); and for this reason the complainant would be justified in abandoning such security and in pursuing the remedy adopted in the present instance.

The averments in the bill that the debtor, subsequent to his voluntary conveyance to his wife, paid off and discharged existing liens on the conveyed property, do not render the bill demurrable. Such statements are in keeping with other allegations of intent to defraud. While the debtor had the right to apply his money to the payment of those creditors who held liens upon the property conveyed by him to his wife, the result of which was to enhance the value of the estate in the wife by the discharge of the liens, yet in equity and good conscience this could not be permitted to be done at the expense of his other creditors. In principle there can be no difference between this and the permitting of the debtor to use his funds in erecting a building or other improvement upon the land of his wife, in fraud of his creditors.

It is immaterial what consideration the complainant paid for the debt sued on. In this respect he stands in the shoes of his transferror.

The bill alleges a scheme on the part of the debtor to defraud future creditors in the making of the conveyance assailed. If this is true, the conveyance is void as to both future and existing creditors.

In its last analysis, the bill is nothing more nor less than one by a creditor to set aside a fraudulent conveyance, and to subject the property conveyed to the payment of debts. The demurrers, in our opinion, are not well taken. The chancellor committed no error in overruling them, and his decree will be affirmed.

Affirmed.

SIMPSON, MAYFIELD, and McCLELLAN, JJ., concur.

### HUYCK v. MCNERNEY.

(Supreme Court of Alabama. Nov. 18, 1909.)

#### 1. MASTER AND SERVANT (§ 256\*)—INJURY TO SERVANT—COMPLAINT—BREACH OF COMMON-LAW DUTY.

The count of a complaint in an action by a servant against a master for injury from the fall of a ladder from a defect therein, alleging that defendant was engaged in the business of doing certain work in the erection of a building, and used therein tools, implements, and appliances of various kinds, including ladders, and that plaintiff was an employé of defendant in such work, and that it was the duty of defendant to have in said building and said business good and safe tools, implements, and appliances, is for a breach of the common-law duty in respect of furnishing instrumentalities employed in the business of the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 809; Dec. Dig. § 256.\*]

#### 2. PLEADING (§ 8\*)—INJURY TO SERVANT—NEGLIGENCE—CONCLUSIONS.

General averments, practically conclusions, of negligence, in the complaint in an action by a servant against his master, are sufficient.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 13; Dec. Dig. § 8; \* *Negligence*, Cent. Dig. § 182.]

#### 3. MASTER AND SERVANT (§§ 101, 102\*)—MASTER'S DUTY—FURNISHING INSTRUMENTALITIES.

The measure of the master's common-law duty to the servant, as to furnishing instrumentalities employed in the business, is not to furnish good and safe, but only reasonably safe and suitable, instrumentalities.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 171, 173, 181; Dec. Dig. §§ 101, 102.\*]

#### 4. MASTER AND SERVANT (§ 258\*)—INJURY TO SERVANT—COMPLAINT—CONNECTING DEFECT AND RESULT.

The complaint for injury to a servant, averring a defective condition of a ladder, and injury to plaintiff in consequence of the falling of the ladder, must also connect the falling with the alleged defect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 823; Dec. Dig. § 258.\*]

**5. MASTER AND SERVANT (§ 258\*)—INJURY TO SERVANT—DEFECTIVE INSTRUMENTALITIES—COMPLAINT.**

The complaint for injury to a servant, based on breach of the master's common-law duty in respect to furnishing instrumentalities employed in the master's duty, while showing that ladders were a part of defendant's business appliances, and that it was defendant's duty to furnish them, and that "a ladder in said business" fell, to plaintiff's injury, does not thereby sufficiently show that such ladder was one furnished or provided by the master, necessary to make him liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 819; Dec. Dig. § 258.\*]

**6. MASTER AND SERVANT (§ 107\*)—INJURY TO SERVANT—EMPLOYER'S LIABILITY ACT—"PLANT."**

A ladder used by a master in pursuit of his business as a contractor, engaged in the construction of a building, is a part of his "plant," within the liability act (Code 1907, § 3910, subd. 1), providing that, when a servant is injured in the business of the master, the master is liable, as if the servant were a stranger, when the injury is caused by a defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 200; Dec. Dig. § 107.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5400, 5401; vol. 8, p. 7755.]

**7. MASTER AND SERVANT (§ 258\*)—INJURY TO SERVANT—DEFECT IN PLANT—COMPLAINT.**

The count of a complaint in an action under the employer's liability act (Code 1907, §§ 3910-3913) for injury to a servant, averring that the defect in a ladder, which fell, causing the injury, consisted in its being "round at the ends" and not being braced, and in consequence that the ladder was liable to slip and fall, does not show a defect per se, as matter of law, though it is averred to be a defect, without the surrounding conditions, the angle at which it stood, and the character of the rest being shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 825; Dec. Dig. § 258.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by John McNERNEY against Charles L. Huyck for injuries received while engaged in doing the work for which he was employed. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The complaint was as follows:

Count 1: "Plaintiff claims of defendant the sum of \$10,000 damages, for that on, to wit, the 25th day of August, 1907, the defendant was engaged in the business of doing the cement work in connection with erecting a certain seven-story brick building on Commerce street in the city of Mobile, Alabama; and used in said business tools, implements, and appliances of various kinds, such as saws, hammers, planers, and ladders; that plaintiff was employed by the defendant to work in or on said building, and was so working at the time he received the injuries herein complained of, and therefore it was the duty of said defendant to have in said building and said business good and safe tools, implements, and appliances; that on,

to wit, the 25th day of August, 1907, while the plaintiff was in said building engaged in the proper discharge of his duties for the defendant, a ladder in said business, and upon which plaintiff was descending from the roof of said building to the seventh floor, fell while plaintiff was thereon, and violently threw plaintiff to the fourth floor of said building, thereby breaking one of plaintiff's shoulders, injuring his back, breaking his leg, injuring his head, and otherwise injuring and wounding him, and plaintiff suffered great mental and physical pain, and was rendered unable for a long time to work, and was put to great inconvenience and trouble and expense for medicine and medical attention in his efforts to heal up and cure said wounds and injuries. And plaintiff avers and alleges that the wrongs and injuries complained of were suffered because of the wrong or negligence of the defendant in having in said building in said business said ladder upon which he was descending, which ladder was defective, out of order, and unsafe, and unfit to be in said business, and which, but for the want of proper care and diligence, would have been known to the defendant."

Count 3: "Plaintiff claims of the defendant the further sum of \$10,000 as damages, for that on or about the 25th day of August, 1907, defendant was engaged in the business of doing the cement work in connection with erecting a seven-story brick building on Commerce street in the city of Mobile, known as the 'Hunter Building,' and in connection therewith and as accessory thereto the defendant was using a certain ladder for the purpose of aiding his employes to ascend from the seventh floor to the roof of said building and to descend from the roof to the seventh floor of said building. Plaintiff alleges that on said day he was in the employ of defendant, and was engaged in working in or on said building under said employment, and that while in the discharge of his duties it became necessary for him to descend on said ladder from the roof of said building, and while he was engaged in or about descending on said ladder it slipped and fell, and violently threw plaintiff to the fourth story of said building, and as a proximate consequence thereof [here follows same allegation of injuries as in first count]. Plaintiff alleges that his said wounds and injuries were caused by defects in the conditions and ways, works, machinery, or plant connected with or used in said business of the defendant as aforesaid, which defect consisted in this: That the ends of the ladder upon which defendant was descending were round at the bottom, and thereby rendered said ladder liable to slip and fall, and said ladder was not braced to prevent it from slipping and falling, which defects arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in the service of defendant in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trusted by the defendant with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

Count 4: Same as 3, down to and including the statement of the wounds and injuries, and the allegation is that the ladder was defective on and down which plaintiff was endeavoring to descend, and that the defect arose from or had not been discovered and remedied, etc.

Count 5: Same as the third count, down to and including the list of injuries, with the allegation that the injuries were caused by reason of a defect in the condition of the ways, works, etc., and the defect consisted in the fact that the ladder down which plaintiff had to descend was not braced so as to prevent its slipping and falling, with the allegation that the defect arose from or had not been discovered through negligence, etc., as in count 3.

The tenth ground of demurrer to the first count is that said count does not allege any negligence on the part of this defendant in failing to provide a reasonably safe ladder for the purpose of its said business. The sixth ground was as follows: "Because, for aught that the said count shows, the falling of said ladder was caused by extraneous circumstances or the acts of other parties." The eighth ground is because said count does not show that the ladder was provided by this defendant. (11) "Because said count does not show any negligence proximately causing the injuries complained of." The first ground of demurrer is that the counts do not show that the injury was caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the defendant.

R. W. Stoutz, for appellant. Fitts & Leigh, for appellee.

McCLELLAN, J. The first count is not drawn to declare a liability under the liability act. It is for a breach of the common-law duty in respect of furnishing instrumentalities employed in the business of the master. 1 Labatt, §§ 22a, 23, and notes; Ryan v. Miller, 12 Daly (N. Y.) 77. It is sufficient in its general averments—practically conclusions—of negligence. Laughran v. Brewer, 113 Ala. 509, 21 South. 415, among many others. While sufficient in this particular, it is deficient in other particulars. The measure of the master's duty in this regard is not to furnish good and safe instrumentalities, but that he shall furnish instrumentalities reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances. 1 Labatt, §§ 22a, 23, 24, and authorities cited in notes; Meriweather v. Sayre Min. Co., 49 South. 916. This count declares too high a degree of duty in the premises. The tenth ground of demurrer should have been sustained.

While averring the injury of the plaintiff

in consequence of the falling of the ladder, the count does not, expressly or by averment of facts, connect the falling of the ladder with the alleged defective condition thereof. Non constat, though defective, it might have fallen from other cause or causes than its defective condition. It is the pleader's duty to at least trace his injury, for proximate cause, to the event and the negligence producing the injury. Had it been averred, in a proper manner, that the falling of the ladder resulted from the defective condition thereof, the objections pointed out by the sixth and eleventh grounds of demurrer would not have been well taken. These should have been sustained.

In order to bring an act or omission of a master within the breach of the duty declared on in the first count, it is obviously essential that the instrumentality alleged to have been out of order, unsafe, or unfit should be one furnished or provided by the master. Construing the count most strongly against the pleader, it was, in this particular, not certainly averred that the ladder in question was one furnished or provided by the master. It cannot be left equivocal and yet withstand appropriate demurrer. It does appear that ladders were a part of defendant's business appliances, etc., and that the duty was to furnish them; but when the pleader came to deal with this particular ladder, complained of as being defective, the means of expression employed was that "a ladder in said business" fell to plaintiff's hurt. The ladder may have been furnished or provided by another than the master, or the master may have been ignorant of its presence, and still the ladder may have been "in said business" on the occasion plaintiff was injured. The eighth ground of demurrer pointed this objection, and it should have been sustained.

Other grounds assailing the first count seem to proceed on the theory that the count was a declaration under the liability act (Code 1907, §§ 3910-3913), and were, hence, inapt.

Count 2 was withdrawn. The remaining counts, 3, 4, and 5, were all intended, as appellee asserts, to charge liability under subdivision 1 of the liability act. Code 1907, § 3910.

The chief question raised by the demurrers to these counts is whether a ladder connected with or used in the business of a contractor engaged at the time in constructing a building is a part of the ways, works, machinery, or plant of such contractor's business. The plaintiff seems to rest the soundness of his pleading, in this particular, upon the proposition, alone, that the ladder was a part of the "plant," in effect granting that it was not a part of the ways, works, or machinery. The inquiry, then, narrows to this: Whether the ladder was a part of the "plant" of the defendant. If not, the demurrer should have been sustained; otherwise, was well overruled.

The demurrant relies upon Gross' Case, 97

Ala. 220, 12 South. 36, Brooks' Case, 84 Ala. 138, 4 South. 289, Clements' Case, 127 Ala. 168, 28 South. 643, Moore's Case, 128 Ala. 435, 29 South. 659, and Burton's Case, 97 Ala. 240, 12 South. 88; all save the last being adjudications mentioned and expressly doubted in soundness in the more recent announcement made in *S. S. S. & I. Co. v. Mobley*, 139 Ala. 425, 36 South. 181. It is evident that our previous decisions, discussed in the *Mobley* Case, if followed, would have led to a ruling on the demurrer to the sixth count opposed to that pronounced proper therein. In short, both the *Mobley* Case, on the one hand, and the *Gross* Case and the others mentioned, on the other hand, cannot stand. They are opposed. We therefore conclude, on this question, in accord with the latter, and as appears to us, with the sounder, doctrine of the *Mobley* Case. A ladder, used by a master in pursuit of his business as a contractor engaged in the construction of a building, is a part of such contractor's plant. See 2 Labatt, § 668e and note; *Id.* § 671d, and note.

The third count avers that the defect in the ladder consisted in its being "round at the ends," and, in consequence, that said ladder was liable to slip and fall, and that it was not braced to prevent it from slipping and falling. The first ground of the demurrer challenges the count as showing a defect. The degree of care and diligence due from the master, in this connection, is no greater than at common law. 2 Labatt, § 672. Whether the averment is too uncertain in ascribing the defect to the ladder alone, or to the manner of its use, or to both, might or might not be a question; but the demurrer does not raise it, and it is not considered.

Common knowledge suggests that a ladder with round ends may or may not be unsafe or unsuitable, and its employment in the business of a building contractor a breach of his duty. It might be unsafe and unsuitable when rested, at the bottom, on one character or condition of support, and safe and suitable, within duty, when rested on another; or the former, rather than the latter, when arranged with greater angle to the level of its base; or the latter, when set at a perfect right angle to the level of a base parallel with the ground—any one of the alternatives being, as of course, immediately affected by the fact whether the rest, bottom, of the ladder was a smooth, sleek, rough, or sloping surface. Other conditions of suitability and safety might be instanced. Those stated will suffice to indicate our view that the degree of care and diligence required may be entirely met, even though the ladder's ends are rounding, and though it was not braced to forestall its liability, under some circumstances, to slip and fall. In short, in the absence of averment showing that the ladder, with rounding ends, was so placed, in respect of angle and rest and the character thereof, as to indicate a

lack of exercise of the prudence and care and diligence required of the master, it cannot be held that the condition described in count 3 was per se, as matter of law, a defect in the plant of the master. Not being per se a defect, the pleader's obligation was to show by averment that in the employment of such an instrumentality, as count 3 describes, the degree of care and diligence required was not met. That which, as described, may not be a defect, cannot be pronounced a defect simply because the pleader denominates it a defect. The condition described refutes the conclusion the pleader draws. Furthermore, no fact is averred wherefrom it must be concluded that a duty to brace the ladder arose on this occasion. If that duty was alone expected and intended to be predicated upon the rounding ends of the ladder, that must, as we have seen, depend upon circumstances, of which there is not proper averment. These considerations lead to the conclusion that the first ground of demurrer should have been sustained, not only to count 3, but also to count 5. Ground 10 of the demurrer was, in consequence, likewise well taken as to counts 3 and 5.

Other points of objection, taken by the demurrers, need not necessarily be now considered, since a reformation of the complaint must be had before another trial. Count 4, wherein the defect was not undertaken to be described, seems to be, in this particular, within the ruling of *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206, 37 South. 445.

This court has so often written in reference to the essentials in pleas of assumption of risk and of contributory negligence, there is no necessity to treat the pleas in this instance. Previous decisions will point the way to good pleading of these defenses, from defendant's view point.

For the errors indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

MICHAEL v. STATE ex rel. WELCH et al.  
(Supreme Court of Alabama. June 30, 1909.  
Rehearing Denied Dec. 16, 1909.)

1. OFFICERS (§ 1\*) — WHAT CONSTITUTES — "PUBLIC OFFICER."

Every one who is appointed to discharge a public duty, and receives compensation, in whatever shape, is a "public officer," and if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, it is very difficult to distinguish such a charge or employment from an office, or the person who holds it from an "officer."

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 4; Dec. Dig. § 1.\*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7772, 7773; vol. 6, pp. 4933-4951; vol. 8, p. 7737.]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. OFFICERS (§ 1\*)—WHAT CONSTITUTES—"OFFICE."

An "office" is a public charge or employment, and the term comprehends every charge or employment in which the public is interested.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 4921-4931; vol. 8, p. 7736.]

## 3. QUO WARRANTO (§ 11\*)—TRIAL OF TITLE TO OFFICE—OFFICE OF CITY TREASURER AS "PUBLIC CIVIL OFFICE."

The office of a city treasurer, appointed by the mayor pursuant to Municipal Code Act (Acts 1907, pp. 799, 811) §§ 17, 33 (Code 1907, §§ 1067, 1171), providing for the determination by ordinance of the officers of a city, their salary, manner of election, and terms of office, and an ordinance thereunder fixing the office of treasurer, defining his duties, requiring him to make bond, etc., is a "public civil office," the title to which may be tried by quo warranto proceedings under Code 1907, § 5453.

[Ed. Note.—For other cases, see *Quo Warranto*, Cent. Dig. § 13; Dec. Dig. § 11.\*]

## 4. MUNICIPAL CORPORATIONS (§ 126\*)—ORGANIZATION UNDER GENERAL LAW—POWERS OF OLD COUNCIL—DETERMINING NEW OFFICERS—APPOINTMENT OF CITY TREASURER—VALIDITY.

Municipal Code Act (Acts 1907, p. 791) § 2 (Code 1907, § 1047), after fixing the day for the election of city officers, etc., provides that till the officers elected at the general municipal election on the third Monday in September, 1908, assume their duties, the corporate organization shall remain as provided by law; but section 199 (Acts 1907, p. 892; Code 1907, § 1048) provides for organizing under the Code "at once," if desired, by ordinance, and provides that the then existing governing body shall elect such other officers as are required by the act and not provided by the charter, etc. Section 17 (Acts 1907, p. 799; Code 1907, § 1067) provides that in cities of less than 6,000 the council shall elect a clerk, and may elect a recorder, and fix their salary and term of office, and determine by ordinance the other officers, their salary, manner of election, and term of office. Section 33 (Acts 1907, p. 811; Code 1907, § 1171) provides that cities may, by ordinance, provide for the election at any regular municipal election, or for the appointment, of such officers as are deemed needful or proper, fix their terms, compensation, etc. *Held* that, where a city of less than 6,000 organized under the act by passing an ordinance under section 199, it might exercise all powers provided for in the act, unless expressly or plainly prohibited, and the old council might anticipate the incoming council in passing an ordinance determining new officers, under the power conferred on the "council" by sections 17 and 33, and so render valid the appointment of a treasurer pursuant thereto.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 298; Dec. Dig. § 126.\*]

## 5. MUNICIPAL CORPORATIONS (§ 97\*)—ORDINANCE DETERMINING OFFICERS—TIME OF OPERATION—"PERMANENT ORDINANCE."

Municipal Code Act (Acts 1907, p. 831) § 81 (Code 1907, § 1252), provides that no ordinance intended to be of permanent operation shall become a law unless on its final passage the majority of the members elected to the council, including the mayor, of cities of less than 6,000, shall vote in its favor. *Held* that, generally speaking, a permanent statute or ordinance is understood to continue in force till repealed, and that this was the obvious sense to be accorded to the word "permanent" as used therein, and hence an ordinance determining of-

ficers pursuant to sections 17 and 33 (Acts 1907, pp. 799, 811; Code 1907, §§ 1067, 1171), providing that until validly repealed the officers provided for should exist, to be filled by each succeeding administration, carried on its face an intent to form a permanent rule of government until repealed, and until such time continued in force.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 207; Dec. Dig. § 97.\*]

## 6. MUNICIPAL CORPORATIONS (§ 97\*)—ORDINANCES—PASSAGE BY LEGAL MAJORITY OF COUNCIL.

An ordinance was passed at a meeting of a city council, in absence of the mayor and chairman pro tempore, so that only four members participated, and four votes were cast therefor, including that of the councilman appointed to preside. *Held*, that the presiding councilman was entitled to vote, and was not stripped of his right by his appointment to preside in place of the mayor, who could only vote on a tie; and hence the ordinance was passed by a legal majority, pursuant to Municipal Code Act (Acts 1907, p. 831) § 81 (Code 1907, § 1252).

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 207; Dec. Dig. § 97.\*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Quo warranto by the State, on the relation of W. H. Welch and others, against George J. Michael. From a judgment for relators, respondent appeals. Affirmed.

Wilson & Wilson and C. K. Abraham, for appellant. Pettus, Jeffries & Pettus and Henry McDaniel, for appellees.

DENSON, J. This is an action under the statute (Code 1907, § 5453), brought in the name of the state, on the relation of W. H. Welch and others, against George J. Michael, to oust him from the office of treasurer of the city of Demopolis, and to declare and fix the right of the relator to said office. The circuit court granted the relief prayed, and the respondent has appealed.

Demopolis, a city of less than 6,000 but more than 2,000 inhabitants, was incorporated by an act of the General Assembly approved December 9, 1896. Acts 1896-97, p. 161. By section 3 of the charter, it was provided that the "government" of the city should consist of a mayor and six councilmen, to be elected on the first Monday in May, 1897, and on the 1st day of May every two years thereafter. By section 17 of the charter it was provided that the board of mayor and councilmen might appoint a clerk, a treasurer, a tax assessor, a tax collector, a marshal, a city attorney, and such other officers as might be deemed necessary for the good government of the city. It was also provided by the charter that the board should prescribe the duties and liabilities of such officers, and fix their compensation. The charter further provided that, before entering upon their respective duties, the mayor, marshal, tax collector, tax assessor, and treasurer should enter into

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had, etc. The power was also given the mayor to remove the designated officers at pleasure—"the mayor excepted." It was further provided that the officers should be appointed at the first regular meeting of the newly elected board, "or as soon thereafter as practicable." Section 18 of the charter provided that the treasurer should receive commissions on the receipts and disbursements, and fixed the amount thereof; and section 43 provided that the treasurer should publish semiannual statements of the receipts and disbursements of the "city government."

The record shows that the office of treasurer was established by the "city government," as provided by the charter, and that the respondent was the incumbent thereof, holding it under appointment by the board of mayor and councilmen elected on the first Monday in May, 1907, and that under the law his term of office did not expire until the first Monday in May, 1909, which was the date of the expiration of the terms of the mayor and councilmen by whom he was appointed. The record further shows that on the 13th day of March, 1908, the city council (as authorized by section 199 of the Municipal Code law [Acts 1907, p. 892; Code, 1907, § 1048]) passed an ordinance whereby the city government became organized under the provisions of that law. It also appears from the record that on the 2d day of April, 1909, at a regular meeting of the city council, an ordinance was adopted, entitled "An ordinance to provide officers and employes for the city of Demopolis, prescribe how they shall be appointed, and fix their term of office and compensation." This ordinance provided that "the officers and employes of the city of Demopolis, not otherwise prescribed by law, should be tax collector, tax assessor, collector of water rents, chief of police, chief of fire department, superintendent of waterworks, two policemen, health officers, sanitary officers, city attorney, and city treasurer." The ordinance had been introduced at a previous meeting of the council held in October, 1908. It provided that each of said officers should be appointed by the mayor as soon after he should take the oath of office as practicable, and that the tenure or term of office of each should be coextensive with that of the mayor conferring the appointment, unless he should be sooner removed as provided, and until his successor was appointed and qualified. The ordinance has a repealing clause, whereby all laws and ordinances in conflict with its provisions are repealed. This ordinance was duly published as required by law.

The information shows that by virtue of said ordinance the mayor, on the 3d day of May, 1909, and after his installation in office, appointed relator to the office of treasurer; that he qualified by taking the required oath and making the required bond. Subsequent to the appointment of the relator by the mayor, but during the meeting of the council at

which the mayor was inducted into office, there was introduced an ordinance prescribing the same officers and employes for the town as had been fixed in the ordinance of April 2d, but providing that they should be elected by the city council of Demopolis, and as soon after the members of said council should take the oath of office as practicable, with the reservation that the city health officer and sanitary officer provided for in the ordinance should be appointed by the mayor. It was provided that the ordinance should go into effect immediately upon its passage, and should be and remain of effect only until the first Monday in October, 1910, and until the successors of such officers should qualify. The ordinance purported to repeal all ordinances and resolutions and parts of ordinances and resolutions in conflict therewith. At the meeting at which the ordinance was passed there were present the newly elected mayor and the five newly elected councilmen. Three of the councilmen voted for the passage of the ordinance, and two against it. This ordinance has never been published. After the passage of the ordinance, but at the same meeting of the council, as the record shows, George J. Michael, the incumbent of the office of treasurer, was elected to that office by a majority vote of the councilmen, three constituting a majority.

The first question presented for determination is one preliminary to the main issues involved. It is: Is the office of city treasurer of Demopolis a "public civil office," within the meaning of section 5453 of the Code of 1907, providing this action in the nature of quo warranto for ousting an usurper of a public civil office? In *Henly v. Lynne*, 5 Bing. 91, Lord Chief Justice Best, defining who is a public officer, said: "Every one who is appointed to discharge a public duty, and receives compensation, in whatever shape, from the crown or otherwise, is a public officer." See, also, *Bac. Abr. tit. "Offices and Officers."* A. Chief Justice Marshall, in *United States v. Maurin*, 2 Brock. 102, said: "If a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, it seems very difficult to distinguish such a charge or employment from an office, or the person who holds it from an officer." An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public is interested. *Shelby v. Alcorn*, 38 Miss. 273, 72 Am. Dec. 169; *People v. Hayes*, 7 How. Prac. (N. Y.) 248; *State v. Valle*, 41 Mo. 29; 2 Cow. (N. Y.) 13, 29, note "b"; *People v. Bedell*, 2 Hill (N. Y.) 196; *People v. Lee*, 28 Hun (N. Y.) 469; *Carthew's R.* 479. It would seem that these definitions should suffice to show that the office in question is a public civil office within the purview of the statute.

But the statutes (Code 1907, §§ 1069, 1171), it seems, should remove any doubt on the sub-

ject. They provide that "the council shall elect a clerk, \* \* \* and may determine by ordinance the other officers of such city or town, their salary, the manner of their election, and the term of office." Both ordinances, if valid, fix the office of treasurer, define his duties, require him to make bond, etc. If these things do not make an office, and constitute the person appointed or elected to fill it a public officer, within the meaning of the statute, then it would be hard to conceive of a case within the statute where it has not expressly declared the offices and officers who come within its terms. The court concludes that the office in question is a public civil office, and that the title thereto may be tried by quo warranto proceedings under the statute.

The next and principal contention of respondent is that, notwithstanding the "city government" of Demopolis—in virtue of the adoption of the ordinance of March 13, 1908, by its "governing body," in pursuance of section 199 of the Municipal Code act (Code 1907, § 1048)—became duly organized under the provisions of that act, yet neither the ordinance, nor any of the provisions of the act by the ordinance made applicable, conferred upon the then existing "governing body" of the city the power to determine the officers of the city. In other words, that the power conferred upon the "council" by sections 17 and 33 of the act (sections 1067, 1171, of the Code of 1907), could be exercised only by the council elected on the third Monday in September, 1908, and inducted into office on the 3d day of May, 1909, and, therefore, that the ordinance of April 2, 1909, under which the relator received his appointment, is void.

Section 2 of the municipal act (Code 1907, § 1047), after fixing the day for the election of city and town officers, etc., continues: "Until the officers elected at the general municipal election on the third Monday in September, 1908, shall have assumed their duties of office, the corporate organization of the several cities and towns of the state shall be and remain as now provided by law, and such municipal corporations shall have the powers and exercise the authority herein conferred, unless prohibited in express terms by the respective charters of the several cities and towns, or when, by their nature, they may not be exercised by such municipalities as now organized." This section of the act, of itself, conferred no right or power upon the old council to adopt an ordinance determining the officers of the city, as provided by sections 17, 33, of the act (Code 1907, §§ 1067, 1171); but in this case we must read section 199 of the act (Code 1907, § 1048) in connection with section 2 (Code 1907, § 1047) as a proviso thereto. *Ward v. State ex rel. Parker*, 154 Ala. 227, 45 South. 655. We said, in the case just cited: "The Municipal Code act is a complete law, which by its terms shall become operative in September, 1908; and the only effect of section 199 was to afford an event

upon the happening of which it should go into operation in the town or city so ordaining in the method stipulated in that section at an earlier date. Section 199 should be read as a proviso to section 2 of the Municipal Code act; and, when so read, the provision of the latter section that the corporate organizations 'shall be and remain as now provided by law' is qualified to the extent section 199 prescribed."

It will be observed that in the codification of the act section 2 was made section 1047, and that section 199 immediately follows, as section 1048 of the Code of 1907. It is well understood that the event referred to was the passage of the ordinance, provided for in section 199, to bring the city government at once under the provisions of the act. So it would seem clear that, after the passage of the ordinance of March 13, 1908, the city government of Demopolis became organized under the provisions of the municipal act. But according to the terms of that part of section 2, herein above set out, its corporate organization—mayor, six councilmen, and subordinate officers—remained the same until their successors were elected and qualified. This is emphasized by section 199, wherein it is provided that "the then existing governing body [that existing at time of adoption of the ordinance] shall proceed to elect such other officers as are required by this act and not provided by the charter of such city or town," etc. *Ward v. State ex rel. Parker*, supra.

It is difficult to see what advantage could inure to a municipal corporation from organizing its city government "at once" under the provisions of section 199 of the act, if during the time intervening the date of such organization and the installation of the officers elected on the third Monday of September, 1908, it could exercise none of the powers specified in the act. The court is of the opinion that, unless expressly or by plain implication prohibited, municipal corporations, after coming in under section 199, might exercise all the powers provided for in the act.

The question then arises: Was the council clothed with the power to pass the ordinance of April 2, 1909, determining the officers of the city? The court is not dealing with the question of the propriety of the old council's anticipating the incoming council in passing the ordinance, being concerned merely with the legal phase of the question. Section 1067 of the Code of 1907 (a part of section 17 of the act) provides: "In cities having a population of less than six thousand and in towns, the council shall elect a clerk, and may elect a recorder, and fix their salary and term of office, and may determine by ordinance the other officers of such city or town, their salary, the manner of their election, and the term of office, but there shall be no recorder in towns." Section 1171 of the Code of 1907 (section 33 of the act) provides: "Cities and towns may, except as aforesaid, by ordinance, provide for the election at any regular mu-



municipal election, or for the appointment, of such officers as are deemed needful or proper for the good government of the city or town, and the due exercise of its corporate powers, fix their terms of office, fix their compensation, and prescribe the duties of such officers, their liabilities and powers, and require them to give bond in such sum and to be conditioned and approved as the council may prescribe."

The charter of Demopolis provided that the council might appoint a clerk and a treasurer, and there were a clerk and a treasurer (appointees) at the time the city government became organized under section 199 of the act (section 1047 of the Code of 1907). We have seen that section 1067 requires the election of a clerk by the council, and that the clerk is the only officer required by the act to be so elected; so the "old council" was without authority to pass an ordinance in regard to the office of clerk, and it did not attempt it. But the two sections, 1067 and 1171, both provide that the council may determine by ordinance the other officers of such town. And we cannot see that either of these sections prohibits the old council from passing such an ordinance, albeit such an ordinance passed by the old council might be repealed by the "new council." If, however, by any sort of strained construction, such prohibition might be inferred from the language of section 1067, yet the language in which section 1171 is couched certainly affords no ground for such an inference. Harking back to section 2 of the act (section 1047, Code 1907), the portion of it hereinbefore set out, and construing it in connection with section 199 (section 1048), its proviso, it would seem that the "old council" was fully warranted in passing the ordinance of April 2, 1909. We have been unable, by fair construction, to find in the act any prohibition of, or limitation upon, the right of the old council to pass said ordinance, and we conclude that it might do so. Of course, it could not appoint the officers for the incoming council, and it did not attempt to do this.

Section 1252 of the Code of 1907 (section 81 of the act) provides that "no ordinance or resolution intended to be of permanent operation shall become a law unless on its final passage a majority of the members elected to said council, including the mayor of cities of less than six thousand inhabitants, and in towns shall vote in its favor." The ordinance of April 2, 1909, in effect provided that, until validly repealed, the offices in said ordinance provided for should exist, to be filled by each succeeding administration, and on its face carries the legislative intention that it should form a permanent rule of government until repealed. "Generally speaking, a permanent statute (ordinance) is one which is understood to continue in force till its repeal." *Palcher v. United States* (C. O.) 11 Fed. 47; *Town v. Sapulpa* (Okla.) 97 Pac. 1007; *McQuillan on Ord.* § 9. It is obvious

that this is the sense which should be accorded to the word "permanent" as used by the Legislature in section 1252 of the Code of 1907. It is also clear that until repealed the ordinance in question would undoubtedly continue in force.

At the meeting of the council at which the ordinance of April 2, 1909, was adopted, the mayor, the chairman pro tempore of the council, and one other councilman, were absent, leaving only four members of the council present and participating in the meeting. One of the councilmen present was appointed (Code 1907, § 1088) to preside at the meeting. On the passage of the ordinance four votes were cast therefor, including that of the councilman presiding. It is now insisted that as the mayor, if he had been present, could not have cast a vote except upon a tie (Code 1907, § 1068), the councilman appointed to preside in the stead of the mayor was not entitled to vote upon the passage of the ordinance, and, therefore, that the ordinance received only three legal votes, and, on that account, failed of legal passage. The councilman appointed to preside at the meeting of the council, being a member of the body and entitled to vote, was not, as an incident of such appointment to preside, stripped of the right to vote upon the passage of the ordinance. *McQuillan on Mun. Ord.* § 102. It will be borne in mind that this record simply shows that the mayor and the chairman pro tempore were absent from the meeting, and that at that meeting Councilman S. G. Wolf "was appointed and acted as chairman pro tempore and presided over said meeting, discharging the functions of the mayor." We think this differentiates the present case from that of *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367, and leaves that case out of point.

It must follow, from the foregoing considerations, that the ordinance of April 2, 1909, was adopted in the legitimate exercise of the powers conferred upon the "old council" by the Municipal Code law legitimately adopted. *Gen. Acts 1907*, p. 790. The ordinance being valid, it must follow that the relator's appointment thereunder was legal, and gave him the right to the office of treasurer, unless there was a repeal of it by some ordinance adopted in conformity to law.

The ordinance of May 8, 1909, purports to repeal the ordinance of April 2, 1909; but, in consonance with the reasons stated for holding the latter ordinance to be of a permanent nature, we must hold that it was the intention of the council, in their efforts to pass the former, that it should be of "permanent operation." It did not, however, receive the votes of a majority of the members, including the mayor, elected to the council, as required by section 1252 of the Code of 1907, and, therefore, never ripened into a valid ordinance.

Answers 1 and 2 are inapt, in this action, and the demurrers thereto were properly sus-

tained. *West End v. State ex rel.*, 138 Ala. 295, 36 South. 423.

The other pleas and answers sought to set up in defense matters which have been covered by our general discussion of the case; and according to the holdings announced in this opinion the said pleas and answers were subject to the demurrers filed thereto, and the court properly sustained the demurrers.

The answer as last amended was subject to demurrer, and the court cannot be put in error for sustaining the objection made by the relator to the filing of the same.

The evidence is without conflict, and proves the relator's case in all its essential aspects. The judgment of the lower court must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### DELEON v. WALTER.

(Supreme Court of Alabama. Dec. 16, 1909.)

##### 1. COURTS (§ 489\*)—STATE AND FEDERAL—JURISDICTION—SUITS AFFECTING CONSULS.

Since Act Cong. Feb. 18, 1875, c. 80, 18 Stat. 316, repealing Rev. St. U. S. § 711, subd. 8, providing that the courts of the United States shall have exclusive jurisdiction of all suits or proceedings against consuls and other diplomatic agents and servants, the jurisdiction of the federal courts of such suits is not exclusive or concurrent with the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1341; Dec. Dig. § 489.\*]

##### 2. PLEADING (§ 205\*)—GENERAL DEMURRER.

A general demurrer to a plea will not be considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-510; Dec. Dig. § 205.\*]

##### 3. APPEAL AND ERROR (§ 1040\*)—REVIEW—PREJUDICE—RULINGS ON DEMURRER.

Where a plea attacked by a general demurrer could not have been amended so as to cure the defect, the court's error in sustaining the demurrer was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4093; Dec. Dig. § 1040.\*]

##### 4. PLEADING (§ 8\*)—ANSWER—PLEA—CONCLUSION.

A plea to a suit on a note, alleging that it was given for the premium on a life insurance policy which plaintiff was to furnish within a reasonable time, and which plaintiff did not furnish, and thereby breached the contract, and that plaintiff recognized such failure of consideration and breach of contract, and waived payment thereof, was demurrable as stating a conclusion only.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 18; Dec. Dig. § 8.\*]

##### 5. APPEAL AND ERROR (§ 1040\*)—RULINGS ON PLEADINGS—PREJUDICE.

Defendant was not prejudiced by the sustaining of a demurrer to the plea, where he had the benefit of the same matter in other pleas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4093, 4094; Dec. Dig. § 1040.\*]

##### 6. APPEAL AND ERROR (§ 681\*)—RECORD—RULINGS ON PLEADINGS—REVIEW.

The sustaining of a demurrer to a plea as amended cannot be considered, where the plea is not in the appeal record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2883, 2884; Dec. Dig. § 681.\*]

##### 7. BILLS AND NOTES (§ 524\*)—ACTION—PRIMA FACIE CASE.

In an action on a note against the maker, plaintiff's introduction of the note corresponding with the allegation in the complaint established a prima facie case.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1826-1831; Dec. Dig. § 524.\*]

##### 8. INSURANCE (§ 188\*)—PREMIUM NOTE—FAILURE OF CONSIDERATION—BURDEN OF PROOF.

Where, in defense of a note given for a premium on a life insurance policy, defendant claimed that the policy was to be delivered within a reasonable time, and that it was not so delivered, the burden was on him to show that the time consumed was unreasonable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 405; Dec. Dig. § 188.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Assumpsit by C. M. Walter against A. C. Deleon. Judgment for plaintiff, and defendant appeals. Affirmed.

The fourth plea is in the following language: "Because the note upon which said suit is based was given by defendant to plaintiff as the premium of policy of life insurance which plaintiff was to furnish within a reasonable time, and which plaintiff did not furnish, and thereby breaching the contract under which said note was given, and that plaintiff recognized such failure of consideration and breach of contract, and waived payment thereof." The demurrer was that the plea stated a conclusion, and no matter of fact, as a defense of the cause of action.

Elliott G. Rickarby, for appellant. F. O. Hoffman, for appellee.

EVANS, J. This was an action upon a promissory note, commenced in a justice of the peace court. A plea to the jurisdiction on the ground that defendant was a consul general of a foreign power was there interposed. Judgment was rendered in favor of plaintiff, and defendant appealed to the law and equity court of Mobile, where the same plea to the jurisdiction of the person of defendant was filed, and a general demurrer to said plea was filed, and was sustained by the court. Five pleas to the merits of the case were then filed, and the court sustained a demurrer to the fourth plea. The court sustained a demurrer to the fourth plea as amended; but said fourth plea as amended does not appear in the record. The case was tried before the court without the intervention of a jury, and judgment was rendered in favor of plaintiff. The defendant appeals

and assigns as error, first, the ruling of the court in sustaining demurrer to plea to jurisdiction; second, the ruling of the court in sustaining demurrer to plea 4; third, the ruling of the court in sustaining demurrer to plea 4 as amended; fourth, in rendering judgment for plaintiff in the sum of \$67.50; fifth, in rendering judgment for plaintiff for any sum whatever.

The first question to be considered is the question raised by the plea in abatement. The defendant was, at the time suit was brought against him and at the time judgment was rendered against him, as set forth in his said plea, "the consul general of a foreign power, the republic of Guatemala," and claims that, such being the case, the district court of the United States had exclusive jurisdiction. It cannot be doubted that prior to the act of Congress of date February 18, 1875 (18 Stat. 316, c. 80), the District Court of the United States had exclusive jurisdiction in suits against consuls of a foreign power by a citizen of the United States. Such was repeatedly decided in such cases, and such, indeed, was the language of the statute. Rev. St. U. S. § 711; *Davis v. Packard*, 7 Pet. 276, 8 L. Ed. 684; *McKay v. Garcia*, 6 Ben. 556, Fed. Cas. No. 8,844; *Miller v. Van Loben*, 66 Cal. 341, 5 Pac. 512; *Sartori v. Hamilton*, 13 N. J. Law, 107; *Valarino v. Thompson*, 7 N. Y. 376, and others. By the said act of February 18, 1875, the former statute was repealed, and said act did not give exclusive jurisdiction in such cases to the United States District Court, and the state courts now have jurisdiction to hear and determine cases, in civil matters, although the defendant may be a consul general of a foreign power. Rev. St. U. S. (2d Ed.) § 563 (U. S. Comp. St. 1901, p. 455); *Froment v. Duclos et al.* (D. C.) 30 Fed. 386; *Bors v. Preston*, 111 U. S. 261, 4 Sup. Ct. 407, 28 L. Ed. 419; *De Givie v. Grand Rapids Furniture Co.*, 94 Ga. 605, 21 S. E. 582.

As to general demurrers, the rule is that they cannot be considered and must be overruled. But where, as in the case sub judice, it plainly appears that the plea could not have been amended so as to make it good, the technical error of the court in sustaining a general demurrer is error without injury. *Ryall v. Allen*, 143 Ala. 227, 38 South. 851.

The demurrer to plea No. 4 was properly sustained, as it was subject to the ground set out in the demurrer. But, even if this were not the case, the ruling was error without injury, as the defendant had the benefit of the same matter there pleaded in pleas Nos. 2 and 3. The only difference between plea 4 and plea 3 is that plea 4 casts an additional burden of proof upon defendant. The demurrer to fourth plea as amended cannot be considered, for the reason that said plea does not appear in the record and we are not informed of its contents.

The case was tried upon pleas 1, 2, 3, and 5. Plea 5 was a plea of set-off for the amount of \$10, which was allowed by the court in rendering judgment. Plea 1 was that the note sued on was without consideration; and plea 2 was to the effect that the note sued upon was given in anticipation of the issue of a certain policy of insurance to be delivered within a reasonable time and that said policy of insurance was not so delivered; and plea 3 was to the effect that the consideration of the note sued upon was a premium on a policy of life insurance, which plaintiff promised to deliver within a reasonable time, and which he did not deliver in such reasonable time.

The plaintiff introduced a note in evidence corresponding with the allegations of his complaint, and thereby made out a prima facie case. The only other evidence that was introduced was by defendant, and it failed to prove the allegations of either of said pleas. It showed that there was a consideration for the note sued upon; that the consideration was the first premium upon a policy in the New York Life Insurance Company, which defendant had made application for through plaintiff, who was the agent of said company; and that said policy was delivered to defendant within about 30 days from the date of application. There was no evidence tending to show that this was an unreasonable length of time, nothing to show what had to be done in the particular case. The burden of proof was upon the defendant to show that the time consumed was unreasonable, and this he failed to do.

We find no error in the ruling of the court below, and the case is therefore affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

## CLIMAX LUMBER CO. et al. v. BAY CITY MACH. WORKS.

(Supreme Court of Alabama. Nov. 18, 1909.)

### 1. APPEAL AND ERROR (§ 250\*)—OBJECTIONS—PRESENTATION BELOW—EXCEPTIONS.

Error in not sustaining objections to questions in examination on special interrogatories cannot be considered on appeal, where no exceptions are saved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1471; Dec. Dig. § 250.\*]

### 2. APPEAL AND ERROR (§ 743\*)—ASSIGNMENTS OF ERROR—REFERENCE TO RECORD.

An assignment of error in not sustaining objections to depositions of the various witnesses shown in the record "at pages 22 to 73, and at pages 81 to 83," are too general to be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2999, 3011; Dec. Dig. § 743.\*]

### 3. MORTGAGES (§ 151\*) — PRIORITIES — MECHANICS' LIENS.

Where the increased value of the property caused by the work done and materials furnished by complainant exceeded the amount due him, his lien therefor was to that extent prior to a mortgage executed before the lien was created.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 151.\*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by the Bay City Machine Works against the Climax Lumber Company and others. From a decree for complainant, defendants appeal. Affirmed.

McIntosh & Rich, for appellants. Inge & McCorvey, for appellee.

MCLELLAN, J. Bill by appellee to enforce mechanic and materialman's lien. There are two assignments of error only. They are: "First. The court below erred in the rendition of its final decree." "Second. The court below erred in not sustaining the objections made to the depositions of the various witnesses shown in the record at pages 22 to 73, and at pages 81 to 83."

Two reasons forbid the consideration of the matters attempted to be suggested for review by the second assignment. In the first place, in chancery practice objections to questions propounded in an examination on interrogatories do not, alone, invoke rulings by the chancellor. It is the office of exceptions to so effect that purpose. *Binford v. Dement*, 72 Ala. 491. That course does not appear to have been observed by appellant in the court below. In the second place, the assignment itself is entirely too general. Its extreme generality is indicated by the volume of paging noted in it. *Williams v. Coosa Co.*, 138 Ala. 673, 33 South. 1015. The review, then, is limited to the propriety of the decree on the evidence presented by the parties and its freedom from prejudicial error in enforcing features.

The evidence is voluminous, and a discussion of it will not be attempted, inasmuch as a full treatment is impracticable. A careful consideration of all the evidence does not convince that the chancellor erred in any of the findings essential to the ascertainment and enforcement of the lien asserted by complainant. There was abundant evidence to justify the conclusion that the materials furnished and mechanical work done were so afforded within the letter of the mechanic and materialmen statutes. Code 1907, § 4754 et seq. Our conclusion, as stated, does not omit consideration of the fact that the evidence was not in harmony. Notwithstanding the conflicts and adverse inferences, the decree, in this particular, cannot be pronounced erroneous.

The only objection urged in brief to the correctness of the decree is that the entire

property was adjudged subject to the lien, and this when a mortgage on the property condemned was outstanding at the time the lien in question was created. Where a prior mortgage is on the property at the time the lien is created, *Wimberly v. Mayberry*, 94 Ala. 240, 10 South. 157, 14 L. R. A. 305, rendered previous to re adoption of the statute involved in the Codes of 1896 and 1907, announces the law applicable to the relative rights and priorities of the lienor and mortgagee and directs the practice in such cases. A reiteration of the holding in *Wimberly v. Mayberry* is unnecessary.

The chancellor here ascertained, and the decree so recites, that the increased value of the property as the result of the materials furnished and work done by complainant exceeded the amount due complainant. That being true, it is obvious that, under the cited authority, the lien was prior in right to that extent, to the incumbrance of the mortgage.

There is no error assigned and urged here. The decree must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

### DOTHAN NAT. BANK v. CRAWFORD. (Supreme Court of Alabama. Nov. 18, 1909.) EXECUTORS AND ADMINISTRATORS (§ 402\*) — SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEE.

Where the administrator of a chattel mortgagor, under order of court, sold the interest of the mortgagor in the mortgaged property, the mortgagee was not entitled to maintain a bill praying that the money be decreed to be held in trust for the payment of complainant's debt; the purchaser, if affected by notice, having taken the property subject to the rights of the mortgagee, and, even in case the property had been destroyed, the remedy being an action at law.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1606; Dec. Dig. § 402.\*]

Appeal from Chancery Court, Houston County; L. D. Gardner, Chancellor.

Action by the Dothan National Bank against R. D. Crawford, as administrator of the estate of A. B. Jones, deceased. From a judgment in favor of defendant, complainant appeals. Affirmed.

A. E. Pace, for appellant. Espy & Farmer, for appellee.

SIMPSON, J. The bill in this case was filed by the appellant against the appellee, and alleges that the complainant held a mortgage on the undivided interest of one A. B. Jones in certain personal property consisting of mules, wagons, turpentine stills, pumping outfits, barrels, and office furniture, and also on 10 acres of land; that said Jones died, and the respondent, Crawford, as ad-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ministrator, by order of the probate court, sold all of the interest of said Jones in said property for \$541.40. The prayer of the bill is that said money be decreed to be held in trust for the payment of complainant's debt, and that said administrator be required to appropriate the proceeds of said sale to the payment of complainant's debt.

The interest of the estate of said Jones in said property was simply the property subject to the mortgage, and the sale by the administrator did not interfere with the rights of the mortgagee; but the purchaser, if affected by notice of the mortgage, took the property subject to any rights he might have. There is no averment that the property has been destroyed, so that the mortgage cannot be enforced against the same; and, even if there were such averment, the remedy would be by action at law. *Ehrman v. Oats*, 101 Ala. 604, 14 South. 361. The case of *Humes et al. v. Scott*, 130 Ala. 281, 30 South. 788, was the enforcement of an express trust, and has no analogy to this case.

The decree of the court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

#### GREEN v. LOUISVILLE & N. R. CO.

(Supreme Court of Alabama. Nov. 18, 1909.)

#### CARRIERS (§ 123\*)—SHIPMENT OF GOODS—DELAY IN TRANSPORTATION.

The failure of a carrier to move a car load of lumber, after being made ready for shipment and notice thereof, renders it liable for the loss of the lumber by its subsequent destruction in the burning of adjacent property without the carrier's fault.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 541; Dec. Dig. § 123.\*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Frank S. Green against the Louisville & Nashville Railroad Company. Defendant had judgment, and plaintiff appeals. Reversed.

Bestor, Bestor & Young, for appellant. Gregory L. & H. T. Smith, for appellee.

McCLELLAN, J. The appellant grounds this action for damages upon this omission of the appellee: In "wholly and carelessly" neglecting and "negligently" failing, "as was its [appellee's] duty in the premises," to remove, after notice and request so to do, a car of lumber belonging to appellant, in consequence of which breach of duty, it is averred, the lumber was destroyed in a fire that consumed the mill of the Crescent Lumber Company, whereat, or near which, the car was loaded, and at or near which the stated negligent omission of appellee permitted the car of lumber to remain and be destroyed.

The only ground of demurrer assigned was that the "complaint shows that the negligence of the defendant complained of was not the proximate cause of the injury sued for." It is insisted by counsel for appellee that no prejudicial error could have attended the sustaining of the demurrer, because the complaint states no cause of action.

We cannot approve this contention. That it is the duty of a carrier to exercise due care and to employ reasonable diligence in the forwarding of goods committed to it for conveyance cannot be doubted. The complaint expressly avers that the duty of the defendant in the premises was to move said car, that notice and request so to do was communicated to defendant, and that defendant negligently omitted the performance of that duty, in consequence of which the lumber was destroyed. The argument that in the complaint no destination for the car is averred, no place whereto the defendant was obligated within its duty to remove the car, might (though we are not now invited to decide it) be in point, if a ground of demurrer had been interposed raising that objection to the complaint. It is sufficient to conclude that the complaint avers, expressly, a duty and its breach, and injury in consequence thereof. If the averment of these ordinarily essential elements in the statement of a cause of action are imperfect, demurrer should have been employed to point out the defects. Under the principles announced and applied in *L. & N. R. Co. v. Gidley*, 119 Ala. 523, 24 South. 753, and *A. G. S. R. R. Co. v. Quarles*, 145 Ala. 436, 40 South. 120; and the very recent decision in *A. G. S. R. R. Co. v. Elliott*, 150 Ala. 881, 43 South. 788, it must be held that the demurrer was erroneously sustained. The complaint makes a case where the carrier was culpable in its failure to move the car in question, and under such circumstances the destruction of the goods by fire, even though communicated without the carriers' other fault, will be traced in causation to the concurrent causes afforded by the fire and the negligent delay in the performance of the duty of removal.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### OLIVER v. WILLIAMS.

(Supreme Court of Alabama. Dec. 16, 1909.)

#### 1. PARTITION (§ 5\*)—PAROL PARTITION—POSSESSION—VALIDITY.

A parol partition between tenants in common, followed by possession taken and retained pursuant thereto, is valid and binding on them.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 13-17; Dec. Dig. § 5.\*]

## 2. TENANCY IN COMMON (§ 15\*)—ADVERSE POSSESSION—KNOWLEDGE.

While possession of a tenant in common, without more, is not adverse to the claim of his co-tenants, a repudiation of the co-tenants' rights and a claim of exclusive ownership, brought to their actual knowledge, will make the tenant's possession adverse.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.\*]

## 3. WITNESSES (§ 140\*)—COMPETENCY—TRANSACTION WITH PERSONS SINCE DECEASED—INTEREST.

The interest which is sufficient to disqualify a witness as to a transaction with a decedent, under Code 1907, § 4007, must be such that the witness will gain or lose by direct legal operation of the judgment to be rendered, or an interest concerning which the record will be legal evidence for or against him in some other action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 599; Dec. Dig. § 140.\*]

## 4. LIMITATION OF ACTIONS (§ 80\*)—SUSPENSION—POSTHUMOUS CHILD.

Where limitations begin to run against the ancestor of a posthumous child, the ancestor's death did not interrupt the statute, though plaintiff was yet unborn.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 424; Dec. Dig. § 80.\*]

## 5. ADVERSE POSSESSION (§ 43\*)—TACKING—PRIVITY.

Privity, required to establish continuity of adverse possession, may be established by a transfer of possession alone, without written evidence, or by any conveyance or agreement, written or oral.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 225; Dec. Dig. § 43.\*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Ejectment by Arthur Williams against J. H. Oliver. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

J. M. Miller, for appellant. William Cunningham, for appellee.

SAYRE, J. Statutory action in the nature of ejectment. Plaintiff and defendant in the trial court, who are respectively appellee and appellant here, traced title to a common source, Ashley Williams, plaintiff's grandfather. Plaintiff proved title and possession in Ashley Williams, and his heirship through Caleb Williams, his father, and on this evidence had a recovery for a one-fifth interest in the property sued for. The defendant offered to prove a parol partition between the widow and children of Ashley, by which the land sued for was assigned to Minerva Pullen, an aunt of plaintiff, subsequent possession by her under an exclusive claim of ownership for more than the period of statutory limitation, and traced his title back to her through a number of mesne conveyances. The court sustained the plaintiff's objection. This ruling, repeated several times during the progress of the trial, constitutes the subject of the principal assignments of error. We gather from the briefs and argument of counsel that the rulings complained of proceeded upon one or the other of two

theories: (1) That the statute of frauds stood in the way of the parol partition; (2) that the witnesses called to prove the partition and subsequent possession under it by the parties to it were incompetent, because peculiarly interested in the result of the suit, and the facts to which it was proposed to have them testify were transactions with Caleb Williams, whose estate was interested in the result. Code 1907, § 4007.

The case of *Yarborough v. Avant*, 66 Ala. 526, seems to recognize, inferentially at least, that a parol partition of lands, followed by possession, continued for so long a time that the statute of limitation operates as a bar, vests in the co-tenants legal title to the parts assigned to them respectively. At the common law a voluntary partition of lands could be made by parol between tenants in common. Judge Freeman states that according to a slight preponderance of American cases, and a decided majority of the English authorities, the statute of frauds now interposes an insuperable obstacle to a valid parol partition. In *Woodhull v. Longstreet*, 18 N. J. Law. 414, the Supreme Court of New Jersey, while intimating that it might possibly uphold a parol partition when sanctioned by long-continued possession taken and held by virtue of it, denied the force of such partition when accompanied by possession for a period of five or six years, and portrayed the evils which, in its judgment, were likely to arise from encouraging parol partitions. In New York, Chancellor Kent said: "A parol division, carried into effect by possessions taken according to it, will be sufficient to sever possessions, as between tenants in common whose titles are distinct, and where the only object of the division is to ascertain the separate possessions of each." *Jackson v. Harder*, 4 Johns. (N. Y.) 212, 4 Am. Dec. 262. In Mississippi, where the question was on the admissibility of certain evidence, the court used this language: "The only question, then, upon which the competency of this evidence depends, is whether it is competent to show a partition by parol between coparceners or tenants in common. And there can be no doubt but that such an agreement, when carried out by the parties taking possession in severalty, is valid and effectual to conclude the rights of the others against the respective parties so holding in severalty." *Willey v. Bonner's Lessee*, 31 Miss. 652. In Pennsylvania, in an action for partition, the defendant pleaded that he and the plaintiff did not hold the land together, and this was the question at issue. The defendant offered parol evidence to show a parol partition, with subsequent possession by each of the part allotted to him by the other. The court was of opinion that the evidence ought to have been received. *Ebert v. Wood*, 1 Bin. (Pa.) 218, 2 Am. Dec. 436. In South Carolina, in a case where parol partition had not been

consummated by possession taken and held in accordance therewith, the court said: "There is no doubt that, if actual possession had followed the partition, it would have bound the parties." *Slice v. Derrick*, 2 Rich. Law, 620. In Virginia, "between parceners, deeds of partition, though the better practice, are not absolutely necessary: they may mark and establish the dividing line between them, and prove it by any other competent evidence; and they will, from the time of marking and establishing the line, be seised in severalty." *Coles v. Wooding*, 2 Pat. & H. 197. In Ohio, a fair division of common property, consummated by possession, will not be disturbed in equity after the lapse of several years, although some of the parties were infants. *Platt v. Hubbell*, 5 Ohio, 245. In Indiana, parol partitions are sustained when followed by exclusive possession. *Hauk v. McComas*, 98 Ind. 460. In West Virginia, voluntary parol partitions, clearly proven, followed by actual possession in severalty, will defeat the right to partition under the law. *Patterson v. Martin*, 33 W. Va. 494, 10 S. E. 817. In Missouri, although a parol partition is good between the parties when accompanied by possession, yet the equitable title only passes, which by adverse possession may ripen into a legal estate. *Hazen v. Barnett*, 50 Mo. 506. In Vermont, tenants in common, who have not perfected their title by 15 years' possession under the statute, may make partition by parol, provided it be accompanied by acts of possession in severalty. *Pomeroy v. Taylor*, *Brayton*, 174. In Tennessee, the registration laws do not apply to a parol partition between co-tenants. *Meacham v. Meacham*, 91 Tenn. 532, 19 S. W. 737. In Texas, a parol partition is sustained on peculiar provisions of the statute of frauds of that state. *Stuart v. Baker*, 17 Tex. 420. In Massachusetts, Maine, California, and North Carolina, parol partitions are not recognized in courts of law. *Porter v. Perkins*, 5 Mass. 235, 4 Am. Dec. 52; *Duncan v. Sylvester*, 16 Me. 390; *Gates v. Salmon*, 46 Cal. 361; *Medlin v. Steele*, 75 N. C. 154. See, also, *Freeman on Co-Tenancy and Partition*, § 308; 38 Cent. Dig. 14, § 13 et seq. Judge Freeman concludes it to be evident that a parol partition of the lands of co-tenants, when followed by possession taken or retained in pursuance of it, is binding upon them, is gaining rather than losing ground, and that, while there may be difference of opinion respecting the reasons on which the proposition ought to rest, practically, it makes little difference what view prevails; for under either each co-tenant is entitled to retain the land so partitioned and allotted to him.

In *Tennessee C. I. & R. R. Co. v. Linn*, 123 Ala. 112, 26 South. 245, 82 Am. St. Rep. 108, it was held that the adverse possession of one who enters and holds under a valid parol contract of sale, after having paid the purchase money, is limited to his possessio pedis, and does not extend to the boundaries

agreed upon in the contract of sale as is the case where one holds under written color of title. No such question is involved in the case at bar, nor are the rights of strangers to the partition involved. We gather from the record that the controversy here related, not to the extent of the possession of the defendant and those under whom he claimed, but to the character of their actual possession. The rule is that the possession of a tenant in common, without more, is not adverse to the claim of his co-tenants. But a repudiation of the right of his co-tenants and a claim of exclusive ownership, brought home to their actual knowledge, will convert his holding into an adverse possession. *Ashford v. Ashford*, 136 Ala. 631, 34 South. 10, 96 Am. St. Rep. 82. And an agreed parol partition necessarily implies knowledge on the part of all the parties to it that the subsequent possession under it is adverse. By different appropriate questions propounded to different witnesses the defendant offered to show a parol partition among the heirs of *Ashley Williams* and an adverse holding under it by those under whom he claimed the land in controversy, which, if the witnesses had been permitted to testify and had met his expectations, would have made his title a question for the jury. This, as for anything yet appearing, he should have been allowed to do.

Mrs. Kirkham and the witness Jowers had no such pecuniary interest in the result of the suit as would have been affected by the judgment to be rendered therein, and were, therefore, not disqualified to testify to the alleged partition. "A case cannot arise for the application of the \* \* \* exception unless it involves a direct, immediate conflict of interests between the dead and the living." Ala. Gold Life Insurance Co. v. Sledge, 62 Ala. 566; *Manegold v. Massachusetts Life Ins. Co.*, 131 Ala. 180, 31 South. 86. The statute excludes witnesses on account of pecuniary interest in the result of the suit. "The true test of the interest of a witness is that he will gain or lose by the direct legal operation or effect of the judgment, or that the record will be legal evidence for or against him in some other action." *Wormley v. Hamburg*, 40 Iowa, 22. Of these witnesses, Mrs. Kirkham was a sister of Caleb Williams and participated in the partition about which she was asked to testify. Jowers had purchased the interest of Caleb Williams many years before. Plaintiff, as we have already noted, was suing to recover that part of the land which had been allotted on the partition to Mrs. Pullen. If these witnesses had any interest in maintaining or denying the partition, it was so remote as not to fall within either the letter or the spirit of the statute. No possible result of the pending cause could have involved pecuniary loss or gain to them, nor could the judgment to be rendered have established any status affecting them or their estate.

The objection to the testimony of these witnesses went to its credibility, as showing a remote interest which might affect their veracity, not within the statute, rather than to their competency as witnesses. There was error in sustaining the plaintiff's objections to this testimony.

Plaintiff was a posthumous child, and only reached his majority in the year 1906. But the statute of limitation began to run against his father, under whom he claimed by inheritance, from the date of the parol partition and possession taken under it. This was several years before the death of his father, Caleb. If the statute of limitation, in that aspect of the case which defendant offered to prove, began to run against plaintiff's ancestor—and it was open to the jury to find that he was more than 21 years of age at the time of his death—the death of that ancestor did not interrupt its running, although the plaintiff had not yet come into being. *Smith v. Roberts*, 62 Ala. 83.

There was no lack of privity between the defendant and Mrs. Pullen, under whom he claimed, to prevent a tacking of their adverse possessions. The privity required to establish continuity of adverse possession which will ripen into title may be effected by any conveyance or agreement, written or verbal, which has for its object a transfer of the rights acquired under the original entry. A transfer of possession alone, without written evidence of the transfer, is sufficient to create privity. *Holt v. Adams*, 121 Ala. 664, 25 South. 716.

Defendant's evidence admitted, plaintiff's right of recovery would have been, as for anything we are able to gather from the involved bill of exceptions, a question for the determination of the jury. There was error in giving the general affirmative charge for the plaintiff.

Reversed and remanded.

ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur.

## SOUTHERN RY. CO. v. STONEWALL INS. CO.

(Supreme Court of Alabama. Nov. 18, 1909.)

### 1. INSURANCE (§ 606\*)—SUBROGATION OF INSURANCE COMPANY.

An insurance company, on paying insured for property tortiously destroyed by a third person, is subrogated to the rights of insured against the third person, and may sue in its own name, or in the name of insured for its use.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1506; Dec. Dig. § 606.\*]

### 2. PARTIES (§ 95\*)—DEFECTS—WAIVER.

Where an insurance company, which had paid insured for property tortiously destroyed by a third person, sued in its own name the third person, instead of in the name of insured

for its use, the defect was amendable, and must be taken advantage of before verdict.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 160, 166; Dec. Dig. § 95.\*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by the Stonewall Insurance Company against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bestor, Bestor & Young, for appellant. Joel W. Goldsby and Gregory L. & H. T. Smith, for appellee.

MAYFIELD, J. This was an action by the appellee insurance company against appellant (defendant) railroad company to recover damages for the destruction of a warehouse and a lot of cotton alleged to have been ignited by fire emitted from defendant's locomotive. The property destroyed was insured by appellee to various owners, against loss by fire. After the loss, the insurance company paid the losses to the insured, in accordance with its contracts, taking assignment and transfer of their respective claims, and thereupon sued appellant, in its own name, for negligently causing the loss by fire. The defendant demurred to the complaint, but its demurrers were stricken from the file, on plaintiff's motion, because not filed within time. Trial was had, which resulted in a verdict for plaintiff for one cent. This verdict and judgment was set aside, on plaintiff's motion, and a new trial awarded. From the judgment and order setting aside the verdict and awarding a new trial, defendant appeals.

It is insisted that the order setting aside the verdict was error, for that the plaintiff could not maintain the action; that the statute (section 5159 of the Code of 1907) which authorizes the transfer and assignment of claims against railroad companies and suits thereon in the names of the successive assignees, is unconstitutional and void, because a discrimination against railroad companies. It is unnecessary to decide this question on this appeal, for the reason that, without any statute, the insurance company, on paying the insurance for the property insured and alleged to have been tortiously destroyed by the railroad company, would be subrogated to the rights of the insured or owners of the property, against the railroad company, if any there were, to make good its loss, and could certainly sue in its own name, or in the name of the insured, for its use. The insurance company, in either case, would be the real party plaintiff; and if it should be conceded that the action should have been in the names of the insured, for the use of the insurance company, this would be an amendable defect, and would have to be taken advantage of before verdict. This was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



not done, however, though it appears that the defendant attempted to do so, but was not within time. *Home Co. v. Oregon Co.*, 20 Or. 569, 26 Pac. 857, s. c. 23 Am. St. Rep. 151; *Conn. Co. v. Erie Co.*, 73 N. Y. 399, s. c. 29 Am. Rep. 171; *Phenix Co. v. Penn. R. R. Co.*, 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; *Johnson v. Martin*, 54 Ala. 271; *Lucas v. Pittman*, 94 Ala. 618, 10 South. 608; *American Union Tel. Co. v. Daughtery*, 89 Ala. 191, 7 South. 680; *Dougherty v. Powe*, 127 Ala. 581, 30 South. 524.

We see no reason for disturbing the order or judgment of the trial court in awarding a new trial, and the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

### SULLIVAN TIMBER CO. v. LOUISVILLE & N. R. CO.

(Supreme Court of Alabama. June 30, 1909.  
Rehearing Denied Dec. 16, 1909.)

#### 1. RAILROADS (§ 460\*)—FIRES—CONTRIBUTORY NEGLIGENCE.

In an action for fire set by a locomotive, a plea that defendant's servants had negligently thrown a large quantity of inflammable grass and weeds in the street near plaintiff's office, and that, though there was danger of fire being communicated to such grass and weeds from defendant's locomotives, plaintiff negligently allowed such material to remain, was not demurrable, since one aware of another's wrong, likely to lead to his injury, cannot remain inactive to avert such injurious consequences, and then claim damages for injuries proximately flowing therefrom.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1681; Dec. Dig. § 460.\*]

#### 2. RAILROADS (§ 480\*)—FIRES—BURDEN OF PROOF.

In an action against a railroad for fire set by a locomotive, if the jury credited the evidence showing that plaintiff's buildings were ignited by fire from defendant's locomotive, the burden passed to defendant to show, at least prima facie, that the fire was emitted without negligence in the construction, equipment, and operation of the locomotive.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1710; Dec. Dig. § 480.\*]

#### 3. RAILROADS (§ 482\*)—FIRES FROM LOCOMOTIVES—EVIDENCE.

That a locomotive running 50 miles an hour and under greater head of steam emits more sparks than one running 25 miles per hour does not of itself show that the former is negligently operated, constructed, or equipped.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1735; Dec. Dig. § 482.\*]

#### 4. DISCOVERY (§ 69\*)—INTERROGATORIES—ANSWERS.

That answers to interrogatories propounded to an adverse party under Code 1896, § 1850 et seq., are merely irresponsible, is not ground for striking them out.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 83; Dec. Dig. § 69.\*]

McClellan, Mayfield, and Sayre, JJ., dissenting in part.

Appeal from Circuit Court, Mobile County; Samuel B. Brown, Judge.

Action by the Sullivan Timber Company against the Louisville & Nashville Railroad Company. From the judgment, plaintiff appeals. Affirmed.

The facts in this case may be found in a former report of the case under the style of *Louisville & N. R. R. Co. v. Sullivan Timber Co.*, 138 Ala. 879, 35 South. 327. For the purpose of this opinion, it is deemed necessary to set out count 6, which is as follows: "(6) The plaintiff, for amendment to its complaint in this cause, and as a part of each count herein set forth, avers that heretofore, and at the time of the matters and things complained of, it was possessed of certain lands and premises in the city and county of Mobile, in the state of Alabama, and upon which was located its sawmill, dry kilns, sheds, offices, and other buildings, and on which premises it had large quantities of lumber, shingles, wagons, and other valuable property, which said property was bounded on the west by Water street, and that on the eastern line of said Water street was located its offices and a lumber shed, the western side of which kiln was constructed of plank; and the defendant was, prior to and at the time aforesaid, possessed of a certain railroad track and a right of way along and over said Water street, in said city of Mobile, and in front of said plaintiff's premises, which said railroad track was at said time within 30 feet of said plaintiff's land and premises, and upon which said railroad track the defendant ran and operated its engine, locomotive, and cars by steam power. And plaintiff says that on, to wit, the 29th day of September, 1896, fire escaped from a locomotive engine which was then being run by defendant along said Water street in front of plaintiff's said premises, and was communicated to plaintiff's said premises, and that thereby the following property of plaintiff thereon was burned and destroyed: [Here follows description of property.] And plaintiff was thereby damaged in the amount of \$25,000, for which it brings this suit. And it avers that until the same was cut down by defendant's servant there was growing upon said Water street, between plaintiff's said premises and said railroad track, grass and weeds, and that on, to wit, the 24th day of September, 1896, a large quantity of such grass and weeds was cut down by defendant's servant under its direction, and was by them negligently and wrongfully thrown towards and near plaintiff's said office, and the side of its said shed, and was by defendant negligently and wrongfully allowed to be and remain near plaintiff's said premises, and that said such grass and weeds there became dry and inflammable. And plaintiff avers that the fire so escaping from defendant's locomotive as set forth above fell into and ignited such dry grass and weeds, and thence was communicated

to plaintiff's said property, and destroyed and damaged its property, all as set forth above."

Plea 2 was as follows: "(2) To the sixth count, filed as above, the defendant says that the west line of plaintiff's lumber shed on the east side of Water street was constructed of inflammable boards, set upright, with cracks between them, and that said shed was covered with wooden timbers, and was so situated that, should combustible material lying in Water street and opposite thereto be set on fire, said shed would be in great danger of being burned; and the remainder of said property mentioned in said counts of the complaint was so situated as to be in great danger of being burned should said shed be set on fire, all of which was well known to plaintiff before the matter and things complained of. Defendant's engine passed said property frequently on each day, and fire frequently escaped therefrom and fell upon that portion of Water street that was opposite the plaintiff's premises, which said fact was well known to plaintiff. And defendant further avers that plaintiff knew that defendant's servants had negligently thrown a large quantity of grass and weeds towards and near plaintiff's office, and the side of the said shed, and that defendant had negligently allowed it to be and remain near plaintiff's said premises, and that said grass and weeds were dry and inflammable, and that there was danger of fire escaping from defendant's locomotives, or some of them, and falling into and igniting such dry grass and weeds, and of thereby communicating fire to plaintiff's premises and destroying and damaging its property, unless such weeds and dry grass was promptly removed, and the plaintiff nevertheless allowed the said dry grass to be and remain in said street and near its said premises, which said negligence on the part of the plaintiff proximately contributed to the damages in said counts complained of."

The following demurrers were filed to plea 2: "(1) Because said plea shows that said defendant's servant negligently put said grass and weeds and inflammable matter near plaintiff's property and caused the dangerous condition to exist, whereby the fire escaping from defendant's engine set the said inflammable matter on fire. (2) Because it was not incumbent on plaintiff to remove the dangerous condition in said plea mentioned, created by the negligence of defendant's servant. (3) Said plea shows that said dangerous condition which proximately contributed to cause the damage complained of was brought about by the negligence of defendant's servant."

L. & H. E. W. Faith and R. H. & N. R. Clarke, for appellant. Gregory L. Smith and Joel Goldsby, for appellee.

MCLELLAN, J. The status in pleading and in fact, of this case, will be found accurately set down in the report of this litigation

on former appeal. *L. & N. R. R. Co. v. Sullivan Timber Co.*, 138 Ala. 379, 35 South. 327. The chief question argued on this appeal concerns the ruling of the court below, following the decision of this court on the other appeal, affirming the sufficiency of plea 2, against the demurrers assigned, as a defense to the sixth count of the complaint. The sixth count averred that the negligence consisted in the negligent accumulation by the defendant, of combustible material alongside or near to the defendant's roadway. The former ruling, in this case, was but the application of the principle announced in *Lilley v. Fletcher*, 81 Ala. 234, 1 South. 273. A careful re-examination of the principle, as applicable to the case at bar, confirms the soundness of the ruling made, in this regard, on the former appeal.

None of our adjudications, pressed upon us by counsel for appellant, relate to the application of the principle to this character of controversy as that principle was first set forth and applied in *Lilley v. Fletcher*, supra. The soundness of the principle that one, aware of another's wrong likely to lead to his injury, cannot remain inactive to avert such injurious consequences so known, and then claim recompense for an injury proximately flowing therefrom, cannot be reasonably questioned. It is grounded in evident duty. Besides, if it be ignored in a case presenting a breach of it, the doctrine of proximate cause as an unvarying condition to a recovery of damages for an injury suffered would probably be seriously qualified. The distinction that must be taken between the principle under consideration and that announced and applied in the *Marbury Case*, 125 Ala. 260, 28 South. 433, 50 L. R. A. 620, is that the latter affirmed the absence of duty on a proprietor to anticipate negligence on the part of the carrier, whereas here the plea 2, to the sixth count, asserts a duty arising out of an act of negligence already committed. The soundness of the ruling in *L. & N. R. R. Co. v. Miller*, 109 Ala. 500, 19 South. 989, is not impugned by the holding made in this case on former appeal; for the reason, among others, that in *Miller's Case* the defense here interposed by plea to the sixth count was not presented. Plea 2 to the sixth count was proven beyond dispute, and hence the affirmative charge on that count was due the defendant.

The third count of the complaint ascribed the destruction of the plaintiff's property to the negligent communication of fire directly thereto from a locomotive by the defendant. There were tendencies in the proof requiring the submission of the issue to the jury, to the effect that the buildings or lumber of the plaintiff were ignited by fire from the defendant's locomotive. If the jury credited the stated tendencies of the evidence, the burden then passed to the defendant to show, at least prima facie, that the fire so communicated was emitted without negligence in the

construction, equipment, and operation of the locomotive in question. *L. & N. R. R. Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66. If the evidence offered by defendant in negation of such negligence *prima facie* overcame the presumption that the communication of the fire as stated was the result of negligence—a question for the court, as was ruled in *Reese's Case*, *supra*—in that event, then, the obligation was on the plaintiff, before it could recover, to adduce some affirmative evidence tending to show negligence in construction, equipment, or operation of the locomotive. The defendant introduced several witnesses, who testified that the locomotive was properly constructed, equipped, and operated. These witnesses were shown to be expert in reference to such matters. There is nothing discoverable in their testimony, as it is presented to this court, reasonably calculated to reflect upon its credibility. There are no inconsistent statements appearing, nor responses by the witnesses that could reasonably be taken as indicia of incorrectness, inaccuracy, or falsity. The court gave the general affirmative charge for the defendant on the whole case, and in reviewing his action we presume that he indulged the conclusion that the defendant had, by its evidence, met and overcome *prima facie* the presumption arising from the fact (if found from the tendencies of the plaintiff's evidence) that the fire was communicated directly to the plaintiff's property from the defendant's locomotive. While the duty of the court in deciding, in this character of cases, whether the defendant has met and overcome, *prima facie*, the presumption before stated, is a delicate one, this court is not convinced, on the record here, that the court erroneously concluded, from the evidence, that the defendant had discharged *prima facie* the burden passed to it by the presumption referred to above.

This brings us to the inquiry whether the plaintiff presented any evidence the tendency of which was to show negligence in the construction, equipment, or operation of this locomotive, causing the ignition of plaintiff's property. The evidence of the plaintiff on this issue, whether excluded by the court from interrogatories or not, has been particularly scrutinized and carefully considered; and after this we are unable to discover any evidence having the essential tendency to support the plaintiff's contention on the issue. It shows, to be sure, that sparks were emitted, on the occasion, in unusual quantities; but this unusual emission is referred, by the proof, to the flow of sparks from locomotives running on time and at a slower speed than when the locomotive or train was late. In other words, the increased, unusual, flow of sparks is attributed, in the evidence, to the speed of the locomotive. Such may be the case, and yet no negligence, the *sine qua non* to liability, colored the release of the fire causing the property loss. It cannot be

said that alone, because an engine is running 50 miles an hour and under greater head of steam emits more sparks than one running 25 miles an hour, that the former is, hence, negligently operated, constructed, or equipped. It may be in point of fact, and yet that action of the mechanism cannot, we think, justly afford a safe reason on which to predicate a finding that negligence, in one or more of the three particulars, allowed the sparks to be so emitted from the more rapidly running locomotive. To be reconcilable as evidence tending to show negligence in the construction, equipment, or operation of a locomotive setting out fire, the emission of fire must have been unusual, as measured by a standard of operation at least substantially circumscribed as was the locomotive emitting fire in unusual quantities.

The court, on motion or objection of defendant, struck many parts of the answers of the plaintiff to interrogatories propounded to it by defendant under Code, 1896, § 1850 et seq.; and this seems to have been generally done upon the authority of *Garrison v. Glass*, 139 Ala. 512, 36 South. 725, and for the reason that such stricken answers were not responsive to the interrogatories propounded. This method of propounding interrogatories to adverse parties in actions at law was formulated (in 1837) before the Code of 1852. See *Clay's Dig.* 341, § 160; *Saltmarsh v. Bower*, 22 Ala. 221, and authorities therein cited. When the codification of 1852 was adopted, several changes were made in the provisions of the system from those prevailing theretofore. Notwithstanding these changes, at least of phraseology, this court, dealing with the statute as written in the Code of 1852, drew therefrom the same meaning and gave to the system the same effect as had been previously drawn and given it when otherwise written. The instance in mind is the case of *Crymes v. White & Johnson*, 37 Ala. 549. This decision was delivered at the June term, 1861. It was there said: "Giving to the sections of the Code (sections 2330-2336) authorizing the examination of parties by interrogatories the same construction which was put upon the old statute on that subject (*Clay's Dig.* 341, § 160), we must hold that the court erred in suppressing that portion of the defendant's answer above quoted. According to our former decisions, interrogatories under the statute are governed by the same rules that apply to bills of discovery in chancery, so far as relates to the nature of the discovery sought and the effect of the answers as evidence when made. In *Saltmarsh v. Bower*, 22 Ala. 221, this subject underwent a careful consideration; and it was there held that, as in an answer to a bill of discovery, nothing can be considered *impertinent* which tends to disprove the existence of the cause of action or defense set up in the bill, so in an answer to interrogatories under the statute, whether it is *purely responsive*, or con-

*tains affirmative irresponsible allegations in avoidance of the demand*, cannot be made the subject-matter of exception. See, also, *Pritchett v. Munroe*, 22 Ala. 501; *Wilson v. Maria*, 21 Ala. 359." (Italics supplied.) As appears, it was expressly held, in the quoted case, that the respondent to interrogatories is not limited, in his answers thereto, to such as are responsive to the interrogatories propounded to him, but that he may incorporate in his answers any matter in avoidance of the demand, or of or in defense; the general restriction being, as in answers to bills of discovery, that the answers shall not embrace impertinent matter. The statutes, as written in the Code of 1852, have been several times readopted in subsequent codifications, including that of 1907.

In *Allen v. Lathrop Lumber Co.*, 90 Ala. 490, 8 South. 129, and *Cain Lumber Co. v. Standard Dry Kiln Co.*, 108 Ala. 346, 18 South. 882, the construction of these statutes taken in *Crymes v. White & Johnson* was not doubted, but, on the contrary, was, in general terms, approved. This state of the law, in this regard, remained without reflection upon its correctness until the decision in *Bank v. Leland*, 122 Ala. 289, 294, 25 South. 195, when, for the first time, so far as we are advised, it was said in effect that answers merely irresponsible might be stricken. This holding was predicated, it appears, upon the decision in *Culver v. A. M. R. Co.*, 108 Ala. 330, 333, 18 South. 827. This latter announcement does not sustain the proposition stated above, but does hold the eliciting of "legal evidence, facts which tend to support the claim of the plaintiff or the line of defense," to be the object of the system. *Culver's Case* and *Cain Lumber Co. v. Standard Co.*, adverted to before, appear in the same volume and are the expressions of the same Justices. It must be that neither of those decisions were intended to announce inconsistent rulings. *Garrison v. Glass* is grounded in authority, on *Bank v. Leland*.

We are of the opinion that in the particular under consideration both of these decisions are unsound, and are, hence, overruled to that extent. They result in an abrupt and important departure from what had, for more than a quarter of a century, been the settled construction, application, and effect of these statutes. If the rule of the *Leland* and *Garrison Cases* is allowed to stand, the consequence is so opposed to common fairness, justice, and right, we entertain no doubt that the lawmaking branch of the government would repeal the statutes. The reason for this strong statement is found set down and conclusively supported in reason and authority in *Saltmarsh v. Bower* and *Crymes v. White & Johnson*. It is that if the interrogatee should be confined in his answers to only those responsive to the interrogatories propounded to him, the power would be thereby given the interrogator to extract from the interrogatee only matter favorable

to his action or defense and to leave the interrogatee dumb to explain or avoid in his answers the favorable (to the interrogator) fact or circumstance so elicited. Such a result cannot be sanctioned, especially in view of the fact that answers to pertinent interrogatories, not otherwise improper or exempted from the requirement to be answered, may be compelled under rigorous penalties. The serious consequence indicated is not avoided by the fact that the party interrogated may testify on the trial; and this, for the reason, among others, that the interrogatee may die, or become otherwise disqualified to testify, between the time he is required to, and does, answer and the time of the trial.

All of the Justices concur in the conclusion, as a result of which *Garrison v. Glass* and *Bank v. Leland* are pronounced unsound and are overruled in the particular indicated.

The foregoing opinion, in the respects that it treats and decides questions other than that presented by the rulings below under the influence of *Garrison v. Glass*, was prepared by the writer by direction of the majority of the court, consisting of Chief Justice DOWDELL and Justices SIMPSON, ANDERSON, and DENSON, and is adopted by them as the expression of their views.

Justices MAYFIELD and SAYRE and the writer are of the opinion that plea 2 to the sixth count was subject to the demurrer interposed to it, and therefore dissent from the conclusion of the court in the particular that they affirm the trial court in overruling that demurrer.

The judgment below is accordingly affirmed. Affirmed.

DOWDELL, C. J., and SIMPSON, ANDERSON, DENSON, McCLELLAN, and MAYFIELD, JJ., concur in overruling *Garrison v. Glass*. McCLELLAN, MAYFIELD, and SAYRE, JJ., dissent on plea 2.

#### LOUGHLIN v. DRYSDALE

(Supreme Court of Alabama. Nov. 18, 1909.)

Appeal from City Court of Selma; J. W. Mabry, Judge.

Action by William Drysdale against P. J. Loughlin. From a judgment for plaintiff, defendant appeals. Affirmed.

A. L. McLeod, for appellant. Craig & Craig, for appellee.

McCLELLAN, J. Action on common counts for work and labor done and on account. The trial was without jury. The issue here argued is one of fact. After a careful consideration of the testimony presented, mainly *ore tenus*, we are not persuaded that the court erred in its conclusion in the premises. The testimony is in conflict, but that for plaintiff supports the court's conclusion in the premises. The judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

**BLANTON v. WEST COAST RY. CO.**

(Supreme Court of Florida. Dec. 21, 1909.)

**1. APPEAL AND ERROR (§ 66\*)—WRIT OF ERROR—WHEN LIES.**

Under the statutes of this state (Gen. St. 1906, §§ 1691, 1695) a writ of error lies only to a "final judgment" in an action at law or to "an order granting a new trial at law."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 329-343; Dec. Dig. § 66.\*]

**2. APPEAL AND ERROR (§ 635\*)—DISMISSAL—NECESSITY OF FINAL JUDGMENT.**

When a writ of error is taken to a judgment in an action at law, and there is in the transcript of the record proper no entry of a final judgment terminating or disposing of the action, the writ of error is improperly issued, and will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 635.\*]

**3. APPEAL AND ERROR (§ 78\*)—FINAL JUDGMENT—JUDGMENT FOR COSTS.**

A judgment for costs alone, where the merits of the cause are not adjudicated, and the action is not terminated or disposed of, is not such a final judgment as will support a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 480, 481; Dec. Dig. § 78.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Taylor County; B. H. Palmer, Judge.

Action by B. P. Blanton against the West Coast Railway Company. Verdict for defendant, and plaintiff brings error. Dismissed.

L. W. Blanton, Hardee & Rowe, and W. B. Davis, for plaintiff in error. Hendry & McKinnon and L. W. Branch, for defendant in error.

**WHITFIELD, C. J.** In an action brought in the circuit court for Taylor county by the plaintiff in error against the West Coast Railway Company a verdict was rendered for the defendant, but no judgment thereon appears in the transcript.

Under the statute of this state a writ of error lies only to a "final judgment" in an action at law or to "an order granting a new trial at law." Sections 1691 and 1695, Gen. St. 1906. There is no order granting a new trial, and the writ of error purports to be from a judgment; but none appears in the transcript, except perhaps a judgment for costs. When a writ of error is taken to a judgment in an action at law, and there is in the record proper no entry of a final judgment terminating or disposing of the action, the writ of error is improperly issued, and will be dismissed. A judgment for costs alone, where the merits of the cause are not adjudicated, and the action is not terminated or disposed of, is not such a final judgment as will support a writ of error. *Dexter v. Seaboard Air Line Ry.*, 52 Fla. 250, 42 South. 685, and authorities cited.

Writ of error dismissed. All concur.

**BASS v. RAMOS.**

(Supreme Court of Florida. Dec. 14, 1909.)

**1. TRIAL (§§ 139, 142, 143\*)—DIRECTION OF VERDICT.**

A charge directing a verdict for the defendant should never be given, unless it is clear that there is no evidence whatever adduced that could in law support a verdict for the plaintiff. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is evidence tending to prove the issue presented by the plaintiff, it should be submitted to the jury as a question of fact, and not taken from them and passed upon by the judge as a question of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-343; Dec. Dig. §§ 139, 142, 143.\*]

**2. TRIAL (§ 139\*)—DIRECTION OF VERDICT.**

Where it is apparent that no evidence has been submitted upon which the jury could lawfully find for the plaintiff, the judge may direct a verdict for the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-341; Dec. Dig. § 139.\*]

**3. APPEAL AND ERROR (§ 1061\*)—DIRECTION OF VERDICT—PREJUDICE.**

If upon the evidence adduced a verdict for the plaintiff could lawfully have been rendered, a charge of the court to find for the defendant is error that necessarily injures the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4211; Dec. Dig. § 1061.\*]

**4. EJECTMENT (§ 16\*)—PRIOR POSSESSION—DEFENSES.**

The general rule, in actions of ejectment, that the claimant must recover upon the strength of his own title, does not operate to prohibit the acquisition of possessory rights, which may be enforced in actions of ejectment between parties in cases where the true owner does not intervene; but a prior possession, to be effective as against a mere squatter or intruder in actual possession, must be an actual, unabandoned possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 33; Dec. Dig. § 16.\*]

**5. EJECTMENT (§ 16\*)—PRIOR POSSESSION—TITLE.**

A plaintiff may recover possession of realty by virtue of a proper prior possession; for then he recovers as much upon the strength of his own title as if he shows a good title to the premises.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-33; Dec. Dig. § 16.\*]

**6. EJECTMENT (§ 16\*)—RIGHT OF ACTION—TITLE—PRIOR POSSESSION.**

A plaintiff in ejectment without title cannot recover as against a mere intruder without title, if such plaintiff has not himself had a prior actual possession of the land.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 31; Dec. Dig. § 16.\*]

**7. EJECTMENT (§ 16\*)—PLAINTIFF WITHOUT TITLE—PRIOR POSSESSION.**

A recovery in ejectment may be had by one without title, but who was in prior actual and proper possession of the land, and such prior possession need not have been for the statutory period necessary to mature into a perfect title by adverse possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 40; Dec. Dig. § 16.\*]

**8. EJECTMENT (§ 17\*)—RIGHT TO POSSESSION.**

In order to recover the possession of lands by the means of an action of ejectment, the plaintiff must have either a title to the lands, with a present right of continued possession, or

must have had actual bona fide possession of the lands, with a right to maintain a continued possession, when ousted by defendant, and a present right to the possession when the action was begun.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 64; Dec. Dig. § 17.\*]

**9. EJECTMENT (§ 16\*) — PRIOR POSSESSION — CHARACTER OF LAND.**

In an action of ejectment, if the character of the land is such that continued, actual possession is apparently not allowed by law, or if the prior possession was not actual, or was unlawful, or was a mere pretense, or was that of an intruder or trespasser, there should be a showing of title or right of possession, in order to recover possession in ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-32; Dec. Dig. § 16.\*]

**10. EJECTMENT (§ 86\*)—POSSESSION—LAWFULNESS—PRESUMPTION—REBUTTAL.**

While ordinarily the possession of land may be presumed to be lawful, yet the character of the land, the time and manner of possession and other apparent circumstances, may rebut a presumption of lawful possession, and put the party claiming such possession to the proof of the lawfulness of the asserted possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 240; Dec. Dig. § 86.\*]

**11. NAVIGABLE WATERS (§ 36\*)—LANDS UNDER NAVIGABLE WATERS—TITLE—RECOVERY.**

Private parties cannot by ejectment recover possession of lands under navigable waters, when such parties have no legal title to or right to use the land, and even when the title is in private parties, a recovery of possession is subject to the rights of the public in the waters.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 199; Dec. Dig. § 36.\*]

**12. EJECTMENT (§ 10\*) — PRIOR POSSESSION — LAND UNDER NAVIGABLE WATERS—DIRECTION OF VERDICT.**

Where a plaintiff in ejectment shows no title, but only that he had some time previously put a one-wire fence around land in the waters of a navigable bay, including the land in controversy, and employed some one to keep up the fence, the direction of a verdict for the defendant in actual possession will not be held to be error.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-41; Dec. Dig. § 10.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Ejectment by O. L. Bass against John Ramos. Verdict for defendant, and plaintiff brings error. Affirmed.

Avery & Avery, for plaintiff in error. Sullivan & Sullivan, for defendant in error.

**WHITFIELD, C. J.** An action of ejectment in the statutory form was brought in the circuit court for Escambia county, Fla., by O. L. Bass, to recover from John Ramos certain described lands, with mesne profits. A plea of not guilty was filed. At the trial the judge instructed the jury to return a verdict for the defendant, whereupon the plaintiff noted an exception, and before the jury retired the plaintiff took a nonsuit, with a bill of exceptions, as authorized by the

statutes. Sections 1490 and 1607, Gen. St. 1906.

The testimony tended to show that before the defendant took possession the plaintiff had posts with one wire between them put on two sides of the space then unoccupied in the waters of the bay several feet deep and opposite to and extending several hundred feet from a designated lot in the city of Pensacola, within which space, several hundred feet out in the water, is the land in controversy; that the south side of the space was open to the bay; that boats passed through or under the wire on the posts erected by the plaintiff; that a person was employed by the plaintiff "to look after premises which he had inclosed and claimed in the water front of the city of Pensacola"; that the land was located "as being a part of the water front property of the city of Pensacola"; that the wire was broken by the storm, but had been repaired several times by the man who attended to it for four or five months for the plaintiff; that the one-wire fence was there in a somewhat dilapidated condition when the defendant built a house on the land.

On writ of error taken by the plaintiff to a final judgment for the defendant, it is contended that the trial court erred in directing a verdict for the defendant.

A charge directing a verdict for the defendant should never be given, unless it is clear that there is no evidence whatever adduced that could in law support a verdict for the plaintiff. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is evidence tending to prove the issue presented by the plaintiff, it should be submitted to the jury as a question of fact, and not taken from them and passed upon by the judge as a question of law. *German American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740, and authorities cited; *Starks v. Sawyer*, 56 Fla. 596, 47 South. 513; *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910; 46 Am. Dig. 1232.

Where it is apparent that no evidence has been submitted upon which the jury could lawfully find for the plaintiff, the judge may direct a verdict for the defendant. Section 1496, Gen. St. 1906; *Wade v. Louisville & N. R. Co.*, 54 Fla. 277, 45 South. 472; *Painter Fertilizer Co. v. Du Pont*, 54 Fla. 288, 45 South. 507; *American Process Co. v. Florida White Press Brick Co.*, 56 Fla. 116, 47 South. 942. See, also, *Tedder v. Fraleigh-Line-Smith Co.*, 55 Fla. 496, 46 South. 419; *Town of Flora v. American Express Co.*, 92 Miss. 66, 45 South. 149; 46 Am. Dig. 1239.

If upon the evidence adduced a verdict for the plaintiff could lawfully have been rendered, the charge of the court to find for the defendant is error that necessarily injures the plaintiff.

The material evidence in support of the plaintiff's right to recover possession of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

land sued for is that he had one wire strung upon posts on two sides of the space covering the land in controversy, that he employed a person to look after the premises for him, and that the defendant had subsequently built a boathouse on the land.

In connection with this testimony it appears that the land is covered by the waters of Pensacola Bay, a navigable waterway, and that the land was located as being a part of the water front property of the city of Pensacola. Even if the facts stated show a prior actual possession, yet if the circumstances disclosed by the testimony are such as to repel any presumption that might otherwise exist that the prior possession of the plaintiff was lawful, the plaintiff cannot recover, since he has shown no title to the land, and no right of possession other than the meager acts of prior possession already stated.

The general rule, in actions of ejectment, that the claimant must recover upon the strength of his own title, does not operate to prohibit the acquisition of possessory rights, which may be enforced in actions of ejectment between parties in cases where the true owner does not intervene; but a prior possession, to be effective as against a mere squatter or intruder in actual possession, must be an actual, unabandoned possession. A plaintiff may recover possession of realty by virtue of a proper prior possession, for then he recovers as much upon the strength of his own title as if he shows a good title to the premises. A plaintiff in ejectment without title cannot recover as against a mere intruder without title, if such plaintiff has not himself had a prior actual possession of the land. *Seymour v. Creswell*, 18 Fla. 29.

While a recovery in ejectment may be had by one without title, but who was in prior actual and proper possession of the land, the prior possession need not have been for the statutory period necessary to mature into a perfect title by adverse possession. *Jackson v. Haisley*, 35 Fla. 587, 17 South. 631.

"There are circumstances under which a prior simple occupant without legal title and his grantees in possession have a right to eject a subsequent occupant or his grantees. \* \* \* The prior possession here contemplated must have been an actual possession. Some of the authorities say 'an open, notorious, and actual possession.' *Seymour v. Creswell*, 18 Fla. 29, text 41, and cases there cited. The rule is that a wrongful ouster gives no title against an actual occupant without title." *Simmons v. Spratt*, 20 Fla. 495, text 506.

In order to recover the possession of lands by the means of an action of ejectment, the plaintiff must have either a title to the lands, with a present right of continued possession, or must have had actual bona fide possession of the lands, with a right to maintain a continued possession, when ousted by defendant, and a present right to the possession when the action was begun. *Jones v. Lofton*, 16

Fla. 189; *Hartley v. Ferrell*, 9 Fla. 374; *Winn v. Coggins*, 53 Fla. 327, 42 South. 897; *Harris v. Butler*, 52 Fla. 253, 42 South. 186, and authorities cited; *Skinner Mfg. Co. v. Wright*, 56 Fla. 561, 47 South. 931; *L'Engle v. Reed*, 27 Fla. 345, 9 South. 213; *Barco v. Fennell*, 24 Fla. 378, 5 South. 9; *Carn v. Haisley*, 22 Fla. 317.

If the character of the land is such that continued, actual possession is apparently not allowed by law, or if the prior possession was not actual, or was unlawful, or was a mere pretense, or was that of an intruder or trespasser, there should be a showing of title or right of possession in order to recover possession in ejectment.

Under the statute the plea of not guilty admitted the possession of the defendant and put the title to the lands in issue as between the plaintiff and the defendant. If neither party has title to the land, and the prior possession of the plaintiff was not actual, but was a mere desultory possession, without any legal right, the plaintiff cannot recover, as against the actual possession of the defendant, unless he shows some right to the possession, besides the acts of prior possession as disclosed here.

The lands in controversy appear to be covered by the navigable waters of Pensacola Bay, and the plaintiff is not shown to be a riparian owner opposite the lands sued for, or to have any title to, or right to the possession of, the lands.

The mere possession of public land, without title, will not enable the party to maintain a suit against any one who enters on it. *Burgess v. Gray*, 16 How. (U. S.) 48, text \*65, 14 L. Ed. 839. If this is so as to public land that may be granted or conveyed to private ownership, for a greater reason is it so in case of lands held in trust for public easements such as land under navigable waters.

While ordinarily the possession of land may be presumed to be lawful, yet the character of the land, the time and manner of possession, and other apparent circumstances, may rebut a presumption of lawful possession, and put the party claiming such possession, either present or prior to an ouster, to the proof of the lawfulness of the asserted possession.

The lands under the navigable waters belong to the state in its sovereign capacity, in trust for all the people of the state, for the uses and purposes allowed by law. Even if the state by the legislative act of 1899 (chapter 4802, p. 191, Laws of Florida), or by the riparian act of 1856 (Laws 1856, p. 25, c. 791), or otherwise has granted or conveyed the title to the lands in controversy to the city of Pensacola, or to riparian or other owners, the plaintiff does not appear to be a riparian owner, and he shows no title from the state or from the city or its grantees.

Even if the lands are subject to private ownership or use, that ownership or use is subordinate to the public rights of navigation, etc., in the waters as allowed by law. Private parties cannot by ejectment recover possession of lands under navigable waters, when such parties have no legal title to or right to use the land; and even when the title is in private parties, a recovery of the possession is subject to the rights of the public in the waters. See *Bork v. United New Jersey R. & Canal Co.*, 70 N. J. Law, 268, 57 Atl. 412, 64 L. R. A. 836, 103 Am. St. Rep. 808, 1 Am. & Eng. Ann. Cas. 861. See *State v. Black River Phos. Co.*, 27 Fla. 276, 9 South. 205; *Sullivan v. Richardson*, 33 Fla. 1, 14 South. 692; *State ex rel. Ellis, Attorney General, v. Gerbing*, 56 Fla. 603, 47 South. 353; *State v. Black River Phos. Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189; *Ferry Pass, etc., v. White River, etc.*, 57 Fla. —, 48 South. 643; *Broward v. Mabry*, 58 Fla. —, 50 South. 826; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

At most the plaintiff shows only the erection of a single-strand wire fence on two sides of the land, under and through which fence boats passed; and the plaintiff makes no showing of title or right to exclusive use of the land for any purpose.

If the defendant is invading the rights of riparian owners under the statutes of this state, such owners have the remedies afforded by law; and for any obstruction of the public rights of navigation, etc., the proper authorities have their remedies in behalf of the public.

The plaintiff has not shown title to the lands, nor that he was legally in prior actual possession and was ousted. The prior possession shown, taken in connection with the character of the land, rebuts any presumption that such prior possession was lawful. As there is no testimony upon which the plaintiff could recover, the court did not err in directing a verdict for the defendant.

The judgment entered on the verdict for the defendant is affirmed. All concur, except HOCKER, J., absent.

#### ENSON v. STATE.

(Supreme Court of Florida. Nov. 30, 1909.)

#### 1. LARCENY (§ 30\*) — INDICTMENT — DESCRIPTION OF MONEY.

By statute, bank notes and money are made the subject of larceny; and, where the required degree of certainty cannot be used in specifying the pieces or denominations of coins stolen or the number and denomination of bank bills, it will be enough to state that a better description than that given is unknown to the prosecuting solicitor, or to the grand jury, as the case may be.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 72-75; Dec. Dig. § 30.\*]

#### 2. LARCENY (§ 40\*) — INFORMATION — DESCRIPTION OF STOLEN PROPERTY.

In a prosecution for larceny, under the plea of not guilty, the allegation in the information of the prosecuting solicitor's want of knowledge of a better description of the property stolen is traversable and the subject of inquiry, and an information false in this respect will not support a conviction.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 40.\*]

#### 3. LARCENY (§ 40\*) — DESCRIPTION OF STOLEN PROPERTY — KNOWLEDGE OF SOLICITOR.

In a prosecution for larceny, under the plea of not guilty, where the information alleges the prosecuting solicitor's want of knowledge of a better description of the property stolen, the defendant may not be acquitted upon proof that the solicitor could easily have known a better description of the property stolen. The fact that the solicitor could easily have ascertained a better description of the property may be evidence that he knew the same; but it is not conclusive, and cannot be made an absolute test of the sufficiency of the allegation that he did not know.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 40.\*]

#### 4. CRIMINAL LAW (§ 814\*) — INSTRUCTIONS — APPLICATION TO CASE.

In a prosecution for larceny, where the information alleges that a more particular description of the property is unknown to the prosecuting solicitor, and there was no evidence that the solicitor knew a more particular description of the property alleged to have been stolen, the court properly refused to give an instruction predicating defendant's right to an acquittal on the fact that the solicitor could easily have known a better description of the property than that given in the information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979-1987; Dec. Dig. § 814.\*]

#### 5. INDICTMENT AND INFORMATION (§ 121\*) — DESCRIPTION OF PROPERTY STOLEN — BILL OF PARTICULARS.

In a prosecution for larceny of bank bills and notes and silver specie, the information alleges that a more particular description than is given of the same is to the prosecuting solicitor unknown, the accused may, upon a proper showing timely made, move the court to order the solicitor to give such other or more particular description, in the nature of a specification or bill of particulars of the property, as may have been acquired by the solicitor after filing the information, and the trial may be suspended until this can be done.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.\*]

#### 6. INDICTMENT AND INFORMATION (§§ 86, 87\*) — ALLEGATIONS AS TO TIME AND PLACE — SUFFICIENCY.

An information found to be sufficient in its allegations of the time and place of the larceny alleged.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. §§ 86, 87.\*]

#### 7. LARCENY (§ 65\*) — EVIDENCE — SUFFICIENCY.

Evidence found to be sufficient to support a verdict of guilty of grand larceny.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 65.\*]

#### 8. CRIMINAL LAW (§ 939\*) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

A motion for new trial on the ground of newly discovered evidence is properly overruled, where the accused fails to show that the evidence was discovered since the trial, and that he could

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



not have discovered it before the trial by the exercise of due diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.\*]

**9. CRIMINAL LAW (§ 1218\*)—SENTENCE—FINE AND COSTS.**

An alternative sentence is erroneous in providing that the defendant be imprisoned in the state penitentiary upon default in the payment of the fine and costs. Where the primary sentence imposed is a fine and costs of prosecution only, the court should fix a period of imprisonment in the county jail, instead of in the state penitentiary, for the nonpayment of such fine and costs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3320-3328; Dec. Dig. § 1218.\*]

Taylor, J., dissenting.

(Syllabus by the Court.)

In Banc. Error to Criminal Court, Dade County; H. F. Atkinson, Judge.

Charlie Enson was convicted of grand larceny, and brings error. Reversed.

Mitchell D. Price, for plaintiff in error.  
Park Trammell, Atty. Gen., for the State.

**PARKHILL, J.** The plaintiff in error was convicted of the crime of grand larceny, and brings the judgment here by writ of error for review.

Omitting the caption, the information is as follows: "In the name and by the authority of the state of Florida, James T. Sanders, county solicitor for the county of Dade, prosecuting for the state of Florida in the said county, under oath information makes that Charlie Enson, laborer, late of the county of Dade and state of Florida, on the 19th day of April in the year of our Lord one thousand nine hundred and nine, in the county and state aforesaid, then and there certain bank bills and notes, commonly known and denominated as lawful currency of the United States, of divers denominations, the number and denomination of which are to the prosecutor unknown, and certain silver specie, a more particular description of which is to the prosecutor unknown, amounting in the aggregate to the sum of \$100 lawful currency of the United States, and of the value of \$100, which said currency and specie was then and there the property of one W. J. Cole, the said Charlie Enson then and there having found, did steal, take, and carry away, contrary to the statute," etc.

At the close of the evidence the defendant requested the judge to give the following instruction to the jury: "The defendant in this case is charged with stealing certain bank bills and notes known as lawful currency of the United States of divers denominations, the number and denomination of which are alleged to be unknown to the county solicitor, and also certain silver specie, a more particular description, it is alleged, is unknown to the county solicitor, said property being alleged to be of the aggregate value

of \$100. It appears from the evidence that the county solicitor knew or could easily have known a better description at the time of the filing of the information than the description set forth in the said information. There is, therefore, a fatal variance, and you will accordingly find a verdict of not guilty."

This instruction was properly refused, for the reason that there was no evidence that the county solicitor knew the number and denomination of the bank bills or a more particular description of the silver specie alleged to have been stolen, and the instruction erroneously predicated defendant's right to an acquittal on the fact that the county solicitor could easily have known a better description of the property than that given in the information. It asked too much. The question here is whether the allegation that a more particular description of the bank notes and specie was unknown to the county solicitor is sustained by the proof, not whether the county solicitor could easily have known a better description. In some jurisdictions the rule is stated to be that a variance results where it becomes apparent from the evidence that the matter alleged as unknown might have been discovered by the exercise of ordinary diligence; but these cases would seem to be properly placed upon lack of diligence or carelessness in making the accusation, and not upon variance between the allegation and proof. The better rule would seem to be that to create a variance the fact of knowledge, not ability to acquire knowledge, must affirmatively appear from the evidence. The information alleges that a more particular description of the property is unknown to the solicitor. It becomes a question, then, upon all the evidence, of accord or variance between this allegation and the proof, not of diligence or carelessness in making the accusation. It is doubtless true that, under the plea of not guilty, the allegation of want of knowledge of a better description of the property on the part of the county solicitor is traversable and the subject of inquiry, and that an indictment false in this respect would not support a conviction. But the defendant desires to go beyond the allegation of the information and raise the outside issue that the solicitor could easily have known a better description of the property. The fact that the county solicitor could easily have ascertained a better description of the property may be evidence that he knew the same; but it is not conclusive, and cannot be made an absolute test of the sufficiency of the allegation that he did not know. 22 Cyc. 465; Commonwealth v. Sherman, 13 Allen (Mass.) 248; Commonwealth v. Hill, 11 Cush. (Mass.) 137, text 141; Commonwealth v. Hendrie, 2 Gray (Mass.) 503; Commonwealth v. Thornton, 14 Gray (Mass.) 41; Commonwealth v. Stoddard, 9 Allen (Mass.) 280, text 282, 283; Commonwealth v. Noble, 165 Mass. 13, 42 N. E.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

328; *Wells v. State*, 88 Ala. 239, 7 South. 272; *Duvall v. State*, 63 Ala. 12; *Terry v. State*, 118 Ala. 79, 23 South. 776; *Winter v. State*, 90 Ala. 637, 8 South. 556; *White v. People*, 32 N. Y. 465; *Noakes v. People*, 25 N. Y. 380; *People v. Noakes*, 5 Parker, Cr. R. (N. Y.) 292; *People v. Fleming*, 60 Hun, 576, 14 N. Y. Supp. 200; *State v. Carey*, 15 Wash. 549, 46 Pac. 1050; *Rex v. Walker*, 3 Camp. 264. See, also, *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455; *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; *Rex v. Bush*, Russ. & R. C. C. 372; *Lang v. State*, 42 Fla. 595, 28 South. 856; *Com. v. Gallagher*, 126 Mass. 54.

In discussing this question, the Supreme Court of Massachusetts, in *Commonwealth v. Sherman*, supra, said:

"The origin of the statement in some books that, if a name alleged to be unknown might with reasonable diligence have been ascertained by the prosecutor, the defendant is entitled to an acquittal, is probably to be found in some imperfect reports of English nisi prius cases. 2 East, P. C. c. 16, par. 80. *The King v. Keakin*, 2 Leach (4th Ed.); *Rex v. Walker*, 3 Camp. 264; *Rex v. Robinson*, Holt, N. P. C. 595. Upon such a case being cited Mr. Justice Littledale, an eminent common-law lawyer, said: 'The question is whether the person is known to the grand jury. It will be difficult to prove that he was so known, and unless he was known to the grand jury, I should doubt about that case.' *Rex v. Cordy*, 2 Russell on Crimes (3d Ed.) 98, note by Greaves. The earliest case which we have seen in which a traverse jury were required to find that the grand jury could not by reasonable diligence have ascertained the name was one tried at nisi prius before Mr. Justice Thomas Erskine. *Regina v. Campbell*, 1 Car. & Kirw. 82.

"By the much higher authority of the 12 judges of England, this matter has been put upon the right footing. In one case they held that an indictment against an accessory of a principal therein alleged to be unknown was good, although the same grand jury had returned another indictment against the principal by name. *Rex v. Bush*, Russ. & Ry. 372. And in another case, according to the fullest report, they stated the rule to be that, 'in order to sustain a count for the murder of a child whose name is to the jurors unknown, there must be evidence showing that the name could not reasonably have been supposed to be known to the grand jury.' *Regina v. Stroud*, 1 Car. & Kirw. 187. Another report of this case in 2 Mood. C. C. 270, by abridging this statement to 'the want of description is only excused when the name cannot be known,' wholly changes its meaning; for what the grand jury may reasonably be supposed to have known is only what it may be rightly inferred they did know, which is a quite distinct thing from that which they could know, or, in other words, reasonably might, but did not, ascertain. The judg-

ments of this court support the position which we now affirm. *Commonwealth v. Hill*, 11 Cush. 141; *Commonwealth v. Hendrie*, 2 Gray, 504; *Commonwealth v. Thornton*, 14 Gray, 41; *Commonwealth v. Stoddard*, 9 Allen, 282, 283.

"It is always open to the defendant to move the judge before whom the trial is had to order the prosecuting attorney to give a more particular description in the nature of a specification or bill of particulars, of the acts on which he intends to rely, and to suspend the trial until this can be done; and such an order will be made whenever it appears to be necessary to enable the defendant to meet the charge against him, or to avoid danger of injustice. *Commonwealth v. Gilles*, 1 Gray, 469; *The King v. Gurwood*, 3 Ad. & El. 815; *Rosc. Crim. Ev.* (6th Ed.) 178, 179, 420."

As sustaining the right of the defendant to a bill of particulars upon a proper showing in this state, see *Mathis v. State*, 45 Fla. 46, 34 South. 287; *Thalheim v. State*, 38 Fla. 169, 20 South. 938; *Eatman v. State*, 48 Fla. 21, 37 South. 576; *Brass v. State*, 45 Fla. 1, 34 South. 307.

Our statute makes bank notes and money the subject of larceny, and where the required degree of certainty cannot be used in specifying the pieces or denominations of coins stolen or the number and denomination of bank bills, it will be enough to state that a better description than that given is unknown to the county solicitor, or to the grand jury, as the case may be. 12 Ency. Pl. & Pr. 990.

The information is sufficient in its allegations of the time and place of the larceny alleged. *Baldwin v. State*, 46 Fla. 115, 35 South. 220.

The evidence is sufficient to support the verdict.

The motion for new trial on the ground of newly discovered evidence was properly overruled, because the defendant failed to show that the evidence offered was discovered since the trial, and that he could not have discovered it before the trial by the exercise of due diligence. A new trial will not be granted on a mere showing that new evidence has been discovered; but the defendant is required to rebut the presumptions that the verdict is correct and that he exercised due diligence in preparing for the trial. See *Mitchell v. State*, 43 Fla. 584, 31 South. 242; *Howard v. State*, 36 Fla. 21, 17 South. 84; *Williams v. State*, 53 Fla. 89, 43 South. 423.

What we have said disposes of all the points presented and argued.

The errors assigned are all overruled, but the judgment must be reversed for a proper sentence. The alternative sentence is erroneous, in providing that the defendant be imprisoned in the state penitentiary upon default in the payment of the fine and cost. Where the primary sentence imposed is a fine and costs of prosecution only, the court

should fix a period of imprisonment in the county jail, instead of in the state penitentiary, for the nonpayment of such fine and costs. Section 4011, Gen. St. 1906; Thompson v. State, 52 Fla. 113, 41 South. 899.

The judgment of the court below is reversed, and remanded for proper sentence, at the cost of the county of Dade.

WHITFIELD, C. J., and SHACKLEFORD, and COCKRELL, JJ., concur.

HOCKER, J., absent, concurred in the opinion as prepared.

WHITFIELD, C. J. (concurring). One of the material allegations in this information charging larceny of currency of the United States is the one that "the number and denomination of which are to the prosecutor unknown." A description of the property stolen is not an essential element of the offense, but such description should be alleged in an information charging larceny when it is known; and it is the duty of the prosecution to exercise reasonable diligence in ascertaining and giving a proper description of the property alleged to have been stolen, so that the court and jury may be informed of the subject-matter of the charge, and that the accused may not be embarrassed in the preparation of his defense, or subjected to a second prosecution for the same offense. A description of the property not being an element of the offense of larceny, where the description is not known to the prosecutor, the law, in lieu of an allegation of the description permits as a matter of necessity, to prevent the failure of justice, an allegation that the description was unknown to the prosecutor. When there is an allegation that the description was unknown to the prosecutor, there should be some evidence that the description was in fact unknown to the prosecutor; though, in the absence of a material allegation requiring proof of due diligence, it may be presumed that the prosecutor, an officer of the law, exercised due diligence to ascertain and allege the description. A failure to exercise due diligence may be remedied, without injury to the accused, by a bill of particulars, or by appropriate judicial action upon proper and timely application to the court. There is no allegation in the information that the prosecutor could not, by the exercise of due diligence, have been informed of the number and denomination of the currency alleged to have been stolen. The "prosecutor" referred to is the prosecuting attorney, who made and filed the information under his oath, and not the prosecuting witness. From the evidence it may properly be inferred that the prosecuting attorney did not know, and there is no positive evidence that he did know, the number and denomination of the currency. This being so, there is no fatal variance between the allegation and the proofs. Lang v. State, 42

Fla. 595, 28 South. 856. There is no allegation, express or implied, that the prosecuting attorney used due diligence to get a description of the property. Whether the prosecuting attorney by the exercise of due diligence could have known of the number and denomination of the currency is not included in the allegation that he had no such knowledge, and the lack of effort to acquire the information was not made an issue at the trial. Any inference that may be drawn from the evidence that the prosecuting attorney could easily have informed himself of the number and denomination of the currency is immaterial as to the issue of actual knowledge by the prosecuting attorney of the number and denomination of the currency made by the plea of not guilty. The requested charge for an acquittal on the ground of fatal variance was not in this case the proper remedy for the defendant. By a timely and proper application therefor the defendant would have been entitled to a bill of particulars giving information, acquired by the prosecuting attorney after filing the information, as to the number and denomination of the currency alleged in the information as having been stolen. If there had been any attempt by act or omission on the part of the prosecuting attorney to embarrass the accused in the preparation or presentation of his defense, the court had ample power to secure to him his rights.

TAYLOR, J. (dissenting). I am unable to concur in the conclusions of law arrived at in the majority opinion prepared in this case. At the close of the evidence the defendant requested the judge to give the following instruction to the jury: "The defendant in this case is charged with stealing certain bank bills and notes, known as lawful currency of the United States, of divers denominations, the number and denomination of which are alleged to be unknown to the county solicitor, and also certain silver specie, a more particular description, it is alleged, is unknown to the county solicitor, said property being alleged to be of the aggregate value of \$100. It appears from the evidence that the county solicitor knew or could easily have known a better description at the time of the filing of the information than the description set forth in the said information. There is, therefore, a fatal variance, and you will accordingly find a verdict of not guilty."

The defendant below under the circumstances of the case was entitled to his discharge, and the requested instruction should have been given, according to my view.

The property alleged to have been stolen is described in the information upon which the defendant was tried as follows: "Certain bank bills and notes, commonly known and denominated as lawful currency of the United States, of divers denominations, the number and denomination of which are to the prosecutor unknown, and certain silver spe-

cle, a more particular description of which is to the prosecutor unknown, amounting in the aggregate to the sum of \$100 lawful currency of the United States and of the value of \$100."

The chief witness for the state, who was the owner of the property alleged to have been stolen, and who on the advice of the prosecuting attorney swore out a warrant for the arrest of the defendant, testified at the trial that the property stolen from him consisted of a check of a private individual on a bank for the sum of \$20, three bank bills for the sum of \$10 each, six bank bills for the sum of \$5 each, and enough \$1 bank bills to make up an aggregate of \$100, and that he gave this description of the stolen property to the deputy sheriff shortly after the theft, and gave the same description of the stolen property on the defendant's preliminary trial; that he knew the description of the property stolen when he first went to the prosecuting attorney's office after the theft, as well as he knew it at the time of testifying at the trial. From this it is seen that the allegation in the information to the effect that a more particular description of the property stolen was to the prosecutor unknown is not sustained by the proofs. The proofs show that he either knew of a much more accurate and definite description of the stolen property than that given thereof in the information, or that he could have easily procured such accurate and definite description thereof by simply applying therefor to the main witness for the prosecution, who was the party from whom the property was stolen. Under these circumstances, according to my view of the law, there was a fatal variance between the allegation and the proofs, that entitled the defendant to his discharge. The true rule in such cases, according to my view, the one supported both by reason and the overwhelming weight of authority, is that it is only permissible upon the ground of necessity to allege in an indictment that the name of a person or fact necessary to be stated is unknown; and the defendant is entitled to be discharged when it appears on the trial that the name or the fact either was known or could by the exercise of ordinary diligence have become known to the grand jury or prosecuting attorney exhibiting the information. *State v. Stowe*, 132 Mo. 199, 33 S. W. 799; *State v. Thompson*, 137 Mo. 620, 39 S. W. 83. The allegation in an indictment that the name of a person, or a fact, is unknown to the grand jurors, or to the prosecuting officer exhibiting an information, is a material one, is traversed by the plea of not guilty, and must be sustained, and may be rebutted by proof. *Cameron v. State*, 13 Ark. 712; *Blodget v. State*, 3 Ind. 403; *Cheek v. State*, 38 Ala. 227; *Rex v. Robinson*, 1 Holt, N. P. 595, s. c. 3 E. C. L. 233; *Reg. v. Campbell*,

1 Carr. & K. 82, 47 E. C. L. 80; *Rex v. Walker*, 3 Camp. N. P. 265; *Reg. v. Stroud*, 2 Moody, C. Cas. 270; *Winter v. State*, 90 Ala. 637, 8 South. 556; *United States v. Riley* (C. C.) 74 Fed. 210; *Sault v. People*, 3 Colo. App. 502, 34 Pac. 263; 1 Chitty's Crim. Law, 213; *Presley v. State*, 24 Tex. App. 494, 6 S. W. 540.

The facts alleged in the information to have been unknown to the prosecutor were material facts that the defendant had the legal right to demand an allegation of in the information. If these facts were in truth unknown to the prosecutor, and could not with ordinary diligence have been ascertained by him, then, and not until then, did the necessity arise or exist, which the law recognizes, permitting such facts to be alleged as being unknown. All the authorities agree that the allegation in an indictment to the effect that a name or a fact is unknown is a material averment, upon which issue is joined by the plea of not guilty, and I cannot agree with the few courts sustaining the majority opinion in their holdings to the effect that, if there is no proof either way as to whether the fact alleged to have been unknown was either known or unknown, the question is immaterial, and the defendant has no right to any advantage therefrom, and that the burden in such cases is on the defendant to prove, if he can, that the alleged unknown fact was in truth known to the grand jury or prosecutor. I had thought that the law had been settled for ages that the burden was on the prosecution to prove every material averment in the indictment; but the holdings of these courts in this respect is a long step towards an uprooting of all the old landmarks that bound the haven of presumptive innocence until all material averments charging guilt are affirmatively established. My view is that, when an indictment alleges that a material fact is unknown to the grand jury or prosecuting officer, the burden is on the prosecution to show that such fact was in truth unknown, and could not with ordinary diligence have been ascertained, and that if such proof is not made there can be no conviction on such indictment.

#### UNITED STATES FIDELITY & GUARANTY CO. v. DISTRICT GRAND LODGE NO. 27 OF GRAND UNITED ORDER OF ODD FELLOWS.

(Supreme Court of Florida. Dec. 21, 1909.)

#### 1. PLEADING (§ 48\*) — DECLARATION—REQUISITES.

A declaration in an action at law should allege every fact that is essential to the plaintiff's right of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 105; Dec. Dig. § 48.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. BONDS (§ 124\*)—ACTIONS—PLEADING—CONDITIONS PRECEDENT.**

Where an action is brought upon a bond with collateral conditions, and the bond contains conditions to be performed by the plaintiff precedent to the liability of the defendant, the declaration should allege the performance of conditions precedent, or a valid excuse for nonperformance; and the failure to so allege renders the declaration subject to demurrer.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 162; Dec. Dig. § 124.\*]

**3. PLEADING (§ 205\*)—GENERAL DEMURRER—ACTION ON BOND.**

Where the mere reading of a declaration discloses the omission thereof of essential allegations that conditions precedent to the liability of the defendant have been performed or excused, the declaration is amenable to a general statement of a demurrer thereto that no right of action appears, even though the failure to allege the performance of conditions precedent is not made a specific ground of the demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 492; Dec. Dig. § 205.\*]

**4. BONDS (§ 124\*)—ACTIONS—PLEADING—PERFORMANCE OF CONDITIONS PRECEDENT—SUFFICIENCY OF ALLEGATIONS.**

The performance of conditions precedent may under the statute be alleged generally, and the opposing party is then required to "specify in his pleading the condition precedent the performance of which he intends to contest"; but matters of excuse for nonperformance of conditions precedent are not covered by the statute, and they should be stated specifically, as required by the rules of pleading at common law.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 162; Dec. Dig. § 124.\*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action by the District Grand Lodge No. 27 of the Grand United Order of Odd Fellows against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant brings error. Reversed.

L. N. Green, for plaintiff in error. H. M. Hampton and H. L. Anderson, for defendant in error.

WHITFIELD, C. J. This is an action on a bond with collateral conditions given by the plaintiff in error to indemnify the defendant in error against loss "by reason of fraud or dishonesty of" one of its officers "amounting to larceny or embezzlement." The bond contains a number of conditions, some being precedent to liability; and while there are allegations that the plaintiff performed conditions as to notice of the embezzlement and proof of loss as required by some of the conditions of the bond, there is no general or specific allegation of the performance of all of the conditions precedent to liability.

A demurrer was filed to the declaration upon the grounds that it stated no right of action, and that a statement referred to in the bond incorporated in the declaration "should have been declared upon along with the bond

and as part thereof." This demurrer was overruled. Verdict and judgment were rendered for the plaintiff, and the defendant took writ of error.

A declaration in an action at law should allege every fact that is essential to the plaintiff's right of action. *Milligan v. Keyser*, 52 Fla. 331, 42 South. 367; *South Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 South. 280; *Savannah, F. & W. R. Co. v. Willett*, 43 Fla. 311, 31 South. 246; *Bennett v. Herring*, 1 Fla. 387; *Hoopes v. Crane*, 56 Fla. 395, 47 South. 992.

Where an action is brought upon a bond with collateral conditions, and the bond contains conditions to be performed by the plaintiff precedent to the liability of the defendant, the declaration should allege the performance of conditions precedent, or a valid excuse for nonperformance; and the failure to so allege renders the declaration subject to demurrer. See *Milligan v. Keyser*, supra; *Thompson v. Kyle*, 39 Fla. 582, 23 South. 12, 63 Am. St. Rep. 193; *Myrick v. Merritt*, 22 Fla. 335; *Sanford v. Cloud*, 17 Fla. 532; 5 Cyc. 814; 9 Cyc. 721; 31 Cyc. 107; *Day's Com. Law Proc.* (4th Ed.) p. 91; 4 *Ency. Pl. & Pr.* 628.

Failure to allege the performance of conditions precedent, or to allege an excuse for nonperformance, is not made a separate ground of the demurrer; but as it is the duty of the plaintiff to make his right to recover on the bond appear by the declaration, the general statement in the demurrer that no right of action appears is sufficient in this case, for a mere reading of the declaration discloses the omission of the essential allegation that conditions precedent have been performed or excused. *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 South. 732, 20 L. R. A. (N. S.) 92. See, also, *Hall v. N. & S. Co.*, 55 Fla. 242, 46 South. 178; *F. C. & P. Ry. Co. v. Ashmore*, 43 Fla. 272, 32 South. 832.

The performance of conditions precedent may under the statute be alleged generally, and the opposing party is then required to "specify in his pleading the condition precedent the performance of which he intends to contest." Section 1436, Gen. St. 1906. But matters of excuse for nonperformance are not covered by the statute, and they should be stated specially, as required by the rules of pleading at common law. See *Day's Common-Law Proc. Act* (4th Ed.) 91.

The declaration being defective, the judgment is reversed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**THOMAS v. STATE.**

(Supreme Court of Florida. Dec. 14, 1909.  
Headnotes Filed Jan. 20, 1910.)

**CRIMINAL LAW (§ 970\*)—ARREST OF JUDGMENT—SHOOTING INTO RAILROAD CAR—INFORMATION—SUFFICIENCY.**

Where the statute makes it an offense to shoot at or into any railroad car "which is being used or occupied by any person or persons," judgment will be arrested when the information fails to allege that the car was being used or occupied by any person or persons.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.\*]

(Syllabus by the Court.)

In Banc. Error to Criminal Court, Walton County; D. S. Gillis, Judge.

Henry Thomas, alias Kid Henry, was convicted of shooting into a railroad car, and brings error. Reversed.

W. T. Bludworth, for plaintiff in error.  
Park Trammell, Atty. Gen., for the State.

**PARKHILL, J.** In the criminal court of record for Walton county the plaintiff in error was informed against for a violation of section 3628 of the General Statutes of 1906 by wantonly and maliciously shooting into a certain railroad car.

The defendant was tried and convicted, and then moved in arrest of judgment upon the ground that the information does not allege that the railroad car was being used or occupied by any person or persons. This motion was denied, and upon writ of error it is urged that the court erred therein.

This question has been disposed of in the case of *Hamilton v. State*, 30 Fla. 229, 11 South. 523. As there pointed out, it is a well-recognized rule in criminal pleading that, where a statute creates an offense and describes its ingredients, not only is it sufficient to charge the offense in the language of the statute, or in language equivalent thereto, but it is necessary that it be so charged.

"Every fact," as Mr. Bishop says, in 1 Cr. Proc. par. 519, "which is an element in a prima facie case of guilt must be stated; otherwise there will be at least one thing which the accused is entitled to know, whereof he is not informed. And that he may be certain what each thing is, each must be charged expressly, and nothing left to intentment. All that is to be proved must be alleged."

The statute makes it an offense to wantonly and maliciously shoot at or into any railroad car "which is being used or occupied by any person or persons." The information fails to allege that the car was "being used or occupied by any person or persons." In *Hamilton v. State*, supra, the information failed to do this, and the court said that the motion in arrest of judgment should have been sustained. As there indicated, the

shooting must be such as to endanger the lives or safety of those who may be in or using the car.

The information is fatally defective and the judgment will be reversed. All concur, except **HOCKER, J.**, absent.

**HOWARD v. STATE.**

(Supreme Court of Alabama. June 30, 1909.  
Response to Application for Rehearing  
Dec. 16, 1909.)

**1. CRIMINAL LAW (§ 134\*)—CHANGE OF VENUE — HOSTILE PUBLIC SENTIMENT — EVIDENCE.**

Evidence on a motion to change the venue in a murder case held not to show such a state of public sentiment as required the granting of the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251, 252; Dec. Dig. § 134.\*]

**2. CRIMINAL LAW (§§ 419, 420\*)—QUESTION CALLING FOR HEARSAY—MERE RUMOR.**

A question to a witness for the state as to whether she had heard of somebody being stripped and whipped because she had refused to say that she knew anything about the murder in question called for purely hearsay evidence, a mere rumor, and was properly disallowed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.\*]

**3. CRIMINAL LAW (§ 815\*)—TRIAL—CHARGES PREDICATING ACQUITTAL ON REASONABLE DOUBT.**

In a prosecution for murder, in which the state relied on the corroborated testimony of an accomplice, there was no error in refusing charges predicating an acquittal on a reasonable doubt as to whether accused and others conspired to kill deceased on a certain night at the house of one of the conspirators, as there was other corroborative evidence, and hence evidence sufficient to support a conviction; this being the only theory on which the charges could be correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1936; Dec. Dig. § 815.\*]

**4. CRIMINAL LAW (§ 798\*)—TRIAL—INSTRUCTIONS—ACQUITTAL—REASONABLE DOUBT.**

A charge requiring an acquittal if any one juror had a reasonable doubt of guilt was on this account bad.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1940; Dec. Dig. § 798.\*]

**5. CRIMINAL LAW (§§ 763, 764\*)—TRIAL—INSTRUCTIONS—CORROBORATIVE EVIDENCE.**

A requested charge, which required the court to charge, as matter of law, that there was no corroborative evidence as to an accomplice's testimony, as required by law, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1763, 1770; Dec. Dig. §§ 763, 764.\*]

**6. CRIMINAL LAW (§ 830\*)—INSTRUCTIONS—REQUESTS—PARTLY ERRONEOUS—CORROBORATIVE EVIDENCE OF ACCOMPLICE.**

In a prosecution for murder, defendant requested a charge that the law would not permit conviction of a defendant charged with a felony on the uncorroborated evidence of an accomplice; that corroborated evidence is such as tends to connect defendant with the com-

mission of the offense, and if it merely shows the commission of the offense or the circumstances thereof, it is not sufficient; that the only evidence introduced as corroborative evidence was the evidence of the conspiracy alleged to have been formed between defendant and others to murder deceased, and unless the jury was satisfied from the evidence beyond a reasonable doubt, independent of anything testified to by the accomplice, that defendant, the accomplice, and others did form a conspiracy to murder deceased, they must acquit. *Held*, that it was not error to refuse the charge, as it was not a correct statement, in its entirety, as to necessity and sufficiency of corroborative evidence to support a conviction of a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2012; Dec. Dig. § 830.\*]

**7. CRIMINAL LAW (§ 1134\*)—APPEAL—REVIEW—MOTIONS FOR NEW TRIALS.**

In criminal cases, motions for new trials, or rulings thereon, cannot be reviewed by the Supreme Court on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1134.\*]

**8. CRIMINAL LAW (§ 261\*)—NECESSITY OF ARRAIGNMENT AND PLEA.**

If there has been no arraignment, and no plea of guilty interposed by defendant, it would be fatal to conviction on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 612, 613; Dec. Dig. § 261.\*]

**9. CRIMINAL LAW (§§ 1088, 1111\*)—APPEAL—RECORD PROPER AND BILL OF EXCEPTIONS—RECITALS CONTROLLING.**

An arraignment and plea must be shown by the record proper on appeal, and not by the bill of exceptions; and hence, if recitals of the record proper and those of a bill of exceptions differ as to this matter, the recitals of the record proper must control.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2801, 2894-2896; Dec. Dig. §§ 1088, 1111.\*]

**10. CRIMINAL LAW (§ 264\*)—"ARRAIGNMENT" OF ACCUSED—PREVAILING PRACTICE.**

According to the present prevailing practice, the "arraignment" is the mere calling of accused to the bar of the court and reading and explaining the indictment; its only purpose being to obtain from him his answer or plea there-to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 618; Dec. Dig. § 264.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 498, 499, vol. 8, p. 7581.]

**11. CRIMINAL LAW (§ 261\*)—NECESSITY OF TWO ARRAIGNMENTS.**

Where the record on appeal affirmatively shows accused was arraigned as required by Code 1907, §§ 7566, 7840, this was all that was necessary, and it was unnecessary to arraign him again by reading the indictment to him at the time trial was begun and having issue joined on his plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 613; Dec. Dig. § 261.\*]

Appeal from Circuit Court, Hale County; B. M. Miller, Judge.

Ed Howard was convicted of murder and he appeals. Affirmed.

The facts sufficiently appear in the opinion of the court. The following charges were refused to the defendant: (2) "The court charges the jury that the only evidence introduced by the state to corroborate

the testimony of Charley Taylor is evidence tending to show that defendant, Charley Taylor, and Shad Williams agreed to kill W. Drake at Shad Williams' house, and they have a reasonable doubt as to truth falsity of that testimony they must acquit the defendant." (3) "The court charges the jury that if they have a reasonable doubt to the truth or falsity of the evidence of women, Etta Ward and Emma Williams, v testified in this case, then they must quit the defendant." (4) General affirmative charge. (5) "Unless the jury believe from the evidence beyond a reasonable doubt that before the murder of R. W. Drake the defendant, Ed Howard, and Joe McDaniel and Charley agreed in the house of Shad Williams, on Monday before the murder of W. Drake, to kill R. W. Drake, then the jury must acquit the defendant." (6) "The court charges the jury that, unless each of them is satisfied of the defendant's guilt beyond a reasonable doubt, they must acquit the defendant." (7) "The court charges the jury that the state has failed to corroborate the testimony of Charley Taylor in the manner required by law, and that they must acquit the defendant." (8) "The court charges the jury that the law will not permit conviction of the defendant charged with felony upon the uncorroborated evidence of an accomplice, and that corroborating evidence is such evidence as tends to connect the defendant with the commission of the offense and if it merely shows the commission of offense, or the circumstances thereof, it is not sufficient; and the court further charges the jury that the only evidence which has been introduced by the state as corroborative of the evidence of Charley Taylor, the accomplice, is the evidence of the conspiracy alleged to have been formed between the defendant, Charley Taylor, and others to murder R. W. Drake, and unless the jury are satisfied from the evidence beyond a reasonable doubt, independent of anything that has been testified to by Charley Taylor, that the defendant, Charley Taylor, and others did form a conspiracy to murder R. W. Drake, then they must acquit the defendant.

A. M. Tunstall and E. S. Jack, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for State.

MAYFIELD, J. The defendant was indicted and convicted of murder in the first degree, and the death sentence was imposed on the jury. The material facts, as stated by counsel for appellant, and necessary to understanding of the case and of the questions raised on appeal, are as follows:

On the night of November 24, 1908, R. W. Drake, while asleep in his bed at his home in Laneville, Hale county, Ala., was hit on the head with some heavy instrument

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

killed. His adjacent store was burglarized, and the store and residence set on fire; the fire being extinguished before gaining much headway. On the next day one Charley Taylor, suspected of the crime, was apprehended, and confessed his guilt, implicating Ed Howard and Shad Williams as his accomplices in the crime. A day or two later he implicated Joe McDaniels as one of the accomplices. All four of the parties were negroes, and the deceased, R. W. Drake, was a white man, formerly sheriff of Hale county. Shad Williams, Ed Howard, Joe McDaniels, and Charley Taylor were thereupon arrested and confined in the Hale county jail.

On the 30th day of November, the judge of the Fourth circuit, Hon. B. M. Miller, made an order for a special term of the court, to be begun on the said 30th day of November (see pages 1-3 of the record), and on that day proceeded to draw a grand jury, and drew a petit jury. On December 2d the grand jury was duly impaneled and organized, and on the same day said grand jury returned an indictment, charging this defendant, Ed Howard, with murder in the first degree (see pages 6-13 of record). On the same day this appellant was brought into court, and being without counsel, and without the ability to employ counsel, the court appointed A. M. Tunstall and E. S. Jack to represent him. The court thereupon set the 5th day of December to try this appellant on said indictment.

On the 5th day of December, the said case against this appellant was called for trial, and said appellant moved for a change of venue (see page 20 et seq. of record). In this sworn application it is set out that Mr. Drake, the deceased, was a white man of much prominence and popularity in the county; that the appellant was a negro boy; that Charley Taylor had confessed his guilt, and implicated the appellant; that articles assuming the guilt of this appellant and that of the others accused by Charley Taylor, appeared in the Greensboro newspapers, particularly the Watchman, a paper edited by the chairman of the county Democratic executive committee, a man in whom the people of Hale county had great confidence, and whose views, as expressed in said paper, extracts from which are made a part of the motion, assuming the guilt of this appellant, produced a strong conviction upon the public mind that this appellant was in fact guilty; that the jurors who were summoned as venire in this case had been present in the courthouse during the trial and at the conviction of Shad Williams and Joe McDaniels, also charged with the murder of Mr. Drake; that much feeling was manifested in said courtroom when the jury imposed only a life sentence on said Shad Williams, and that so marked was the public disapproval of anything less than a death verdict that after the verdict the sheriff threw an arm-

ed guard around the jail and the courthouse to prevent a lynching of Shad Williams and others charged with the murder of R. W. Drake; that, shortly after the arrest of this appellant and the others charged with the said murder, the feeling in Hale county against said parties was so strong that under the order of the Governor of Alabama the said parties so charged with or suspected of said murder were carried by a special train, on the night of November 28th, to Birmingham, to prevent any attempt to lynch them, and were kept in the jail at Birmingham until December 2d, the day they were arraigned on said indictment; and that the murder of Mr. Drake aroused the deepest resentment and created the greatest excitement among the people of Hale county. On the hearing of said motion, the allegations of which were duly verified by said appellant, the state offered a joint ex parte affidavit of nine men (see page 37 of record), which set out that the parties signing the same were acquainted with the public sentiment of Hale county, that the defendant could get a fair trial, that there had not been any danger of mob violence, and that there had been "no change of sentiment against this defendant" since the Shad Williams trial. The court overruled the motion, and the appellant duly excepted.

On the trial of the case the state examined Turner Cash, Robert Campbell, E. E. Gewin, Charley Taylor, Etta Ward, Emma Williams, and Pick Bird. The testimony of none of these witnesses, except Charley Taylor, Emma Williams, and Etta Ward, tended to implicate appellant. Charley Taylor swore positively that he, Shad Williams, Joe McDaniels, and appellant plotted and accomplished the murder of Mr. Drake. The woman Emma Williams, the wife of one of the defendants, Shad Williams, testified that she heard a conversation between Charley Taylor, Joe McDaniels, Shad Williams, and appellant, in her house, on the Monday night before Mr. Drake was killed, in which conversation they all agreed to kill Mr. Drake. The woman Etta Ward testified that she was walking from the field, in the path that passed by Shad Williams' house, and while passing there she heard a conversation between Charley Taylor, Shad Williams, and appellant, in which they agreed to kill Mr. Drake. This conversation was a few days before Mr. Drake was killed. She further testified that she, a few days before Mr. Drake was killed, saw Charley Taylor, Shad Williams, Joe McDaniels, and appellant at the well in a conversation; that as she walked up they all stopped talking. The defendant, through his counsel, asked the witness Etta Ward the following question: "Haven't you heard of somebody down there being stripped and whipped because she had refused to say that she knew anything about the murder?" The state objected to this question, the court sustained the objection, and



the defendant excepted. Defendant stated to the court that he expected to prove that the witness had heard that a woman had been stripped and whipped because she had refused to testify that she knew anything about the killing of Mr. Drake (see page 75 of record). This was all of the testimony introduced by the state. The defendant introduced a number of witnesses, the testimony of none of whom is material for an adjudication of the questions involved in this appeal.

Had all the facts stated in the motion for a new trial been conceded or confessed, it would, indeed, have been a strong showing for a change of venue; but all the facts necessary to entitle the appellant to a change were not confessed, but were denied, and affidavits were introduced on the hearing of the motion denying the existence of the facts material to entitle the defendant to a change of venue. There was no proof offered in support of the motion, other than the affidavit of the defendant. It was shown that he had been in jail nearly all the while since the commission of the offense, and hence had had very little opportunity to know the condition of public sentiment for or against him. It is natural that public indignation should be aroused by the commission of such a crime as is conceded to have been perpetrated in this instance; but it is not shown that it was so aroused against this defendant individually, or so aroused, or so prejudiced, as to prevent a fair trial. While it is conceded that public indignation was aroused, and that there were rumors of mob violence, the very evidence introduced by the defendant disproves the rumor of a mob and of all violence. The clipping from the county paper, introduced by the defendant in support of his motion, is headed, "Rumor of a Mob—False Alarm," while the body of the notice shows that the rumor was false, that there was in fact no such danger, and no such public excitement, indignation, or anger as to justify any apprehension of violence; that the defendants were to be returned to the county, and that no attempt had been made to do or offer them any violence, but that everything was orderly. The affidavits of the nine citizens, offered by the state, did contain statements of facts, and that the affiants knew the facts to be as stated; and if these facts were true the defendant was not entitled to a change of venue. Surely these facts as testified to by nine disinterested witnesses were entitled to as much weight as that of the defendant alone, who was vitally interested, and who could not know some of the necessary facts stated in his motion. We therefore conclude that there was no error in denying the change of venue.

The question propounded to the witness Etta Ward called for purely hearsay evidence, a mere rumor, and was properly disallowed.

There was no error in refusing any of the charges refused to the defendant. Charge 1 was the general affirmative charge for the defendant, and was, of course, properly refused.

Charges 2, 3, 5, and 8 predicated an acquittal upon a reasonable doubt as to whether the accused and others conspired to kill deceased on a certain night at the house of Shad Williams. There was other evidence than this to corroborate the evidence of the accomplice, and hence evidence sufficient to support a conviction; this being the only theory on which these charges could be correct.

Charge 6 required an acquittal if any one juror had a reasonable doubt of guilt, and was on this account bad.

Charge 7 required the court to charge, as matter of law, that there was no corroborative evidence, as required by law, and was for this reason properly refused.

Charge 8 is not a correct statement, in its entirety, as to the necessity and sufficiency of corroborative evidence of an accomplice to support conviction of a felony.

Motions for new trials, or rulings thereon, in criminal cases, cannot be reviewed by this court on appeal.

If there had been no arraignment, and no plea of guilty interposed by the defendant, of course, it would be fatal on appeal. But the record proper shows the arraignment, shows that the defendant pleaded not guilty; in fact, the record proper shows all that is necessary to support the conviction. This is matter that must be shown by the record proper, and not by bill of exceptions; hence, if the recitals of the record proper and those of the bill of exceptions differ as to this matter, the recitals of the record proper must control. If there was in fact no arraignment, and no plea interposed by or for the defendant, the recitals of the record proper as to this effect should have been corrected by appropriate proceedings. These necessary and proper recitals in the record proper cannot be disregarded on appeal by recitals in the bill of exceptions.

An arraignment at English common law was much more formal than with us now. Under the former, Lord Hale says: "An arraignment consists of three things: First, the calling of the prisoner to the bar by his name and commanding him to hold up his right hand, which, though it may seem a trifling circumstance, yet it is of importance, for, by holding up his hand, constat de persona indictati, and he owns himself to be of that name; second, reading the indictment distinctly to him in English, that he may understand his charge; third, demanding of him whether he be guilty or not guilty, and if he pleads not guilty then the clerk joins issue with him *cul. prius*, and enters the prisoner's plea, then demands how he will be tried. The common answer is 'By God and the country,' and thereupon the clerk

calling the accused to the bar of the court, and reading or explaining the indictment to him, and demanding his plea. Its only purpose is to obtain from the accused his answer or plea to the indictment. *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; *Early v. State*, 1 Tex. App. 248, 28 Am. Rep. 409. Our statute (section 7565 of the Code of 1907) directs that if the defendant on arraignment refuses or neglects to plead, or stands mute, the court must cause the plea of not guilty to be entered for him. Under our practice and statutes, one charged of a capital offense is required to be arraigned, and his plea to be interposed, at least one entire day before the day of the trial, so that it may be determined whether or not he is entitled to a special venire for his trial. If, on arraignment, he pleads "guilty," he is not entitled to the special venire; if he pleads "not guilty," he is, and this special venire, together with a copy of the indictment, must be served upon him or upon his counsel one entire day before the trial. Code, §§ 7566, 7840.

The record proper in this case affirmatively shows this was done; but it is insisted that the indictment was not read to the accused at the time the trial was begun, that no plea was then interposed by the defendant, and no issue was joined thereon. It is not necessary that there should be two arraignments for one trial. The record affirmatively shows all that is necessary as to the arraignment before drawing the special venire or the trial.

Finding no error, the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

In Response to the Application for a Rehearing in This Case.

PER CURIAM. There is evidence in this record, tending to connect the defendant with the commission of the crime, other than that of the witnesses hypothesized in the charges complained of, which was not the fact in the record of *McDaniel's Case*, 50 South. 324, which is referred to and insisted upon by counsel.

# SUPREME LODGE KNIGHTS AND LADIES OF HONOR v. BAKER.

(Supreme Court of Alabama. Dec. 16, 1909.)

## 1. TRIAL (§ 46\*)—EVIDENCE—RELEVANCY AND MATERIALITY.

The question in an action on a life policy, in which the defenses were false statements of

material evidence; no statement being made as to what was expected to be proved thereby.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 116; Dec. Dig. § 46.\*]

## 2. TRIAL (§ 46\*)—RECEPTION OF EVIDENCE—OFFER.

Objection is properly sustained to a question; it not being clear that the answer called for would be relevant to any issue, and the party failing to state what answer he expected to elicit.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 116; Dec. Dig. § 46.\*]

## 3. INSURANCE (§ 818\*)—BENEFIT CERTIFICATE—ACTION—EVIDENCE—RELEVANCY.

Witness in an action on a benefit certificate, in which the defense was a misstatement by insured as to his occupation and as to his use of stimulants, having testified that he could not recall whether deceased quit the railroad or was discharged, "My best recollection is that his services were unsatisfactory," the latter part was properly excluded, on objection, as having no bearing on any issue.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 2004; Dec. Dig. § 818.\*]

## 4. INSURANCE (§ 818\*)—BENEFIT CERTIFICATE—FALSE WARRANTIES—EVIDENCE.

The question, to the doctor who examined one for insurance, whether there was any indication of his habitual use of alcoholic or other stimulants, was proper in an action on the benefit certificate, in which a defense was that insured falsely answered the question as to whether he used such stimulants.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 2004; Dec. Dig. § 818.\*]

## 5. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in sustaining objections to questions was harmless; they having been answered in full, and the answers not having been ruled out.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

## 6. EVIDENCE (§ 322\*)—QUESTIONS CALLING FOR HEARSAY.

The question, "Did you ever hear of his being a railroad clerk?" is objectionable as calling for hearsay evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1203-1213; Dec. Dig. § 322.\*]

## 7. WITNESSES (§ 248\*)—EXAMINATION—IRRESPONSIVE ANSWER.

The answer, to the question whether or not witness knew a certain person was a professional gambler, that he was not a straight hand to gamble, was unresponsive.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 861-863; Dec. Dig. § 248.\*]

## 8. INSURANCE (§ 818\*)—BENEFIT CERTIFICATE—ACTION—EVIDENCE.

Whether insured gambled straight or crooked was irrelevant, in an action on a benefit certificate, in which the defense was that the occupation of insured was that of a gambler and loafer, while he had stated in his application that it was that of a railroad clerk.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 2004; Dec. Dig. § 818.\*]

## 9. EVIDENCE (§ 129\*)—SIMILAR FACTS.

One cannot prove one vice or moral dereliction as a circumstance tending to show the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

existence of another not necessarily or vitally connected with it as cause or effect.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388, 389; Dec. Dig. § 129.\*]

**10. WITNESSES (§ 240\*)—EXAMINATION—LEADING QUESTIONS.**

A question being leading, objection to it on that ground is properly sustained.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837, 850; Dec. Dig. § 240.\*]

**11. INSURANCE (§ 723\*)—BENEFIT CERTIFICATE —“OCCUPATION” OF INSURED.**

“Occupation” is correctly defined, in an action on a benefit certificate, in which the defense is a wrong statement in the application as to insured's occupation, by an instruction stating that it means that which practically takes up one's time and energies, especially one's regular business or employment, and that the word does not necessarily mean the present occupation, but it means that which principally takes up one's time, thought, and energy, especially one's regular business or employment, so that one might have a regular occupation, such as that of a painter, and be out of employment, and might temporarily engage in other business, yet, if he was questioned as to what was his occupation, he would give it as a painter, that being his general occupation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1862; Dec. Dig. § 723.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 4907, 4908.]

**12. INSURANCE (§ 826\*)—INSTRUCTIONS—CONFORMITY TO PLEAS.**

The pleas having averred that the benefit certificate sued on was issued on the condition that the statements in the application were to be treated as warranties, and that insured answered, “No,” to the question, “Do you use alcoholic or other stimulants?” and that this answer was untrue, in that he did, at the date of making said answer, and previously thereto, and at the issuance of the policy, use alcoholic or other stimulants habitually and in the ordinary course of his life, it was not error to give plaintiff's requested charge, that in order to find a verdict for defendant, on the ground that insured used alcoholic or other stimulants, the jury must believe that when he made his application it was his habit to use alcoholic or other stimulants, this substantially following the pleas; or to refuse defendant's requested charge that if they believed insured, at or about the time of the application, used alcoholic or other stimulants, they should find for defendant, this not being as broad as the allegations of the pleas.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2010; Dec. Dig. § 826.\*]

**13. INSURANCE (§ 826\*)—BENEFIT CERTIFICATE —ACTION—INSTRUCTIONS—OCCUPATION OF INSURED.**

Defendant's requested charge, in an action on a benefit certificate, on the defense of breach of insured's warranty that his occupation was “clerk in a railroad office,” that the jury should find for defendant if they believed insured was not, on or about the date of his application, engaged in the occupation of clerking in a railroad office, was, if not an actual misstatement of the law, misleading, being open to the construction that the warranty was breached unless he was actually at work as clerk in a railroad office at the time of the application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2010; Dec. Dig. § 826.\*]

**14. INSURANCE (§ 723\*)—BENEFIT CERTIFICATE —OCCUPATION OF INSURED.**

Within a warranty, in an application for beneficial insurance, as to applicant's occupa-

tion, one who has once had and followed an occupation continues to have it till he has abandoned it, either by quitting work in it without intention or ability to resume it, or by engaging in some other occupation not of a mere temporary character.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1862; Dec. Dig. § 723.\*]

**15. TRIAL (§ 84\*)—RECEPTION OF EVIDENCE—OBJECTIONS.**

There was no error in admitting in evidence, in an action on a life policy, receipts, purporting to be signed by defendant's secretary, for proofs of death, though they were not shown to be genuine; the only objection being that they were irrelevant and immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 217; Dec. Dig. § 84.\*]

**16. INSURANCE (§ 825\*)—BENEFIT CERTIFICATE —ACTION—GENERAL AFFIRMATIVE CHARGE.**

The general affirmative charge for defendant, in an action on a benefit certificate, was properly refused; plaintiff making out a prima facie case by proof of the existence of the certificate, death of insured, and the giving of the notice and proof of death in accordance with the certificate, and the evidence being conflicting on the issues raised by the special pleas of breach of warranties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.\*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action on an insurance policy by Mims R. Baker against the Supreme Lodge Knights and Ladies of Honor. Judgment for plaintiff, and defendant appeals. Affirmed.

There was the following entry in response to the summons: “I enter this my appearance for the defendant, and reserve the right to plead specially to the complaint filed against it in this cause. B. B. Boone, Attorney for Defendant.”

The following special pleas appear: (1) “And for further special plea in this behalf defendant avers that said policy of insurance or relief fund certificate on the life of Alexander Price Baker, in which plaintiff was named as beneficiary thereunder, and which is the foundation of this suit, was issued upon the following express and written conditions, viz.: ‘That the statements made by said Alexander Price Baker in the contract, known as application for membership in relief fund, and the answers to questions in said Alexander Price Baker's statement to the medical examiner, known as the medical examiner's certificate, were to be treated as warranties.’ And defendant says that to the question in said medical examiner's certificate propounded to said Alexander Price Baker, viz., ‘Do you use alcoholic or other stimulants?’ said Alexander Price Baker answered, ‘No,’ which answer defendant avers is untrue in this: That said Alexander Price Baker did at the date of making said answer, to wit, August 25, 1905, and previous thereto, and at the date of said issuance of the said policy or relief fund certificate, use alcoholic or other stimulants habitually, and in the ordinary course of his life. Wherefore

"And for further special plea in this behalf defendant avers by the terms of said policy of insurance or relief fund certificate on the life of said Alexander Price Baker, in which plaintiff was named as beneficiary thereunder, and which is the foundation of this suit, said Alexander Price Baker expressly warranted the truth of his answers to all questions propounded to him by the medical examiner, and expressly agreed that if the answers to such questions were not true that said policy of insurance or relief fund certificate, if issued, would be null and void; and defendant says that to the question propounded said Alexander Price Baker by the medical examiner, V. P. Gaines, viz., 'Do you use alcoholic or other stimulants?' that said Alexander Price Baker answered, 'No,' which said answer defendant avers was untrue, and untrue in this: That the said Alexander Price Baker did on or about the date of making said answer, to wit, August 23, 1905, habitually and in the ordinary course of his daily life use alcoholic or other stimulants. Wherefore defendant says that said policy of insurance is null and void, and that it is not liable to plaintiff." (3) "And for further special plea in this behalf defendant avers that said policy of insurance or relief fund certificate on the life of Alexander Price Baker, in which plaintiff was named as beneficiary thereunder (same as plea 1 down to and including the words 'treated as warranties,' where they occur therein, and adds the following:) And defendant says that to the question in said medical examiner's certificate propounded to said Alexander Price Baker, viz., 'What is your occupation?' said Alexander Price Baker answered, 'Clerk in railroad office,' which said answer defendant avers is untrue in this: That the usual and ordinary occupation of the said Alexander Price Baker at or about the date of making said answer, to wit, August 23, 1905, and the date of the issuance of said policy or relief fund certificate, was not that of clerk in a railroad office, but that of a gambler and loafer. Wherefore defendant says it is not liable." (4) Same as plea 2, down to and including the words "null and void," where they first occur therein, with this addition: "And defendant says that to the question propounded to said Alexander Baker by the medical examiner, V. P. Gaines, viz., 'What is your occupation?' that said Alexander Price Baker answered, 'Clerk in a railroad office,' which said answer defendant avers was untrue in this: That the usual and ordinary occupation of the said Alexander Price Baker at or about the date of making said answer, to wit, August 23, 1905, was not that of a clerk in a railroad office. Wherefore defendant says that said policy of insurance was null and void, and that it is not liable." (5) This plea avers that Baker expressly warranted the truth and correctness of his answers to questions propounded by

his answer of "No" to the question propounded to him by the medical examiner, "Do you use alcoholic or other stimulants?" which was embraced in said applicant's statement to the medical examiner, "was untrue and incorrect in this: That said Alexander Price Baker did habitually and in the ordinary course of his daily life use alcoholic or other stimulants at the date he made such answer and statement, to wit, August 23, 1905, and at the date said policy of said insurance was issued. Wherefore defendant says he is not liable."

In his oral charge to the jury the court said: "Now, an occupation, in a legal contemplation, means that which practically takes up one's time and energies, especially one's regular business or employment. The word 'occupation' does not necessarily mean the present occupation, but it means that which principally takes up one's time, thought, and energy, especially one's regular business or employment. For illustration: A man might have a regular occupation, such as that of a painter, and be out of employment, and might temporarily engage in other business, yet, if he was questioned as to what was his occupation, he would give it in as a painter, that being his general occupation, whereas at that moment he might be engaged in other business as a general occupation."

The following charge was given at the request of the plaintiff: (1) "The court charges the jury that, in order to find a verdict for the defendant on the ground that he used alcoholic or other stimulants, you must believe that at the time of making his application for membership in the defendant's order it was the habit of Baker to use alcoholic or other stimulants."

The following charges were refused to the defendant: (1) General affirmative charge. (2) "The court charges the jury that if they believe from the evidence that Alexander Price Baker, on or about August 23, 1905, used alcoholic or other stimulants, you ought to find a verdict for the defendant." (3) "The court charges the jury that if they believe from the evidence that Alexander Price Baker, on or about August 23, 1905, was not engaged in the occupation of clerking in a railroad office, they ought to find a verdict for the defendant."

Bestor, Bestor & Young, for appellant. McIntosh & Rich, for appellee.

EVANS, J. This was an action in code form on a relief fund certificate or life insurance policy, issued in favor of appellee's intestate on the life of Alexander Price Baker, on September 14, 1905, by appellant, a secret benevolent society, a corporation. Upon the trial of the case issue was joined upon five special amended pleas of confession and avoidance filed by defendant.

There are 27 assignments of error by appellant. The assignments from 1 to 20, both

inclusive, are upon the ruling of the court upon the testimony. The twenty-second assignment of error is to the court's giving a certain written charge asked by plaintiff. The twenty-third and twenty-fourth assignments are to the court's refusal to give charges asked by defendant. The twenty-first and twenty-fifth assignments of error are to the definition given by the court, in its oral charge, of the word "occupation." The twenty-sixth assignment of error is to the ruling of the court in admitting in evidence certain receipts tending to show that defendants below, appellants here, had been duly notified of the death of said Alexander Price Baker. The twenty-seventh assignment of error was to the refusal of the court to give the general affirmative charge for defendant. As to whether there was error in the court's ruling upon the evidence depends first upon the issues raised by the five special pleadings. These pleas are set out in full in the statement of the reporter.

1. There was no error in the ruling of the court in sustaining plaintiff's objection to the following question propounded to the witness Mims R. Baker by defendant's counsel on cross-examination, upon the ground that it called for irrelevant and immaterial testimony, viz.: "Do you know whether Fisher shot another party at the time, or any other person?" The defendant did not state what he expected to prove in asking said question, so as to show its relevancy or materiality, and we are unable to see what answer could have been made that would have been relevant or material to any issue in this case.

2. The court properly ruled in overruling defendant's motion to exclude the policy of insurance upon the ground that the whole contract had not been offered in evidence, and as appellant does not mention this assignment in his brief we take it that he so understands it.

3. The court properly ruled in sustaining plaintiff's objection to the question propounded to witness George J. Santa Cruz to wit: "Do you know why Price Baker quit there?" as it is not clear that the answer called for would be relevant to any issue in the case, and defendant failed to state what answer he expected said question to elicit, and, furthermore, the transcript of the bill of exceptions shows that the question was answered as follows: "I cannot now recall whether Price Baker quit the railroad or whether he was discharged—my best recollection is that his services were unsatisfactory." The latter part of the answer was objected to by plaintiff, viz., "My best recollection is that his services were unsatisfactory," and the same was excluded from the jury, and properly so, as it had no bearing upon any issue in the case. The action of the court in excluding that part of the testimony is assigned as error in the fourth assignment.

4. The fifth assignment of error was the overruling of defendant's objection to the question propounded by plaintiff to the witness Dr. V. P. Gaines on cross-examination viz.: "What was his general appearance—that of a man in good health?" The plaintiff explained, after question was objected to, that he expected to show that the applicant gave no indication of being an habitual drunkard. The question was not answered by the witness, and was then asked as follows: "What was the general appearance of Baker?" (It was admitted that the witness was a medical expert.) "A. It was very good. Q. Was there, or not, any indication of the habitual use of alcoholic stimulants?" It is a well-known fact that the habitual use of alcoholic stimulants will in many cases, if not in all cases, manifest itself in the appearance of a person—especially to an expert medical man; and as the witness was the doctor who examined the applicant we think the question was clearly proper. So, also, was the following question to the same witness on cross-examination, viz.: "Was there, or not, any indication of the habitual use of alcoholic or other stimulants?" and for the same reasons given above.

5. The eighth assignment of error is to the ruling of the court in sustaining plaintiff's objection to the question propounded by defendant to witness J. E. Zeigler, viz.: "Did you know or see him drunk just a short time before he was killed?" The transcript of the bill of exceptions shows that this question was answered in full, and the answer was not ruled out, and defendant got the full benefit of it. Defendant, therefore, received no injury from the ruling of the court.

6. The ninth assignment of error is to the court's ruling in sustaining plaintiff's objection to the following question propounded to the witness J. E. Zeigler by defendant, viz.: "Did you ever hear of his being a railroad clerk?" This clearly called for hearsay evidence, and the objection was properly sustained.

7. The tenth assignment is to the ruling of the court in excluding the following part of an answer of the witness J. E. Zeigler to a question propounded by defendant, viz.: "I know one thing: He was not a straight hand to gamble. What I mean is—" This answer was in reply to the question: "Do you know whether or not he was a professional gambler?" The answer was: "I can't say whether he was a professional gambler or not. I know one thing: He was not a straight hand to gamble. What I mean is—" It is evident that the part excluded was not responsive to the question, and it was entirely irrelevant to any issue in the case whether Baker gambled straight or crooked.

8. The eleventh, twelfth, thirteenth, fourteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth assignments of error are all to the same effect. The defend-

ant attempted to prove one vice or moral dereliction as a circumstance tending to show the existence of another not necessarily or vitally connected with it as cause or effect. This could not be done, and the court properly ruled thereon. *McCutchen v. Loggins*, 109 Ala. 458 (6th headnote), 19 South. 810. As to the twelfth assignment, the question was leading, and was objected to on that ground. The objection was properly sustained.

9. The twenty-first and twenty-fifth assignments of error were to the definition of the term "occupation" in the court's oral charge to the jury. The definition, as restated to the jury after objection was first made, was taken word for word from the *Standard Dictionary*, and was correct. *Mowry v. World Ins. Co.*, 7 Daly (N. Y.) 324; *Clemens v. Metropolitan Life Ins. Co. of New York*, 20 Pa. Super. Ct. 567. The defendant could not, therefore, complain of the definition.

10. The twenty-second assignment of error was to the court's giving written charge No. 1, requested by plaintiff. This charge substantially follows defendant's amended pleas 1, 2, and 5, the only pleas setting up a breach of warranty on account of the use by Alexander Price Baker of alcoholic stimulants, which was equivalent to saying that, in order for the jury to find a verdict for defendant on the ground that said Baker used alcoholic stimulants, they must believe the allegations of either the first, second, or fifth pleas to be substantially true. The court was without error in giving said charge.

11. The twenty-third assignment of error was to the court's refusal to give written charge No. 2 asked by defendant. This charge should not have been given, because it is not as broad as the allegations of either defendant's pleas Nos. 1, 2, or 5.

12. The twenty-fourth assignment of error was to the court's refusal to give written charge No. 3, asked by defendant. This charge was liable to mislead the jury, if in fact it is not an actual misstatement of the law of the case. The jury would certainly have been warranted in drawing the conclusion that, unless the insured was actually at work as clerk in a railroad office at the time of making application, his warranty as to occupation was breached. Such is not the law. *Mowry v. World Ins. Co.*, 7 Daly (N. Y.) 324; *Clemens v. Metropolitan Ins. Co. of New York*, 20 Pa. Super. Ct. 567. A man who has once had and followed an occupation continues to have it until he has abandoned it, either by quitting work in it without intention or ability to resume it, or by engaging in some other occupation not of a mere temporary character. As to whether this has been done is usually a question for the jury, and was a question for the jury in this case.

13. The twenty-sixth assignment of error was that "the court erred in admitting in evidence the two alleged receipts showing

that proof of death was forwarded and received by defendant." The objection to the admission of these two paper writings was that they were irrelevant and immaterial. These grounds of objection were clearly not good, as an examination of the papers will at once show. The argument in the brief of counsel for appellant is that they should not have been admitted because that they were not proven to be genuine. There was no objection on this ground, and the court could not, therefore, consider it. The court did not err in overruling the objection upon the grounds stated. Besides, defendant's witness E. L. Cahall testified that proof of death of said Alexander Price Baker had been made, and those receipts purported to have been signed by him as secretary of appellant.

14. The twenty-seventh and last assignment of error was to the court's refusal to give the general affirmative charge requested by the defendant. The plaintiff, having proved, first, the existence of the policy sued on; second, the death of the insured; and, third, the giving of the notice and proof of death as required by the policy—made out a prima facie case. 25 Cyc. 925. The evidence being in conflict upon the issues raised by defendant's special pleas, the general affirmative charge for defendant should not have been given.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

#### GRIFFIN v. STATE.

(Supreme Court of Alabama. June 30, 1909.  
Rehearing Denied Dec. 16, 1909.)

1. **CRIMINAL LAW (§ 575\*)—TIME FOR TRIAL.**  
Acts 1886-87, p. 183, requiring the criminal docket of the Perry county circuit court to be called on Monday of the second week of the term, only gives the criminal docket preference on that day to the civil docket, and does not prevent the trial of a criminal case during the first week of the term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1294; Dec. Dig. § 575.\*]

2. **JURY (§ 116\*)—MODE OF SELECTION.**

Though it is irregular, in selecting jurors, for the commissioners to draw a name from the box, and then decide among themselves whether the person drawn will make a good grand or petit juror, and assign him accordingly, such irregularity is not, in the absence of fraud, ground for quashing the venire, in view of Code 1907, § 7256, providing that "no objection can be taken to any venire for a jury except for fraud in drawing or summoning the jurors."

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 116.\*]

3. **HOMICIDE (§ 187\*)—SELF-DEFENSE—REBUTTING EVIDENCE.**

Where it appeared that before the homicide defendant exhibited to deceased an anonymous letter, purporting to have come from some of deceased's family, containing threats against defendant's family, all of which deceased denied.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and defendant, under his plea of self-defense, offered this letter in evidence, it was proper for the prosecution to show that deceased had no connection with the sending of the letter by showing its authorship.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 390; Dec. Dig. § 187.\*]

**4. HOMICIDE (§ 300\*)—SELF-DEFENSE—INSTRUCTIONS.**

An instruction on self-defense is properly refused, where it omits any mention of the belief, reasonably and honestly entertained by defendant, of imminent danger and the necessity to kill, which are facts necessary to self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 617, 629; Dec. Dig. § 300.\*]

**5. CRIMINAL LAW (§ 756\*)—TRIAL—INSTRUCTIONS—ASSERTING EXISTENCE OF FACTS.**

It is proper to refuse an instruction which asserts that there is evidence of certain facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1768, 1769; Dec. Dig. § 756.\*]

**6. CRIMINAL LAW (§ 811\*)—TRIAL—INSTRUCTIONS—UNDUE PROMINENCE TO FACTS.**

It is proper to refuse an instruction which gives undue prominence to certain facts or phases of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1969; Dec. Dig. § 811.\*]

**7. HOMICIDE (§ 300\*)—SELF-DEFENSE—INSTRUCTIONS.**

An instruction that defendant "had a right to protect himself by taking the life of deceased, if such protection could not otherwise be secured," was properly refused, as it omits a statement of defendant's duty to retreat, unless to do so would increase his peril.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 617, 630; Dec. Dig. § 300.\*]

**8. HOMICIDE (§ 300\*)—SELF-DEFENSE—INSTRUCTIONS.**

Where it appeared that, before the homicide, defendant had exhibited to deceased an anonymous letter, purporting to have come from some of deceased's family, containing threats against defendant's family, an instruction that "if defendant approached deceased in a peaceable manner, and asked him if he knew anything about the letter, would not put defendant at fault in bringing on the difficulty," was properly refused, as it invaded the province of the jury and was misleading. There being evidence of ill feeling between the families, the act of defendant in approaching deceased on that subject, without regard to his mere manner, might have been construed into a threat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 627-630; Dec. Dig. § 300.\*]

**9. CRIMINAL LAW (§ 807\*)—TRIAL—INSTRUCTIONS—ARGUMENTATIVENESS.**

An instruction that "No exact definition of an overt act can be given. It may be a motion, a gesture, conduct or demonstration, or anything else that evidences a present design to take the life of defendant or to do him great bodily harm. Trifles, light as air when viewed alone, may become fraught with deadly meaning, when viewed in connection with all the preceding facts disclosed and with all the evidence in the case" was properly refused as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1959, 1960; Dec. Dig. § 807.\*]

**10. CRIMINAL LAW (§ 309\*)—CHARACTER OF DEFENDANT—PRESUMPTION.**

There is no presumption in respect to defendant's character being good or bad.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 738; Dec. Dig. § 309.\*]

**11. HOMICIDE (§ 300\*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.**

Where there is a conflict in the evidence as to who was the aggressor, it was proper to refuse an instruction that if deceased was a man whose general character was of a violent, turbulent, and bloodthirsty kind, and he made a hostile demonstration toward defendant, then "defendant had the right to act more promptly to protect himself from injury than if such hostile demonstration had been made by a man who was not of general bad character," etc.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 628; Dec. Dig. § 300.\*]

Appeal from Circuit Court, Perry County; B. M. Miller, Judge.

John Griffin was convicted of murder, and he appeals. Affirmed.

The facts sufficiently appear in the opinion of the court. The following charges were refused to the defendant:

"(2) In deciding on the guilt or innocence of defendant, if you believe from the evidence that he did not fight willingly, and that he was free from fault in bringing on the difficulty, and could not retreat without having increased his peril, and come to consider whether the defendant was actually in danger of death or great bodily harm, or whether the circumstances surrounding him were such as to create in the mind of a reasonable man, and did create in the mind of defendant, the honest belief that he was in danger of death or great bodily harm, you should determine what an ordinary and reasonable man might have fairly inferred from all the facts and circumstances by which the evidence showed that the defendant was at the time surrounded, and in so doing must not try him in the light of subsequent developments; nor must they require of him the same cool judgment that the jury can now bring to bear on the occurrence. The jury must put themselves as far as possible in the defendant's place, and then judge whether the danger was apparent, or should have been considered apparent, by a man of ordinary caution and prudence in like conditions. The danger to life or great bodily harm need not have been real, present, or urgent at the very moment of the killing, but only apparently so. The question is, Was the danger apparently so imminently present at the time of the killing that a reasonable man and a prudent man situated as Griffin was would believe that it was necessary to kill in order to avoid the loss of life or to prevent great bodily harm; and if, from all the evidence in the case, the jury have a reasonable doubt whether such was the case when the defendant killed Hughey, then if you believe defendant is free from fault in bringing on the difficulty, and did not fight willingly, and could not retreat without increasing his peril, you must acquit him.

"(3) There is evidence in the case tending to show that the defendant was in imminent danger, real or apparent, of death or great

bodily harm from Hughey at the time he fired; and if you believe from the evidence that he was in such imminent danger, real or apparent, and that he was free from fault in bringing on the difficulty, and could not retreat without increasing his peril, and did not fight willingly, you must acquit him.

"(4) If the jury believe from the evidence that the defendant had reasonable apprehension of great personal violence, involving imminent peril to life or limb, then he had a right to protect himself by taking the life of Jeffie Hughey, if such protection could not otherwise be procured, and they must acquit the defendant unless they find that the defendant was not free from fault in bringing on the difficulty.

"(5) If the jury have a reasonable doubt as to whether or not the act was done maliciously, then they must acquit the defendant.

"(6) There is evidence in this case tending to show that the defendant at the time of the shot could not retreat without increasing his peril; and if you believe from the evidence that he could not retreat without increasing his peril, and was free from fault in bringing on the difficulty, and was in imminent danger, real or apparent, of death or great bodily harm from Hughey at the time, you must acquit him.

"(7) If you believe from the evidence that the defendant approached the deceased in a peaceable manner, and in a peaceable manner asked him if he knew anything about the letter which has been offered in evidence as the letter shown the deceased by the defendant at the time of the killing, I charge you that this would not put the defendant at fault in bringing on the difficulty.

"(8) I charge you that there is evidence in this case that it was communicated to Griffin before the killing that Hughey had made threats against the defendant's life. This evidence goes to aid you in determining, if you believe it, whether the defendant or the deceased was the aggressor, and whether reasonably entertained the honest belief that he was in imminent danger of death or great bodily harm; and if you believe that such threats were communicated to the deceased before the killing, and contributed to creating in the mind of the defendant the reasonable and honest belief that he was in imminent danger of death or great bodily harm, if he did entertain such belief, and if a reasonable man, situated as the defendant was, would have entertained such belief, it is immaterial whether such threats were so or not.

"(9) I charge you, gentlemen of the jury, that there is evidence tending to show that the defendant was free from fault in bringing on the difficulty; and if you believe from the evidence that he was free from fault in bringing on the difficulty, and was at the time he shot in imminent danger of death or great bodily harm from Hughey, and could

not retreat without increasing his peril, and did not fight willingly, then, I charge you, you must acquit the defendant.

"(10) I charge you, gentlemen of the jury, that there is evidence in this case tending to prove that the defendant acted in self-defense, as I have defined self-defense to you in my general charge; and if, after considering all the evidence in the case, you have a reasonable doubt as to whether the defendant acted in self-defense, as I have defined it to you in my general charge, you must acquit him.

"(11) I charge you, gentlemen of the jury, that the design, real or apparent, to kill the defendant, or to do him some great personal injury, and the danger, real or apparent, of the execution of such design by the deceased to cause the killing, must be manifest by some overt act, conduct, or behavior of deceased at the time of the killing, indicating to the defendant, situated as he was, such design and danger; but what shows such design, real or apparent, or such danger, real or apparent, are not matters of law for the court to decide, but are matters of fact, to be determined by the jury according to all the evidence in the case. No exact definition of an overt act can be given. It may be a motion, a gesture, conduct or demonstration, or anything else which evidences reasonably a present design to take the life of the defendant, or do him great bodily harm. Trifles, light as air when viewed alone, may become fraught with deadly meaning when viewed in connection with all the preceding facts disclosed and with all the evidence in the case.

"(12) I charge you, gentlemen of the jury, that there is no evidence in this case tending to prove the general bad character of John Griffin, and in the absence of such evidence the law presumes that he is a man of general good character, and that the presumption of a good character goes with him to the jury as a matter of evidence, and may be considered by you, in connection with all the other evidence in the case. It may be sufficient to create in your mind a reasonable doubt of the defendant's guilt requiring his acquittal.

"(13) If the jury believe from the evidence that on the day of the fatal difficulty the defendant approached the deceased in a peaceable manner for the purpose of adjusting or explaining the previous difficulties, or getting such explanation from the deceased, and for such purpose showed him the letter admitted in evidence in this cause, and thereupon there arose a controversy between the deceased and the defendant, and the defendant was without fault in bringing on the difficulty, and did not fight willingly, and that the deceased made a demonstration such as to create in the mind of a reasonable man the honest belief that defendant was in imminent danger of death or great bodily harm, and that it was necessary to



shoot in order to protect himself from such danger, even though such danger was not real, but was apparent only, and there was no reasonable way of escape or retreat without increasing his peril, and it did create such honest belief in the mind of defendant, even though such danger was not real, but only apparent, and that there was no reasonable way of escape or retreat without increasing his peril, and that thereupon under such circumstances the defendant shot and killed the deceased, then the defendant would not be guilty.

"(14) If the jury believe from the evidence that Jeffie Hughey was a man who had the general character in the community in which he lived as that of a quarrelsome, violent, and turbulent man, and as that of a man who went habitually armed, and for two or three years prior to the fatal difficulty he had numerous difficulties with the defendant, and made numerous threats against the defendant to take his life, or to do him great bodily harm, and that such threats and difficulties continued up to a short time before the fatal difficulty, and that on the day of the fatal difficulty the defendant approached the deceased in a peaceable manner for the purpose of adjusting the previous difficulty, or of getting such explanation from the deceased, and for such purpose showed him the letter admitted in evidence in this cause, and that thereupon there arose a controversy between the defendant and the deceased, and that the defendant was without fault in bringing on the difficulty, and did not fight willingly, and that the deceased then and there made a demonstration such as to create in the mind of a reasonable man the honest belief that the defendant was in imminent danger of death or great bodily harm at the hands of deceased, and that it was necessary to shoot in order to protect himself from such danger, even though such danger was not real, but only apparent, and that it did create such honest belief in the mind of defendant, even though such danger was not real, but only apparent, and that there was no reasonable way of escape or retreat without increasing his peril, and that thereupon, under such circumstances, the defendant shot and killed the deceased, then the defendant would not be guilty.

"(15) I charge you, gentlemen of the jury, that if you believe from the evidence that Jeffie Hughey was a man whose general character was that of a violent, turbulent, and bloodthirsty man, that if you believe from the evidence that Jeffie Hughey made a hostile demonstration towards the defendant, I charge you that the defendant had a right to act more promptly to protect himself from injury than if such hostile demonstration had been made by a man who was not of general bad character for violence, turbulence, or bloodthirstiness.

"(16) If the jury believe from the evidence

that on the day of the fatal difficulty the defendant approached the deceased in a peaceable manner for the purpose of adjusting or explaining previous difficulties, or of getting some explanation from the deceased, and showed him the letter in evidence in this cause, and that thereupon there arose a controversy between the deceased and the defendant, and that the defendant was without fault in bringing on the difficulty, and did not fight willingly, and that the deceased then and there made a demonstration such as to create in the mind of a reasonable man the honest belief that the defendant was in imminent danger of death or great bodily harm at the hands of the deceased, and that it was necessary to shoot to protect himself from such danger, even though such danger was not real, but only apparent, and that it did create such honest belief in the mind of defendant, even though such danger was not real, but only apparent, and that there was no reasonable way of escape or retreat without increasing his peril, and that thereupon under such circumstances the defendant shot and killed the deceased, then the defendant would not be guilty; and the court further charges the jury that if you believe from the evidence that the deceased, Jeffie Hughey, had the general reputation in the community in which he lived as that of a violent, turbulent, and quarrelsome man, and as that of a man who habitually went around armed, and that such reputation was known to the defendant, and that for several years prior to, and up to a short time before, the fatal difficulty, deceased had had numerous difficulties with the defendant, and had made numerous and deadly threats against him, the jury may consider these facts, in connection with all other evidence in the case, in determining who was at fault in bringing on the difficulty which resulted in the killing, and in determining whether or not the circumstances were such as to create in the mind of a reasonable man the honest belief that the defendant was in imminent danger of death or great bodily harm at the hands of the deceased, and that it was necessary to shoot in order to protect himself from such danger, and as to whether or not it did create in the mind of defendant such honest belief, even though such danger was not real, but only apparent.

"(17) I charge you, gentlemen of the jury, that the laws of this state, as well as the laws of nature, give every man the right to defend himself from death or great bodily harm, by killing the person from whom the danger proceeds, if that be necessary to his protection, and this right is not given a man by law, but is a right that exists independently of the law, except in so far as the law has restricted it for the good of society, and on the exercise of this right the law has placed these three restrictions: (1) The defendant must be free from fault in bringing on

the difficulty, and I charge you that if, in the discussion or talk between the defendant and deceased, the defendant was not the aggressor, but only used quarrelsome words in reply to quarrelsome words used by the deceased, if you believe from the evidence he did such, and did not fight willingly or by his voluntary consent, then he would be free from fault in bringing on the difficulty. And I charge you, further, that if you believe from the evidence that the defendant believed or thought that the deceased knew or might know something about the letter offered in evidence as the letter shown to the deceased by the defendant at the time of the killing, then the defendant had the right to ask the deceased in a peaceable manner if he knew anything about it, and that would not be considered by the law as putting the defendant at fault in bringing on the difficulty. And if you believe from the evidence that the defendant knew or believed that deceased was armed, and, so knowing and believing, armed himself, not with the intention to provoke a difficulty, but to protect himself, then I charge you that the defendant had a right to arm himself for his protection without incurring the penalty of being considered at fault in bringing on the difficulty. (2) The defendant must have been, at the time he fired the fatal shot, either actually and really in imminent danger of death or great bodily harm, or the circumstances surrounding him at the time must have been such as to create the honest belief in the mind of a reasonable man that he was in imminent danger of death or great bodily harm. And if you should believe from the evidence that the defendant was not actually in such danger, then he would have the same right to act as if the danger had been actual, if you believe, from the circumstances surrounding the transaction, that they were such as to create in the minds of a reasonable man, and did create in the mind of defendant, the reasonable and honest belief that he was in such danger. I further charge you that the question as to whether he was actually or apparently in such danger is to be determined by you after the consideration of all the evidence. I further charge you that, in determining whether the circumstances were such as to create a reasonable and honest belief in the defendant's mind that he was in such danger, you may look at the facts, if they be facts, in connection with all the other evidence, that the deceased was a man of violent and dangerous character, and habitually went armed, and had to the defendant's knowledge made threats to take his life. A man has the right to act more promptly and decisively in his defense, when a demonstration has been made against him by a man of dangerous character, than when such demonstration is made by a peaceable or timid man. (3) The defendant must have been so situated as not to be able to retreat without increasing his peril; and if you believe from the evidence

that the defendant, as I have above explained to you, was, first, free from fault in bringing on the difficulty, and, second, in imminent danger of great bodily harm, and, third, could not retreat without increasing his peril, and did not fight willingly, it is your duty to find him not guilty, and in that event the form of your verdict will be, 'We, the jury, find the defendant not guilty.' "

De Graffenried & Evins, for appellant. Alexander M. Garber, Atty Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

SAYRE, J. On Monday, the first day of the term, the court fixed the trial of the indictment against the defendant for the following Thursday. The act approved November 22, 1886 (Acts 1886-87, p. 183), provides that the criminal docket of the circuit courts in Perry and other counties therein named shall be taken up on Monday of the second week of each term. The defendant made this statute the basis of an objection and exception to the recited action of the court. The contention is that the statute is mandatory, and that, therefore, the court was without jurisdiction to try the defendant on a day of the first week. In *Goley v. State*, 87 Ala. 56. 6 South. 287, it was held that a Code provision, identical in every substantial particular with the statute in question, meant only that the criminal docket should be taken up on the second Monday of the term to the exclusion of civil business, but did not deny the court the right to proceed with the trial of criminal cases before that time. We are satisfied with the authority of that case. *Hall v. State*, 130 Ala. 45, 30 South. 422.

In support of a motion to quash the venire summoned for the trial of his case, the defendant showed to the court by one of the jury commissioners of Perry county that the jury commission had, at a regular sitting for drawing grand and petit jurors, drawn from the jury box the names of jurors, including that part of the venire for the trial of the cause which was composed of the regular jury impaneled for the first week of the court, in manner following: When a name was drawn out of the box, the commission would decide among themselves whether the man would make a good juror to serve on the grand jury, or a good juror to serve on the petit jury, and the juror would be assigned to one or the other, as he was, in the opinion of the commission, better suited to serve on one or the other. No fraud in the drawing of the juries was charged or shown. Admitting the effect of the last clause of section 7256 of the Code of 1907 to be that it renders innocuous any objection taken to any venire facias for a petit jury, except for fraud in drawing or summoning the jurors, the argument for a reversal on the exception just here in hand is that there was no drawing, but a deliberate selection of jurors prejudicial to the defendant, in that some of the most intelligent and upright men, presumably se-

lected for the grand jury because they were such, might have been upon the petit jury summoned for the trial of defendant, but for their selection as grand jurors. If it be admitted that the argument of prejudice here insisted on was more than a mere speculation, it must be conceded that the method of selection practiced was irregular, and not in strict conformity to statutory direction. But we cannot concede that there was no drawing, nor even that the absence of drawing, omitted in a bona fide effort to accomplish the purpose of the statute, would be fatal to the venire, or the jury organized from it. Who should be jurors appears to have been determined by the drawing, though their distribution to grand and petit juries was determined otherwise. In any event, the irregularity, in the absence of fraud, is saved by the statute. The section (7249) providing the method of drawing juries, grand and petit, is found in the same chapter of the Code of 1907 with section 7256. The last-named section enacts that "the provisions of this chapter in relation to the selection, drawing, and summoning of jurors are merely directory; \* \* \* and no objection can be taken to any venire facias for a petit jury, except for fraud in drawing or summoning the jurors." We cannot assume that the full import of this statute was not understood or intended by the Legislature when it was adopted. The plain wording of the statute overrules the objection taken by the appellant. *Thompson v. State*, 122 Ala. 12, 26 South. 141; *Childress v. State*, 122 Ala. 21, 26 South. 162.

The state's testimony showed that, immediately before the shooting which resulted in the death of Jeffie Hughey, the defendant approached deceased and exhibited to him a letter, asking him if he knew anything about it. The letter was anonymous, and was addressed to N. A. Griffin. It contained threats against the Griffins generally, and against the defendant and a female member of the family (whose exact relation with defendant does not appear) in particular. The threats conveyed by the letter purported to come from the Hugheys generally, and others. Witnesses for the state, and defendant himself, testified that the deceased denied to defendant any knowledge of the letter. After the interchange of a very few angry words the shooting followed. The evidence was conflicting whether at the time of the fatal shot the attitude of the deceased was indicative of offensive purpose. During the cross-examination of a witness for the state, the defendant offered the letter in evidence. Thereafter the state brought forward as a witness, a female relative of the deceased, who was permitted to testify, over defendant's objection, that she had written the letter, and that the deceased had no agency in procuring it to be written, nor any knowledge that the witness had written it. The appellant argues that the fact of the author-

ship of the letter was foreign to any issue in the cause, and its admission in evidence was calculated to cause the jury to view more harshly the act of the defendant in calling the attention of the deceased to the letter. But to this argument we do not assent. The letter was a threat purporting to emanate from the family to which deceased belonged, and directed against the defendant, and so capable of pertinent construction as a threat by the deceased against the defendant. When the defendant, under his plea of self-defense, offered the letter in evidence, notwithstanding the denial of the deceased that he was responsible for it, he affirmed by his offer the responsibility in some sort of the deceased, notwithstanding his denial. On no other theory did it have any relevancy to the issue being tried. The letter, then, having been introduced by the defendant as a threat to show the mental attitude of the deceased towards him at the time of the homicide—for so it must be taken—it was competent for the prosecution to show that deceased had no connection with the writing or sending of the letter, as a fact tending to rebut the inference of hostile temper on his part which the jury might draw from the letter if not thus explained. Being entitled to show that deceased was not responsible for the letter, the state was not limited in proof to the denial of the deceased, but might support that denial by other evidence to the same effect.

Charge 2 refused to the defendant was faulty in that part of it which said: "The question is, Was the danger apparently so imminent and present at the time of the killing that a reasonable man and a prudent man situated as Griffin was would believe it was necessary to kill in order to avoid loss of life or to prevent great bodily harm; and if, from all the evidence in the case, the jury have a reasonable doubt whether such was the case when the defendant killed Hughey, then if you believe defendant was free from fault in bringing on the difficulty, and did not fight willingly and could not retreat without increasing his peril, you must acquit him." This was a summary or brief restatement of what had been stated in the fore part of the charge, and the jury would have had the right to treat this concluding summary as a complete statement of the law the charge was intended to state. As such it was defective, because it pretermitted any mention of the fact, necessary to acquittal on the ground of self-defense, that the belief of imminent danger and necessity to kill must be honestly entertained as well as reasonable. "The law requires that such belief must be both reasonable and honestly entertained." *Jackson v. State*, 78 Ala. 471; *Storey v. State*, 71 Ala. 330; *McCain v. State*, 49 South. 361, and *Williams v. State*, 50 South. 59, both at the present term.

Charges 3, 6, 8, 9, and 10, among other things, assert that there is evidence of certain

facts. It has been frequently held that courts cannot be required to declare to juries that there is or is not evidence of particular facts. Their business is to declare the law. *Troup v. State*, 49 South. 332, and authorities there cited. Charges of the sort are also bad because they give undue prominence to certain parts or phases of the evidence. Appellant relies upon the authority of *Harris v. State*, 96 Ala. 24, 11 South. 255, in support of his contention that the refusal of these charges was error. There are two reasons why that authority does not avail the appellant. For one, the charge in that case did not undertake to state the evidence, but the contradictory statements, relied on for an impeachment of the witness, were stated in the charge with hypothesis. For another, not affecting, however, charge 8, the eminent judge who wrote the opinion in *Harris' Case*, in the later case of *Hale v. State*, 122 Ala. 85, 26 South. 236, speaking of charges touching the credibility of witnesses, quoted *Roberts v. State*, 122 Ala. 47, 25 South. 238, which dealt with similar charges, as follows: "Charges 5 and 6, requested by defendant, are not offensive to the rule against giving undue prominence to particular parts of the evidence, but come within the exception to that rule as laid down in the cases of *Harris v. State*, 96 Ala. 24 [11 South. 255], and *Smith v. State*, 88 Ala. 73 [7 South. 52]." In the last-named case of *Smith v. State* it was said that there was no desire to qualify the general principle that the jury should not be instructed to consider certain parts of testimony. A limited, exceptional class of cases was, however, recognized as not falling within the rule, and among them the case in which there is testimony of threats, communicated or uncommunicated, made by the person on whom injury was inflicted. We are not disposed at this time to inquire into the merit of the distinction drawn. It is sufficient in this case to say that the charges requested by the defendant, and numbered 3, 6, 8, 9, and 10, were properly refused for one or the other, or both, the reasons indicated. The case in hand illustrates the vice of such charges. In successive charges the court is required to say to the jury that there is evidence of threats made by the deceased and communicated to the defendant, that the defendant was in imminent peril of life or limb, that he could not retreat without increasing his peril, that he was free from fault in bringing on the difficulty, and that he acted in self-defense. If these charges were not properly refused, then they might have been appropriately combined in one charge. At any rate, the jury would be expected to read them in connection with one another. Than such a charge, or such a series of charges, one or a series more palpably misleading and argumentative can hardly be conceived.

Charge 4, if not otherwise objectionable,

was properly refused for that it pretermits the defendant's duty to retreat. The ambiguous statement that "he had a right to protect himself by taking the life of Jeffie Hughey if such protection could not otherwise be secured" cannot be made to do service for a statement of the defendant's unequivocal duty to retreat unless to do so would increase his peril.

Charge 7 predicates defendant's freedom from fault in bringing on the difficulty upon the fact that he approached the deceased in a peaceable manner, and in a peaceable manner asked him if he knew anything about the letter which had been offered in evidence. Defendant offered evidence to show numerous threats made by the deceased against him, of which he had been informed. Bad blood not only existed between the defendant and the deceased, but the letter, the divorce of defendant and the sister of deceased, and some other facts appearing in the record, go to show that the feeling included the families of both. Under these conditions the act of the defendant, in approaching the deceased on that subject, without regard to his mere manner, was capable of being construed as a threat. It was an implied assertion that the defendant at least suspected that the deceased was responsible in some way for an offensive anonymous letter. Such an assertion, such an uncovering of an old sore, however disguised under a peaceable manner, was calculated to arouse anger and resentment, and it was for the jury to say whether it constituted fault in bringing on the difficulty. The doctrine that the plea of self-defense is not available to a defendant who is not free from fault in the creation of a necessity to take life is "too important, too conservative of human life and of good order, to allow it to be frittered away." *Johnson v. State*, 102 Ala. 19, 16 South. 105. And in *McQueen v. State*, 103 Ala. 17, 15 South. 825, it is said that "the law admits of no qualification of this requirement. The defendant must have been free from all fault or wrongdoing on his part, which had the effect to provoke or bring on the difficulty." *Crawford v. State*, 112 Ala. 1, 21 South. 214. The charge invaded the province of the jury, was misleading, and was properly refused.

Charges 13, 14, 16, and 17 hypothesized substantially the same facts as charge 7 in respect to the manner in which the defendant approached deceased, and added, "and that the defendant was without fault in bringing on the difficulty." These charges referred the issue of defendant's fault to the jury, but gave undue prominence to the facts hypothesized in the charges, pretermitted the history of the previous relations between defendant and deceased as illustrating the purpose of the defendant, and were calculated to mislead the jury to the conclusion that on consideration of the facts stated in the charges, without more, they were authorized

to find that the defendant was altogether free from fault.

It hardly needs to be argued that a charge is an argument, and not a statement of law, which asserts that "no exact definition of an overt act can be given. It may be a motion, a gesture, conduct or demonstration, or anything else which evidences reasonably a present design to take the life of the defendant, or to do him great bodily harm. Trifles, light as air when viewed alone, may become fraught with deadly meaning when viewed in connection with all the preceding facts disclosed and with all the evidence in the case." Charge 11 was palpably bad.

It is the settled law of this jurisdiction that there is no presumption in respect to a defendant's character being good or bad. *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662; *Little v. State*, 58 Ala. 265; *Sullivan v. State*, 102 Ala. 135, 15 South. 264, 48 Am. St. Rep. 22. We are not inclined, for any reasons there appearing, to follow the adjudications of other states contrariwise. There was no error in the refusal of charge 12.

The defendant requested, and the court refused, charge 15, as follows: "I charge you, gentlemen of the jury, that if you believe from the evidence that Jeffie Hughey was a man whose general character was that of a violent, turbulent, and bloodthirsty man, that if you believe from the evidence that Jeffie Hughey made a hostile demonstration towards the defendant, I charge you that the defendant had a right to act more promptly to protect himself from injury than if such hostile demonstration had been made by a man who was not of general bad character for violence, turbulence, or bloodthirstiness." Appellant cited *Roberts v. State*, supra, and *Karr v. State*, 100 Ala. 6, 14 South. 851, 46 Am. St. Rep. 17, as authority in support of his argument that there was error in the refusal of this charge. These cases do assert the general proposition that, when one is assailed by another whose character is bad for violence, turbulence, and bloodthirstiness, more prompt and decisive means of defense are justifiable than if the assailant is of peaceable disposition; but they do not affirm the propriety of the charge in question in a case involving conflicting inferences as to who was the aggressor. If, as the state's evidence tended to show, the defendant was the aggressor, he could not justify his aggression, whether prompt or otherwise, by invoking consideration of responsive hostile demonstration on the part of deceased. This aspect of the case is left out of view by the charge, and for this reason it was misleading and properly refused.

We agree with counsel representing appellant that charge 5 was properly refused.

In the criticisms we have made of the several charges, we must not be understood as

affirming that they are free from all other respects.

The judgment of the trial court must be affirmed.

DOWDELL, C. J., and ANDERSON  
McCLELLAN, JJ., concur.

#### IRVIN v. STROTHER.

(Supreme Court of Alabama. June 30,  
Rehearing Denied Dec. 16, 1909.)

##### 1. WORK AND LABOR (§ 2\*)—IMPLIED PROMISE.

The law implies a promise to pay a and reasonable compensation for services rendered to another which are knowingly accepted. [Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 1; Dec. Dig. § 2.\*]

##### 2. ATTORNEY AND CLIENT (§ 133\*)—COMPELLED ACTION OF ATTORNEY—NECESSITY OF CONTRACT OF EMPLOYMENT.

An attorney's claim for services must be based on a contract of employment, express or implied, made with the person sought to be charged as his authorized agent.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 317; Dec. Dig. § 133.\*]

##### 3. ATTORNEY AND CLIENT (§ 167\*)—COMPELLED ACTION OF ATTORNEY—QUESTIONS FOR JURY.

In an action by an attorney for compensation for services in conducting litigation, the question for the jury whether plaintiff was liable to defendant for compensation, and whether defendant understood that he was so doing.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 374; Dec. Dig. § 167.\*]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Action by J. W. Strother against J. W. Irvin and another. From a judgment in favor of plaintiff against defendant Irvin, and defendant appeals. Reversed.

The charge given for the plaintiff versus the affirmative charge to find against J. W. Irvin. The charge refused to Irvin was the affirmative charge to find for the defendant.

P. O. Stephens and Bulger & Ryland, appellants. George A. Sorrell and J. W. Strother, for appellee.

DENSON, J. This record reveals the following state of facts, briefly stated: The Legislature passed an act in 1903, establishing a dispensary in Alexander City, which prohibited any person from engaging in the saloon business in that town after the 1st day of January, 1904. W. P. Truitt, J. W. Jackson, and John Irvin were saloon keepers in the town at the time the act was passed. Truitt and Jackson employed two attorneys to test the constitutionality of the act, making an express contract with them for a fee of \$300, to be paid to them if they succeeded in having the act declared invalid. It was understood and agreed that the proceeding to test the validity of the act should be carried on in the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

name of John Irvin, though he was not bound for the fee to the attorneys. "The wholesale liquor men" furnished the \$300, and the amount was placed in the hands of E. P. Duncan, to be delivered to the attorneys if the courts declared the act invalid. In January, 1904, in pursuance of the agreement, Irvin applied for license to sell liquor in Alexander City. On the day he appeared in Dadeville to present his application to the probate judge for the license, one of the attorneys who had been employed to test the validity of the act asked the plaintiff in this cause to come to his office at 1 o'clock with a view to joining him in Irvin's case. Plaintiff went to the attorney's office, and according to plaintiff's testimony the attorney informed him that Irvin had filed his application with the probate judge for license to retail liquors in Alexander City, for the purpose of testing the dispensary law; that the application was set for hearing at 2 o'clock; and that, if the license was refused, the purpose was to commence mandamus proceedings for the purpose of testing the law. He further said to plaintiff, "If we can win the suit we can get a fee of \$500," and plaintiff told the attorney he would join him in the case on those terms. Soon afterwards Irvin went into the office where plaintiff and the other attorney were, and the attorney stated to Irvin that plaintiff had agreed to join him (the attorney) in the case; and Irvin said that he was glad of it, that he was glad to have plaintiff in the suit. The proof shows that from that time on plaintiff went forward with the litigation, conducting same with no assistance from others, to a successful termination.

The plaintiff testified that he never had any agreement with Duncan about a fee in the case, that Duncan did not agree to pay him any fee, but that he had been informed that "Duncan was to do the paying in the case." He further testified that he never had any agreement with Irvin about the amount of the fee in the case, nor any agreement with him as to plaintiff's employment in the case, but that Irvin conferred with him about the case, all along during its progress, and would, when in Dadeville, come to his office for that purpose, and that Irvin knew plaintiff was representing him in the case. One of the attorneys engaged by Truitt and Jackson testified that he employed plaintiff in the case; that Irvin had "nothing to do with employing the lawyers, nor with paying any part of their fee"; that he (witness) made the trade with plaintiff to come into the case, and employed him to "come in and assist him and his associate," and that Irvin was not present when he engaged plaintiff; that he afterwards told Irvin that, should he come to Dadeville and not find witness at home, he could call on plaintiff, who would advise him. He further testified that the money

had been paid over to him by Duncan, and that of it he had \$100 that belonged to "somebody." Irvin testified that he had nothing to do with employing the attorneys in the case; that witness was informed by one of the attorneys that he had employed the plaintiff, and was told by that attorney that he could consult with plaintiff, should he go to Dadeville and not find him (said attorney) there; and that witness did so upon one occasion.

The action is in assumpsit, upon the common counts, by the plaintiff (appellee here) against E. P. Duncan and John Irvin, to recover for services as an attorney claimed to have been rendered at the request of the defendants. There were verdict and judgment in favor of the defendant Duncan, and also in favor of the plaintiff against the defendant Irvin; the court having given the general charge with hypothesis, at the request of plaintiff in writing, against Irvin. From the judgment, Irvin appealed, and here assigns for error the giving of the charge against him.

It is a settled principle of law "that an attorney's claim for professional services against persons *sui juris* must rest upon a contract of employment, express or implied, made with the person sought to be charged or his authorized agent." 4 Cyc. 984; 3 Am. & Eng. Ency. Law, 435; *Humes v. Decatur Land Co.*, 98 Ala. 461, 13 South. 368; *Milligan & Son v. Ala. Fertilizer Co.*, 89 Ala. 322, 7 South. 650; *Grimball v. Cruse*, 70 Ala. 544; *Tisdale v. Troy*, 152 Ala. 566, 44 South. 601. There is no pretense in this case that Irvin made any express contract of employment with plaintiff, nor that he had authorized any one to do so for him; nor does the evidence tend to show that he knew what was said between plaintiff and the attorney who invited him to come into the case. But we presume the theory of the plaintiff (he has no brief) to be that he was entitled to recover upon the principle that the law will imply a promise to pay a fair and reasonable compensation for services, rendered to another, which are knowingly accepted. *McFarland v. Dawson*, 125 Ala. 428, 29 South. 327. This is a correct principle, and would probably be of easy application if the attorney who invited plaintiff into the case had been in the employment of the defendant; but, as we have seen, he was not. He was acting in the case under an express contract of employment with others. And in this state of the case it was not within the power of that attorney to raise up a privity between plaintiff and Irvin; nor do we think it could be asserted, as a matter of law, that what occurred between the attorney and the plaintiff created such privity.

But we find that the plaintiff testified (in addition to the evidence above recited) that, on the morning of the day of his conversation with the attorney at the latter's of-

fice, Irvin spoke to plaintiff, and asked him if he would be in his office during the day, and that, upon his replying in the affirmative, Irvin said, "I might want to see you during the day." This—taken in connection with Irvin's remark, when informed that plaintiff had agreed to join the attorney in the case, and with the testimony of plaintiff to the effect that Irvin knew plaintiff was representing him—was sufficient, in our opinion, to make it a question for the jury, under proper instructions by the court, as to whether the plaintiff was looking to Irvin, and to Irvin alone, for compensation, and whether Irvin understood that he was so doing; and if the jury should find these propositions against the defendant then the plaintiff might recover. *Humes v. Decatur, etc., Co.*, 98 Ala. 461, 13 South. 368; 3 Am. & Eng. Ency. Law, 441.

The views above expressed show that the circuit court erred in giving the charge for the plaintiff against Irvin, but committed no error in refusing the charge requested by Irvin.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

McCALLA et al. v. LOUISVILLE & N. R. CO.  
(Supreme Court of Alabama. Nov. 25, 1909.)

1. LIMITATION OF ACTIONS (§ 55\*)—STATUTE OF LIMITATIONS—APPLICABILITY TO PARTICULAR ACTIONS—TORTS IN GENERAL.

Where defendant's blasting operations caused rock to fall into a stream where plaintiffs had contracted to erect a bridge pier for defendant, the statute limiting the time for bringing suit for the injury ran from the time the rock fell.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 303; Dec. Dig. § 55.\*]

2. LIMITATION OF ACTIONS (§ 55\*)—STATUTE OF LIMITATIONS—APPLICABILITY TO PARTICULAR ACTIONS—EVIDENCE.

Where defendant's blasting caused rock to fall into a stream where plaintiffs were to erect a pier for defendant, the running of the statute of limitations to a suit for the injury was not postponed until plaintiffs could demonstrate their loss by completing their contract under conditions of increased difficulty and cost, since the increase in cost of construction from the injury was not the measure of plaintiffs' damages, but only an element in the computation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 303; Dec. Dig. § 55.\*]

3. NUISANCE (§ 4\*)—PRIVATE NUISANCE—ACTIONS FOR DAMAGES—GROUNDS OF ACTION.

No action can be maintained for a private nuisance, except as it affects the comfortable enjoyment of private property.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 26; Dec. Dig. § 4.\*]

4. NUISANCE (§ 3\*)—NATURE AND ELEMENTS—DISTINCTION BETWEEN "NUISANCE" AND "TORT."

Where defendant by blasting caused rock to fall into a stream where plaintiffs were to erect a pier for defendant, the injury was not a nuisance, since the term "nuisance" involves the idea of continuity or recurrence of the acts causing the injury, while a "tort," constituting an invasion of personal or contract right, extends its force in one act, though the injurious consequences may be of long duration.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 15; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734; vol. 8, pp. 7007-7009, 7817.]

Appeal from County Court, Tuscaloosa County; H. B. Foster, Judge.

Action by W. A. McCalla and others against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

London & Fitts, for appellants. Oliver, Verner & Rice, for appellee.

SAYRE, J. The railroad company contracted with a certain firm of railroad contractors for the construction of the Skelton Creek extension of its road. The contractors sublet a part of the work to plaintiffs, including therein the construction of a concrete pier in the bed of the Locust fork of the Warrior river. The subcontractors contracted with reference to the then condition of the bed of the river. Thereafter the defendant company caused a mass of rock to be blasted from a bluff overhanging the river, so that the detached rock fell upon the proposed site of the pier, greatly enhancing the cost of preparing the necessary foundation. This was in April or May, 1906. Plaintiffs began their efforts to secure a foundation for the pier in the latter days of August thereafter. The pier was gotten above low water in January, 1907. During February it was raised 30 and odd feet above the water. In April, 1907, it was finished. Suit was brought March 23, 1908. At the conclusion of the evidence the trial court excluded the plaintiffs' evidence and gave the general affirmative charge for the defendant. The arguments of counsel on either side indicate that this was done on the theory that plaintiffs' evidence established the defendant's plea of the statute of limitation of one year. We will so consider the case.

Let it be conceded that the relation of the railroad company to the plaintiffs and to the property was such that a cause of action in favor of the plaintiffs would arise out of the defendant's act at some time. When did it arise, and when did the statute begin to run? Appellants contend that it began to run in April, 1907, assigning its beginning to that time for the reason that then the additional cost of building the pier, imposed by the act of defendant, was first ascertainable. Defendant, for its part, contends that the cause of action arose upon the act of blasting the rock into the river. That a cause of action accrued to plaintiffs upon the performance of the act complained of does not seem to admit

of serious question. Then their right was invaded. Then the injury became certain and was finished. There was no contingency, upon the happening or failure of which the right of action depended. That was the malfeasance from which the statute must date. *Snedicor v. Davis*, 17 Ala. 472; *Governor v. Gordon*, 15 Ala. 72; *Mardis v. Shackelford*, 4 Ala. 493. No sufficient reason is suggested why the running of the statute should be postponed to such time as the plaintiffs could demonstrate their loss and damage by completing their contract under the conditions of increased difficulty and cost. That would make the operation of the statute to depend upon the option of the plaintiffs, and upon their ability to prove their damage, rather than upon the fact that there has been an invasion of their right. But in truth the quantum of plaintiffs' damage was no more capable of exact ascertainment after the completion of the pier than it was immediately after the rock was thrown into the river. The difference in the cost of constructing the pier under the conditions existing before and after that event would be, not indeed the measure of plaintiffs' damages, but an element necessarily entering into the computation. In other words, whether the suit had been brought before or after the construction of the pier, one member of the comparison must have been proven by inference and opinion, and without the aid of that practical demonstration in experience which appellants urge as a condition precedent to the running of the statute. The reason urged in behalf of appellants' contention is not only insufficient to work an exception to the general rule that the running of the statute is not delayed until plaintiff can get sufficient evidence to maintain his action, but it fails as a mere rule of convenience.

Appellants rely upon a class of cases in which the cause of action has been ruled to arise when the wrong results in an interference with the utility or enjoyment of property. They cite *Roundtree v. Brantley*, 84 Ala. 544, 73 Am. Dec. 470, *Polly v. McCall*, 37 Ala. 29, *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731, *Eagle & Phoenix Mfg. Co. v. Gibson*, 62 Ala. 369, *Huntsville v. Ewing*, 116 Ala. 576, 22 South. 984, *Sloss-Sheffield Co. v. Sampson*, 48 South. 493, and *West Pratt Coal Co. v. Dorman*, 49 South. 849, from among cases decided in this court. Those were all cases in which the damages claimed arose out of wrongs which were nuisances. In the last named of them we quoted definitions of nuisance from our antecedent cases and from *Blackstone's Commentaries*. In line with those definitions it may further be said that, strictly speaking, no action can be maintained for a private nuisance, except as it affects the comfortable enjoyment of private property. *Ellis v. Kansas City, etc., R. R. Co.*, 63 Mo. 131, 21 Am. Rep. 436; *Kavanagh v. Barber*,

131 N. Y. 211, 30 N. E. 235; 15 L. R. A. 689. Certainly no definition of nuisance can be extended to the inclusion of everything done to the injury of rights of another not connected with lands, tenements, and hereditaments. There is a wide difference between tort, constituting an invasion of personal or contract right, and nuisance. The former expends its force in one act, although injurious consequences may be of lasting duration. A nuisance involves the idea of continuity or recurrence. *S. & N. Ala. R. R. Co. v. McLen-don*, 63 Ala. 266. Clearly the wrong of which plaintiffs complain cannot be referred to that class of cases which they cite. As well we might classify an assault and battery as a nuisance.

It results, as we think, that appellants' right of action accrued, and the statute of limitations commenced to run, when the defendant interfered with the exercise of their right to execute their contract by causing the rock to be thrown into the river. That was more than one year before action brought. The judgment of the court below is therefore affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

#### REVENUE & ROAD COM'RS OF MOBILE COUNTY v. STATE ex rel. CAMPBELL.

(Supreme Court of Alabama. Dec. 14, 1909.)

##### 1. STATUTES (§ 286\*)—ENACTMENT—EVIDENCE—LEGISLATIVE JOURNALS.

On the question whether an act was passed, the original journal of the Senate, which is the official journal, will prevail over the printed journal.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 386; Dec. Dig. § 286.\*]

##### 2. STATUTES (§ 110½\*) — TITLES AND SUBJECTS.

The subject-matter of Code 1907, § 703, subd. "G," is, as required by Const. 1901, § 45, expressed in the title of Act Aug. 15, 1907 (Acts 1907, p. 893), of which it is section 3, subd. "G"—the title of such act being "An act to amend" certain sections of, including 3 and 4, and to add certain other sections to, an act entitled "An act to amend, reconstruct and provide for the enforcement of the laws relating to public health," approved October 9, 1903; said act of 1903 (Acts 1903, p. 500), by section 3, giving the state board of health general powers with regard to the enforcement of the laws relating to public health, and the right to inspect all public schools, hospitals, asylums, jails, poor-houses, etc.; section 4 authorizing the county boards to supervise the administration of the health laws of the state in their respective counties, together with a number of similar powers, including the power and duty to exercise special supervision over the sanitary conditions of public schools, hospitals, opera houses, theaters, asylums, courthouses, jails, workhouses, prisons, markets, public dairies, and slaughter pens or houses, to elect a health officer, and also to elect a health officer for cities, whose salary shall be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.



fixed by the city; said Acts 1907, p. 894, § 3, amending section 4 of said act of 1903 by incorporating therein subdivision "G," authorizing said county boards of health "to elect physicians to attend to the inmates of the county poorhouse and jail, and to fix the term of office of such physicians, \* \* \* provided \* \* \* that the court of county commissioners or board of revenue shall fix fair salaries for such physicians; and the matters brought in by the amendment being within the spirit of, and not foreign to, the original act.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 110½.\*]

### 3. MANDAMUS (§ 73\*)—COUNTY OFFICERS.

Mandamus is the proper remedy to compel county revenue and road commissioners to comply with Code 1907, § 703, subd. "G," providing that they shall fix a fair salary for one who has been elected by the county board of health as physician to attend the inmates of the poorhouse and jail of the county; it not being sought to control their discretion as to the amount of salary, but only to compel them to act.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 73.\*]

### 4. STATUTES (§ 140\*)—AMENDMENT.

Act Aug. 15, 1907 (Acts 1907, p. 893), though entitled "An act to amend" certain sections, including section 8, of Act Oct. 9, 1903 (Acts 1903, p. 504), does not amend such section; it containing no provision amendatory of it.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 140.\*]

### 5. QUO WARRANTO (§ 1\*)—REQUIRING COUNTY OFFICERS TO ACT.

It being sought only to require county revenue and road commissioners to act under Code 1907, § 703, subd. "G," providing that they shall fix the salary when a physician to attend the inmates of the poorhouse and jail has been elected by the county board of health, and not to determine the authority of such commissioners to appoint a person to such office, or the right of any one appointed by them to hold the office, quo warranto is not the proper remedy, though, after such commissioners had refused to act on a petition presented to them to so act, they amended their previous minutes of the election of another person as county physician, so as to state he was elected to attend the inmates of the poorhouse and jail.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 1; Dec. Dig. § 1.\*]

### 6. PAUPERS (§ 6\*)—OFFICERS—FIXING SALARY—CONDITION PRECEDENT.

The law not requiring the physician, elected by the county board of health to attend the inmates of the county poorhouse and jail, to notify the county road and revenue commissioners of his acceptance of the office before they shall fix his salary, under Code 1907, § 703, subd. "G," the fact that they had not been so notified was no ground for their refusal to act.

[Ed. Note.—For other cases, see Paupers, Dec. Dig. § 6.\*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Mandamus, on the relation of Douglas G. Campbell, against the Revenue and Road Commissioners of Mobile County. From a judgment granting a peremptory writ, defendants appeal. Affirmed.

Fitts, Leigh & Leigh, for appellants. Gregory L. & H. T. Smith, for appellee.

SIMPSON, J. This appeal is from a judgment of the circuit court granting a peremptory writ of mandamus requiring the revenue and road commissioners of Mobile county to fix a fair salary for Douglas G. Campbell, who had been by the board of health of said county elected as physician to attend the inmates of the poorhouse and jail of said county.

On the 21st day of December, 1908, the petition of the board of health was presented to said revenue and road commissioners, praying the fixing of said salary. Previous thereto, to wit, on November 16, 1908, said revenue and road commissioners had elected W. G. Ward as "county physician" of said county, and on said 21st day of December, 1908, said revenue and road commissioners amended their previous minute so as to read as follows: "Dr. W. G. Ward, a physician of this county, is hereby elected to attend the inmates of the county poorhouse and the jail, and to perform such other duties as this board may impose, for the term of two years, at a salary of \$900 per annum, payable monthly out of the county treasury." The question at issue is whether or not the law makes it the duty of said revenue and road commissioners to fix the salary of the physician elected by the board of health of said county.

The claim of the appellants, who were the respondents below, is that, under the local act of January 31, 1856 (Acts 1855-56, p. 105), which authorized the establishment of the poorhouse and authorized said respondents "to adopt and put in force such rules and regulations for the management of said asylum for the poor \* \* \* as to them may seem most conducive to the good government and comfort and health of said pauper inmates of the same," the duty and responsibility rests upon said respondents to select the physician to attend said inmates, and it is insisted, first, that subdivision "G" of section 105 of the Code of 1907, being a part of the act of August 15, 1907 (Acts 1907, p. 893, § 3), which was passed after the act adopting the Code, and was only inserted in said Code by the commissioner, must stand upon the validity of the original act, and that said act was not legally passed, because the printed journal of the Senate shows, not that said act was "passed," but only that it was read a third time "and placed on the calendar." Senate Journal 1907, vol. 2, pp. 2611, 2613. It is true that the printed journal so reads; but an examination of the original journal, filed in the office of the Secretary of State, shows that this is an error, and should read that said act was "passed." Original Senate Journal 1907, vol. 5, p. 2858. The original journal is the official record and must prevail.

It is insisted, second, that the subject-mat-

ter of said subdivision "G" (which corresponds with subdivision "G" of section 3 of said act of August 15, 1907) is not expressed in the title of said act, in accordance with section 45 of the Constitution of 1901. The title of said act is: "To amend sections 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 16, 17, and 19 of, and to add sections 9½, 16½, 17½, 24, and 25 to, an act entitled 'An act to amend, re-construct, and provide for the enforcement of the laws relating to public health,' approved October 9, 1903." Section 3 of said act of 1903 gives the state board of health general powers with regard to the enforcement of the laws relating to public health, and gives said board the right to inspect all public schools, hospitals, asylums, jails, poor-houses, etc.; and section 4 authorizes the county boards to supervise the administration of the health laws of the state in their respective counties, together with a number of similar powers, including the power and duty to exercise "special supervision over the sanitary conditions of public schools, hospitals, opera houses, theaters, and asylums, courthouses, jails, workhouses, prisons, markets, public dairies, and slaughter pens or houses," to elect a health officer, and also to elect a health officer for cities, whose salary shall be fixed by the city. Acts 1903, p. 500. Section 3 of the act of August 15, 1907, amends said section 4, among other things, by incorporating therein subdivision "G," authorizing said county boards of health "to elect physicians to attend to the inmates of the county poorhouse and jail, and to fix the term of office of such physicians, \* \* \* provided \* \* \* that the court of county commissioners or board of revenue shall fix fair salaries for such physicians," etc.

It is unnecessary to repeat the numerous decisions of this court as to the objects of this provision of our Constitution, to the effect that much must be left to the discretion of the Legislature in framing the titles of its acts, provided that the same are not deceptive or misleading; that the requirement is not to be so exactly enforced as to cripple legislation; that the title may be very general, and need not specify every clause of the statute, but the requirement of the Constitution is met if they are all referable and cognate to the subject expressed; and, "when the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is included in and authorized by it." *Balentyne v. Wickersham*, 75 Ala. 533; *Ex parte James Gayles*, 108 Ala. 514, 516, 19 South. 12; *Lindsay v. United States Savings & Loan Ass'n*, 120 Ala. 156, 176, 24 South. 171, 42 L. R. A. 783; *Ex parte Mayor and Aldermen of Birmingham*, 116 Ala. 186, 189, 22 South. 454.

We have held that "an act to create a new

convict system," and to provide for its government, etc., could not provide what sentence the courts shall impose in certain cases, because that is not a part of the convict system (*Brown v. State*, 115 Ala. 74, 78, 22 South. 458 et seq.); also that "an act to regulate the fine and forfeiture fund, \* \* \* and to better provide for the payment of claims against the same," could not contain a provision requiring the county to appropriate out of its general fund a certain sum to the fine and forfeiture fund, because the fine and forfeiture fund is a recognized, distinct, and separate fund, and the title did not give any intimation that the general fund of the county was to be invaded (*Sanders v. Court of County Com'rs*, 117 Ala. 543, 546, 547, 23 South. 788); and also that "an act to provide for the organization, incorporation, government, and regulation, of cities and towns, and to define" their rights, etc., could not legally include a provision requiring the courts of county commissioners to pay over to the cities one-half the amounts collected on road and bridge taxes on property located within the municipality, because the title of the act related only to the organization, etc., of cities and towns, and said provision related solely to the duties of boards of revenue of the counties. *State v. Miller*, 48 South. 496. The title of the act in question being simply to amend certain sections of a previous act, a reference to said previous act is necessary in order to ascertain what were the subjects treated of therein and whether the section objected to is so foreign to the provisions of that act as to render its inclusion a deception or surprise to the members of the Legislature or to the people.

Section 4 of said original act provided (as has been stated) that the salaries of the health officers, selected by the board, shall be fixed by the respective cities; and section 8 of said act provides that the salary of the county health officers selected by the board shall be fixed by the county commissioners or boards of revenue, and fixes a minimum salary, according to the population of the county. While the original act does not specifically mention poorhouses, except in providing for inspection by the state board, yet it does mention jails, and the general provisions of the act show an intention to confer upon the county boards of health a general supervision of all the public institutions of the county. An amendatory act, then, it might naturally be supposed, would include another county institution, which, while not within the letter, is within the spirit, of the original act. In looking after said institutions and supervising their sanitary conditions, the further provision is naturally suggested of having the health officer or some other competent physician to attend the inmates, and thus detect the first appearance of infectious diseases; and as the act had already provided that the health officer's sala-

ry should be fixed by the board of revenue, it does not seem foreign to the act, which it is proposed to amend, to provide for the salary of the physician who is to attend said inmates in the same way. These provisions differentiate the act in question from the acts referred to in cases cited, in which a different conclusion was reached, and we hold that subdivision "G" of section 3 of the act of August 15, 1907, is not violative of section 45 of the Constitution of 1901.

It is unnecessary to decide whether or not, under the local act of 1836, the board of revenue might, in the exercise of its general powers, select a physician to attend the inmates of the jail and poorhouse. That act does not specifically confer that power nor require that duty; hence there is no necessary repugnance between that act and the one in question, so it is not necessary to decide whether or not that act is superseded by the act of 1907.

There is no force in the contention that mandamus is not the proper remedy, as the fixing of a fair salary is discretionary. It is not sought to control or direct their discretion but merely to require the board to act. It is left to their discretion what salary to fix, and in exercising their discretion they can consider all the circumstances, the services to be rendered, whether or not the same physician is receiving a salary as county health officer, etc.

It seems to have been the intention of the Legislature to make some change in section 8, which provides for the payment of the salary of the county health officer, as that is mentioned in the title among the sections to be amended; but there is no provision in the act amending section 8, so it remains.

There is no force in the suggestion that quo warranto, and not mandamus, is the proper remedy, because the office in question is now held by Dr. Ward, and the effect of this proceeding would be to oust him. The petition does not seek to oust Dr. Ward, and he does not claim to hold the office. Dr. Ward was elected by the board of revenue and road commissioners "county physician," and after the petition in this case had been presented, and the board of revenue had refused to act on it, the previous minute was amended so as to state that he was elected to attend the inmates of the poorhouse and jail.

The plain mandate of the statute is that, when the physician is elected by the board of health, the board of revenue shall fix the salary; and it is only sought to require them to act under that requirement. The right of Dr. Ward to hold the office to which he was elected, or the question as to whether there is any authority of law for his appointment, is not involved.

The law does not require the physician elected by the county board of health to no-

tify the board of revenue of his acceptance of the office before the salary is fixed; hence it is no reason for the refusal of the board to act that they had not been so notified.

The judgment of the court is affirmed.  
Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

## COX v. BIRMINGHAM RY., LIGHT & POWER CO.

(Supreme Court of Alabama. Nov. 25, 1909.)

### 1. DAMAGES (§ 87\*)—PUNITIVE DAMAGES—DISCRETION OF JURY.

The jury's discretion in awarding punitive damages is not arbitrary, but is a sound legal discretion, to be exercised with a view to the enormity of the wrong as shown by the circumstances, and the enormity of the wrong cannot be determined merely by the consequences of the wrongful act.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 188-192; Dec. Dig. § 87.\*]

### 2. NEW TRIAL (§ 76\*)—GROUNDS—EXCESSIVE DAMAGES—PUNITIVE DAMAGES.

The jury's abuse of its discretion in awarding punitive damages may be corrected by a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 153; Dec. Dig. § 76.\*]

### 3. APPEAL AND ERROR (§ 1015\*)—REVIEW—GRANT OF NEW TRIAL.

In determining whether the trial court properly set aside the verdict for excessive damages, the question for determination is not whether the Supreme Court would have so ruled, sitting as a trial court, but whether the trial court, with its superior opportunities for determining the question, erred in its ruling.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3873; Dec. Dig. § 1015.\*]

Appeal from Circuit Court, Jefferson County; John H. Miller, Special Judge.

Action by S. E. Cox, as administratrix, against the Birmingham Railway, Light & Power Company. From an order setting aside a verdict for plaintiff and ordering a new trial, plaintiff appeals. Affirmed.

Bowman, Harsh & Beddow, for appellant. Tillman, Grubb, Bradley & Morrow, for appellee.

DOWDELL, C. J. This is an action for damages for the wrongful killing of the plaintiff's intestate. The case was tried on the twenty-fourth, twenty-fifth, and twenty-sixth counts of the complaint. Intentional or wanton wrong is alleged in the twenty-fourth count, while the twenty-fifth and twenty-sixth counts are based on simple negligence. In each of these counts the damages claimed are laid in the sum of \$30,000. A verdict for the plaintiff was returned by the jury for \$15,000. This verdict the trial court on motion of the defendant set aside and ordered a new trial; and it is from this order

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the record is based on the order appealed from, setting aside the verdict and granting the new trial.

Among other stated grounds of the motion for a new trial was that of the verdict's being excessive. This is one of two grounds upon which, according to the assumption of counsel for appellant, the trial court based its conclusions in granting a new trial; counsel insisting that the ruling was reversible error. If, for the sake of argument, it should be conceded that the verdict of the jury in the present case was referable only to the wanton count of the complaint, which authorized the imposition of exemplary or punitive damages, it does not follow that in the assessment of such damages the jury is to be left to an unbridled and arbitrary power, without any guide in law or beyond the supervision and control of the court. We find the principle well stated in the recent case of *Coleman v. Pepper*, 49 South. 310, where it was said: "Punitive damages, being apart from compensation, are not recoverable as a matter of right. Their imposition is discretionary with the jury. And this discretion is not an unbridled or arbitrary one, but a legal, sound, and honest discretion; and after instructing the jury in respect to the elements which must be found to exist, to warrant the assessment of such damages, in submitting to the jury the question of imposing punitive damages, the court should always safeguard the submission with such instructions as that the jury will not be misguided, but will be held mindful, in fixing such damages, that they should act with due regard to the enormity or not of the wrong, and to the necessity of preventing similar wrongs, and that, if such damages are imposed, they should be in such an amount (much or little) as, under all the circumstances attending the commission of the wrong, the exigencies of the case, in the sound judgment and discretion of the jury, may demand, in no event to exceed the amount claimed in the complaint"—citing authorities in support of the principles stated.

It seems, therefore, to be well settled that in the imposition of punitive damages the discretion of the jury is not unlimited, but qualified. It must be sound and legal, and be exercised with due regard to attendant circumstances in the commission of the wrong complained of, its enormity, etc. And the enormity of the wrong is not to be determined alone by the consequences of the act,

ally done, or otherwise attended with circumstances of aggravation, may be accorded their due weight; hence the mere fact that death results does not alone and of itself determine the enormity of the wrong. As to the measurement of damages in such a case, it was said in *Richmond & Danville Railroad Co. v. Freeman*, 97 Ala. 294, 11 South. 800, that "the admeasurement of the recovery must be by reference alone to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act or in the omission to act as required by the dictates of care and prudence, and without reference to or consideration of the loss or injury the act or omission may occasion to the living." Since the discretion to be exercised by the jury in the assessment of the damages measured by the degree of culpability of the act, must be a sound and reasonable one, it necessarily follows that any abuse of such discretion is subject to correction by the court, on motion to set aside the verdict and grant a new trial.

In reviewing the action of the trial court in setting aside the verdict and granting a new trial upon the ground that the verdict was excessive, we can see no good reason for not applying the same rule of presumptions to the trial court's action as was laid down in *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, touching other grounds there mentioned. In the case under consideration the evidence without dispute showed that the injury was not intentionally nor wrongfully inflicted. As to wantonness, while the evidence might have been open to conflicting influences, it cannot be said, as against the ruling of the trial court on the motion, that it plainly and palpably showed such a degree of reckless disregard of human life as to support the verdict for the amount returned by the jury. The question is, not what this court might have ruled, sitting as a trial court, but can we say that the trial court, with superior and better opportunities for determining the question, erred in its ruling? This we are not prepared to say, under all the facts and circumstances in the present case.

The ground of the motion considered by us being conclusive of the appeal, it is unnecessary to notice other grounds.

The judgment will be affirmed.

Affirmed.

ANDERSON, SAYRE, and EVANS, JJ., concur.

## STATE v. SPIGENER et al. (No. 14,286.)

(Supreme Court of Mississippi. Jan. 17, 1910.)

ASSAULT AND BATTERY (§ 77\*)—INDICTMENT—  
"COWHIDE, WHIP, OR STICK."

An indictment charging that defendant assaulted and beat C. with "leather bridle reins," while armed with a pistol, with intent to intimidate C., and prevent him from defending himself, while not good as one for the offense denounced by Code 1906, § 1044, declaring a penalty for one who, under such circumstances, assaults and beats another with a "cowhide, whip, or stick," is good as one for common assault and battery.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 106; Dec. Dig. § 77.\*]

Appeal from Circuit Court, Quitman County; Sam C. Cook, Judge.

Jeff Spigener and others were indicted, and from a judgment sustaining a demurrer to the indictment, the State appeals. Reversed and remanded.

Geo. Butler, Asst. Atty. Gen. for the State. Brewer & Watkins, for appellees.

WHITFIELD, C. J. The appellees were indicted under section 1044 of the Code of 1906, which is in the following words:

"1044 (968). The Same; With Cowhide, Whip, etc.—If any person assault and beat another with a cowhide, whip, or stick, having at the time in his possession a pistol, or other deadly weapon, with intent to intimidate the person assaulted, and prevent him from defending himself, he shall, on conviction, be imprisoned in the penitentiary not longer than ten years."

The indictment, in the first count, omitting the formal part, is as follows:

"That Jeff Spigener, S. J. Spigener, Walter Denham, and Bud Holland, late of the county aforesaid, on the 8th day of March, A. D. 1909, with force and arms, in the county aforesaid, and within the jurisdiction of this court, being then and there armed with a deadly weapon, a pistol, did then and there willfully and feloniously assault and beat John Cockran with leather bridle reins, with the intent of them, the said Jeff Spigener, S. J. Spigener, Walter Denham, and Bud Holland, then and there willfully and feloniously to intimidate the said John Cockran and prevent him from defending himself, against the peace," etc.

It will be observed that the statute provides, "If any person shall assault and beat another with a cowhide, whip, or stick," etc.; and it will be further observed that the indictment does not charge the beating to have been with any one of these things, but with "leather bridle reins." There was a demurrer interposed to this indictment on the ground that it charged no offense under this statute, and no offense at all, and the demurrer was sustained, and the state appealed; the defendants being discharged.

It will be observed that this statute does not provide, as some statutes of this sort do, that if the assault shall be with cowhide, whip, stick, or other like thing. We find in the case of *State v. Taylor*, 50 Or. 449, 93 Pac. 252, an opinion which presents the precise point for decision here involved. The statute there provided, "If any person shall assault another with cowhide, whip, stick, or like thing," etc., and the indictment charged that the assault and beating were with a "leather strap," and upon that indictment the court said:

"3. The sufficiency of the indictment is also questioned by the defendants, in that it does not charge the crime for which they were tried. In the statute of 1864 the name of this crime is given in the index to the sections at the beginning of chapter 43, of which it is a part, and also on the margin opposite section 527, its original number, as 'assault, being armed with a cowhide,' and was so adopted by the Legislature, and the name of the crime thus became part of the law (*State v. Vowels*, 4 Or. 324; *State v. Nease*, 46 Or. 433, 80 Pac. 897), and 'assault, being armed with a strap,' does not name the crime defined by this section. However, an error in the name of the crime in the preliminary part of the information is not fatal, if the charging part is sufficiently specific. *State v. Sweet*, 2 Or. 127; *State v. Jarvis*, 18 Or. 360, 23 Pac. 251. But the charge is, 'did assault, strike, hit, and beat one Exilda Mitchell \* \* \* with said leather strap.' The allegation contains nothing to bring the strap within the class of instruments mentioned under 'cowhide, whip, stick, or like thing.' In Alabama, under a similar statute [Rev. Code 1861, § 3672], providing that an assault with a cowhide, stick, or whip, having in his possession a pistol with intent to intimidate, an indictment that charged an assault with a rope, stick, or whip was held sufficient to sustain a conviction for assault, but insufficient if the conviction had been for the offense charged. *Higginbotham v. State*, 50 Ala. 133. Where the instrument used is not one of those named in the statute, then it must be so described as to bring it within the class named. Where a statute, in defining a crime committed by use of weapons, mentions certain weapons 'or other deadly weapon,' it is held that those named in the statute need not be described as deadly weapons; but if another than those named in the statute is relied upon as coming within the term 'other deadly weapon,' it must be so averred as to bring it within that designation. *State v. Sebastian*, 81 Mo. 514; *State v. Hoffman*, 78 Mo. 256; *State v. Painter*, 67 Mo. 84; *State v. Porter*, 101 N. C. 713, 7 S. E. 902. The language of this statute is 'with a cowhide, whip, stick, or like thing.' If the instru-

other instrument relied upon as coming within the term 'or like thing,' then it must be so set forth as to disclose that it is a like thing to a cowhide, whip, or stick, and it is not sufficient to refer to it as a leather strap. Therefore the information is insufficient to charge the crime defined by section 1786, B. & C. Comp., but it is sufficient to charge the crime of assault and battery."

It will be observed that this court held the indictment good for assault and battery, as the Alabama court did in the case of Higginbotham v. State, 50 Ala. 133. We think it is clear that under our statute, under the strict rules always applied in criminal pleading, especially, where a felony is charged, this defendant could not be convicted under this precise statute; the indictment charging that the assault was with "leather bridle reins," and not charging that it was with a cowhide, whip, or stick. In the absence of a charge in the indictment that the assault and battery was with a whip, or cowhide, or stick, the thing specially named in the statute, it is not possible, within the strictness required by the rules of criminal pleading, to uphold this indictment as a good one for the precise offense denounced by the statute; but we think it is clear, as held in the Oregon case and Alabama case, that this is a good indictment for common assault and battery.

It follows that the judgment sustaining the demurrer is reversed, the demurrer is overruled, the case remanded, and the defendants will be held to answer for assault and battery simply.

**STATE v. KENNEDY et al.** (No. 14,321.)  
(Supreme Court of Mississippi. Jan. 17, 1910.)  
**CRIMINAL LAW (§ 178\*)—FORMER JEOPARDY—NOLLE PROSEQUI.**

Under Const. 1890, § 22, providing that there must be an actual acquittal or conviction on the merits to bar another prosecution, a nolle prosequi, entered with the court's consent after the jury are impaneled and proof offered, is no bar to a subsequent indictment for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 328; Dec. Dig. § 178.\*]

Appeal from Circuit Court, Smith County; R. L. Bullard, Judge.

The appellees were jointly indicted for unlawful cohabitation, and put on trial, the jury impaneled, and the evidence offered by the state, when the district attorney, in open court, and with the consent of the court, nolle prossed the case. Later, at a succeeding term of the court, the appellees were again indicted for the same offense, and to this second indictment they interposed a plea in bar, alleging former jeopardy. To this plea the district attorney demurred, and the court

**MAYES, J.** We only deem it necessary to notice one question involved in this case, and that is the action of the court in overruling the demurrer of the state to defendant's plea of former jeopardy. The court below should not have overruled the demurrer of the state, since the plea itself shows that there had been no actual acquittal or conviction on the merits, and this being the case the state was not barred from further prosecution. Section 22 of the Constitution of 1890 expressly provides that before a person shall be considered to have been once in jeopardy, so as to bar another prosecution, there must be "an actual acquittal or conviction on the merits," and there had been no such acquittal or conviction. In the case of Roberts v. State, 72 Miss. 728, 18 South. 481, in speaking of this section the court said: "It was put into the Constitution in the interest of due and proper administration of the criminal law, is too plain for construction, and means exactly what it says."

The action of the court below in overruling the demurrer was error. So ordered.

**CASEY v. STATE.** (No. 14,064.)  
(Supreme Court of Mississippi. Jan. 17, 1910.)  
**CRIMINAL LAW (§ 649\*)—TRIAL—POSTPONEMENT.**

A postponement from late Saturday afternoon till Monday should have been granted in a murder case; a witness for defendant, taken from a sickbed and forced to attend, having been so hysterical as to be unable to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1515; Dec. Dig. § 649.\*]

Appeal from Circuit Court, Bolivar County; J. M. Cashin, Judge.

Walter Casey was convicted of murder, and appeals. Reversed and remanded.

The appellant was indicted for murder. He was arraigned on Friday, and on the same afternoon the court appointed counsel to defend him. A list of witnesses was called, and two of them did not answer. Subpoenas were at once issued. Saturday morning, when the case was called for trial, these witnesses did not appear, and a capias was placed in the hands of a deputy sheriff. He found one of the witnesses, a woman, at home claiming to be sick. He forced her to get out of bed and attend the trial, but she was so hysterical that she was not able to testify. The defendant's attorneys made a motion to have the case passed until Monday morning, so as to have the benefit of this witness' testimony. The motion was overruled, and defendant tried and convicted, and from a judgment imposing the death sentence, he appeals.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. Undoubtedly, under the showing made in the record, this case, involving the life of the appellant, should have been postponed until Monday from late Saturday afternoon.

Reversed and remanded.

#### FILES v. STATE. (No. 14,303.)

(Supreme Court of Mississippi. Jan. 17, 1910.)

##### BLASPHEMY (§ 3\*)—AFFIDAVIT.

An affidavit charging the use of profane language in a public place must allege the particular public place.

[Ed. Note.—For other cases, see Blasphemy, Cent. Dig. § 3; Dec. Dig. § 3.\*]

Appeal from Circuit Court, Itawamba County; J. H. Mitchell, Judge.

W. O. Files appeals from a conviction. Reversed and remanded.

Anderson & Long, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

SMITH, J. The demurrer interposed to the affidavit in the court below should have been sustained, for the reason that it (the affidavit) failed to designate the particular public place where the defendant used the alleged profane language. State v. Shanks, 88 Miss. 410, 40 South. 1005.

Reversed and remanded.

#### HARDENSTEIN v. BRIEN. (No. 14,215.)

(Supreme Court of Mississippi. Jan. 17, 1910.)

##### 1. EXECUTORS AND ADMINISTRATORS (§ 221\*)—CLAIM OF PHYSICIAN—EVIDENCE.

Where, in an action against an administrator by a physician for medical services rendered the intestate in her last illness, two witnesses testified that the intestate, while the physician was treating her, contracted to pay him \$500 for his services, a contract to pay him \$500 was established.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 903½; Dec. Dig. § 221.\*]

##### 2. EVIDENCE (§ 355\*)—PRIVATE BOOKS—ADMISSIBILITY.

Where a physician, when first making his visiting list, had no intention of charging a patient for visits, and the entries in the list were not at the time made with a view of charging the patient, but subsequently a contract to pay the physician a specified sum for his services was entered into, the list was competent to show the dates and the number of the visits.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1484; Dec. Dig. § 355.\*]

##### 3. EXECUTORS AND ADMINISTRATORS (§ 437\*)—CLAIMS—LIMITATIONS.

Under Code 1906, §§ 2096a, 2110, 3105, providing an action shall not be brought against an administrator until after six months from date of letters of administration, and that an action may not be brought against an administrator

a claim for medical services rendered an intestate during her last illness is not barred until after four years and six months.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1737-1739; Dec. Dig. § 437.\*]

Appeal from Circuit Court, Warren County; Jno. N. Bush, Judge.

Action by Dr. A. O. Hardenstein against E. L. Brien, administrator c. t. a. of Mrs. Harper, deceased. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Plaintiff had been for many years the physician of a Mrs. Harper, the widow of a physician, and had attended her without charge. During her last illness, which continued for nine or ten months, Mrs. Harper stated to him in the presence of witnesses that she wanted to pay him for this last illness, and he finally agreed to accept \$500. He never made her out a bill, and was never paid anything prior to her death, which occurred August 23, 1904. Her will was probated, and the executor qualified September 9, 1904. Afterwards he resigned and was succeeded by the appellee, who qualified as administrator c. t. a. Shortly after the death of Mrs. Harper, plaintiff presented his bill for \$500 to the executor, and payment was refused. Thereafter, on March 5, 1909, he entered suit against the administrator, and filed an itemized claim for \$572.50, which was afterwards revised so as to make the amount \$600. He offered on the trial, among other proof, his visiting list, blotters, and cashbook, from which his bill had been made up. The visiting list, from which a record of his visits was taken, showed no charge of any sort, but simply the visits which he had made Mrs. Harper; but it was shown that the reasonable charge for such visits was \$2.50 each, and that they continued regularly for a period of something like nine months.

After the testimony was in, the defendant filed the following motion: "We move the court to exclude the visiting book and other books, except cashbook, offered in the evidence by plaintiff, on the ground it is shown by plaintiff's own testimony that the books in question do not contain any charge against the decedent or her estate; that the testimony of the plaintiff himself shows that there were no charges made against the decedent until after her death, and that no charges were contemplated to be made by him until a very short time before her death, and therefore the charges as made were not contemporaneous with the memorandum made in the books heretofore admitted in evidence. The defendant further moves to strike out all of plaintiff's testimony regarding the correctness of the books kept, and all of that part of the testimony relating to the books, or charges made therein, or memorandums

contained therein, regarding any charge made against defendant, except in so far as the testimony undertakes to identify the book or books. The defendant moves to exclude all of the testimony of plaintiff, and asks for a peremptory instruction to find for defendant, on the ground that the account sued on is an open account, and began to run before decedent's death, and was barred in three years and six months from the last item on said account. Defendant further moves to exclude all of the testimony in support of all items of the account that appear to be more than three years and six months old. The defendant further moves to exclude all of those items of the accounts that appear to be more than four years and six months old, and, further, because the basis of the account herein sued on is a gift, and is not sound in contract." This motion was sustained, and a peremptory instruction granted for defendant, and from a judgment thereon this appeal is prosecuted.

The provisions of the Code of 1906 on the subject of suits against executors or administrators is found in the following:

"Sec. 2110. The presentation of a claim, and having it probated and registered as required by law, shall stop the running of the general statute of limitations as to such claim, whether the estate be solvent or insolvent."

"Sec. 2096a. A suit or action shall not be brought against an executor or administrator until after the expiration of six months from the date of letters testamentary or of administration."

"Sec. 3105. An action or scire facias may not be brought against any executor or administrator upon any judgment or other cause of action against his testator or intestate, but within four years after the qualification of such executor or administrator."

Brunini & Hirsch, for appellant. McLaurin, Armistead & Brien, for appellee.

WHITFIELD, C. J. The effort to show that the amount Mrs. Harper agreed to pay Dr. Hardenstein for services to her in her last illness, to wit, the sum of \$500 was a gift merely, under the testimony, is preposterous. The testimony of Mrs. James Searles and the testimony of Miss Penelope Hanney disposes of this contention completely. Mrs. Searles states that Mrs. Harper said, touching this subject: "I have paid him nothing for this [that is, services for about 16 to 18 years previously]; but in this last illness, which has run over so many months, he has come to see me so often by day and night,

any hour in the night he was sent for, that he must be paid for this. I feel the obligation is too great to be passed over, and I feel I must pay him for this." Miss Penelope Hanney testifies on the same subject (see record, pages 65 and 66) as follows: "A. Well, one day she said to him, just about a few days after she made her will, that she wanted to pay him something for his services, as he had been good and kind to her, and she said to him, 'Make out a bill for me, Doctor,' and he said, 'Oh, no, Mrs. Harper; I cannot make out a bill; I don't want to, because you are the widow of a physician, and I won't think of doing such a thing,' and she referred to it again, and said, 'Have you made out that bill?' and he said, 'No; I have, not made out any bill,' and she said, 'I want the thing settled right now; have you made out any bill?' and he said, 'No; I told you I was not going to make out any bill,' and she said, 'I want to give you something; will a thousand dollars do?' and he said, 'I would not think of asking that much,' and she said, 'How will \$500 do?' and he said, 'All right, I will take that.'" This constituted a distinct contract, supported by a valuable consideration, to wit, the services in the last illness.

Dr. Howard testified that the customary and reasonable charge for a visit of a doctor in Vicksburg was \$2.50. The visiting list of Dr. Hardenstein contains no amount, but sets out the dates of his visits, and the number of them. It is true that, when Dr. Hardenstein first made this "visiting list," he had no intention of charging Mrs. Harper anything, and the entries in that list were not, at that time, made with a view of charging her. But, from the moment he made the contract with her to accept \$500 for all his services during her last illness, he of course relied upon these entries from that time forward as showing the dates of the visits and number of them, and the list was competent for that purpose from and after the making of the contract. He should have been permitted to recover on the testimony in this case to the extent of the contract, to wit, \$500.

It seems that the court below gave the charge to find for the defendant upon the theory that the claim is barred by the statute of limitations. The simple reading of sections 2110, 2096a, and 3105 of the Annotated Code of 1906 makes it clear that the claim would not have been barred until after the expiration of four years and six months.

The court was manifestly in error in giving a peremptory instruction.

Reversed and remanded.



## CITY OF GREENWOOD v. WEAVER.

(No. 14,288.)

(Supreme Court of Mississippi. Jan. 17, 1910.)

## 1. CRIMINAL LAW (§ 1134\*)—APPEAL—MOOT QUESTIONS.

The court on appeal will not discuss a question not essential to a disposition of the case.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134.\*]

## 2. CRIMINAL LAW (§ 1105\*)—APPEAL—RECORD—CERTIFICATION—DISMISSAL.

Code 1906, § 85, providing that the justice of the peace, mayor, or police justice from whose decision an appeal is taken shall transmit a certified copy of the record, contemplates that the record shall be certified to by the justice of the peace, mayor, or police justice, and a certification by another person is insufficient, and an appeal not certified to as required by the statute is properly dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2887; Dec. Dig. § 1105.\*]

Appeal from Circuit Court, Leflore County; J. M. Cashin, Judge.

Jesse Weaver was prosecuted by the City of Greenwood for carrying a concealed weapon. From a judgment of the circuit court dismissing an appeal, the City of Greenwood appeals. Affirmed.

E. V. Hughston and Geo. Butler, Asst. Atty. Gen., for appellant. Gardner & Whittington, for appellee.

MAYES, J. In the argument of this case we are invited to pass upon questions not necessarily involved in the decision. We decline to discuss any question not essential to a disposition of this case, and confine ourselves to the single question.

Section 85, Code of 1906, provides that: "The justice of the peace, mayor or police justice of any city, town or village from whose decision an appeal shall be taken, shall at once transmit to the clerk of that court a certified copy of the record of the proceedings," etc. This section clearly contemplates that the record shall be certified to by the justice of the peace, mayor, or police justice; and, this being the requirement of the statute, the certification by any other person does not answer the requirement of the statute.

The appeal was not certified to as required by law, and we think the action of the court in dismissing the appeal proper, and the action of the court below in so holding is approved.

## LIZANO v. CITY OF PASS CHRISTIAN.

(No. 14,370.)

(Supreme Court of Mississippi. Jan. 17, 1910.)

## 1. MUNICIPAL CORPORATIONS (§ 111\*)—REMOVAL OF OFFICER—VALIDITY OF ORDINANCE—CONFORMITY TO CONSTITUTION AND STATUTES.

A city ordinance, pursuant to Code 1906, § 3332, providing "for the impeachment and re-

moval of elective officers" for willful neglect of duty or misdemeanor in office, which does not require an indictment and conviction of such officer as a condition of removal, as provided by Const. 1890, § 175, is void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 246; Dec. Dig. § 111.\*]

## 2. MUNICIPAL CORPORATIONS (§ 183\*)—REMOVAL OF "PUBLIC OFFICER"—CONDITIONS—CITY MARSHAL.

A city marshal elected by the people is a "public officer," within Const. 1890, § 175, providing that such officer shall not be removed from office for willful neglect of duty or misdemeanor in office, except on an indictment and conviction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 477; Dec. Dig. § 183.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7772, 7773; vol. 6, pp. 4933-4961; vol. 8, p. 7737.]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

"To be officially reported."

Proceedings by the City of Pass Christian against F. P. Lizano for removal of defendant from the office of city marshal. From the judgment of removal, defendant appeals. Reversed.

J. H. Mize, for appellant. Jno. J. Curtis, for appellee.

MAYES, J. As the law now stands, in so far as it authorizes a removal of this character of public officer, section 175 of the Constitution of 1890 of the state provides the exclusive mode, where the removal is sought on a charge of willful neglect of duty or misdemeanor in office. Under the above section the sine qua non to removal is presentment or indictment by the grand jury and conviction before there can be any removal on account of the things named in the above section, to wit, willful neglect of duty or misdemeanor in office. The appellant is a city marshal, elected by the popular vote of the city, and the mayor and board of aldermen are seeking to impeach and remove him because of willful neglect and misdemeanor in office, the very causes which the Constitution names in the above section, and which it provides as causes for removal only when the officer has been presented or indicted by a grand jury and convicted. The mayor and board of aldermen have not proceeded in the way required by the Constitution, but are proceeding by virtue of an ordinance passed under the authority of section 3332 of the Code of 1906, which gives the municipality power to pass ordinances providing "for the impeachment and removal of elective officers," etc., and undertake to remove the marshal without indictment and conviction.

We do not deem it necessary to set out here the ordinance passed by the mayor and board of aldermen under this section of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

statute. Suffice it to say that the ordinance does not conform to the requirements of the section of the Constitution in question, in that it provides for the removal without indictment, trial, and conviction, and is therefore a nullity. While the Legislature gave the power to the municipality to pass ordinances for the impeachment and removal of elective officers, etc., of course the Legislature did not intend that the municipality should pass an ordinance conflicting with the Constitution of the state. We shall not undertake to name all the persons engaged in a public employment who are "public officers" within the meaning of section 175 of the Constitution of 1890, but we deal with the case now before us, and do not hesitate to say that a city marshal, elected by the people as their officer, is a "public officer," within the meaning of this constitutional provision. In the case of *Moore v. State*, 45 South. 866, it appears that Moore was the city marshal of Senatobia, and was charged by affidavit before a justice of the peace with malfeasance in office, fined, and removed from office; but this court held that the conviction, even before a justice of the peace, would not warrant the removal of the marshal by him, because the Constitution required that there should be a grand jury presentment or indictment and conviction before removal. The rule announced here is the rule which this court has heretofore declared in the case of *Ex parte Lehman*, 60 Miss. 967, *Hyde v. State*, 52 Miss. 665, and the cases therein cited.

But it is argued that the decision in those cases only applied to constitutional offices, and, since the city marshal is not a constitutional officer, these cases have no application. We do not think there is anything in this contention. Section 175 applies to "all public officers," and the city marshal is certainly a "public officer," within the meaning of the Constitution. It should be a serious thing to remove from office, before the expiration of his term, any officer whom the people have selected to govern them. It was designed by the Constitution to make it a serious thing. Unless there is immediate and serious cause, the ballot is intended to be the method of removal, and it was not the purpose of the Constitution makers that the will of the people should be thwarted by partisans, but that removals should only be made by calm judicial investigation, and only after conviction. This method is safe, and should and must be pursued as the Constitution requires. We are not to be understood as intimating that the mayor and board of aldermen were moved by any but the most impartial motives in attempting to remove appellant, but we are merely discussing the reasons for the law in its application to this case.

Reversed and remanded.

## WILSON v. TOWN OF HANSBORO.

(No. 13,883.)

(Supreme Court of Mississippi. Jan. 17, 1910.)

### 1. APPEAL AND ERROR (§ 872\*)—REVIEW—SCOPE AND EXTENT IN GENERAL.

On appeal from a judgment dismissing a case, with a writ of procedendo to the mayor's court, no review can be had of the question of the court's power to correct a former judgment overruling a demurrer, and in lieu thereof enter a judgment sustaining it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3513; Dec. Dig. § 872\*]

### 2. APPEAL AND ERROR (§ 801\*)—DISMISSAL—HEARING.

The court has no power to dismiss a case on appeal and order a writ of procedendo to issue, without calling the appellant and giving him an opportunity to defend.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3161; Dec. Dig. § 801\*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action between G. E. Wilson and the Town of Hansboro. From an adverse judgment, G. E. Wilson appeals. Reversed and remanded.

E. M. Barber, for appellant. Geo. Butler, Asst. Atty. Gen., for appellee.

MAYES, J. The question of whether or not the court had the power to correct a former judgment overruling the demurrer, and in lieu thereof enter a judgment sustaining same, is in no way involved in this appeal. The action of the court on that question is not brought in review by the appeal, since no appeal was ever prosecuted therefrom. The judgment appealed from is the judgment dismissing the case, with a writ of procedendo to the mayor's court. Before the court had the power to dismiss, and order the writ of procedendo to issue, it was necessary that appellant be called and given an opportunity to defend. The record nowhere shows that this was done. So far as the record shows, it appears that the court, without calling appellant's case for trial, dismissed the appeal, and issued a writ of procedendo to the court below, and in doing this we think the court erred.

Reversed and remanded.

## HAGGET v. CITY OF HATTIESBURG.

(No. 14,281.)

(Supreme Court of Mississippi. Jan. 10, 1910.)

Appeal from Circuit Court, Forrest County; G. A. McLean, Judge.

Action between Emma Hagget and the City of Hattiesburg. From the judgment, Hagget appeals. Dismissed for want of prosecution.

Geo. Butler, Asst. Atty. Gen., for the appellee.

PER CURIAM. Dismissed for want of prosecution.

(Supreme Court of Mississippi. Jan. 17, 1910.)  
Appeal from Chancery Court, Lowndes County; J. F. McCool, Chancellor.  
Action between the Southeastern Lime & Cement Company and Kelly, Pope & Rather and others. From the judgment, the company appeals. Affirmed.  
Newnan Cayce, for appellant. William Baldwin, for appellees.

PER CURIAM. Affirmed.

ALABAMA & V. RY. CO. v. W. R. LUCKETT & CO. (No. 14,222.)

(Supreme Court of Mississippi. Jan. 17, 1910.)  
Appeal from Circuit Court, Warren County; Jno. N. Bush, Judge.  
Action between the Alabama & Vicksburg Railway Company and W. R. Lockett & Co. From the judgment, the railway company appeals. Affirmed.

McWillie & Thompson, for appellant. McLaurin, Armistead & Brien, for appellees.

PER CURIAM. Affirmed.

POSTAL TELEGRAPH CABLE CO. v. DANIEL. (No. 14,213.)

(Supreme Court of Mississippi. Jan. 17, 1910.)  
Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.  
Action between the Postal Telegraph Cable Company and W. J. Daniel. From the judgment, the company appeals. Affirmed.

W. R. Harper, for appellant. Alexander & Alexander, for appellee.

PER CURIAM. Affirmed.

WARREN COUNTY v. ALABAMA & V. RY. CO. (No. 14,194.)

(Supreme Court of Mississippi. Jan. 17, 1910.)  
Appeal from Chancery Court, Warren County; J. S. Hicks, Chancellor.  
Action between Warren County and the Alabama & Vicksburg Railway Company. From the judgment, Warren County appeals. Affirmed.

Bryson & Dabney, for appellant. McWillie & Thompson, for appellee.

PER CURIAM. Affirmed.

GRIFFIN et al. v. MAYOR, ETC., OF CITY OF COLUMBUS. (No. 14,106.)

(Supreme Court of Mississippi. Jan. 17, 1910.)  
Appeal from Circuit Court, Lowndes County; J. L. Buckley, Judge.  
Action between O. R. Griffin and R. C. McClanahan and the Mayor and City Council of Columbus. From the judgment, Griffin and McClanahan appeal. Affirmed.

Betts & Sturdivant, for appellants. E. T. Sykes, for appellee.

PER CURIAM. Affirmed.

(Supreme Court of Mississippi. Jan. 17, 1910.)  
Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action by the State, on the relation of J. B. Stirling, Attorney General, against E. J. Adam, Mayor of the City of Pass Christian. Judgment for defendant, and the State appeals. Affirmed.

J. H. Mize, for appellant. Dodds & Leathers, for appellee.

PER CURIAM. Affirmed.

COLLINS v. STATE. (No. 14,099.)

(Supreme Court of Mississippi. Jan. 17, 1910.)  
Appeal from Circuit Court, Yalobusha County; Sam C. Cook, Judge.  
George Collins was convicted of an unlawful sale of liquor, and appeals. Affirmed.

Wm. F. Hamilton and A. A. Hammond, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

HEMPHILL v. STATE. (No. 14,076.)

(Supreme Court of Mississippi. Jan. 17, 1910.)  
Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.  
Wilburn Hemphill was convicted of crime, and appeals. Affirmed.

Flowers, Fletcher & Whitfield, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

CALDWELL v. CITY OF KOSCIUSKO. (No. 13,965.)

(Supreme Court of Mississippi. Jan. 17, 1910.)  
Appeal from Circuit Court, Attala County; G. A. McLean, Judge.  
Bob Caldwell was convicted of violating an ordinance of the City of Kosciusko, and appeals. Affirmed.

Lockett & Guyton, for appellant. Geo. Butler, Asst. Atty. Gen., for appellee.

PER CURIAM. Affirmed.

LYLE v. STATE. (No. 14,300.)

(Supreme Court of Mississippi. Jan. 17, 1910.)  
Appeal from Circuit Court, Scott County; R. L. Bullard, Judge.  
Joe Lyle was convicted of carrying a concealed weapon, and appeals. Affirmed.

McKay & Triplett, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

ALABAMA & V. RY. CO. v. HURST. (No. 14,221.)

(Supreme Court of Mississippi. Jan. 24, 1910.)  
Appeal from Circuit Court, Warren County; Jno. N. Bush, Judge.

Action between J. N. Hurst and the Alabama & Vicksburg Railway Company. From the judgment, the railway company appeals. Affirmed.

McWillie & Thompson, for appellant. S. S. Hudson, for appellee.

PER CURIAM. Affirmed.

WILLIAMS et al. v. CITY OF TUPELO.

(No. 14,315.)

(Supreme Court of Mississippi. Jan. 24, 1910.)

Appeal from Circuit Court, Lee County; J. H. Mitchell, Judge.

James and Neal Williams were convicted of violating an ordinance of the City of Tupelo, and appeal. Affirmed.

Geo. H. Hill, Jr., and Clayton, Mitchell & Clayton, for appellants. Anderson & Long, for appellee.

PER CURIAM. Affirmed.

WESTERN UNION TELEGRAPH CO. v. CHEAIRS. (No. 14,161.)

(Supreme Court of Mississippi. Jan. 24, 1910.)

Appeal from Circuit Court, Marshall County; W. A. Roane, Judge.

Action by A. M. Cheairs, administratrix, against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fant & Fant, for appellant. L. A. Smith, for appellee.

PER CURIAM. Affirmed.

CURTIS v. STATE. (No. 14,142.)

(Supreme Court of Mississippi. Jan. 24, 1910.)

Appeal from Circuit Court, Amite County; M. H. Wilkinson, Judge.

Joe Curtis was convicted of murder, and appeals. Affirmed.

Eugene Gerald and J. T. Lowry, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. BALL et al.

(No. 14,290.)

(Supreme Court of Mississippi. Jan. 24, 1910.)

Appeal from Circuit Court, Carroll County; G. A. McLean, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Louis Ball and others. From the judgment, the railroad company appealed. Affirmed.

Gardner & Whittington and Mayes & Longstreet, for appellant. Wm. C. McLean and Pollard & Hamner, for appellees.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. WHEELER.

(No. 14,201.)

(Supreme Court of Mississippi. Jan. 24, 1910.)

Appeal from Circuit Court, Warren County; Jno. N. Bush, Judge.

Action between R. S. Wheeler and the Yazoo & Mississippi Valley Railroad Company. From the judgment, the railroad company appeals. Affirmed.

Mayes & Longstreet, for appellant. Henry, Fox & Canizaro, for appellee.

PER CURIAM. Affirmed.

LEHARDY, THESMAR & CO. v. ST. LOUIS & S. F. R. CO. (No. 14,162.)

(Supreme Court of Mississippi. Jan. 24, 1910.)

Appeal from Circuit Court, Marshall County; W. A. Roane, Judge.

Action between Lehardy, Thesmar & Co. and the St. Louis & San Francisco Railroad Company. From the judgment, Lehardy, Thesmar & Co. appealed. Affirmed.

L. A. Smith, for appellants. Fant & Fant, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. G. BANKS & CO.

(No. 14,170.)

(Supreme Court of Mississippi. Jan. 24, 1910.)

Appeal from Circuit Court, Tunica County; Sam C. Cook, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and G. Banks & Co. From the judgment, the railroad company appeals. Affirmed.

Mayes & Longstreet, for appellant. J. T. Lowe, for appellees.

PER CURIAM. Affirmed.

SLACK v. HEBDON et al. (No. 14,261.)

(Supreme Court of Mississippi. Jan. 24, 1910.)

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.

Action between J. D. Slack and R. B. Heddon and others. From the judgment, Slack appeals. Dismissed.

Maynard & Fitzgerald, for appellant. O. G. Johnston, for appellees.

PER CURIAM. Appeal dismissed.

BAY POINT MILL CO. v. SAUNDERS et al.

(Supreme Court of Florida. Dec. 14, 1909.)

Rehearing Denied Jan. 25, 1910.)

1. INJUNCTION (§ 35\*)—TRESPASS—OCCUPANCY UNDER CLAIM OF TITLE.

Exclusive occupancy of land under claim of title, and the actual boxing of the pine timber thereon in good faith for any considerable length of time, is possession, and sufficient to sustain an injunction against irreparable injury to the premises by another who subsequently enters without good title.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 77; Dec. Dig. § 35.\*]

**2. INJUNCTION (§ 38\*)—TRESPASS—CUTTING TIMBER.**

In a suit to enjoin the cutting and moving of timber from land valuable chiefly for the timber, where the complainants allege "that they are the owners in fee simple and are in possession of" the land, and the answer, not under oath, admits that one of the complainants "caused men to enter upon and trespass upon said land, and box part of the pine timber on said land, but erected no structure upon the said land, and the defendant denies that the plaintiff boxed or caused to be boxed all the timber on said land," and neither complainants nor defendant shows good paper or other title or right to the possession of the land, a decree enjoining the defendant, and reserving to defendant "the right to institute such action at law as it may be advised to recover possession of the said premises," will not be reversed, no error of law appearing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 88-90; Dec. Dig. § 38.\*]

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Santa Rosa County; J. E. Wolfe, Judge.

Suit by D. R. Saunders and others against the Bay Point Mill Company. Decree for complainants, and defendant appeals. Affirmed.

Sullivan & Sullivan, for appellant. Maxwell & Reeves, for appellees.

WHITFIELD, C. J. The appellant was enjoined from cutting and removing timber from certain described land as to which the complainants allege "that they are the owners in fee simple and are in possession of"; but the decree reserved to the defendant "the right to institute such action at law as it may be advised to recover possession of the said premises." The answer of the defendant under its corporate seal admits that the land is valuable chiefly for its timber, and that one of the plaintiffs "caused men to enter upon and trespass upon said land, and box part of the pine timber on said land, but erected no structure upon the said land, and the defendant denies that the said Saunders boxed or caused to be boxed all the timber on said land." The answer also denies the title and possession of the complainants as alleged, and denies that it unlawfully entered upon the land, but admits that it entered without authority from complainants, as it had legal right to do under an averred authority from third parties as the owners in fee of the land. Neither party showed an apparently good paper or other title or right to the possession of the land. Under these circumstances the court will not be held in error for enjoining the defendant, reserving to it the right to proceed at law to recover possession if entitled thereto. Exclusive occupancy of land under claim of title, and the actual boxing of the pine timber thereon in good faith for any considerable length of time, is possession, and sufficient for an injunction against irreparable injury

to the premises by another who subsequently enters without good title; and the court may properly leave the question of title to the law courts. See *Richbourg v. Rose*, 53 Fla. 173, 44 South. 69, 125 Am. St. Rep. 1061; *Reddick v. Meffert*, 32 Fla. 409, 13 South. 894; *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; *Spear v. Cutter*, 5 Barb. (N. Y.) 486; 2 Joyce on Injunctions, par. 1139a; 22 Cyc. 831.

The decree is affirmed. All concur, except HOCKER, J., absent.

**HARTFORD FIRE INS. CO. v. HOLLIS.**

(Supreme Court of Florida, Division A. Dec. 21, 1909.)

**1. APPEAL AND ERROR (§ 194\*)—REVIEW—ORDER SUSTAINING DEMURRER TO PLEA.**

In passing upon an assignment based upon a ruling sustaining a demurrer to a plea, an appellate court will restrict its investigation to the grounds stated in the demurrer, unless the plea is so faulty as to constitute no defense to the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246, 1375; Dec. Dig. § 194.\*]

**2. APPEAL AND ERROR (§ 172, 173\*)—REVIEW—POINTS NOT RAISED IN LOWER COURT.**

It is the declared policy of this court to confine the parties litigant to the points raised and determined in the court below, and not to permit the presentation of points, grounds, or objections for the first time in this court, when the same might have been cured or obviated by amendment, if attention had been called to them in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1070-1120; Dec. Dig. §§ 172, 173.\*]

**3. PLEADING (§ 200\*)—DEMURRER—SUFFICIENCY.**

A ground of demurrer interposed to several pleas "that each and all of said pleas are vague, indefinite, and uncertain, and set forth no defense as against the plaintiff's cause of action," is not a sufficient compliance with the statutory requirements, and presents nothing for consideration, unless, upon a bare inspection of the pleas, they should be found so faulty and defective as to constitute no defense to the action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 470, 471; Dec. Dig. § 200.\*]

**4. PLEADING (§ 341\*)—AMENDMENT—PLEAS FRAMED TO DELAY TRIAL.**

If the plaintiff conceives pleas are "so framed as to prejudice or embarrass or delay the fair trial of the action," he should move the court for a compulsory amendment thereof in accordance with the provisions of section 1433, Gen. St. 1906.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 341.\*]

**5. INSURANCE (§§ 328, 333\*)—SALE OF PROPERTY UNDER FORECLOSURE—AVOIDANCE OF POLICY.**

A clause in a fire insurance policy, providing that "this entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void \* \* \* if with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed," is a wise and proper safe guard to the insurer against the greatly

means within the control or knowledge of the insured." In an action upon such policy the insurer is entitled to base its defense upon a failure to comply with such provisions.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 842; Dec. Dig. §§ 328, 333.\*]

**6. INSURANCE (§ 642\*)—DEMURRER TO PLEA—SUFFICIENCY.**

In an action upon a fire insurance policy containing the customary provisions in such policies as to the institution of foreclosure proceedings and increased hazard, when such policy, which is attached to the declaration and made a part thereof, shows that it is a combination policy issued for a single stated consideration, whereby the defendant company agreed and undertook to insure the plaintiff against loss or damage by fire to the amount of \$1,250, of which \$1,000 was placed upon the stock of merchandise "while contained" in the described building, and the other \$250 was placed upon such building "while occupied as a general merchandise store," it is error to sustain a demurrer to pleas which aver the institution and pendency of foreclosure proceedings upon such building with the knowledge of the insured, and the failure of the plaintiff to comply with the provisions of the policy relating thereto, especially when the grounds of the demurrer fail to specifically point out wherein such pleas are defective in substance.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 642.\*]

**7. INSURANCE (§ 335\*)—IRON-SAFE CLAUSE.**

What is commonly known as the "iron-safe clause" usually found in fire insurance policies has been held by this court to be a valid provision, and the defendant company, in an action brought against it upon such policy, is entitled to base its defense thereto upon the failure of the plaintiff to comply with such provision.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.\*]

(Syllabus by the Court.)

**8. APPEAL AND ERROR (§ 854\*)—REVIEW—GROUNDS FOR SUSTAINING DEMURRER.**

In reviewing a ruling sustaining a demurrer prior to Laws 1909, p. 56, c. 5912, requiring the trial judge to specify the particular grounds of a demurrer upon which his ruling is founded, if the demurrer should have been sustained on any ground, it is immaterial that it was sustained upon a wrong ground, since it is with the ruling itself, and not with the reasons therefor, that the appellate court deals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854.\*]

**9. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—SUSTAINING DEMURRER TO PLEA.**

Where a demurrer was interposed to a plea when a motion to strike out would have been the proper practice, but such plea was so faulty that the court would have been justified in striking it out of its own motion, the sustaining of the demurrer thereto would be harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4093; Dec. Dig. § 1040.\*]

**10. PLEADING (§ 34\*)—CONSTRUCTION.**

Rules of pleading are for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.\*]

1906, § 1694, it is not necessary to take an exception to a judgment upon demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1486-1487; Dec. Dig. § 254.\*]

**Error to Circuit Court, Jackson County; J. E. Wolfe, Judge.**

Action by J. M. Hollis against the Hartford Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Cockrell & Cockrell, for plaintiff in error.  
Price & Watson, for defendant in error.

**SHACKLEFORD, J.** A judgment is brought here for review which the defendant in error as plaintiff in the court below recovered against the plaintiff in error as defendant upon a fire insurance policy. The declaration substantially follows the statutory form in such actions, and a copy of the policy is attached thereto. Six pleas were filed as follows:

"(1) The building described in said declaration was located on and was a part of certain real estate which was granted to the plaintiff by one John W. Sketo under whom plaintiff claimed title, and, while so owned by said Sketo, said Sketo gave a mortgage thereon, to wit, two mortgages to Covington & Co. and one mortgage to F. M. Hawkins, upon which foreclosure proceedings were commenced and duly prosecuted to a judicial sale of said property on the 6th day of January, A. D. 1908, the day following the night when said building was destroyed by fire. Said foreclosure proceedings were so commenced and prosecuted in the said circuit court on the chancery side, with the knowledge of the plaintiff, and notice was given of the sale of said land including said building by virtue of said mortgage, to wit, each and every the three mortgages aforementioned, and in pursuance of the final decree of said court ascertaining due by said mortgagor to said mortgagees a large sum in the aggregate, to wit, \$2,400, and directing the said sale by a master appointed for the purpose, and said notice of sale was so given by said master for the usual period, to wit, 30 days, as directed in said decree, and for such period said notice was published in a newspaper published in said county, and said notice contained a description of said land whereof said building was a part and gave the title of the case and the day of sale as aforesaid, and the place of sale therein given was at the county site of said county, to wit, at the courthouse door, and during said period long prior to said sale the plaintiff saw said notice, and knew that said property was to be sold on the first Monday in January, A. D. 1908, and said real estate was so sold on said day by said master, but the night

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

before, as aforesaid, said building was destroyed by fire. There was no agreement indorsed on or added to said policy with reference to said foreclosure or to said notice of sale.

"(2) And for a second plea the defendant says that notice of sale was given of property covered by the said policy, to wit, said building, by virtue of a mortgage thereon, that said notice was by publication in a newspaper published in said county and pending the same and long before the sale day was known to the plaintiff, and said fire occurred the night before the day for sale fixed in said notice, and that there was no agreement indorsed on or added to said policy with reference to said foreclosure or to said notice of sale.

"(3) And for a third plea the defendant says that the alleged contract declared on called a policy contains the provision, 'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void \* \* \* if the hazard be increased by any means within the knowledge or control of the insured;' that after the issuance of the policy declared on, and prior to the alleged fire, Covington & Co. and F. M. Hawkins procured a decree in a foreclosure suit against one John W. Sketo, which decree ascertained a large sum, to wit, \$2,400, due said mortgagees, and said decree directed the sale of said land by a master appointed for the purpose, and said notice of sale was given by said master for the usual period, to wit, 30 days, as directed in said decree, and for such period such notice was published in a newspaper published in said county, and said notice contained a description of said land whereof said building was a part, and gave the title of the case and the day of the sale as aforesaid, and the place of sale therein given was at the county site of said county, to wit, at the courthouse door, and during said period long prior to said sale the plaintiff saw said notice and knew that said property was to be sold on the first Monday of January, A. D. 1908, and said real estate was so sold on said day by said master, but the night before, as aforesaid, said building was destroyed by fire. The procurement of this decree and the advertisement of the sale of property covered by the policy sued on increased the hazard, and there was no agreement indorsed on or added to said policy otherwise providing with reference to increasing the hazard.

"(4) And for a fourth plea the defendant says that it is not true, as alleged, that all conditions have been performed and all things and events existed and happened to entitle the plaintiff to the sum sued for or any sum in the premises, in this: that there was a part of said policy generally styled 'iron-safe clause,' made a part of said declaration, and that said plaintiff did not comply therewith, in this: that he did not keep a set of books, which did clearly and plainly

present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory, provided for in the first section of said clause during the continuance of the said policy preceding said fire.

"(5) And for its fifth plea the defendant says it is not true, as alleged, that all the conditions have been performed and fulfilled and all things existed and happened to entitle the plaintiff to the sum sued for or any sum in the premises, in this: that there was a part of said policy generally styled 'iron-safe clause,' made part of said declaration, which required the plaintiff to produce for the inspection of the defendant the books so required to be kept, and the defendant says the books called for by said clause were not produced by the plaintiff for the inspection of the defendant.

"(6) And for a sixth plea the defendant says that it is not true as alleged that all conditions have been performed and fulfilled and all things existed and happened to entitle the plaintiff to the sum sued for, or any sum in the premises, in this: that there was a part of said policy generally styled 'iron-safe clause,' made a part of said declaration, and the said plaintiff did not, as required by the third section of said clause, keep the books therein provided for securely locked or otherwise in a fireproof safe or in an iron-safe at night, and at all other times when the building mentioned in said policy was not actually open for business, nor, failing in this, did said plaintiff keep such books in some place not exposed to fire which would destroy the aforesaid building."

To these pleas the following demurrer was interposed:

"Now comes the plaintiff in the above styled and entitled cause, and demurs to the first, second, third, fourth, fifth, and sixth pleas of the defendant's filed herein, and to each of said pleas, and for grounds of demurrer says:

"(1) That each and all of said pleas are vague, indefinite, and uncertain, and set forth no defense as against the plaintiff's cause of action.

"And for grounds of demurrer to the first, second, and third pleas the plaintiff says:

"(1) That said pleas and each of them do not show that the alleged mortgage or mortgages were executed by this plaintiff, or with his knowledge or consent, or that he was in any way connected with or a party to the foreclosure proceedings alleged in said pleas, or either of them.

"(2) That it is not shown by either of said pleas that the hazard of said building so insured was in any manner increased by reason of said foreclosure proceedings alleged in said pleas.

"(3) That said pleas nor either of them do not show that there was any change in the title of said property since the issuance of said policies of insurance, or that the hazard

was increased by reason of said foreclosure proceedings.

"(4) That said pleas affirmatively show that the plaintiff was not a party to the alleged foreclosure proceedings set forth and described in said pleas.

"And for grounds of demurrer to the fourth, fifth, and sixth pleas, and to each of said pleas, the plaintiff says:

"(1) That said pleas and each of them do not show in what manner the terms and conditions of the iron-safe clause mentioned in said pleas and each of them violated.

"(2) That said pleas and each of them fail to allege what book or books pertaining to plaintiff's business was not so kept in the iron safe, or protected from fire, and do not allege what books were not produced for the inspection of the defendants.

"Wherefore, plaintiff prays judgment of the court as to the sufficiency of the pleas aforesaid, and to each of said pleas."

Upon this demurrer the court made the following ruling:

"Now at this time came on to be heard the demurrer interposed by the plaintiff to the first, second, third, fourth, fifth, and sixth pleas of the defendant, and the said cause having been submitted upon said demurrer, and the court being advised in the premises, is of the opinion that said demurrer as to the first, second, third, and fifth pleas is well taken.

"It is therefore considered and adjudged by the court that the said demurrer as to the first, second, third, and fifth pleas, respectively, be and the same is hereby sustained.

"It is further ordered and adjudged by the court that said demurrer as to the fourth and sixth pleas be and the same is hereby overruled.

"Done and ordered at Marianna, Fla., this 24th day of June, A. D. 1908."

This ruling forms the basis of the first four assignments of error, to the effect that error was committed in sustaining the demurrer to the first, second, third, and fifth pleas respectively. These assignments we shall now consider.

In several cases we have fully considered the functions of a demurrer, and have also construed our statutes relating thereto, so that it would be a work of supererogation to enter into any extended discussion of such matters in this opinion. See *Florida Cent. & P. R. Co. v. Ashmore*, 43 Fla. 272, 32 South. 832; *State ex rel. Kittel v. Trustees of the Internal Improvement Fund*, 47 Fla. 302, 35 South. 936; concurring opinion in *Atlantic Coast Line R. R. Co. v. Benedict Pineapple Co.*, 52 Fla. 165, text 185, 186, 42 South. 529, text 536; *Benedict Pineapple Co. v. Atlantic Coast Line R. R. Co.*, 55 Fla. 514, 46 South. 732, 20 L. R. A. (N. S.) 92. We have also held in several cases that, on an assignment of error based upon the overruling of a demurrer to the declaration, the

plaintiff in error will be confined to the grounds stated in the demurrer and argued in the appellate court, and no other grounds will be considered, unless there is an omission in the declaration of allegations of substantive facts which are essential to a right of action, so that the declaration wholly fails to state a cause of action. See *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318; *Royal Phosphate Co. v. Van Ness*, 53 Fla. 135, 43 South. 916; *Atlantic Coast Line R. R., Co. v. Beazley*, 54 Fla. 311, 45 South. 761; *German American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740, in addition to the cases cited supra. The same principle must necessarily apply to an assignment based upon the overruling of a demurrer to a plea. We have also held that in passing upon an assignment based upon a ruling sustaining a demurrer to a pleading, if the demurrer should have been sustained on any ground, it would make no difference in the result that it was sustained upon a wrong ground, since it is with the ruling itself, and not with the reasons therefor, with which an appellate court is called upon to deal. *Hoopes v. Crane*, 56 Fla. 395, 47 South. 992, and *Murrell v. Peterson*, 57 Fla. 480, 49 South. 31, and authorities therein cited. Prior to the enactment of chapter 5912, p. 56, Laws 1909, with which we are not now concerned, the trial judge was not required to specify the particular grounds of the demurrer upon which his ruling is founded. *Gainesville & Gulf R. Co. v. Peck*, 55 Fla. 402, 46 South. 1019. So we have likewise held in several cases that where a demurrer is interposed to a plea, when a motion to strike out would have been the proper method of attack, but such plea is so faulty that the court would have been justified in striking it out of its own motion, the sustaining of the demurrer thereto will be considered harmless error. *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910, and authorities there cited. We would also refer to *Southern Home Ins. Co. v. Putnal*, 57 Fla. —, 49 South. 922, for a discussion of the distinction between the respective functions performed by a motion to strike out a pleading and a demurrer, where in a number of prior decisions of this court will be found collected. Unless, however, the plea to which a demurrer is interposed is so faulty as to constitute no defense to the action, in passing upon an assignment based upon a ruling sustaining a demurrer thereto, an appellate court will restrict its investigation to the grounds stated in the demurrer. This was clearly intimated in *State v. Seaboard Air Line Ry.*, 56 Fla. 670, text 680, 47 South. 986, text 990. As was said in *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, text 415, 12 Sup. Ct. 188, 194, 35 L. Ed. 1055: "Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible." So in South-



ern Life Insurance & Trust Co. v. Cole, 4 Fla. 359, which was a chancery case, in which an appeal opened up the whole case, this court held: "But though this court will re-examine questions decided against the respondent as well as such as passed sub silentio, or consider points made here for the first time, if raised by the pleadings and proofs, yet care must be taken that neither party be permitted to surprise or mislead his adversary, or to make objections which, if made in the court below, might have been obviated." To the same effect is Logan v. Slade, 28 Fla. 689, text 715, 10 South. 25, text 28. We have likewise held that a party who objects to the competency of a witness or to proffered testimony should state specifically the grounds of his objection in order to apprise the court and his adversary of the precise objection he intends to make. McKinnon v. Johnson, 57 Fla. 120, 48 South. 910, and authorities there cited. So we have uniformly held that an appellate court will consider only such grounds of objection to the admissibility of evidence as were made in the court below; the plaintiff in error being confined to the specific grounds of objection made by him in the trial court, and only such of the grounds so made below as are argued will be considered by an appellate court. Cross v. Aby, 55 Fla. 311, 45 South. 820, and authorities there cited, and Brown v. Bowie (decided here at the present term) 50 South. 637. Also see Reid v. Southern Development Co., 52 Fla. 593, text 612, 42 South. 211. Upon the points we are now considering we would refer especially to the reasoning and authorities cited in the concurring opinion in Atlantic Coast Line R. R. Co. v. Benedict Pineapple Co., supra; and Benedict Pineapple Co. v. Atlantic Coast Line R. R. Co., supra. It will readily be seen from an examination of the authorities which we have cited that it is the declared policy of this court to confine the parties litigant to the points raised and determined in the court below, and not to permit the presentation of points, grounds, or objections for the first time in this court when the same might have been cured or obviated by amendment if attention had been called to them in the trial court.

We now take up for consideration the grounds of demurrer directed against the pleas. The first ground—"that each and all of said pleas are vague, indefinite, and uncertain, and set forth no defense as against the plaintiff's cause of action"—is not a sufficient compliance with the statutory requirements, as the cited decisions of this court will show, and presents nothing for consideration, unless, upon a bare inspection of the pleas, they should be found so faulty and defective as to constitute no defense to the action. See, also, Cowan v. Motley, 125 Ala. 369, 28 South. 70, approvingly cited by us in Benedict Pineapple Co. v. Atlantic

Coast Line R. R. Co. If the plaintiff perceived that such pleas were "so framed prejudice or embarrass or delay the trial of the action," he should have in the court for a compulsory amendment of in accordance with the provisions of section 1433 of the General Statutes of See Southern Home Insurance Co. v. Putnam, 57 Fla. —, 49 South. 922, and authorities there cited.

The next four grounds of the demurrer are directed to the first, second, and third pleas. As we have already copied the pleas and grounds of demurrer, we shall repeat them. Suffice it to say that the pleas were based upon a provision in the policy to the effect that "this entire policy unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed." This sentence occurs in a long paragraph containing different provisions common in insurance policies and all found therein, which provisions are well known that we deem it unnecessary to copy more than the one sentence. In the absence of any contention or showing of any fraud or deception was practiced by the insured by the insurance company in issuing such policy or that any of the provisions thereof are unlawful, we are warranted in assuming the validity and legality of such provisions. This being true, the defendant was entitled to base its defense to an action upon such policy upon the failure to comply with any of the provisions of such policy. See Southern Home Insurance Co. v. Putnam, 57 Fla. —, 49 South. 922, and Phoenix Insurance Co. v. Bryan (decided here at the present term) 50 South. 576. This very provision in insurance policies has been held by this court "to be a wise and proper safeguard to the insured against the greatly increased risk consequent upon the circumstances provided against therein." J. I. Kelly Co. v. St. Paul Fire Marine Insurance Co., 56 Fla. 456, 47 South. 742. We content ourselves with referring to the reasoning and copious citation of authorities in the opinion rendered in the case. While a dissenting opinion was filed in such case by Mr. Justice Parkhill, which Mr. Justice Hocker concurred, the dissent was based upon a point as we understand it entirely foreign to the one now before us for consideration. The clause in question contains the words "any mortgage and is entirely silent as to any participation by the insured in the foreclosure proceedings, his connection therewith or being a party thereto, or his knowledge of or consent to the execution of the mortgages in question." We would also refer to Titus v. Glens Falls Insurance Co., 81 N. Y. 410, which has been

frequently approvingly referred to by this court. The policy also contains the customary clause, "or if the hazard be increased by any means within the control or knowledge of the insured."

We also find that the declaration contains an allegation to the effect that for and in consideration of the sum of \$41.25 the policy in question was issued, whereby the defendant company agreed and undertook to insure the plaintiff against loss or damage by fire to the amount of \$1,250, of which \$1,000 was placed upon the stock of merchandise "while contained" in the described building and the other \$250 was placed upon such building "while occupied as a general merchandise store." The policy which is attached to and made a part of the declaration also contains these allegations and stipulations. Thus we see that the policy upon which this action is based is a combination mercantile and building policy issued upon a single consideration. The pleas aver the institution and pendency of foreclosure proceedings upon the building covered by the policy. Surely the nice distinction in the law as to when such a policy may be treated as devisable, assuming that such question might be raised by proper proceedings in this case, should be raised by some specific ground of the demurrer and brought directly to the attention of the opposite party as well as of the court. It is asking too much to require the court to consider such an intricate and controverted point *sua sponte* as it were. Quite a number of authorities have been cited to us, but we see no useful purpose to be accomplished by a discussion thereof. We are not called on to declare whether or not the first three pleas are such that they are unassailable by demurrer, but simply whether or not they are open to attack by the demurrer as framed. After a careful consideration of the matter, we are of the opinion that this question must be answered in the negative. We might well say of each of such pleas as the Supreme Court of Alabama did say of a certain plea in *Cowan v. Motley*, 125 Ala. 369, 28 South. 70: "The plea may be defective, but the demurrer carefully fails to point out in what the defect consists." It follows that the first three errors are well assigned.

We pass now to a consideration of the assignment based upon the sustaining of the demurrer to the fifth plea. This plea simply avers, in substance, that the books required by a provision in the policy known as the "iron-safe clause" to be kept by the plaintiff were not produced by the plaintiff for the inspection of the defendant. The two grounds of demurrer directed against this plea are that it does "not show in what manner the terms and conditions of the iron-safe clause mentioned in said plea were violated," and that it fails to allege

"what books were not produced for the inspection of the defendant." What we have already said in discussing the preceding assignments applies with like force to this assignment. It may be that the plea in question is defective and imperfect in some respects, but we have no hesitancy in declaring it sufficient to withstand the attack made upon it by this demurrer, and we do not feel called upon to extend our investigations any further than to determine that the plea is not so faulty as to wholly fail to set up a defense. See the discussion in *Camp v. Hall*, 39 Fla. 535, 22 South. 792, as to the distinction between matters of substance and matters of form in pleading, wherein it was held that only defects in matters of substance could be reached by demurrer. As to the validity of the "iron-safe clause," it is sufficient to refer to the full discussion in *Tillis v. Liverpool & L. & G. Ins. Co.*, 46 Fla. 268, 35 South. 171, s. c. 110 Am. St. Rep. 89. We think that this error is well assigned.

The fifth and sixth assignments are based, respectively, upon the refusal to instruct the jury to return a verdict for the defendant and upon the charge to the jury to bring in a verdict for the plaintiff and assess the damages in the total sum of the policy, with interest from the date the suit was instituted and \$125 attorney's fees, while the seventh and last assignment is based upon the denial of the motion for a new trial. Having discovered reversible errors committed in the ruling upon the demurrer to pleas, which necessitates the remanding of the case, when the pleadings doubtless will be recast or amended, whereby different issues may be framed, under which other and different evidence may be adduced, it is not likely that the questions presented by these assignments will arise on another trial. For this reason, we do not feel that it is incumbent upon us to treat them, if, indeed, it is advisable. As to withdrawing the case from the jury and directing the verdict, see *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910, and *Bass v. Ramos* (decided here at the present term) 50 South 945.

In reply to the contention of the defendant in error that the assignments based upon the sustaining of the demurrer to certain pleas cannot properly be considered by this court for the reason that the plaintiff in error did not at the time of presenting and settling the bill of exceptions in the assignment of errors presented therewith include assignments upon such ruling, it is sufficient to say that special rule 1 to be observed in the preparation of bills of exceptions and transcripts of the record does not so require. Section 1694 of the General Statutes of 1906, which has been construed several times by this court, expressly provides that it shall not be necessary to take an exception to a judgment upon demurrer.

For the errors found, the judgment must be reversed.

WHITFIELD, C. J., and COCKRELL, J., concur

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

# FIDELITY & DEPOSIT CO. OF MARYLAND v. AULTMAN.

(Supreme Court of Florida. Dec. 21, 1909. Rehearing Denied Jan. 25, 1910.)

## 1. PLEADING (§ 193\*)—DEMURRER TO DECLARATION—GROUNDS.

Where a declaration states a cause of action for at least nominal damages, a ground of demurrer that no cause of action is stated is unavailing.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 433; Dec. Dig. § 193.\*]

## 2. BONDS (§ 122\*)—ACTIONS—PARTIES.

Where a bond is the joint and several undertaking of two or more parties, the obligors may be sued severally or all jointly.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 154; Dec. Dig. § 122.\*]

## 3. PLEADING (§ 193\*)—DEMURRER—DAMAGES.

Grounds of demurrer that reach only the extent of the damages to be recovered are unavailing, where a cause of action for at least nominal damages is stated.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 439; Dec. Dig. § 193.\*]

## 4. BONDS (§ 124\*)—ACTIONS—PLEADING.

In an action on a bond in which the obligation is limited in amount, it is immaterial on demurrer that the ad damnum clause states an amount in excess of the liability on the bond.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 171; Dec. Dig. § 124.\*]

## 5. PLEADING (§ 193\*)—DEMURRER—SPECIAL DAMAGES.

Where a cause of action is stated, improper claims for special damages in a declaration are reached, not by demurrer, but by proper motion, or by exclusion of evidence relating thereto, or by proper instructions by the court to the jury.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 439; Dec. Dig. § 193.\*]

## 6. PLEADING (§ 354\*)—IRRELEVANT PLEAS—MOTION TO STRIKE.

In an action at law, where pleas do not tender an issue of fact going to the cause of action, and are wholly irrelevant and improper, they may be stricken on motion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1093; Dec. Dig. § 354.\*]

## 7. APPEAL AND ERROR (§ 518\*)—RECORD—BILL OF EXCEPTIONS.

Pleas offered with motion to vacate a judgment by default are not a part of the record proper when they are not allowed to be filed by the court, and they should be evidenced to the appellate court by a proper bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.\*]

## 8. APPEAL AND ERROR (§ 545\*)—REVIEW—NECESSITY OF BILL OF EXCEPTIONS.

Motions based upon matters dehors the record proper are not self-supporting, and mat-

ters in pais in support of the motions should be brought to the appellate court by proper bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2416; Dec. Dig. § 545.\*]

## 9. BONDS (§ 142\*)—ACTION—INSTRUCTIONS.

In an action on a bond, requested charges that if a portion of the damages claimed were paid by or charged to a volunteer third party, who was to pay the same to the plaintiff, even if warranted by the evidence, are properly refused when they tend to confuse the issues.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 250; Dec. Dig. § 142.\*]

## 10. JUDGMENT (§ 123\*)—DEFAULT—APPLICATION FOR JUDGMENT—INSTRUCTIONS.

Requested charges going to the entire cause of action are properly refused after judgment by default has been rendered by the court.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 123.\*]

## 11. PLEADING (§ 291\*)—VERIFICATION—ACTION ON BOND.

The rule dispensing with proof of the execution of a bond unless the execution is denied by plea under oath does not dispense with the production of the instrument at the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 859-863; Dec. Dig. § 291.\*]

## 12. PLEADING (§ 36\*)—ADMISSIONS—CONCLUSIVENESS.

An admission that a bond was approved and filed is not necessarily an admission that the bond was executed by the alleged obligors.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 36.\*]

Cockrell, J., dissenting.

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Hillsborough County; J. B. Wall, Judge.

Action by S. B. Aultman against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendant brings error. Reversed.

J. J. Lunsford and H. P. Baya, for plaintiff in error. H. S. Hampton, for defendant in error.

WHITFIELD, C. J. An action was brought in the circuit court for Hillsborough county by S. B. Aultman against the plaintiff in error upon an injunction bond for \$1,000 given in a case wherein R. F. Bickerdike, as next friend of Elizabeth J. Bickerdike, was plaintiff and S. B. Aultman was defendant. The bond was the joint and several obligation of R. F. Bickerdike and the Fidelity & Deposit Company of Maryland, and was conditioned to "pay to S. B. Aultman, defendant, in said suit, all costs and damages which may be sustained by him by reason of the issuance of the temporary writ in case the same shall be dissolved." The declaration alleges that the injunction was dissolved, and that during the time the injunction was in force the defendant "in securing a dissolution of the said injunction was compelled to expend \$90 railroad fare, \$800 attorney's fees, \$20 for attending hearing before the court, \$10 for securing affidavit and filing same in court," amounting to \$920, "which said amount plain-

tiff expended by reason of the said injunction order without deriving any benefit therefrom in and about his defense in that behalf."

The declaration was demurred to upon the grounds that (1) no cause of action is stated; (2) the action is against only one obligor; (3) the attorney's fees are not alleged to be reasonable; (4) the damages are too remote; (5) the railroad fare is not a proper claim against the bond; (6) it does not appear that the damages accrued between the issuance and the dissolution of the injunction; (7) the amount of the bond is \$1,000, while damages are laid in \$1,999; (8) no facts are alleged for general damages. This demurrer was overruled, and the defendant filed the following pleas:

"Defendant avers that, if it is responsible at all for attorney's fees as an element of damage in the above cause, it is only responsible for reasonable attorney's fees necessary in the dissolution of the temporary writ of injunction, and defendant denies that the sum of \$800 is a reasonable attorney's fee for the dissolution of the said temporary writ of injunction.

"And for a second plea defendant denies that the plaintiff herein was compelled to expend the sum of \$90 railroad fare from Chicago to Tampa and return in securing a dissolution of the temporary writ of injunction, and further denies that the said sum of \$90 is a proper element of damage for which said defendant as obligee on said injunction bond is responsible.

"And for a third plea defendant denies that the complainant herein was compelled to expend the sum of twenty dollars (\$20) for attending the hearing before the court at Wall Springs, and further denies that plaintiff herein was compelled to expend the sum of ten dollars (\$10) in securing affidavits to be filed in the said court.

"And for a fourth plea defendant denies that, by reason of anything in the said injunction bond contained, it has become liable to the complainant as an obligee on said bond in the sum of nine hundred and twenty dollars (\$920.00) by reason of the dissolution of said writ of injunction.

"And of these defendant puts itself upon the country."

A motion to strike the pleas because inadmissible and improper, and because irrelevant and immaterial, was granted after argument by counsel for both parties. No leave to file other pleas appears to have been asked. Judgment by default was entered by the court, and the cause was referred to a jury for the assessment of damages. A motion subsequently made to vacate the default judgment and for leave to file pleas, and the order denying the motions are with the pleas copied into the record proper, but as they are not a part of the record proper, never having been allowed by the court, and as they do not appear in the bill of exceptions, they will not be stated in full. The jury assessed the dam-

ages at \$820 and interest from the date of the institution of the action. A motion for a new trial was denied and an exception taken. Judgment was entered for the amount of the verdict, and the defendant took writ of error.

The first ground of the demurrer is unavailing, since the declaration states a cause of action for at least nominal damages. *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 South. 732, 20 L. R. A. (N. S.) 92. As the bond is the joint and several obligation of the defendant company and another, the second ground of the demurrer falls. Where a bond is the joint and several undertaking of two or more parties, the obligors may be sued severally or all jointly. See 2 *Andrews Am. Law*, 1347; 1 *Chitty's Pleading*, 143. The reasonableness of the attorney's fees claimed as damages is a matter of proof, and does not go to the cause or right of action. As a breach of the condition of the bond is alleged, the special damages stated by the fourth, fifth, and sixth grounds of the demurrer to be too remote, and not within the condition of the bond go to the damages recoverable and not to the action. Since the obligation of the bond is limited to \$1,000, the excess of this amount put in the ad damnum clause is immaterial. A failure to allege general or substantial damages does not render the declaration subject to a demurrer when a cause of action for at least nominal damages is stated. Where a cause of action is stated, improper claims for special damages in a declaration are reached by proper motion or by exclusion of evidence relating thereto, or by proper instructions by the court to the jury. See *Western Union Tel. Co. v. Wells*, 50 Fla. 474, 39 South. 838, 2 L. R. A. (N. S.) 1072, 111 Am. St. Rep. 129; 7 *Am. & Eng. Ann. Cas.* 531; *Hildreth v. Western Union Tel. Co.*, 56 Fla. 387, 47 South. 820; *Borden v. Western Union Tel. Co.*, 32 Fla. 394, 13 South. 876.

The pleas did not tender an issue of fact going to the cause of action, and were therefore properly stricken as being wholly irrelevant and improper. *Russ v. Mitchell*, 11 Fla. 80; *Southern Home Ins. Co. v. Putnal*, 49 South. 922.

The motion to vacate the default judgment was not in accordance with the rule, and the pleas tendered with the motion do not appear in the bill of exceptions. Even, if the motion itself be regarded as a part of the record proper, it is not self-supporting, and, as the matters presented in support of the motion are in pais, they should be brought up for review in a proper bill of exceptions. As the pleas offered after the default judgment was entered are not a part of the record because they could not be filed as a matter of right and were not permitted by the court to be filed, they cannot be considered here, even though they are copied in the transcript, since they are matters in pais, and are not included in the bill of exceptions. *Thomas v.*

Walden, 48 South. 746; Benedict v. W. T. Hadlow Co., 52 Fla. 188, 42 South. 239.

Charges that if a portion of the damages claimed were paid by or charged to another party who was to pay the same to the plaintiff, even if warranted by the evidence, were properly refused as calculated to confuse the issues, any such obligation of the third party being voluntary as to the defendant. Charges going to the entire cause of action were properly refused as a judgment by default had been rendered by the court.

The court having by appropriate questions to a witness ascertained without objection or contradiction that, in order to get affidavits for the purpose of dissolving the injunction, it was necessary for the plaintiff to take persons to Tampa, it was not error to refuse to strike testimony as to small items of expense for meals incident thereto. See *Gonzalez v. De Funiak H. T. Co.*, 41 Fla. 471, 26 South. 1012.

It does not appear that the bond sued on was put in evidence. As to the practice in requiring the production of the original bond or a certified copy at the trial where the final judgment is entered by the clerk under the statute, see *West v. Fleming*, 36 Fla. 298, 18 South. 587. And as to the practice where the execution of the instrument is denied, see *Hooker v. Johnson*, 10 Fla. 198. In this case it was admitted of record that the bond was approved and filed in the clerk's office, but there is no direct express admission that the instrument was duly executed and delivered. The rule dispenses with proof of execution unless specially denied by plea under oath, but it does not dispense with the production of the instrument at the trial. *Hooker v. Johnson*, supra.

The judgment is reversed. All concur, except COCKRELL, J., dissenting.

# SARASOTA ICE, FISH & POWER CO. et al. v. LYLE & CO.

(Supreme Court of Florida. Division A. Dec. 21, 1909. Rehearing Denied Jan. 25, 1910.)

## 1. APPEAL AND ERROR (§ 1009\*)—REVIEW—FINDING OF CHANCELLOR.

While the findings and conclusions of a chancellor, where the testimony is not taken before him, but before a master or examiner, by reason whereof he is not afforded an opportunity of seeing and hearing the witness, are not entitled to the same weight as the verdict of a jury, yet even in that case they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3973; Dec. Dig. § 1009.\*]

## 2. APPEAL AND ERROR (§ 931\*) — REVIEW — PRESUMPTIONS—FINDINGS OF FACT.

In equity, as well as at law, every presumption is in favor of the correctness of the ruling of the trial judge, and a final decree rendered by him based largely or solely upon questions

of fact will not be reversed, unless the evidence clearly shows that it was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. § 931.\*]

## 3. APPEAL AND ERROR (§ 1203\*)—PROCEEDINGS AFTER REMAND.

Where a final decree is reversed upon appeal because the trial court had never acquired jurisdiction of the person of one of the appellants, who is a necessary party, and, upon such case being remanded, such party voluntarily comes in and files an answer, whereby he virtually admits the allegations of the bill in so far as they concerned him, and such cause is referred to the same master to take the testimony therein to whom it had previously been referred, and the complainant files a motion, reciting therein such above stated facts, and alleging that the issues had not been changed and that it would be a great saving of time and expense to use such testimony so previously taken, whereby an order is sought directing such master to mark and file all the testimony previously taken by him, "including all exhibits, depositions, oral testimony taken and reduced to writing by him," and that he report the same, without delay, to the court for further consideration, no error is committed by the trial court in granting such motion, due notice of the time and place of the hearing thereof having been given to the defendants, who are not shown to have interposed any objections or offered any opposition thereto, but who subsequently sought and obtained an order allowing them additional time to take further testimony, and did take such testimony.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1203.\*]

## 4. EQUITY (§ 422\*)—DECREE—MASTER'S FINDINGS.

An assignment of error that "the court erred in adopting and making a part of its final decree the master's unauthorized finding and conclusion of fact and law as set forth and made a part of said final decree" is without force, when it is satisfactorily shown how such master's report happened to be before the court, and the decree does not recite that such findings and conclusions were adopted and incorporated therein. Even if the court did so adopt and incorporate them, no error was committed thereby, provided they were warranted and supported by the evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 944; Dec. Dig. § 422.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Manatee County; J. B. Wall, Judge.

Bill by Lyle & Co. against the Sarasota Ice, Fish & Power Company and others. Decree for complainant, and defendants appeal. Affirmed.

J. B. Singletary and Sparkman & Carter, for appellants. Wilson & Boswell, for appellee.

SHACKLEFORD, J. The appeal in this case is presented here for the second time. For the opinion on the former appeal, see *Sarasota Ice, Fish & Power Company v. Lyle & Co.*, 53 Fla. 1069, 43 South. 602, wherein will be found a statement of the facts. As is stated therein, the final decree from which the appeal was entered had to be reversed, for the reason that it appeared that the court had never acquired jurisdiction

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the appellants, although a decree pro confesso had been entered against him; such appellant being affected by the final decree, and therefore a necessary party. We also called attention to the fact that it appeared that an order of reference had been made before all the issues had been properly made up. On the case being remanded, S. D. Futch voluntarily came in, waived the service of a subpoena upon him, and filed an answer, whereby he virtually admitted the allegations of the bill in so far as they concerned or affected him. The issues were all properly made up, and the court thereupon made an order referring the cause to O. K. Reaves, a practicing attorney, as special master, to take the testimony therein and report the same to the court without his findings and conclusions. Such special master was the same person to whom such cause had been previously referred, only in the first order he seems to have been directed to make and report findings and conclusions. After the making of the second order of reference, the complainant, who is the appellee here, filed a motion, due notice of the time and place of the hearing thereof being given to the defendants, reciting therein the fact of the appearance and answer of Futch, the taking of the testimony by the same master, that the issues had not been changed, and that it would be a great saving of time and expense to use such testimony so previously taken, wherefore an order was sought from the court directing such master to mark and file as evidence all the testimony previously taken by him, "including all exhibits, depositions, oral testimony taken and reduced to writing by him," and that he report the same, without delay, to the court for further consideration. This motion was granted by the court, without opposition upon the part of the defendants or without any objections being interposed by them, so far as is disclosed by the record. After the making of this order, the defendants sought and obtained from the court an order granting them 15 days from the date thereof within which to take other and further testimony, and the defendants did take such testimony before the master. Such master filed his original report of the evidence taken before him, in obedience to the order of the court, as well as another report containing the evidence subsequently taken before him by the defendants, in accordance with the order of the court to which we have previously referred; such two reports being attached together. Such original report also contained the master's findings and conclusions as made by him at that time; the same not having been detached from the report. The cause came on for a final hearing before the court upon the pleadings and all the evidence so taken before and reported by such master, and a final decree was rendered in favor of the complainant, being substantial-

appeal was entered.

Twenty-three errors have been assigned by the appellants, practically all of which are insisted upon and argued. Voluminous briefs, including a reply brief by the appellants, have been filed by the respective parties, and we have also had the benefit of oral arguments from their respective counsel. The appellants lay great stress upon the evidence in support of their different contentions, and quote extensive extracts therefrom in their two briefs. The evidence so taken before the master covers a large number of typewritten pages and we have given the same our careful consideration, but shall not attempt to set it forth in this opinion or even to give a summary or synopsis thereof, for the reason that we see no useful purpose to be accomplished by so doing. We have also carefully read the briefs of counsel in support of their respective contentions, and we listened attentively to their oral arguments. In view of the conclusion which we have reached, we feel that it would be fruitless labor to discuss the different assignments in detail, therefore shall make no attempt to do so. It seems to us, after mature deliberation, that by the final decree, from which this appeal was entered, substantial justice has been done between the parties, and we do not feel warranted in disturbing the findings and conclusions reached and announced therein. Upon some points the evidence is conflicting, and perhaps it is not as satisfactory in all respects as we could desire, yet there is evidence to warrant and support the decree, and, following the established practice in this court by a long line of decisions, we are not disposed to interfere with it. We are not unmindful of the distinction pointed out by this court where the evidence was taken before the chancellor, who was thereby afforded the opportunity of seeing and hearing the witnesses, and where the testimony was taken before a master or examiner and no such opportunity was afforded the chancellor. See *Lucas v. Wade*, 43 Fla. 419, 31 South. 231. While the findings and conclusions of a chancellor, where the testimony is not taken before him, are not entitled to the same weight as the verdict of a jury and are not so conclusive, yet even in that case they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous. In other words, in equity, as well as at law, every presumption is in favor of the correctness of the ruling of the trial judge and a decree based largely or solely upon questions of fact will not be reversed, unless the evidence clearly shows that it was erroneous. See *Waterman v. Higgins*, 28 Fla. 660, 10 South. 97, and *Mock v. Thompson* (decided here at the present term) 50 South. 673. We are unable to say in the instant case that the preponderance of the evidence is against the findings of fact made by the chancellor. Nei-

ther have any reversible errors of law either in the decree or in his other rulings upon which errors have been assigned, been made to appear to us. The contention of the appellants that the testimony should have been retaken, and that it was error to direct the special master to refile his report is clearly untenable. Upon the showing made to the chancellor in the motion of complainant, such a direction to the master was eminently proper and correct, especially so since the defendants interposed no objections thereto. The further contention of the appellants that "the court erred in adopting and making a part of its final decree the master's unauthorized finding and conclusion of fact and law as set forth and made a part of said final decree" is also without force. We have already stated how such findings and conclusions happened to be filed with the report. The decree does not recite that the court adopted such findings and conclusions and incorporated them in the decree, but, even if the court did so adopt and incorporate them, no error was committed thereby, provided they were warranted and supported by the evidence. We have previously said that in our opinion the evidence does warrant and support the decree. No reversible error having been made to appear to us, it necessarily follows that the decree appealed from must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

#### BROWN et al. v. FLOYD.

(Supreme Court of Alabama. June 30, 1909.  
Rehearing Denied Dec. 16, 1909.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 119\*)—PERSONAL OR REPRESENTATIVE LIABILITY—TRESPASS.

An administrator may be liable individually for trespass, but not in his representative capacity, since the estate of a deceased person cannot be held liable for the torts of the personal representative.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 483; Dec. Dig. § 119.\*]

#### 2. TRESPASS (§ 50\*)—ACTIONS—DAMAGES—RENT.

In trespass, plaintiff is not entitled to recover for rent of the lands trespassed upon, where she left the premises at the request of a third party, and not because of the trespass.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 134; Dec. Dig. § 50.\*]

#### 3. TENANCY IN COMMON (§ 13\*)—POSSESSION OF CO-TENANT—EFFECT—TRESPASS.

The fact that possession of one tenant in common is the possession of all is not a defense for trespass by one tenant in common against the possession and person of another, holding

the actual possession and claiming the entire property.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 28, 29; Dec. Dig. § 13.\*]

#### 4. TRESPASS (§ 27\*)—ACTIONS—PARTIES—DEFENSES.

A sole owner of land or a chattel cannot commit a trespass to recover their possession, although they are wrongfully withheld by one having no claim or title, since he has an adequate remedy at law.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 59; Dec. Dig. § 27.\*]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Action by Mary L. Floyd against R. E. Brown and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Lackey & Bridges, for appellants. D. H. Riddle, for appellee.

MAYFIELD, J. Plaintiff, a woman, sues defendants in trespass *quare clausum fregit vi et armis* as to lands described in the complaint. The defendant R. E. Brown is sued jointly with the other defendants, and is sued individually and as administrator.

The trespass as alleged and proved was committed by the said R. E. Brown et al. after the death of the intestate of the said Brown. As for such trespass, the personal representative is liable individually, but not in his representative capacity. The estate of a deceased person cannot be held liable for the torts of the personal representative. The separate demurrer of R. E. Brown as administrator should have been sustained to the complaint. It stated no cause of action against him in that capacity. The complaint should have been amended in this respect. *Shorter v. Urquhart*, 28 Ala. 360; *Dally's Adm'r v. Dally*, 66 Ala. 266; *Spotswood v. Bentley*, 132 Ala. 266, 31 South. 445.

The plaintiff in this case could not recover damages as for rent of the lands trespassed upon. It is shown that she left the premises at the request of a third party, and not on account of the trespass or wrong committed by these defendants. Consequently she could not recover in this action, as damages, the rent of the lands, or the value thereof, after she abandoned them at the request of a third party.

While the possession of one tenant in common is the possession of all, this is not available as a defense for trespass *vi et armis* committed by one tenant in common against the possession and person of another, who is at the time in the actual possession, claiming the entire property in his sole right, and is disputing the title of his co-tenant. If the defendants were tenants in common with the plaintiff of the lands in question (as they claim they were), they should have resorted to the law to have declared and enforced their rights as such tenants in com-

mon. They should not have attempted to assert and enforce their rights by force and contrary to law, as all the evidence shows they did. If the relation of tenant in common as to the lands had been undisputed, that fact could not justify the torts alleged and proven in this case against those defendants. A sole owner, much less a tenant in common, will not be permitted thus with force to right a wrong by committing a trespass, though the other party wrongfully withholds the possession of the land or chattel from its true owner. *Herndon v. Bartlett*, 4 Port. 481; *Folmar & Sons v. Copeland*, 57 Ala. 588; *Finch v. Alston*, 2 Stew. & P. 83, 23 Am. Dec. 299.

The evidence in this case tends to show an unwarranted and unlawful, if not a malicious, trespass, and was sufficient to authorize the jury to award vindictive damages. It conclusively appears that they did award such damages; and we are not prepared to say that such award, as to either character or amount, was so unwarranted as to authorize the trial court in setting it aside on the motion for a new trial. However, we do not pass on the ruling upon the motion for a new trial, for the reason that the case must be reversed for other causes assigned; but this much is said as to the right to recover punitive damages.

The judgment is reversed, and the cause remanded.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

# FLETCHER v. TENNESSEE COAL, IRON & R. CO.

(Supreme Court of Alabama. Nov. 25, 1909.)

## 1. MASTER AND SERVANT (§ 286\*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.

In an action for injury to a servant, alleged to have been caused by a blow from a piece of iron falling from the top of an accumulator, evidence held not to create a reasonable inference for the jury that plaintiff was injured by the alleged cause.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.\*]

## 2. EVIDENCE (§ 117\*)—EVIDENCE IRRELEVANT UNLESS SUPPORTED.

In an action for injuries to a servant by his being struck by a piece of iron which fell from the top of an accumulator, evidence that pieces of iron on the top of the accumulator sometimes fell off when they were not piled straight is not admissible, where there was no proof that the iron was not piled straight, or was sticking out at the time when plaintiff was injured, or that the conditions were the same then as when iron fell off on previous occasions; no statement being made by counsel that it would be made relevant by competent evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 136; Dec. Dig. § 117.\*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Dewitt Fletcher, pro. am., against the Tennessee Coal, Iron & Railroad Company for damages. From a judgment for defendant, plaintiff appeals. Affirmed.

The first count is by a licensee for damages, and the allegations of negligence are general. The second count was charged out. The third count is by an employé, and the negligence is alleged to have consisted in a defect in the condition of the ways, works, machinery, etc. Count 4 is by an employé, and counts on the negligence of one intrusted with superintendence. Count 5 is by an employé, and counts on the negligent order of one Hill, to whose orders plaintiff was bound to conform, and that said Hill negligently ordered plaintiff to work at or near an accumulator, from which there was danger of heavy pieces of iron falling. Counts 6 and 7 went out. Count 8 is by an employé, and alleges the duty of the defendant to furnish a reasonably safe place to work, and charges the failure to perform that duty in putting the plaintiff to work at or near an accumulator, which was dangerous and unsafe by reason of the jarring of said accumulator by machinery, and by reason of the fact that the pieces of iron, or billets of iron or steel, were lying loose on the top of said accumulator, where they were in danger of being shaken or jarred off. Count 9 is the same as count 8, except that it alleges that the danger was a latent one, of which the plaintiff was ignorant.

Huey, a witness for the plaintiff, testified that he was head fireman, and that the plaintiff was firing engine No. 1, and that there was an accumulator or compressor there, which worked up or down by water pressure, and that it was within three feet of boiler No. 1; that in firing the boiler it is necessary to be near by; that the fireman punched the fire and stepped back between the boiler and the accumulator; that the accumulator is about 20 feet high; and that it goes up and down, and was weighted down with pig iron on top. The witness was asked this question: "State whether or not the old man working there knew that running the accumulator was dangerous." Objection was sustained. Further testifying in reference to the accumulator, witness said: "It was dangerous around the accumulator. The water pressure was strong, and the iron was to hold it down. It goes up and down, and the effect of the movement is to shake it all the time." Witness was then asked this question: "What effect does it have on the iron on top?" Witness answered: "It shakes, and if the iron isn't straight on, sometimes pieces fall off." The answer was excluded on motion. This and similar evidence was offered and excluded. Testifying for himself, the plaintiff said that he had never seen an accumulator before, but that, when he saw it, it was going up and



down, and that there was iron on the top. "I could see the iron sticking out. I knew it was up there. I could tell, when I looked up at the accumulator, that it was filled up, piled up, with pieces of iron." No evidence was introduced showing that the iron from the accumulator struck the plaintiff; the only evidence in that connection being that the firemen were in the habit of stepping back to get fresh air, and that plaintiff stepped back, stepping in between the accumulator and the boiler, and that while standing there, looking at another punch the fire, something struck him on the head and shoulders, rendering him unconscious.

Gaston & Pettus, for appellant. Percy, Benners & Burr, for appellee.

ANDERSON, J. The evidence fails to show, or create a reasonable inference for the jury, that the plaintiff was injured by the falling of a piece of iron from the top of the accumulator, and the fact that he was so injured is a mere matter of conjecture or speculation. It is true that some of the excluded evidence, when taken with that of the plaintiff as to the condition of the iron on top of the accumulator at the time of the injury, might create an inference that he was struck by a piece of falling iron; but this evidence was not in when the trial court gave the general charge for the defendant.

Nor can the trial court be put in error for excluding the evidence of the plaintiff's first two witnesses, or so much thereof as was excluded, as it was not competent when given; there being no proof that the iron was not piled straight, or was sticking out, the morning in question, or that conditions were the same then as when the iron fell off on previous occasions, and no statement by counsel that it would be made relevant by competent evidence. In order to put the trial court in error, this evidence should have been offered after the plaintiff testified.

Finding no reversible error in the record, the judgment of the circuit court must be affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and EVANS, JJ., concur.

### MARTIN v. EVANS.

(Supreme Court of Alabama. Nov. 11, 1909.)

#### 1. EVIDENCE (§§ 434, 436\*)—PAROL EVIDENCE—INVALIDITY.

That a conveyance was obtained by fraud or undue influence is open to proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2024; Dec. Dig. §§ 434, 436.\*]

#### 2. ACKNOWLEDGMENT (§ 55\*)—CERTIFICATE OF NOTARY—EFFECT.

The certificate of a notary is presumptive evidence, and cannot be contradicted; nor can the acknowledgment itself be contradicted.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 290-314; Dec. Dig. § 55.\*]

#### 3. DOWER (§ 55\*) — DOWER NOT ASSIGNED — NATURE OF INTEREST.

Before dower is assigned, it is in the nature of a right of action, and not an interest or estate in land.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 176; Dec. Dig. § 55.\*]

#### 4. CANCELLATION OF INSTRUMENTS (§ 60\*)—PLEADING—DECREE.

Where, pending a suit to cancel a conveyance to defendant, he died, and the suit was revived against his heirs and against his administrator and widow, and the heirs and administrator allowed decrees pro confesso to be taken, the widow having had no estate in the lands, under Code 1907, § 3754, and there being no allegations to show that she had a dower interest, and the decrees pro confesso, under section 3163, admitting all allegations of the bill and dispensing with proof, a decree for complainant would be entered.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 60.\*]

#### 5. DEEDS (§§ 18, 71, 72\*)—VALIDITY.

Defendant accused complainant's son of having embezzled funds from defendant, and caused it to be represented to complainant that unless she made a conveyance of certain real estate to defendant within a few hours the son would be prosecuted, and acting under extreme distress and apparent necessities of the case the conveyance was made. *Held*, that complainant was entitled to have it set aside as obtained under duress and undue influence, and as without consideration.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 24, 27, 183-190; Dec. Dig. §§ 18, 71, 72.\*]

#### 6. CANCELLATION OF INSTRUMENTS (§ 30\*)—PARTIES AGAINST WHOM CANCELLATION MAY BE HAD.

Defendant, who had employed complainant's son, after the termination of the employment accused the son of having embezzled funds from defendant, and he stated to one who acted as the son's adviser that if a settlement was not made the son would be prosecuted, whereupon such person and the son visited complainant, and stated that the prosecution would be commenced unless she should make a conveyance of certain real estate, which was done, and which defendant accepted. *Held*, that defendant was the beneficiary of the wrong perpetrated on complainant, and was responsible for the acts of the son and his adviser, though they did not act as his agents, and cancellation could be had as against him.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 30.\*]

#### 7. VENDOR AND PURCHASER (§ 227\*)—BONA FIDE PURCHASER.

Defendant was not in a position to set up any claim as a bona fide purchaser for value without notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 474; Dec. Dig. § 227.\*]

#### 8. CANCELLATION OF INSTRUMENTS (§ 18\*)—ESTOPPEL.

Complainant was not estopped from setting up the truth of the transaction and obtaining relief in equity.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 28-27; Dec. Dig. § 18; Deeds, Cent. Dig. § 210.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Suit by Mary D. Evans against Margaret Martin. From a decree in favor of complainant, defendant appeals. Affirmed.

The following is the opinion of the chancellor in the court below:

"Complainant alleges: That on the 15th day of February, 1907, her youngest son came to her in distress and stated to her that his former employer, Ed Martin, accused him of being an embezzler in a large amount. He told her that if he did not obtain a deed to her home within a few hours he would be prosecuted. That, acting under the extreme distress and what she thought the necessity of the case required, she did execute a deed to said Martin for her home, which she had accumulated by her own industry, and which was the only property that she owned. That no consideration whatever was ever paid to her. The deed states a consideration of \$2,500. That this is entirely fictitious, and she received nothing whatever for the deed. That she had no advice, and acted hastily and under the extreme distress and surprise, and without due deliberation. The evidence sustains the above allegations.

"In *Holt v. Agnew*, 67 Ala. 369, it is said: 'In this case it cannot be said that there was any relation of trust and confidence existing between the parties. To the fidelity and integrity of the appellees the appellant did not commit her interest, nor did she look to them for advice or protection. They met, and by her own act, and upon her own suggestion, they were invited into the relation of parties contracting with her, that she might obtain relief for her husband, afflicted by disease, harassed in mind because of the official default from which he apprehended the most serious and extreme consequences. Transactions with her, looking to the relief of her husband, from which she sustains detriment, and does not derive corresponding benefit, in which she parts with the property, or rights of property, and does not obtain an adequate valuable consideration, in view of her distressed condition, which was known to appellees, the plainest consideration and highest obligation of right and justice compelled a court of equity to investigate zealously and vigilantly, and to undo them, if there be any traces of undue influence from any source or of advantages taken of her condition. Fraud or imposition may not be shown. Of either of these the parties may be fully acquitted. Yet if she has acted hastily, without time and opportunity for deliberation, in the absence of disinterested advice, and without opportunity to obtain it, or if she was acting under the influence of threats of the punishment of her husband, or of extreme terror, or of apprehension of his impending death, and her motive was his relief, a court of equity must intervene and restore her to

the condition in which she was when induced into the transaction. The doctrine upon which the court acts, when a party by force of circumstances is reduced to a condition in which he cannot deal upon terms of equality with another, and peculiarly subject to oppression or imposition, or to undue influence, is thus expressed by Judge Story: "As where he does not act or makes a contract when he is under duress or the influence of extreme terror, or of apprehension short of duress, or of threats. For, in cases of this sort, he has no free will, but stands in vinculis, and the constant rule in equity is that, where a party is not a free agent and is not equal to protecting himself, the court will protect him. \* \* \* On this account courts of equity will watch with extreme jealousy all contracts made by a party while under imprisonment, and if there is the slightest ground to suspect oppression in such cases they will set the contract aside. Circumstances, also, of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may in like manner so overcome his free agency as to justify the court in setting aside a contract made by him, on account of some oppression, or fraudulent advantage, or imposition, attending upon it." 1 Story, Eq. § 239. And so in cases of surprise, of sudden action without due deliberation, if there is great inequality of consideration in the transaction, and advantage is taken of the circumstances which mislead, confuse, or disturb the reason and judgment, the court will intervene. 1 Story, Eq. § 251.' I do not understand that an acknowledgment precludes an inquiry into the manner in which a deed was executed. The certificate of the notary is presumptive evidence and cannot be contradicted, nor can the acknowledgment itself be contradicted; but that the conveyance was obtained by fraud or undue influence is open to proof, otherwise no acknowledged conveyance could ever be attacked on these grounds. As I understand the cases of *Moog v. Strang*, 69 Ala. 98, and *Miller v. Marx*, 55 Ala. 322, this is all they hold. The cases of *Moog v. Strang*, 69 Ala. 98, *Mohr v. Griffin*, 137 Ala. 406, 34 South. 378, *Pratt Land & Improvement Co. v. McClain*, 135 Ala. 452, 33 South. 185, 93 Am. St. Rep. 35, and *Walker v. Nicrosi*, 135 Ala. 356, 33 South. 161, are different from this case in this: That there was a consideration paid out by the defendant against whom the relief is asked.

"In the present case complainant was paid no consideration, and Martin, the grantee in the deed, suffered no loss or detriment, and paid out no consideration, bringing these cases under the rule laid down in *Holt v. Agnew*, 67 Ala. 369, and *Story's Equity*, there cited. The present case seems to be a plain case of entire failure of consideration for the deed, and its being executed under great distress, and that the grantor was not in

any condition to act with due deliberation, but from the influence brought to bear upon her indirectly by said Martin. The suit was brought against Ed Martin, who has since died. Upon the suggestion of his death, leave was granted to revive against his heirs and personal representatives when known. Subsequently, on motion of complainant, the suit was revived against his heirs, being his brothers and sisters, named in the motion and order of revival, and also against his administrator, and also against his widow. The heirs and administrator have allowed decrees pro confesso to be taken against them (being brought in by publication). The widow alone is defending this suit. Having died intestate, leaving brothers and sisters, Martin's widow has no estate in the lands. Section 3754, Code 1907. There are no allegations to show that she even has a dower homestead interest in the lands. Sections 3812, 3813, 3814, 4160, Code 1907. *Francis v. Sandlin*, 150 Ala. 586, 43 South. 829. 'Before dower is assigned, it is in the nature of a right of action, and not an interest or estate in lands.' *Francis v. Sandlin*, 150 Ala. 586, 43 South. 830. So that, had I arrived at a contrary conclusion than that there was no such consideration as would sustain the deed upon the proof offered by the widow alone, yet, she having no right in the property, and the heirs and personal representatives having admitted the allegations of the bill, the conveyance would still have to be set aside. The ruling is undisputed that a decree pro confesso admits all of the allegations of the bill and dispenses with the proof. Section 3163 of the Code of 1907, and authorities cited there."

Gregory L. & H. T. Smith, for appellant.  
Fitts & Leigh, for appellee.

MAYFIELD, J. This bill was filed by complainant to set aside, cancel, and annul an absolute conveyance of her home, upon the grounds that the conveyance was obtained by undue influence, that in executing it she acted under mental, if not physical, duress, and because there was no consideration to support the conveyance. The facts are briefly these:

A son of complainant, a boy about 20 years of age, had been employed by one Martin, the grantee in the deed in question, for 5 or 6 years. The boy seems to have had complete charge and control of Martin's business; that is, of one line of it, to wit, the stable business, and was bookkeeper and general manager of it. The boy, for some reason which does not appear, quit the employ of Martin, and set up for himself a business of the same kind as that in which he was engaged for Martin. Neither Martin nor the boy appears to have known anything about bookkeeping, and the books of Martin's business seem to have been poorly kept. After the boy left Martin, the latter employed one Horn to check up his books and the accounts of the boy. Horn did not complete the work, but

abandoned it at Martin's request. Martin then employed one Rosson, who checked up the books, who reported the boy \$4,000 or \$5,000 short in his accounts. There were conversations between Martin, Horn, and Rosson concerning the manner in which the books were kept, what the books showed and failed to show, and the amount of the shortage. Horn seems to have been the friend, if not the legal adviser, of the boy, and to have acted as an intermediary between him and Martin. Martin in the meantime employed an attorney in the matter, and referred the boy and Horn to his attorney for final settlement and adjustment. Martin, on one or more occasions, told Horn that, if the boy did not make settlement of his default by a given date, he (Martin) was going to prosecute him to the full extent of the law—intimating, if not saying, that the boy was criminally guilty of embezzlement and that he would put him in the penitentiary if he did not settle up the matter. Martin finally agreed to accept \$2,500 in payment of the shortage and default. He declined to accept a mortgage upon the mother's home for the amount, but agreed to accept an absolute deed thereof in payment of the \$2,500 and in settlement of the claim, and, further, that he would lease the place to the mother for \$5 per month, and reconvey upon the payment of a certain amount. These conditions were finally agreed upon between Martin, Horn, and the boy, before the mother ever knew of the matter. Horn and the son then went to her house to see her and have her to sign the deed and lease. They explained the matter to her, and told her that the arrangement was necessary in order to keep her son from being prosecuted, and probably sent to the penitentiary, and advised her to execute the paper. She was greatly grief-stricken, but under protest, and while declaring that she did not and could not understand the matter, signed the deed and lease, which were prepared by the attorneys of Martin. The deed recites the payment to her of \$2,500; but it is conceded that nothing was paid to her, and that the real consideration, if any, was the prevention of the prosecution of her son. It is certain that there was no consideration moving from the grantee to the grantor personally. If there was any at all from the grantee, it was the relinquishing by him of his claim against the boy. No one can read the evidence, as shown by this record, and reach any other conclusion than did the learned chancellor, which he has well expressed in his opinion; and in his conclusions and findings we concur, here directing that his opinion be set out in the report of this case.

It is insisted by counsel for appellee that there was a material variance between the allegations of the bill and the proof. We cannot assent to this insistence. The bill certainly contained equity, and the material averments were proven beyond dispute, and

beyond controversy. Martin was the beneficiary of the wrong perpetrated upon the complainant, and was certainly civilly responsible for the acts of the boy and Horn, though they were not his agents. His acts and deeds were certainly the cause or agreement which induced the boy and Horn to overpersuade the complainant to execute the deed. While Martin may not have directed them to do exactly what they did, or to say what they said to the complainant to induce her to execute the deed, he certainly agreed to accept the deed and the fruits of their acts, and said enough to them to justify them in saying and in doing what they said and did. Martin is certainly not in a position to set up the claim of a bona fide purchaser for value without notice, and complainant is clearly not estopped from setting up the truth of the whole matter, and obtaining the relief to which the truth of the matter entitles her. This, and this only, does the decree of the chancellor award her.

No other decree than that rendered by the chancellor would have been proper under the pleadings and proof in this case as shown by this transcript. There can be no doubt that the threat of Martin, respondent and grantee, to prosecute and imprison the boy, his former employé, the son of complainant and grantor, caused such fear and terror as to overcome the will and free agency of the mother. Her assent was coerced by this fear, which Martin instigated, if he did not directly incite by personal communication of the threat. He made the threat for the express purpose of having it communicated to her, and no doubt under the belief and hope that it would produce the effect it did produce. Aside from allaying the fear and grief of the mother and son, there was no consideration for the deed. She was unquestionably overreached. If equity cannot lend her its aid, she must lose her home without fault on her part.

The appeal, under the circumstances, attacked the mother's affections and sympathies for her child. It attacked the weakest point of the weakest creature. Had she not yielded to the appeal, she would have been unnatural and inhuman. A mother, under such conditions, is powerless to resist the appeal. If courts of chancery could not grant relief in the instant case, they would be without the most needy wards, and be deprived of the noblest purpose or object in our system of equity jurisprudence. *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *McCormick Co. v. Hamilton*, 73 Wis. 486, 41 N. W. 727; *Holt v. Agnew*, 67 Ala. 361; *Glass & Co. v. Haygood*, 133 Ala. 494, 31 South. 973; *Hart-*

*Affirmed.*

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

#### A. R. GANUS & CO. v. TEW.

(Supreme Court of Alabama. Dec. 16, 1909.)

##### 1. PLEADING (§§ 352, 369\*)—PLEAS—INCONSISTENCY—REMEDY—MOTION TO ELECT.

Where pleas were so inconsistent that they could not be pleaded together, defendant could elect on which he would stand, so that it was error to allow a motion to strike one of them designated therein by plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1201; Dec. Dig. §§ 352, 369.\*]

##### 2. TENDER (§ 1\*)—PLEA—AVAILABILITY.

In absence of statute, a plea of tender is proper only where the demand is in the nature of a debt, or the sum due is either certain or capable of being ascertained by calculation, and is not available in actions for unliquidated damages.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

##### 3. WITNESSES (§ 204\*)—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

It was error to admit the contents of a letter written to defendants by their attorney relating to a settlement of the suit and to compel defendants' attorney, over his and their protest, to testify as to the letter and a copy thereof; it being a privileged communication.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 762; Dec. Dig. § 204.\*]

Appeal from Circuit Court, Washington County; Samuel B. Browne, Judge.

Action by Jerry M. Tew against A. R. Ganus & Co. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Granade & Granade, for appellants. Frederick G. Bromberg, for appellee.

MAYFIELD, J. This is an action, sounding in damages merely, for injuries to plaintiff's health and estate, the result of defendants' flooding his land by the erection and maintenance of a milldam. Some of the counts claim as for simple negligence in the construction and maintenance of the dam; others, in that the wrongful acts of the defendants were wanton and willful. Demurrers to the complaint being overruled, defendant filed four pleas—first, the general issue; second, a plea of tender of \$75; third and fourth, pleas setting up a license or permit from plaintiff to erect and maintain the dam. Demurrers were sustained to pleas 3 and 4; and defendant then filed plea 5, setting out a little more fully the same defenses attempted to be set up by pleas 3 and 4. Demurrers being overruled to this plea, plaintiff then moved to strike pleas 1 and 5, because inconsistent.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ent with plea 2, of tender. The court granted this motion, striking these two pleas, leaving only the plea of tender, on which the trial was had; the trial resulting in verdict and judgment for plaintiff for \$250. From this judgment the defendants appeal.

The first error insisted upon was the striking of pleas 1 and 5 on plaintiff's motion. This was clearly error. It is unnecessary to decide whether the pleas were so inconsistent with plea 2 that all could not be pleaded together, which is the reason assigned for the motion, and seems to have been the one acted on by the trial court. If this contention be true (as to which we intimate no opinion), the defendants were entitled to say which of the two lines of defense they would pursue, if not entitled to both. The plaintiff or the trial court had no right to select for them, which was the effect of the motion and the action of the trial court in striking pleas 1 and 5. The plaintiff and the court had no more right to select plea 2 as the one alone on which the case should be tried than they had to select 1, or 5, or both. If the pleas were so inconsistent that all could not be set up as defenses to the same suit, the court could decline to allow the defendants to set up all, and could compel them to elect as to which of the inconsistent ones they would rely upon; but the court or the plaintiff, one or both, could not select for the defendants, as they did in this case.

It is unnecessary for us to decide whether the plea of tender filed in this case was sufficient or apt, as a complete defense to this action, which sounded in damages merely. Unless authorized by statute, a plea of tender is apt only in cases in which the demand is in the nature of debt, or in which the sum due is either certain or capable of being made certain by mere arithmetical calculation. It is not applicable to actions for the recovery of unliquidated damages. There are some other cases provided by statute for tender, such as actions for slander, etc., when accompanied by a recantation. *Wilhite v. Ryan*, 66 Ala. 109.

The court also committed error in allowing appellee to prove, over the objection of the appellants, the contents of a letter written by appellants' attorney to them, concerning a settlement of this suit. It was likewise reversible error for the court to compel appellants' attorney, over his protest and that of his clients, to testify as to that letter and a copy thereof. This was clearly a privileged matter—a letter from an attorney, to his client, about the settlement of the identical matter on trial. No excuse, necessity, or justification is shown for thus compelling an attorney to testify as to transactions with his client. Such matters are among, if they are not, the most privileged; and the cases are very rare, if any there be, where these se-

crets should be revealed by compulsion as was done in this case.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

#### LATHAM et al. v. BOYLES.

(Supreme Court of Alabama. Dec. 18, 1909.)

#### APPEAL AND ERROR (§ 1029\*)—HARMLESS ERROR.

The proponent of a will, contested on the grounds of want of testamentary capacity and undue influence, being entitled to the general charge, the evidence showing without conflict sufficient capacity, and there being no sufficient evidence of undue influence, any errors were harmless to contestants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.\*]

Appeal from Probate Court, Baldwin County; J. H. H. Smith, Judge.

Ella B. Latham and others contested a will, of which Virginia Boyles was proponent. Judgment for proponent, and contestants appeal. Affirmed.

John E. Mitchell, for appellants. Leslie Hall and Charles Hall, for appellee.

SIMPSON, J. The appellee, Virginia Boyles, propounded for probate the will of Mattie A. English, and a contest was filed by the appellants, on the grounds that, first, it was not duly executed; second, that testatrix did not have sufficient mental capacity; and, third, that testatrix was under the domination and control of Virginia Boyles, Mayne Belt, and Dr. Coughlin, and that the will is the result of undue influence, exercised by said parties or one or more of them.

The evidence shows, without conflict, that the will was properly executed and that the testatrix had sufficient mental capacity to execute it. There is no evidence tending to show such undue influence as to invalidate the will. *Eastis v. Montgomery*, 95 Ala. 486, 491, 494, 495, 11 South. 204, 36 Am. St. Rep. 227; *Schleffelin v. Schleffelin*, 127 Ala. 16, 25, 37, 28 South. 687. Such being the state of the evidence, the proponent was entitled to the general charge in favor of the validity of the will, and any errors that the court may have committed were without injury to the contestants. *L. & N. R. R. Co. v. Johnson*, 128 Ala. 635, 30 South. 580; *Hill v. McBryde*, 125 Ala. 542, 28 South. 85; *Glass v. Meyer, Son & Co.*, 124 Ala. 332, 26 South. 890; *Griffin v. Bass Foundry & Machine Co.*, 135 Ala. 490, 33 South. 177; *Cash v. So. Express Co.*, 133 Ala. 273, 31 South. 936; *McLaren v. Ala-*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

bama Midland Ry. Co., 100 Ala. 506, 14 South. 405.

The judgment of the court is affirmed.  
Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

### DAVIS v. ANDERSON et al.

(Supreme Court of Alabama. Dec. 16, 1909.)

#### 1. MORTGAGES (§ 298\*)—PAYMENT—EFFECT.

In statutory ejectment by one claiming under a senior mortgage against one claiming under a junior mortgage, evidence that the senior mortgage had been paid before its foreclosure was admissible, since Code 1907, § 4899, provides that the payment of the mortgage debt divests the title passing by the mortgage.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 298.\*]

#### 2. EVIDENCE (§ 129\*)—SIMILAR FACTS—RELATION TO ISSUES—ADMISSIBILITY.

In statutory ejectment by one claiming under a senior mortgage against one claiming under a junior mortgage, a crop lien mortgage executed by the mortgagor to the senior mortgagee, which has no relation to the mortgage on the land, is properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388-398; Dec. Dig. § 129.\*]

#### 3. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The error, if any, in sustaining objections to evidence, was cured by the court reversing its ruling and offering to the party the opportunity of introducing the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4206; Dec. Dig. § 1058.\*]

#### 4. WITNESSES (§ 380\*)—RIGHT OF PARTY TO DISCREDIT OWN WITNESS.

A party may not, for the purpose of discrediting his own witness, inquire whether he had had a conversation with third persons in reference to the matter testified to.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1214-1219; Dec. Dig. § 380.\*]

#### 5. EVIDENCE (§ 258\*)—ADMISSIONS OF AGENT—EXISTENCE OF AGENCY—PROOF OF RELATION.

The testimony of a witness that the bookkeeper of a mortgagee sent him and a third person to get a new mortgage from the mortgagor, and instructed them what assurance to give if the mortgagor would execute a new mortgage, and testimony by the mortgagee that he gave instructions to his bookkeeper what to do about it, proved agency, so that the witness could testify as to what took place when he and the third person called on the mortgagor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.\*]

#### 6. WITNESSES (§ 403\*)—IMPEACHMENT.

Where the bookkeeper of another testified that the account of the latter was never less than \$200, a receipt in full of account for \$49.34 was admissible to show whether the bookkeeper was accurate in his statement.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. § 400.\*]

#### 7. WITNESSES (§ 267\*)—CROSS-EXAMINATION—SCOPE.

Matters testing the accuracy of a witness' statements may be inquired about on his cross-

examination, the extent of which is largely within the discretion of the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 923-930; Dec. Dig. § 267.\*]

Appeal from Circuit Court, Clarke County; John T. Lackland, Judge.

Statutory ejectment by Thomas W. Davis against Ollie Anderson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Thomas W. Davis, in pro. per. Quincey W. Tucker, for appellees.

SIMPSON, J. This is an action of statutory ejectment by the appellant against appellees. Both parties trace their title to the common source—Ollie Anderson. The plaintiff's title was through a mortgage from said Ollie Anderson and wife to N. B. Boyles, dated September 7, 1895, and a deed from said Boyles, the mortgagee, to plaintiff, dated January 10, 1906; and the defendants claimed under a mortgage by said Ollie Anderson and wife to John Kimbrough, dated May 6, 1904, and a deed (reciting a foreclosure) from said John Kimbrough to Norman Gunn, dated December 28, 1905, and deed from Gunn to said Kimbrough, dated January 22, 1906.

After testimony as to the foreclosure of the mortgage from Anderson to Boyles, the purchase by the plaintiff, and the receipt by said Boyles of the amount bid at the foreclosure sale, the defendant Ollie Anderson (who was the tenant of the other defendant, Kimbrough), being examined as a witness for the plaintiff, was asked, on cross-examination by the defendants, whether or not the mortgage to Boyles was paid before the foreclosure. The plaintiff objected to this question, and the overruling of said objection is made the subject of the first assignment of error insisted on. In addition to the fact that no motion was made to exclude the answer to said question, the question was proper, as under the statute the payment of the mortgage debt would divest the title passing by the mortgage, and be a complete defense to an action thereunder for the property. Code 1907, § 4899; Foster & Rudder v. Smith, 104 Ala. 250, 16 South. 61; Bufford v. Raney, 122 Ala. 570, 26 South. 120; Baker v. Burdeshaw, 132 Ala. 169, 31 South. 497; McKinnon v. Lessley, 89 Ala. 627, 8 South. 9.

There was no error in excluding the crop lien mortgages made by said Anderson to said Boyles from 1895 to 1899, inclusive, as they were not shown to have any relation to the mortgage on the land.

If there was error in sustaining objections to the question by plaintiff to the witness Anderson as to a conversation between plaintiff and said witness, it was cured by the subsequent action of the court in reversing its ruling and offering to plaintiff the opportunity to introduce said evidence.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There was no error in sustaining the objection to the question by the plaintiff to the witness N. B. Boyles "if he did not have a conversation with Ollie Anderson in the presence of Thomas W. Davis in October, 1901, at witness' store, in reference to amount due on mortgage." No statement was made showing the relevancy of the testimony sought. Its apparent object was to discredit plaintiff's own witness, which could not be done.

There was no error in overruling the objections to the introduction by the defendants of the mortgage from Ollie Anderson to John Kimbrough. Said mortgage constituted a link in the chain of title set up by the defendants, and the mere fact that it was dated after the maturity of the mortgage introduced by the plaintiff did not make it inadmissible. There is nothing on the mortgage as copied in the record to show that it had been transferred "by John Kimbrough to J. W. Kimbrough & Co.," and the record does not show that any objection was made on that account.

The objection made to the introduction of the foreclosure deed of John Kimbrough to Norman Gunn was because "it seeks to convey the same land embraced in the mortgage made by Anderson to N. B. Boyles in 1895," which, of course, was no reason for excluding the deed.

There was no error in overruling the objection to the question to the witness Tucker as to "what took place" when witness and one Cammack went to see Anderson. The witness had testified that W. D. Boyles, the bookkeeper of N. B. Boyles, sent him and Cammack to get the new mortgage from Anderson, and instructed them what assurance to give if Anderson would execute the new mortgage, and N. B. Boyles had testified that he gave instructions to W. D. Boyles what to do about it. No further evidence of agency was needed.

The question to the witness Tucker as to whether a certain clause in the mortgage was written by the same machine as the other parts of the instrument was not subject to the objection made.

The receipt of N. B. Boyles for "\$49.34 in full of store a/c to date," was relevant in connection with the testimony of W. D. Boyles that his account was never less than from \$200 to \$250, as showing whether said Boyles was accurate in his statement. At any rate, no injury could occur to the plaintiff in this action by showing that this little account was paid.

As to the questions to the witness N. B. Boyles in regard to his bankruptcy, in addition to the principle that the extent to which a cross-examination may be carried, is largely within the discretion of the trial court, the matters inquired of were permissible to

test the accuracy of the witness' statements in regard to the nonpayment of the mortgage.

The alleged discrepancies in the statements of witnesses were for the consideration of the jury, and there was no error in the refusal to give the general affirmative charge in favor of the plaintiff. The judgment of the court is affirmed.

Affirmed.

ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur.

# CARMICHAEL v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of Alabama. June 30, 1909.  
Rehearing Denied Dec. 16, 1909.)

## 1. SHERIFFS AND CONSTABLES (§ 157\*)—LIABILITIES ON OFFICIAL BONDS—DETINUE.

Where a sheriff seized property under a writ of detinue, and delivered it to the plaintiff in the detinue suit before the expiration of the five days within which the defendant had the right under the statute (Code 1907, § 3780) to execute a replevy bond, he violated the statute, and was guilty of a breach of his bond.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 361; Dec. Dig. § 157.\*]

## 2. SHERIFFS AND CONSTABLES (§ 88\*)—LIABILITIES—CUSTODY OF PROPERTY.

Where goods are seized by a sheriff in detinue, it is immaterial where they are kept, so long as they are kept safely by the officer and ready to be delivered as the law might require.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 124; Dec. Dig. § 88.\*]

## 3. EVIDENCE (§ 246\*)—ADMISSIONS BY ATTORNEYS—TERMINATION OF AUTHORITY.

In a suit for breach of a sheriff's bond in failing to require and take a forthcoming bond of the plaintiff in detinue, evidence as to statements of counsel for plaintiff in the detinue suit, made after the termination of that suit, that the plaintiff never gave a forthcoming bond, was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 948; Dec. Dig. § 246.\*]

## 4. SHERIFFS AND CONSTABLES (§ 171\*)—ACTION ON BOND—TRIAL—QUESTIONS FOR JURY.

In a suit for breach of a sheriff's bond in failing to require and take a forthcoming bond of plaintiff in detinue, evidence held sufficient to make the question whether a forthcoming bond was taken one for the jury.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 415; Dec. Dig. § 171.\*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by M. E. Carmichael against the United States Fidelity & Guaranty Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The first count sets out the bond, the oath of office, and the duelling oath, and alleges the breach of said bond as follows: "That on the 13th day of September, 1904, Eliasberg & Bro. filed in the office of the clerk

of the circuit court of said county of Houston a summons and complaint in detinue against this plaintiff, in which said complaint the property described, claimed, and sued for is set out in Exhibit A, attached to this complaint and made a part hereof; that an affidavit and bond was filed in said court along with said complaint, and the said summons and complaint was indorsed by the clerk of said court requiring the sheriff of said county to seize and take into his possession the property sued for in said complaint; that said complaint in detinue was delivered to Charles E. Walker, as sheriff of said county, and was by him executed on the 13th day of September, 1904, by levying on and taking into his possession that portion of the property in said complaint described which is set out in said Exhibit A of this complaint; that the property levied upon was at the time of said levy in the possession of and the property of plaintiff; that this plaintiff, who was defendant in the detinue suit, did not give a replevy bond and retain possession of said property, but that said Charles E. Walker, as said sheriff, delivered said property over to said Eliasberg & Bro., who were plaintiffs in said detinue suit, without requiring said Eliasberg & Bro. to give a replevy bond as is by law required, at the time and in the manner provided and required by law; and that at the expiration of 10 days from the date of said levy and seizure of said property said Charles E. Walker failed to return said property as it was his duty to do. And plaintiff avers that said property has been wholly lost to her, although at a term of the court subsequent to said levy said detinue suit of Eliasberg & Bro. against this plaintiff was dismissed out of said court, but that, notwithstanding this fact, plaintiff has been deprived of her property; that in making said levy and taking said property into his possession and handling them, and in delivering them to said Eliasberg & Bro., and in failing to return them to this plaintiff after the expiration of 10 days from said levy, said Charles E. Walker was acting under color of and by virtue of his said office of sheriff of the county of Houston, and that by reason of the damages sustained as aforesaid, plaintiff sues."

Count 2: "Plaintiff claims of defendant the further sum of \$500 damages for the breach by defendant of the conditions of the bond set out in count 1 of this suit, which said bond is referred to and made a part of this count. And plaintiff avers that the conditions of said bond have been breached and broken by defendant in this: That on the 13th day of September, 1904, Eliasberg & Bro. filed in the circuit court of said county summons and complaint in detinue, with bond and affidavit as provided by law, against this plaintiff as defendant, which said complaint in detinue was indorsed by the clerk of said court requir-

ing the sheriff of said county to seize the property described in said complaint, under which said complaint the said Charles E. Walker, as said sheriff, and in the pursuance of the authority in said indorsement contained, seized and took into his possession the following property sued for in said complaint, to wit: All that property which is set out in Exhibit A attached to count 1, which said exhibit is referred to and made a part of this count, on said 13th day of September, 1904; said property being at the time of said levy and seizure in the possession of and the property of the plaintiff. And plaintiff avers that said C. E. Walker, as said sheriff, delivered said property over to said Eliasberg & Bro., the plaintiffs in said detinue suit, before the expiration of five days from the date of said levy, and that at a term of said court subsequent to said levy and seizure said Eliasberg & Bro. were cast in said detinue suit, but that notwithstanding said Eliasberg & Bro. were cast in said suit and failed to prosecute the same to effect, by reason of the delivery of said property of plaintiff to said Eliasberg & Bro., this plaintiff has lost said property; that at the time of the levy of said process and seizure of said property, and taking the same into his possession, and delivering the same to said Eliasberg & Bro., as aforesaid, and making such disposition thereof, said C. E. Walker was acting under color of and by virtue of his said office of sheriff of said county of Houston; and that by reason of and on account of the aforesaid acts of the said C. E. Walker, as said sheriff, plaintiff has been and is deprived of the property aforesaid, which has been entirely lost to her. Wherefore she sues. Said C. E. Walker being dead, he is not sued in this action."

The demurrers interposed were as follows: "It is not alleged in either count that the property alleged to have been seized by the sheriff was the property of the plaintiff. It is not averred in either count that plaintiff was damaged in any manner by the seizing and taking by the sheriff of said property, or by delivering to the plaintiffs in the suit the property so seized by him in the suit. It does not appear that the plaintiff had any interest in the property that was seized in the detinue suit. No facts are averred showing that the plaintiff in this suit was ever entitled to possession of the property as described in the complaint. It is not shown that there was any judgment rendered in said action of detinue, which authorized the delivery of the property described in said complaint to the plaintiff in this suit. Each count fails to show that the plaintiff tendered to the sheriff a bond of sufficient surety in double the value of the property, payable to the plaintiff in the detinue suit, with condition that if the defendant was cast in the detinue suit he would deliver the property, etc. It is not shown that the plaintiff in this suit, the defendant in the detinue



suit, executed a replevy bond or tendered to the sheriff a replevy bond within five days after the seizure by the sheriff of the property sued for. It is not averred that Ellasberg & Bro. did not give a proper forthcoming bond to the said sheriff as provided by section 3780 of the Code."

The amendment to the second count consists in this: After the words "in possession of and" is inserted the words "bona fide claim by," and by erasing in said complaint all the words after the words "date of said levy" to the words "that at the time of the levy," thereby erasing five whole lines and part of two lines. The same demurrers were refiled and sustained.

B. F. Reid, for appellant. Coleman, Dent & Weil, for appellee.

DOWDELL, C. J. The second count of the complaint, both as originally filed and as amended, to which demurrer was sustained, counted on a breach of duty by the sheriff in delivering the property seized under the writ of detinue to the plaintiff in the detinue suit before the expiration of the five days from the seizure, within which time the defendant had the right under the statute to execute a replevy bond, and whereby it is averred the property was wholly lost to the plaintiff in the present suit. There can be no doubt that a delivery of the property to the plaintiff before the expiration of five days from the seizure was in palpable violation of the statute, and consequently a breach of duty by the sheriff. The court erred in sustaining the demurrer to the count.

The case was tried on the plea of the general issue to the first count. Under this issue it was immaterial that the box containing the goods which had been seized under the writ, and that had been placed in the storehouse of one Wilks, was removed from said place within five or six days after the seizure. It was wholly immaterial where the goods were kept, so they were safely kept by the officer and ready to be delivered as the law might require. There was no reversible error committed in rejecting this evidence of the witness D. G. Carmichael.

The evidence as to a statement made by R. D. Crawford, an attorney for the plaintiff in the detinue suit, and after the termination of that suit, that he as attorney prepared the papers in that case, and that the plaintiff never gave a forthcoming or replevy bond, was purely hearsay and inadmissible, and the court properly sustained the objection to this evidence.

The breach of the official bond sued on, alleged in the first count of the complaint, was the failure of the sheriff to require and take a forthcoming bond of the plaintiff in the detinue suit as the statute prescribes.

The plaintiff here introduced evidence showing that no such bond was ever returned by the sheriff with the other papers in the case, as it was his duty to do, if he had ever taken such bond. The evidence further showed that the sheriff making the levy died about six months thereafter; and there was also evidence tending to show that no such bond could be found in the office of the sheriff among his papers. Under this evidence it becomes a question for the jury to determine whether or not a forthcoming bond was taken by the sheriff from the plaintiff. It was, we think, a fact in inference to be determined by the jury, and the trial court erred in giving the general charge for the defendant.

For the errors indicated, the judgment must be reversed, and the cause remanded. Reversed and remanded.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

### NEVILLE et al. v. CHESHIRE.

(Supreme Court of Alabama. Nov. 18, 1900.)

#### 1. HUSBAND AND WIFE (§ 119\*)—CONVEYANCE BY HUSBAND TO WIFE—EFFECT.

A deed of land by a husband to his wife, executed prior to the married woman's act of February 28, 1887 (Acts 1886-87, p. 80), is void in law, but valid in equity, and creates an equitable separate estate, which was not within the statute requiring a married woman's separate estate to be deducted from her dower or distributive share of her husband's estate, nor within the statute enabling the wife to take and hold property owned by her at the time of her marriage, or to which she may become entitled subsequently.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 426; Dec. Dig. § 119.\*]

#### 2. HUSBAND AND WIFE (§ 114\*)—MARRIED WOMAN'S ACT—APPLICABILITY.

The married woman's act of February 28, 1887 (Acts 1886-87, p. 80), relating to marital rights and powers of the husband and wife, does not apply to a conveyance to the wife by the husband, who died before the passage of the act, as after his death the wife is a feme sole, and the act has no application to her or to her property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 395; Dec. Dig. § 114.\*]

#### 3. HUSBAND AND WIFE (§ 114\*)—CONVEYANCES TO WIFE—TITLE ACQUIRED.

A husband executed a deed of land to the wife, who on the same day conveyed the land to a trustee for the husband's heirs. The husband died prior to the married woman's act of February 28, 1887 (Acts 1886-87, p. 80). *Held*, that the wife acquired only the equitable title, and the legal title descended to the husband's heirs at his death, and the married woman's act did not divest the heirs of such title, and a will subsequently made by the wife was ineffectual.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 395; Dec. Dig. § 114.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

#### 4. EJECTMENT (§ 13\*)—TITLE OF PLAINTIFF—EQUITABLE TITLE.

An equitable title will not support ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 56-58; Dec. Dig. § 13.\*]

Appeal from Circuit Court, Lee County; A. A. Evans, Judge.

Statutory action in the nature of ejectment by Sue Kimbell Neville and others against J. M. Cheshire. From a judgment for defendant, plaintiffs appeal. Affirmed.

Brown & Kyle, for appellants. J. M. Chilton and Houston & Powell, for appellee.

MAYFIELD, J. This is a statutory action in the nature of ejectment. Both parties claim title through a common source—Thomas J. McDaniel. The plaintiffs and defendant on appeal were respectively the plaintiffs and defendant on the trial. Plaintiffs claim title through a deed from the common source of title, Thomas J. McDaniel, to his wife, Sarah Ann McDaniel, of July 7, 1876, and through the last will of Sarah Ann McDaniel, of August 19, 1889. The defendant claims title through the same deed from the common source to Sarah Ann McDaniel, and thence through conveyance from her, as grantee, to J. E. Williams, as trustee, for the beneficiaries, children or heirs of Thomas J. McDaniel, named therein, of the same date as the deed to Sarah Ann McDaniel from her husband, Thomas J. McDaniel, and thence through deeds from the trustee to the beneficiaries named therein, of January 30, 1891, and by deeds from them to the plaintiffs of August 12, 1890, and of December 15, 1890.

Thomas J. McDaniel, the husband, died in August, 1876. Sarah Ann McDaniel, the wife died in August, 1890. She was in possession of the lands up to the time of her death. The defendant was her tenant as to the land at the time of her death. Soon thereafter he became the tenant of the beneficiaries named in the wife's deed to the trustee, from whom he subsequently purchased. The last date at which he began to hold for the beneficiaries after the wife's death is not shown. Whether he at any time after the wife's death held for plaintiffs, or recognized their title before becoming the tenant of the beneficiaries under her deed, is not without dispute. The beneficiaries named in her deed of July 7, 1876, the day her husband conveyed to her, were the heirs and children of her husband. The plaintiffs, who claim under her will of August 19, 1889, were probably her own heirs, being her nieces; she not having any children or descendants. While the claims are not made as such, the contest is really between the heirs of the husband and those of the wife.

The prime, if not the sole, question of importance involved, is the legal effect of the two deeds of July 7, 1876; the one by the

husband to the wife, the other by the wife to a trustee, for the use and benefit of the husband's heirs or children. The deed from the husband to the wife was an attempt to pass the fee to the wife, and would have passed it, but for the marital relations then existing between the parties. The one from the wife was intended to pass a remainder in fee to the children or heirs of the husband, but reserving a life estate to the grantor, with right to sell and convey, jointly with her husband, during her life. This it would have done, but for the fact that at the date thereof the grantor was a married woman. So we must decide what effect the marital relations of the parties to the first deed had upon it, and what effect the fact that the grantor to the other was a married woman had upon it, what was the law of this state at that particular time governing each of these transactions, and what effect, if any, "the new married woman's law" of February 28, 1887 (Acts 1886-87, p. 80), had upon these two transactions.

According to the ancient English common law, which came to Alabama as a common-law heritage, marriage made a bi-unity of husband and wife, and the husband was it. In him was thereby merged all the property and contractual rights of the wife, which, fortunately for the wife, continued only during coverture. Death of her master or divorce from him could restore to her her property right or power to contract or be contracted with. Under this common-law fiction of bi-unity of husband and wife, the wife's personal property became absolutely that of the husband, he had the complete *jus disponendi*, and it was liable for his debts, and he took a sole estate in her lands during coverture. She could not dispose of them by gift, deed, or will, or contract as to them, not even with her husband (her legal self). Her very and sole earnings belonged to her husband, though she alone was physically or naturally able to earn the bread for herself and children. Though physically, mentally, and morally she was all of the bi-unity, legally she was nothing. Parliament could have changed this any day, but allowed it to remain the law for centuries. It was the law of England when Blackstone said that "the English law was the perfection of human reason, the product of matured experience." It was also the English law when Bentham, the pupil of Blackstone, characterized it as "a fathomless and boundless chaos, made up of fiction, tautology, technicality, and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery, which maximizes delays and denials of justice."

This common-law doctrine was so cruel, unjust, and inhuman at one time that it shocked the moral sense of the rulers, and led the courts of chancery to timidly, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

partially in some instances, take the wife under their benign protection. At common law a man could not, if he would, give his land to his wife, not even that which he had received from her by virtue alone of the marriage and the law. Some writers say it was because they were but one person in law, and some assign other reasons; but they all agree that a gift or deed of land from the husband to the wife during coverture had no effect on the legal title—as to the gift or deed it was void, as were all other contracts made between them. But courts of equity came to the relief of the wife, and would support and protect such gifts or deeds, so far as the equitable title was concerned, when not otherwise fraudulent. Consequently, at law, such gifts or deeds were void. In equity, if fair, just, and not fraudulent, they created in the wife what was classed as an equitable separate estate, vesting in her the entire exclusive interest, since otherwise the transaction, which was intended to have some effect, would have had none in law or equity. A conveyance by the husband to the wife without reservation or qualification was held to be a clear and unmistakable intentional relinquishment of the husband's rights to the wife, and courts of equity would enforce that intention.

This estate of the wife thus created was her separate estate by virtue of contract and equity, and not of common law or of statute. But for the law, common or statutory, the conveyance would have vested in her the entire legal and equitable estate. Conveyances by the husband directly to the wife by reason of this equitable doctrine were considered and treated exactly as were their separate estates created by conveyances from the husband to a trustee for the use of the wife, or as any other estate made separate without the aid of legislation. This kind of an estate she was capable of alienating or incumbering as if she were sole. *McMillan v. Peacock*, 57 Ala. 127; *Turner v. Kelly*, 70 Ala. 85. This equitable estate was not within the statutes which required her separate estate to be deducted from her dower or distributive share of her husband's estate. Her separate estate referred to in the statute was her estate created by the Constitution and statutes. *Harris v. Harris*, 71 Ala. 536. But this equitable estate would not support an action of detinue or ejectment, or other action which required a legal title. *Gluck v. Cox*, 75 Ala. 310; *Meyer v. Sulzbacher*, 75 Ala. 424.

The deed of the husband to the wife prior to February 28, 1887, was invalid at law, but valid in equity. The equitable separate estate thus created was not within the operation of the statutes which enabled the wife to take and hold the property owned by her at the time of the marriage, or to which she might become entitled subsequently. *Seals v. Robinson*, 75 Ala. 370. This equitable separate estate created by deed from the hus-

band to the wife was, in many respects, an anomalous estate or interest in land. It was clearly and uniformly distinguished from the wife's separate estate created by the Constitution or statutes, and was not, therefore, within the purview of the various statutes, prior to 1887, regulating and defining her estates. It was held at first not to be distinguishable from estates conveyed by the husband to a trustee for her use. This was later doubted, but adhered to, because it had become a rule of property. *Washburn v. Gardner*, 76 Ala. 599.

In that case it was held that it did not divest the legal title out of the husband, or vest it in her, as in the case of a conveyance to a trustee for her use, but that the husband remained the holder of the legal title, and therefore the trustee, and that the legal title did not vest in her upon the death of the husband and trustee. *Powe v. McLeod*, 76 Ala. 418. In that case *Stone, C. J.*, says: "The problem is: What is the status of the property thus conveyed and held? The conveyance is inoperative at law; and does it not follow, that in any relief which a court of law can administer the property is that of the husband, unaffected by his abortive attempt to divest the title out of himself? And has the wife any interest in or right to the property, other than the equitable right to invoke the power of the chancery court to perfect that which the husband, by force of the relation he sustained to his wife, was incompetent to do? And is this mere equitable right of the wife the equivalent of an estate secured to her sole and separate use? Possibly this has become a rule of property, which it would be unwise to disturb. In that event the proper remedy would be with the Legislature, not with us. We do now, however, hold ourselves concluded from re-examining the principle asserted in the seventh headnote of *Goodlett v. Hansell*, supra [66 Ala. 151], should the question come again before us." In this same case, Chief Justice *Stone*, speaking of the estate, title, or interest the wife acquires by gift or deed directly from the husband, says that it has been declared, by three previous decisions of the court, referred to, that the property thus acquired "becomes the equitable separate estate of the wife, which she can fasten a charge upon by any promise or contract of hers to pay money; in other words, that it has all the incidents of property secured to her sole, separate, or exclusive use. If this were an open question in this court, we think much might be said against its correctness."

In the subsequent case of *Loeb v. McCullough*, 78 Ala. 537, the same learned Chief Justice, in referring to what he said above, added that in that case it was left an open question, but that the rule, since first announced in *McMillan v. Peacock*, 57 Ala. 127, had been so often followed that it had become a rule of property, and that the court

would not disturb it; that if a change was desirable the Legislature could administer the proper relief. In the case last above referred to, the court expressly overruled the case of *Turner v. Kelly*, 70 Ala. 85, in so far as held that the husband and wife could, by contract or conveyance, convert her statutory separate estate into an equitable separate estate, thus following the older case of *Coleman v. Smith*, 55 Ala. 377, which had been declared dictum and departed from. In this same case of *Loeb v. McCullough*, the seventh headnote in the report of *Goodlett v. Hansell*, 66 Ala. 151, was declared improper. The opinion upon which it was based was held to be dictum, and was overruled, in so far as it held that the husband and wife could convert her statutory estate into an equitable estate, and that thereafter the wife could charge it, or sell or otherwise dispose of it, as if she were a feme sole.

So it seems that these estates were not only separate and distinct, but that they were incapable of being converted by the parties one into the other. As to the one, the wife could charge it, or dispose of it, as if sole; as to the other, she could not. The one was without the operation of married woman's statutes; the other, within. The estate or title of the one was available only in a court of equity; that of the other, in a court of law. *Carrington v. Richardson*, 79 Ala. 105. In *Rabitté & Gaudin v. Orr Brothers*, 83 Ala. 189, 3 South. 421, *Stone, C. J.*, says: "It has been too often ruled by this court to be further open to controversy that, if a husband make a voluntary conveyance or gift directly to his wife, it vests in her an equitable separate estate, which she has power to charge and does charge by her contracts lawfully made."

In *Maxwell v. Grace*, 85 Ala. 577, 5 South. 319, the husband conveyed land directly to the wife prior to February 28, 1887, the date of the new married woman's law. The land conveyed was subsequently levied upon and sold, under an execution against the husband. The wife sued the purchaser at that sale in ejectment and this court held that the wife did not have such title as would support ejectment against the purchaser at that execution sale. In that case the court held that the statute of February 28, 1887, did not vest the wife with the legal title; that the Legislature could not divest title out of one, and vest it in another. The same case held that property acquired by the wife under previous married woman's statutes passed immediately under the dominion of the later act, and thereafter was governed by its provisions. But it did not and could not change the equitable separate estate into a legal estate, for the reason assigned in that case, and for the further reason that it was not an estate acquired under the married

woman's statutes, and was not within the influence of any of such statutes—not even of the last. *McMillan v. Peacock*, 57 Ala. 127.

Another strong and conclusive reason why the married woman's law cannot affect equitable separate estates, such as the one in question, is that they are created by contract and not by statute, and hence they cannot be taken away, changed, or impaired by contract, as they could be if created by statute. The Constitutions, state and federal, prevent such result. *Bynum's Case*, 92 Ala. 338, 9 South. 185. But a stronger and more conclusive reason than these, why the statute of 1887 did not, and cannot, have any effect in this case, is that it related, and was merely intended to relate, to, or affect, the marital rights and powers of the husband and wife, and no marital relations existed, as between the grantor and grantee, at the time of the passage of this act. The husband had been dead 10 years when the act was passed. His death dissolved all relations of husband and wife. After his death Mrs. McDaniel did not hold the property as his wife or his widow. She was a feme sole at the date of the married woman's law, and it could have no application to her or to her property.

It is unnecessary in this case to decide whether Mrs. McDaniel's deed to the trustee, on the day her husband conveyed to her, passed her equitable interest after her death. It did not pass the legal title, because she did not possess it to pass, and whether it passed the equitable title or not it is not necessary or proper to now determine. As Mrs. McDaniel did not acquire the legal title to the land by her deed from her husband, but only the equitable title, and that descended to the husband's heirs at his death 10 years before the married woman's law was enacted, and that act did not and could not have the effect to divest it of the heirs and invest it in her, it follows that the plaintiff did not and could not acquire the legal title under will; and, this being necessary to a recovery in ejectment, the court properly instructed the jury to find for the defendant.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

#### TENNESSEE COAL, IRON & R. CO. v. KELLY.

(Supreme Court of Alabama. Nov. 18, 1909.)

##### 1. MASTER AND SERVANT (§ 341\*)—PROCURING DISCHARGE OF SERVANT—LIABILITY.

Defendant, if it wrongfully and maliciously procured plaintiff's discharge by his employer, would be liable, though the master had a right to discharge him; but if it procured it by do-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing only what it had a right to do, terminating by mutual agreement with the employer the contract of the employer to do certain work for it, whereby the employer had no further need for employes, it would not be liable, whatever its motive.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1286; Dec. Dig. § 341.\*]

**2. MASTER AND SERVANT (§ 341\*)—PROCURING DISCHARGE OF SERVANT—LIABILITY—EVIDENCE.**

Evidence in an action for damages for the procuring by defendant of plaintiff's discharge by his employers, who were operating a mill on defendant's land under a contract with it, that defendant, who furnished the water for the mill, had it cut off, for the purpose of causing the mill to shut down and preventing plaintiff's employers from operating it, to the end of encompassing his discharge, was inadmissible; the question whether defendant had a right to cut off the water, and whether it did it in order to shut down the mill, not being made issues by the pleadings, if, indeed, they could be.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 341.\*]

**3. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Evidence being clearly inadmissible, and its direct tendency being to prejudice the jury against defendant, it cannot be said its admission was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.\*]

**4. EVIDENCE (§ 471\*)—OPINIONS.**

A witness may not give his opinions and conclusions as to matters on which he is not shown to be qualified or competent to state an opinion, but he may merely state the facts and let the jury draw the conclusions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

**5. MASTER AND SERVANT (§ 341\*)—PROCURING DISCHARGE OF SERVANT—LIABILITY—EVIDENCE.**

Evidence in an action for damages for the procuring by defendant of plaintiff's discharge by his employer, that after he was discharged defendant warned him not to go on its premises, is inadmissible; it raising an immaterial issue of his right to go there, and its only tendency being to prejudice the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 341.\*]

**6. LIBEL AND SLANDER (§ 89\*)—COMPLAINT.**

When the article on which libel is predicated is not libelous per se, special damages must be shown from the publication; that is, the complaint must allege or show something additional to make the publication libelous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 213-214; Dec. Dig. § 89.\*]

**7. LIBEL AND SLANDER (§ 7\*)—LIBEL PER SE.**

It is not libel per se to charge that plaintiff had made trouble at defendant's mines, or that he had run negroes out of their homes; such conduct not necessarily being a crime.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-18; Dec. Dig. § 7.\*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by Henry C. Kelly against the Tennessee Coal, Iron & Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Percy, Benners & Burr, for appellant. Bowman, Harsh & Beddow, for appellee.

MAYFIELD, J. Waggoner & Hannon, a partnership, were operating a sawmill on the lands of the defendant company, a corporation, which was engaged in the business of mining coal and iron ore, operating furnaces, etc. Waggoner & Hannon were sawing the timber of the defendant, for the defendant, for which they were paid so much per thousand. Waggoner & Hannon employed and discharged their own men; but there was some kind of an agreement between them and the defendant, the exact terms of which are not made very certain, to the effect that they would not employ nor retain employes who were not acceptable to the defendant company. It appears that there was some trouble existing, and more brewing, between the union and the nonunion laborers, and that the defendant had declined to employ union men, and had notified Waggoner & Hannon that they should not employ, nor retain in their employment, union laborers, and that Waggoner & Hannon had failed to discharge some union laborers, in consequence of which the agents of the defendant, alleged to have been acting within the line and scope of their authority, wrote certain letters to Waggoner & Hannon, demanding the discharge of the union laborers, and in one letter named certain of such employes, charging that they were union laborers and that they "had run some of the defendant's nonunion laborers out of their houses, and otherwise demoralized the organization of the coal mines department, to such an extent that no one was at work." The plaintiff was named as one of the union men causing the disturbance. In consequence of these letters, or of other causes, which was one of the disputed issues, Waggoner & Hannon terminated their contract with defendant, and discharged all of their employes, including plaintiff, having no further need for them after they ceased to operate the mill. Plaintiff was employed in building and repairing houses, and as a carpenter, by Waggoner & Hannon. He was employed by the job, and not for any stated time or fixed salary. Plaintiff denied being a member of the union, or having taken part in the disturbance alluded to in the letters; and there was no proof to the contrary.

Plaintiff sued the defendant, claiming damages for its wrongful and malicious procurement of his discharge, and its libeling him in the publication of the letters above referred to. The complaint contained seven counts. The first, fifth, sixth, and seventh were for defendant's wrongfully procuring his discharge, and the others were for libel, based solely upon the letters which, in whole or in part, were set out in the counts. There were no special pleas of justification or of privileg-

general issue, and no questions are raised as to the sufficiency of the counts. The general charge was given in favor of the defendant as to the fourth count, and the trial resulted in verdict and judgment in favor of plaintiff for \$1,000.

If the defendant, without any lawful right, or by threats made not in the exercise of a lawful right, broke up the contractual relations existing between plaintiff and his employers, although such relations could have been terminated at the pleasure of his employers, with resultant damage to plaintiff, the defendant would be liable to him for the damages thus occasioned. On the other hand, if the defendant only acted or threatened to act as it had a right to act or threaten, and only did or threatened to do that which it had a lawful right to do, and this did not involve a superior or paramount right of the plaintiff, this would give the plaintiff no right of action, though it may have caused him injury, and though defendant may have been actuated by a desire and intention to cause him injury. If one does an act which is legal in itself and violates no right of another, the fact that this rightful act is done from bad motives or with bad intent toward the person so injured thereby does not give the latter a right of action against the former. Therefore, if the defendant's acts complained of in this case were legal in themselves, and violated no superior right of the plaintiff, they were not actionable.

One of the rights incident to many, if not to all, contracts is to be protected from malicious interference. A contract between master and servant is one of these contracts, though the contract of employment be at will, and though the master be free from liability in discharging the servant; yet if the discharge were wrongfully or maliciously procured by a third party, such third party is liable to the servant, and the motive with which the discharge was procured may, in some cases, determine the liability vel non, as well as go to the amount of damages. But if such third party, maliciously and without just cause, induce the master to discharge the servant, whether the inducement be false libels and slanders, or successful persuasion, it is nevertheless an actionable tort. But if the third party had a perfect legal right to do what he did, which resulted in the discharge of the servant, it is not an actionable wrong, though he were actuated to do this legal and rightful act by a malicious motive against the servant.

It is a violation of a legal right to interfere with contractual relations recognized by the law, if there be no sufficient justification or excuse for so doing. Losses thus willfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own industry, labor, or skill, will sustain an action. *Rayeroff v. Tayntor*, 68 Vt. 219, 35 Atl. 53,

*v. Pendleton*, 30 Me. 113, 33 Atl. 33, 30 Am. St. Rep. 252; *Porter v. Mack*, 50 W. Va. 584, 40 S. E. 459; *Baker v. M. P. L. Ins. Co.*, 64 S. W. 913, 23 Ky. Law Rep. 1174, 53 L. R. A. 271; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. Rep. 496; *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; *London Co. v. Horn*, 206 Ill. 493, 69 N. E. 526, 90 Am. St. Rep. 185. It follows from these authorities that, if the defendant wrongfully and maliciously procured the discharge of plaintiff, it is liable to him for the damages proximately resulting from that discharge, though Waggoner & Hannon were not liable for discharging him, and had a right to discharge him at any time, with or without cause. But, on the other hand, if the defendant had a right to do what it did, and in doing it terminated its contract with Waggoner & Hannon, thus causing the latter to discharge the plaintiff, and he suffered loss in consequence, then defendant is not liable, though its action in terminating its contract with Waggoner & Hannon was actuated by malice towards plaintiff, and was intended to injure him. In other words, if defendant had a right to terminate its contract with Waggoner & Hannon at will, or for the cause assigned, and it did so terminate it, resulting in the discharge and injury of plaintiff, the defendant is not liable to plaintiff, no matter what motive impelled the act, provided the act itself was rightful.

The plaintiff was discharged on July 5th, and, as he and his witnesses claim, on account of the letters written by the defendant or its agents to his employers, Waggoner & Hannon. On the other hand, it is claimed by the defendant and its witnesses that plaintiff was discharged because the contract of his employers with the defendant was terminated by an agreement between the parties, and that Waggoner & Hannon had no further need of his, or any other employé's, services. The defendant and Waggoner & Hannon both had a right to terminate their contractual relations, as they did, and by their so doing no legal right of the plaintiff was violated. These were questions for the jury, and any evidence tending to prove or to disprove these issues was relevant and admissible. The sawmill was never operated by Waggoner & Hannon after July 3d; the 4th of July being a holiday, and the 5th being the day the plaintiff was discharged. Waggoner & Hannon were not engaged in operating the mill on the day plaintiff was discharged, and never operated it thereafter, and it was solely in the business of operating this mill that plaintiff was employed. There is evidence to the effect that the mill was not operated on the 5th of July because there was no water available with which to operate it.

The first error insisted upon is that the court, over the objection of defendant, allowed plaintiff to prove that defendant (appellant) furnished the water to the sawmill, and that it had the water cut off on the 5th day of July, for the purpose of causing the sawmill to shut down and preventing Waggoner & Hannon from operating it, to the end of encompassing the discharge of plaintiff and other of their employes objectionable to the defendant. This objection, we think, is well taken. Whether the defendant had a right to cut off this water from this mill, and whether it did it in order to shut down the mill, were questions which could not be litigated in this action. They were not made an issue by the pleadings, and we do not see that they could have been properly made an issue in this case.

It is conceded by plaintiff's counsel that plaintiff can claim no benefits in this action under any contract between defendant and Waggoner & Hannon for water supply; and the court charged the jury that plaintiff could recover nothing on account of defendant's breaking its contract with Waggoner & Hannon, and that, if defendant caused Waggoner & Hannon to shut down, plaintiff could recover nothing for being thrown out of employment on that account, and this is considered to be correct by plaintiff's counsel. And certainly, if defendant had a right to shut off the water, and exercised that right, then it violated no contract with any one; and plaintiff could not complain, even though defendant was actuated so to do by malice toward, and the desire to injure plaintiff—a clear case of *damnum absque injuria*. And whether the act in question was rightful or wrongful could not be litigated in this case. The evidence was clearly inadmissible for such purpose, and its direct tendency was to prejudice the jury against the defendant; hence we cannot say that it was without injury.

A part of the evidence was also objectionable for affording the plaintiff a vehicle for his opinions and conclusions as to matters upon which he was not shown to be qualified or competent to state an opinion. If the evidence was admissible, he should have been required to state the facts, and let the jury draw the conclusions. Likewise was the evidence offered by plaintiff to prove that defendant had warned him to keep off its premises. The defendant had a right, so far as the evidence shows, to warn plaintiff to keep off its premises, with or without just cause. Of course, the plaintiff might not have been liable for going on the premises after warning not to do so, if he had just cause therefor; but the defendant had a right to warn him not to go thereon, solely because of its dislike toward him, or without any ground whatever. *Ivey v. Pioneer*, 113 Ala. 349, 21 South. 531. Plaintiff was not a servant of the defendant, nor of Waggoner & Hannon, at the time of his warning. He was a third

party and a stranger to both, and all happened after the libel, if libel there and after he was discharged, and at a time when he had nothing whatever to do with either party. The only effect of this evidence was to prejudice the jury, and not to enlighten them. This necessarily raised the issue as to whether plaintiff had a right to go on the premises after the warning, an immaterial and foreign to this case. It is true that some of the questions eliciting testimony were not answered, and as to this no injury was done; but all the evidence offered by both plaintiff and defendant, on this subject, should have been rejected.

There is no assignment of error as to sufficiency of the counts attempting to charge libel. If any of these counts are sufficient to charge libel, or to support a judgment thereon, it is upon the theory that they charge special damages suffered in consequence of the publication of the alleged libelous letters on which they are based. Neither the letters as a whole, nor any parts of them, are libelous per se; and consequently, in order to state a cause of action, there must be alleged or shown some special damages suffered in consequence of the libelous publication—this is, the counts must allege or show something additional, in order to make the publication libelous. The letters do not charge the commission of a crime. They do not, in themselves, contain any matter which will authorize the court to presume, as a matter of course, that they—all or either of them, or any part thereof—were intended to disgrace or to degrade the plaintiff, or to hold him up to public hatred, contempt, or ridicule, or to cause him to be shunned or avoided.

The charge that plaintiff had caused trouble at the mines, if this was charged, or that he had run negroes out of their houses, does not necessarily involve libel. The plain may have been justified in such acts, or may have perpetrated them as a joke; and whether the writings are libelous per se is a question that, from the nature of the case and from the words used, must be presumed to be determined by the court. The conduct that was charged in the letters might constitute a crime; but, either standing alone or taken in connection with all the letters, or with any parts of them, it does not constitute a crime and could not be characterized as libelous per se. Certain it is that, without the averment as to special damages suffered in his being discharged from his employment in consequence of this publication, these counts for libel would have stated no cause of action.

For these reasons we think the court erred in refusing defendant's requested charge 25. The letter referred to in the charge was certainly not libelous per se, and the defendant had the right to have the court so instruct the jury. The other charges were properly refused.

As the case must be reversed, it is unnecessary to pass upon other questions raised

the appeal. The judgment of the lower court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

# WESTERN STEEL CAR & FOUNDRY CO. v. BEAN.

(Supreme Court of Alabama. Nov. 18, 1909.)

## 1. MASTER AND SERVANT (§ 274\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In a servant's action for injuries from falling off a plank on a scaffold which he had ascended to close a steam valve, where defendant pleaded contributory negligence, in that plaintiff failed to observe the dangerous condition alleged to have caused the injury, that he remained on the scaffold too long, and stepped on a loose plank, when there was a smooth one, etc., evidence of the number of steam pipes and the surroundings, whether the place was hot or cold, whether there was much steam or vapor present, and whether plaintiff could see distinctly at the time and place of the injury, was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.\*]

## 2. EVIDENCE (§ 127\*)—DECLARATIONS—PAIN AND SUFFERING.

While the declarations of one injured, indicative of pain, in actions for damages, are not limited to those uttered near the time of the injury, but may be shown to have been made several months after the injury and after suit brought, such declarations must be limited to the existence of pain or suffering at the time they are made, and do not extend to rehearsals of past conditions or sufferings, nor to declarations as to the cause of the pain or suffering.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.\*]

## 3. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR.

In a servant's action for injuries, a question, "What has plaintiff had to say about his injury?" was not prejudicial, where the answer simply was that plaintiff complained every day of his leg, etc., hurting him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140, 4143; Dec. Dig. § 1048.\*]

## 4. EVIDENCE (§ 127\*)—PERSONAL INJURIES—DECLARATIONS.

In a servant's action for injuries, declarations of plaintiff as to his suffering could be proven by his father, to whom they were made, as well as if made to the physician treating him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.\*]

## 5. MASTER AND SERVANT (§ 205\*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

A servant has the right to presume that the premises of the master are safe for the work which he is engaged to perform, unless he is chargeable with some duty of seeing to the safety of the premises or of remedying the defects.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.\*]

## 6. DAMAGES (§ 130\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where plaintiff, a young man 21 or 22 years of age, was injured in his leg, hip, and

back, had a dead sensation in his leg up to the time of trial, a year or more, was in bed for more than six weeks from the injury, could not work for eight weeks, and his back had hurt him and he had had headaches since the injury, which he did not have before, and his health, which was theretofore good, was bad, and it appeared that his fall rendered him unconscious, caused him to bleed from the ear, and those present at the time thought he was killed, a verdict of \$1,600 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 130.\*]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Action by W. J. Bean against the Western Steel Car & Foundry Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willett & Willett, for appellant. Tate & Walker, for appellee.

MAYFIELD, J. Appellee was a servant of appellant, and sues to recover damages for personal injuries. The complaint contained four counts, but demurrers were sustained to the second and third, and no question is raised as to the pleadings; hence these counts need not be noticed.

The first count was clearly under the first subdivision of the employer's liability act (Code 1907, § 3910), and the fourth probably sought to recover on the common-law liability of the master to furnish the servant a safe place in which to work, though it contains some averments necessary to state a cause of action under the first subdivision of the employer's act. The gravamen of the action, in both counts, is that a certain plank in a platform, or gangway, used by the master in connection with his business, was warped, and would not on that account lie in its proper position; that in consequence of its being warped it was loose, and would move or rock about, and was unstable.

To these counts defendant pleaded the general issue, and special pleas setting up contributory negligence and assumption of risk by the plaintiff. The trial was had upon all these issues, which resulted in a judgment for plaintiff in the sum of \$1,600. From this judgment the defendant appeals, and assigns various errors, which will be treated separately so far as practicable and necessary.

The plaintiff, at the time of the injury, was at work for defendant as its servant in and about its foundry, and while so employed he was directed, or it became his duty, to ascend a ladder to the platform, about 30 feet high, for the purpose of closing a valve, thereby cutting off the steam from a hammer, which was being operated by the defendant company. After he had cut off the steam, he started back to the ladder to descend; but before reaching the top of the ladder he stepped upon a plank which was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



warped, and on that account not stable, and it, not being fastened, turned with him as he stepped upon it, and threw him to the ground or floor, a distance of about 30 feet, thereby injuring him. There was some conflict in the evidence as to whether this plank was a part of the scaffold, or whether it was merely a loose plank left on the scaffold. The scaffold was used for the servants to stand upon, and to approach the valve in question for the purpose of turning on or cutting off the steam from the hammer.

It is insisted by appellant that the court should have given the general affirmative charge for defendant, or have excluded plaintiff's, upon the theory that plaintiff's evidence did not show that the alleged defect, or warped plank, complained of, was a part of the ways, works, and machinery. There can be no doubt that the platform was a part of the ways, works, or machinery of defendant's plant, and the evidence, to say most of it in defendant's favor, was in conflict as to whether the plank was a part thereof, or was merely a loose plank left thereon. *Virginia Bridge & Iron Co. v. Jordan*, 143 Ala. 603, 42 South. 73; *Buzzell v. Laconia Co.*, 77 Am. Dec. 212; *Weir's Case*, 96 Ala. 396, 11 South. 436; *Tuscaloosa Waterworks Co. v. Herren*, 131 Ala. 81, 31 South. 444; s. c. (second appeal) 40 South. 55; *Walch's Case*, 132 Ala. 490, 31 South. 470.

The questions propounded to the witnesses Foster, West, and Matthews, for the purpose of showing the number of steam pipes, and boilers, and other surroundings, at the place at time of plaintiff's injury, whether it was hot, cold, or pleasant at the valve at the time of the injury, whether there was much steam or vapor present on the occasion of the injury, whether one could see distinctly at the time and place of the injury, were all proper and free from objections, and the answers to such questions were likewise proper, relevant, and admissible, and hence the court properly declined to exclude them. The defendant had pleaded contributory negligence, in that plaintiff failed to observe the dangerous conditions alleged to have caused the injury; that he remained upon the scaffold too long, that he stepped upon a warped plank when there was a smooth and level one, which was fastened, upon which he could have stepped and avoided the injury; that he negligently fell off the scaffold; that he negligently made a misstep, or did something else of like character; that he became dizzy while upon the scaffold, and in consequence thereof fell off. Hence all the evidence was proper, relevant, and material, to show the condition of the plank, with the attendant circumstances proper for the jury to consider in determining the questions and issues thus raised by the pleadings, and to show whether or not plaintiff was guilty of contributory negligence which proximately contributed to his injury. Un-

der some conditions he might have been guilty of contributory negligence, and under others not.

This evidence all tended to prove or disprove the issues on the trial; hence it was relevant, if it tended to do either. If the place was enveloped in steam escaping from the pipes or boilers, the steam would obstruct the plaintiff's vision; and if it was very hot at this point, on account of these pipes and boilers, such fact might impose a greater duty on the master to provide a safe platform—one that would be safe under these existing conditions; for, if there was no smoke or steam present, the plaintiff might have observed the warped plank and have avoided it. For aught we can know from this record, the jury might have properly found the plaintiff to have been guilty of contributory negligence, but for this evidence; and as a matter of fact and truth he might have avoided the injury, but for the surrounding circumstances which prevented his being able to avoid stepping on the defective plank which threw him. The jury could not have correctly determined the issues raised by the defendant itself, without evidence of these conditions which surrounded and attended the plaintiff at the time and place of the injury. A part of appellant's evidence, on the direct examination of its own witnesses and by the cross-examination of the defendant's witnesses, was evidence intended to show that it was light at the time and place of the injury, and that plaintiff could or ought to have observed the warped plank, and have avoided it. Consequently the evidence in question was clearly relevant and proper in rebuttal of defendant's evidence tending to prove its pleas; but, as we have shown above, it was proper as original evidence on the part of plaintiff to disprove or avoid the defendant's pleas of contributory negligence.

Whatever is, or might have been, the rule of evidence in other countries and states as to the admissibility, relevancy, and competency of declarations and exclamations of a person injured, indicative or expressive of pain and suffering, in actions to recover damages, the rule is firmly settled in this state, by a long line of decisions, extending from the case of *Phillips v. Kelly*, 29 Ala. 628, down to, and probably beyond, *Matthews' Case*, 142 Ala. 311, 39 South. 207. The rule does not limit such declarations to those uttered at or very near the time of the injury, which could be said to be a part of the *res gestæ*; but it is extended to those made several months, and even years, after the injury, and even to those made after suit is brought. They are admitted upon the ground of necessity, and are probably the best mode, and sometimes might be the only mode, of determining whether pain or suffering was endured. These expressions of pain, and of the locality, nature, extent, and character of it, are usually admissible evidence. True,

the rule allows an opportunity for simulation and the perpetration of a fraud; but necessity and justice require it. The reality or the simulation of such expressions is a question for the jury. The rule, however, has limitations. The declarations must be limited to the existence of pain or suffering at the time they are made, and do not extend to rehearsals or narrations of past conditions or sufferings; nor does the rule extend to declarations as to the cause of the pain or suffering.

It is insisted by appellant that the question and answer to which objections and exceptions were interposed in the present case were improper and did not fall within the rule, but were mere narrations of past conditions. The question probably would have called for an answer not within the rule, but the answer was strictly within the rule; hence no injury came to defendant on account of the question. The question was: "What has he [plaintiff] had to say about it [his injury]?" The answer was: "He complained every day of his leg, hip, and back hurting him." *Montgomery Co. v. Shanks*, 139 Ala. 501, 37 South. 166; *Hale's Case*, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748, and authorities supra; *Bennett v. N. P. Co.*, 2 N. D. 112, 49 N. W. 408, 13 L. R. A. 465 and note.

Counsel for appellant attempt to distinguish the question at bar from the rule, in that the plaintiff offered to prove these declarations by the plaintiff's father, and not by a physician, or by the plaintiff himself. We do not think this argument sound, or persuasive. The declarations, if admissible, can be proven by any one who heard them. It would not be proper or appropriate to prove the declarations by the plaintiff or person who made them. If he were himself testifying as a witness, it would certainly be more appropriate for him to testify directly that he had been subjected to pain or suffering, to locate it, and to tell when and how long he suffered, than to testify to what he himself had declared about the pain or suffering. Counsel is therefore in error in supposing that the plaintiff, in the case of *Phillips v. Kelly*, supra, testified to the declarations. It was evidently some third party who testified to the declarations in that case. This is made certain by the opinion and the report of the case.

It might be error to allow the plaintiff to testify as to what he said or did on these occasions, indicative of pain. It would be better and more appropriate for him to testify to whether or not he suffered pain, than to what he said about it. A third party is allowed to testify to the declarations indicating pain, though he is not competent to give his opinion as to whether plaintiff suffered pain. While the rule is, in some respects, different where the declarations are made to a physician who is examining the

injured party, in that the physician in certain cases is competent to give an opinion as an expert as to whether a given injury would cause pain, when a person not a physician could not give his opinion on the question, and the declarations of a party injured, made to the physician who is examining and treating his injuries, may in proper cases be competent and proper to aid the physician in forming his own professional opinion as to the nature and character of the injuries, and the pain and suffering consequent thereto, yet the declarations of plaintiff in this case in question could be proven by his father, to whom they were made, as well as if made to the physician treating him.

We do not think there was error in the giving of charge G, requested by plaintiff, which was as follows: "The plaintiff had a right to assume that there was no defects in the ways, works, machinery, or plant of the defendant; nor was it his duty to be on the lookout for such defects." This charge, we think, is nothing more than the assertion by the court of a well-established proposition of law, announced by all the authorities on Master and Servant, and which has, in effect, if not in exact words, often been declared by this court as correct. It may be the duty of a servant to report defects to the master, which are known to the servant and not known to the master, and also to look out for defects, and to remedy them if they be defects, as to which he is charged with some duty to discover or remedy; but he is not charged with the duty of specially looking out for, or of remedying, those defects as to which he is chargeable with no duty to either look out for or to remedy. Of course, if he has actual notice or knowledge of a defect, though he is chargeable with no duty of looking out for or of remedying it, he must then use care not to be injured thereby, and must report it to the master, unless the master is aware of it. But as to defects of which he has no notice or knowledge, and concerning which he is chargeable with no duty, he may presume that they do not exist, that the premises are safe, and he need not specially look out therefor.

Of course, the servant may be guilty of contributory negligence relating to such defects. One might be so obviously open and dangerous that a reasonably prudent person, situated as he was, would have seen it and avoided the danger. Yet in such case the burden is on the master to show the contributory negligence. It is not shown by the mere fact that he was not at the time on the lookout for such defect. The servant at all times has the right to presume that the premises of the master are safe for the work which he is engaged by the master to perform, unless he is chargeable with some duty of seeing to the safety of the premises or of remedying the defects. It is not shown to be any part of the duty of this plaintiff

the defect. He, therefore, had the right to presume that the scaffold was safe, and was chargeable with no duty of being on the lookout for this defect; and this is all the charge asserts. Labatt on Master & Servant, §§ 354, 355, and notes; Davis' Case, 92 Ala. 300, 9 South. 252, 25 Am. St. Rep. 47; Osborne's Case, 135 Ala. 575, 33 South. 687; Bouldin's Case, 121 Ala. 197, 25 South. 903; Baker's Case, 106 Ala. 624, 17 South. 452.

While it was proper for defendant to prove, if it could, that the plank complained of was not a part of the scaffold, and was a mere obstruction, and, therefore, not a part of the ways, works, and machinery, as alleged, yet it was not proper to prove this by the opinion of the witness West as to the purpose for which it was placed on the scaffold. This was not the proper inquiry. The plank might have been placed so as to form a part of the scaffold, no matter for what purpose or object so placed. Intent is usually an inferential fact, and, unless it is announced at the time the act is done, it is usually not susceptible of direct proof. Sharp v. Hall, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28. The inquiry was one of fact, did it not constitute a part of the ways, works, and machinery? and not, What was it intended to be used for? This could not and should not control. However, if there was error in excluding this evidence, it was without injury, for it was shown without dispute that West and Foster merely testified that it was placed where it was to get it out of the way; but this did not show that it was not a part of the ways, works, and machinery.

We cannot say that the verdict was excessive in this case. The evidence tended to show that plaintiff was a young man, 21 or 22 years of age; that he was hurt; that his leg, hip, and back were injured; that he had a dead sensation in his leg up to the time of trial, a year or more; that he was in bed for more than six weeks from the injury; that he could not work for eight weeks; that his back had hurt him ever since the injury; that he had had headaches since the injury, which he did not have before; that his health was good before, but bad since the injury. Of course, some of these facts were disputed; but they were questions for the jury. It was undisputed that plaintiff fell a distance of 30 feet; that the fall rendered him unconscious, and caused him to bleed from the ear; and that the men present at the time thought he was killed. Hence, under this evidence, we cannot say that the verdict for \$1,600 was excessive; and we think that the trial court properly refused the motion to set it aside and to grant a new trial. Lackey's Case, 114 Ala. 152, 21 South. 444; Bailey's Case, 112 Ala.

335, 34 South. 981; Crowder's Case, 130 Ala. 265, 30 South. 592.

The judgment of the lower court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

LOUISVILLE & N. R. CO. v. COWLEY et al. (Supreme Court of Alabama. Dec. 16, 1909.)

1. PLEADING (§ 216\*)—DEMURRER—SCOPE.

Under Code 1907, § 5340, providing that no demurrer can be allowed but to matter of substance, which the party demurring specifies, and no objection can be allowed which is not distinctly stated in the demurrer, and section 3121, providing that a demurrer must set forth the grounds specially, and abolishing the motion to dismiss for want of equity, rulings and decrees on demurrers must be confined to the special causes assigned.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 216.\*]

2. MUNICIPAL CORPORATIONS (§ 671\*)—STREETS—OBSTRUCTIONS—INJUNCTION.

Code 1907, § 1241, requiring the board of public works to supervise all public works of the city, and giving it exclusive power over the streets, etc., does not deprive an abutting property owner of his right to injunction against obstructions in streets, if he would otherwise be entitled to such relief.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

3. MUNICIPAL CORPORATIONS (§ 671\*)—STREETS—OBSTRUCTIONS—INJUNCTION—PARTIES.

Owners of property abutting on a public street, whose rights, damages, and injuries are alleged to be of the same kind, differing only in extent and amounts, may join as complainants in a bill to restrain the maintenance of an obstruction in the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Bill by John R. Cowley and others against the Louisville & Nashville Railroad Company. From the decree, defendant appeals. Affirmed.

Gregory L. & H. T. Smith, for appellant. Fitts & Leigh, for appellees.

MAYFIELD, J. The bill is filed by a number of abutting property owners against a railroad company to enjoin the erection and maintenance of a passenger train umbrella shed, and iron fence inclosing it. In and along a public street in the city of Mobile, in front of their property which abuts on the street, where the structures complained of are being erected by the defendant railroad company. The bill alleges, among other things, that the street in question is a public one, made such by dedication. And that the same has been in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the depot or shed is a wooden structure 15 feet high and 12 feet wide, and extends along the street in front of complainants' property for a considerable distance; that the fence is a high iron one, constructed of bars set close together and held in place by iron stringers, and fixed into the street by means of cement; that the two structures constitute an appropriation of about one-half of the street, for the distance along which they extend; that the obstruction cuts off the view and outlook from the property of complainants to the east in the direction of the morning sun, the Mobile river, and the other side of the street, and of the river front; that the obstruction prevents the tenants from crossing and recrossing the entire width of Commerce street; that it impairs the value of the properties of complainants to an extent which it is impossible to measure by dollars and cents; that it destroys the width and symmetry of the street; that it obstructs the light, air, view, and prospects necessarily arising from and incident to an open street; that the several things complained of will depreciate the value and use of the property; that it appropriates part of the street to the defendant's own use without condemnation proceedings, and without the payment of just compensation.

The grounds of the demurrer were as follows: (1) Because the exclusive power of prohibition and removal of obstructions and unsightly objects from the city of Mobile is vested wholly in the board of public works of said city. (2) Because depreciation in the value of their properties and in the use thereof is the only injury that the allegations of the bill of complaint show that complainant suffered different in kind from that suffered by the public generally. (A) Because the right that each complainant seeks to enforce is different from the right sought to be enforced by others of the complainants. (B) Because the injury suffered by each of the complainants is different from the injury suffered by others of the complainants. (C) Because the remedy that each complainant is entitled to is different from the remedy that others of complainants are entitled to.

It is insisted on this appeal that the bill is without equity, and that it is too indefinite and uncertain in its averments as to the interests of the respective complainants in and to the street thus obstructed, and as to the facts, to show the nature, character, and extent of their respective damages or injuries by reason of the structures; that the bill is too indefinite and uncertain as to the location of the structures in the street, and as to whether or not any part of the street as to which the complainants own the fee is taken, and, if so, how much and what part; and that the averments are too indefinite and

the public in consequence of the obstruction. It is sufficient to say that none of these objections was sufficiently pointed out by the demurrers to be considered on this appeal. The trial court could not and did not pass upon them in the lower court.

The statute (section 5340 of the Code of 1907) provides: "No demurrer in pleading can be allowed but to matter of substance, which the party demurring specifies; and no objection can be taken or allowed which is not distinctly stated in the demurrer." Section 3121 of the Code of 1907 provides as follows: "A demurrer to the bill must set forth the grounds of demurrer specially, unless the defendant desires to test the equity of the bill, when he may do this by a general demurrer, 'that there is no equity in the bill.' The motion to dismiss for the want of equity is hereby abolished." Under these statutes it is the uniform practice to confine the rulings and decrees on demurrers to the special causes assigned.

The first ground of demurrer is not well taken. The provision of the Municipal Code, now embodied as section 1241 of the Code of Alabama, was not intended to deprive, and does not deprive, the property owner of his right to injunctive relief as against obstructions of the public streets on which his property abuts, if he would otherwise be entitled to such relief. Whatever change such statute may have wrought as to the municipal control of the streets and highways of municipalities, it did not destroy the rights or remedies of the abutting property owner, such as are attempted to be asserted in this bill.

The second ground of demurrer, that the only injury shown to have been suffered by complainants, different in kind from that suffered by the public generally, is the depreciation in value of complainants' property, is not well taken. The bill does aver other injuries different in kind and degree from that suffered by the public generally. It may be that some of these are not alleged with sufficient certainty; but the demurrer should have pointed out such defects, if such there be.

The other grounds of demurrer go only to the misjoinder of parties complainant. These grounds are not well taken to this bill. We know of no rule of law, pleading, or practice which prohibits the joinder of complainants such as those in this suit. The rights, damages, and injuries of all are alleged to be of the same kind, and to differ only in extent and amounts. The interests of the abutting owners in and to the street, so far as appears from the bill, are common, and the damage, if any, is common to all; and, there being but a single object to be accomplished by all, they may unite as co-complainants in a single bill, for an injunction as

to an alleged public nuisance in the obstruction of the public street. 1 High on Injunctions, § 635, pp. 614, 615; Taylor v. Bay City R. R. Co., 80 Mich. 77, 49 N. W. 335; Rowbotham v. Jones, 47 N. J. Eq. 337, 20 Atl. 731, 19 L. R. A. 663; Jones v. Rowbotham, 48 N. J. Eq. 311, 24 Atl. 131, 19 L. R. A. 663; Whipple v. Guile, 22 R. I. 576, 48 Atl. 935, 84 Am. St. Rep. 855.

It follows that none of the grounds of demurrer assigned is well taken, and that the chancellor properly overruled the demurrer; and his decree thereon must be affirmed.

Affirmed.

SIMPSON, ANDERSON, and McCLELLAN, JJ., concur.

### JONES v. TENNESSEE COAL, IRON & R. CO.

(Supreme Court of Alabama. Nov. 18, 1909.)

#### 1. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—PLEADING—DEFECTS IN CONDITION OF WAYS AND WORKS.

A complaint under the liability act (Code 1907, § 3910, subd. 1) for injuries received from the falling of an insecurely supported furnace door, alleging the cause of the injury to be a defect "in the condition" of the ways, works, etc., of defendant, is not subject to a demurrer on the ground that it fails to show a defect "in" the ways, works, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

#### 2. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—PLEADING—FAILURE TO WARN SERVANT OF DANGER.

A complaint for injuries from the falling of an insecurely fastened furnace door, alleging that plaintiff's superior knew, or by the exercise of reasonable diligence would have known, that such danger existed, and that plaintiff was ignorant of the danger, is not subject to demurrer on the ground that it does not show that plaintiff's superior, "who is charged with negligence in failing to warn plaintiff of the danger that said door would fall, had knowledge that plaintiff was ignorant of said danger, or should have had such knowledge by the use of ordinary care."

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.\*]

#### 3. MASTER AND SERVANT (§ 217\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant does not assume the risk of dangers from an insecurely fastened furnace door, about which he is to work, where he has no knowledge of the defective condition of the fastenings.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by Tobe Jones against the Tennessee Coal, Iron & Railroad Company. Defendant had judgment on demurrer to the complaint, and plaintiff appeals. Reversed.

Frank Deedmeyr and James A. Mitchell, for appellant. Percy, Benners & Burr, for appellee.

MCCLELLAN, J. The errors assigned and argued complain against the action of the court below in sustaining demurrers to counts 1 and 3. The averments common to the counts are: That at the time of the injury the relation of master and servant existed between plaintiff (appellant) and defendant; that plaintiff was engaged in the performance of his duty to the master when injury befell him; that the master was operating a manufacturing plant, namely, steel works; that plaintiff was at work "in front of or near to one of the furnaces" in the plant, and "a large door to said furnace, which was insecurely placed or supported, fell on or against the plaintiff," inflicting the injury. Count 1 ascribes the injury for proximate cause to a "defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the defendant, which said defect was in this: That the said door was insecurely placed or supported. \* \* \* The demurrer's sole ground is "that the facts set forth in said count show no defect in the ways, works, machinery, or plant connected with or used in the business of the defendant."

The count, as readily appears, predicated the culpability of the defendant upon a defect "in the condition of" the ways, works, etc., and did not, as the sole ground of the demurrer assumes, undertake to impute negligence to the master in respect of a defect "in" the ways, works, etc. The demurrer was, hence, inapt. If there may be, under the statute, a line of demarcation between a defect "in" the ways, etc., and a defect "in the condition of" the ways, etc., an inquiry not raised nor necessary to be considered, there is unquestionably a distinction between the two. The employment of the word "condition" widens the statute beyond what would have been its scope had only the word "defect" been used. If, as the demurrer assumes, one claiming under the subdivision must show a defect "in" the ways, etc., the effect would be to contract the right therein declared, and this by denying the word "condition" its proper influence in defining the status that will, under subdivision 1 of the statute (Code 1907, § 3910) afford, in essential factor, a cause of action against the master. This distinction appears from an illustration stated in one of the decisions cited below, viz., that "way" is rendered defective in condition by the presence thereon of ice formed by natural climatic causes. The "way" is complete in itself, but its condition for the use intended is defective. *McGriffin v. Palmer's Shipbuilding & Iron Co.*, 10 L. R. (Q. B.) 5; *Heske v. Samuelson*, 12 L. R. (Q. B.) 30; *Dresser's Employer's Lia-*

bility, § 35; Tate v. Latham, [1897] 1 Q. B. 502, 506; Willey v. Boston El. Co., 168 Mass. 40, 42, 46 N. E. 395, 37 L. R. A. 723. The two English decisions first cited were followed in the decision here of K. C., M. & B. R. R. Co. v. Burton, 97 Ala. 240, 246, 12 South. 88. While in Burton's Case the court undertook to define "defect in the condition," it did not, as readily appears, have before it the question now present and before stated.

The demurrer to count 1 was improperly sustained, for the reason indicated.

The gravamen of the third count is the breach of duty to warn the plaintiff of a danger of which he did not know. The count undertakes to state a cause of action under the third subdivision of the liability act (Code 1907, § 3910). As indicated, the count does not complain against the order, to which he was bound and did conform, but against the omission to warn plaintiff of a condition to be encountered by him in conforming to the order. The sole ground of demurrer is: "That said count does not show that the person who is charged with negligence in failing to warn plaintiff of the danger that said door would fall had knowledge that plaintiff was ignorant of said danger, or should have had such knowledge by the use of ordinary care." The count obviously describes an abnormal condition, a condition not comprehended in the risks, assumed by the servant, incidental to the employment in which he was, when injured, engaged. The substance of the descriptive averment is that a door of a furnace was so insecurely placed or supported as to render it dangerous for servants to perform their duty within its zone. No other construction of the count is possible, save that the master's plant, works, etc., was not as it should have been in the particular in question. Whether the existence of that condition was the result of negligence of the master is not a factor in dealing with the demurrer to the third count. The count also avers that the person giving the order knew, or by the exercise of reasonable diligence would have known, that such danger existed, and that plaintiff was ignorant of the risk. The demurrer objects that the further averment should have been that the order giver knew plaintiff was so ignorant, or by the exercise of due care could have ascertained that fact.

Where the risks are normal or ordinary in the service in which the servant engages, there is no obligation, *prima facie*, on the master to warn or instruct. The rule rests upon the master's *prima facie* right to act on the presumption that the person whom he is about to engage understands the risks of that service, unless the master has notice of the person's inexperience, or that he is below average intelligence. 1 Labatt, § 239, and notes. Nor is the master obligated to warn or instruct the servant in respect of risks of which the servant has actual knowl-

edge. 1 Labatt, § 237, and notes. The count under consideration avoids, by averments, both of these exemptions of the master from the *prima facie* obligation. It is, to repeat, averred that the risk was the product of an abnormal condition and that the plaintiff did not know of the risk. Under this state of hazard, so created, the obligation, *prima facie*, is on the master to warn the servant. Under such circumstances, the presumption is that the servant is ignorant of the risk. 1 Labatt, § 240, and authorities cited in notes; Dresser, § 94. To justify the sustaining of this demurrer, it must be held that the stated presumption, arising out of the source, character, and nature of the risk, should be averred. In other words, it is necessary to affirm that not only must the condition raising *prima facie* the presumption of the servant's ignorance be shown in the court, but also that the pleader shall in effect reiterate that which the law attaches in this particular to the condition—the facts—the pleading describes. We do not understand that to be the rule. The condition described carried the obligation, *prima facie*, on the master to warn the endangered servant. It was a duty created by the abnormal hazard. The servant averred the basis for that duty when his count disclosed an abnormal risk and of which he did not know. It then became the duty of the master to inform the servant of the risk. The master must have, then, become the actor to avoid the consequences of his presumed knowledge that the servant was ignorant of the abnormal risk. The demurrer was not well taken, for the reason, before indicated, that the count described an abnormal risk, of which the plaintiff did not know, and to which state of averred fact the master's duty, *prima facie*, was to warn the ignorant servant. If more were required of the pleader, it would be surplusage, a mere reiteration of that which, from the facts averred, the law, *prima facie*, implied. In order to sustain his cause of action, the plaintiff must, of course, support his averments—averments of fact for which the obligation, *prima facie*, to warn arose—in the proof. If the master, or his representative, was ignorant of the plaintiff's presumed ignorance, that is, of course, within the issue of fact upon the averments of the count, and necessarily within a general traverse thereof.

Counsel for appellee cite 1 Labatt, § 235, wherein that learned author lays down the three propositions upon which depend, concurrently, the right of a servant to maintain his action for the omission to warn or instruct. Our views, as appears, are in accord with the doctrine of the cited section. Ala. Consol. Coal & Iron Co. v. Hammon, 156 Ala. 253, 47 South. 248, does not deal with the point taken by the demurrer. The decision there, in the particular urged for appellee, pertained to the inquiry whether there was any duty on Varnon to inspect the

place of plaintiff's injury, and, in consequence, whether Varnon breached that duty as charged in the count. The court held that the count did not so conclude. As before stated, that is not the point of the demurrer here. In *Horan v. Gray & Dudley Hardware Co.*, 48 South. 1029, the court responded to the contention of appellant by the criticism that the complaint did not negative the plaintiff's knowledge of the danger against which he asserted duty required him to have been warned. *Horan's Case* does not relate to the point of this demurrer. *Richards v. Sloss Co.*, 146 Ala. 254, 41 South. 288, had to do, in decision, with an obvious or actually known condition of danger. It has no bearing here. *Bear Creek Mill Co. v. Parker*, 134 Ala. 203, 32 South. 700, is likewise without application on the inquiry here.

The opinion is entertained that the demurrer to the third count should not have been sustained.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### DICKENS v. MURRAY & PEPPERS.

(Supreme Court of Alabama. Dec. 16, 1909.)

##### 1. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—EVIDENCE.

In an action for rent of a boat, the refusal to exclude part of a memorandum showing the number of days the boat was worked was not prejudicial to defendant, who had testified that he sent to plaintiff a statement corresponding with such entry.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

##### 2. EVIDENCE (§ 317\*)—HEARSAY.

In an action for rent of a boat, defendant could not testify as to what an employé told him as to the number of days the boat worked during a particular week when witness was absent; such testimony being hearsay.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

##### 3. TRIAL (§ 256\*)—INSTRUCTIONS.

Where instructions correctly stating the law possess any misleading tendency, it is the duty of the adverse party to meet them by a counter or explanatory charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 629; Dec. Dig. § 253.\*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Murray & Peppers against Charles C. Dickens. Judgment for plaintiffs, and defendant appeals. Affirmed.

For the facts in this case, see the former report thereof in 149 Ala. 240, 42 South. 1031. The following charges were given at the request of the plaintiff: (2) "If you are reasonably satisfied from the evidence in this case that the plaintiffs rented the holster to the defendant at \$10 per day, and that the defendant used the holster under the con-

tract, then you must find for the plaintiffs, unless you are reasonably satisfied from the evidence that defendant has paid the plaintiffs in full for the use of the holster, and the burden of proving payment is on the defendant." (3) "The court charges the jury that if you are reasonably satisfied from the evidence that defendant used plaintiffs' holster under an agreement that he would pay them \$10 for each day he used it, and that he has not paid them in full for the use of the holster, then you must find for the plaintiffs, and assess their damages at such an amount as will compensate them, at the rate of \$10 per day for the number of days that remain unpaid for." (4) "The court charges the jury that if you are reasonably satisfied from the evidence in this case that plaintiffs rented a holster to defendant at the rate of \$10 per day for each day the holster worked, and that defendant used the holster under this agreement, and has not paid plaintiffs in full for its use, then you must find for the plaintiffs, and assess their damages at such a sum as will compensate them, at the rate of \$10 per day for each day defendant used the holster and failed to pay the plaintiffs." (7) "The court charges the jury that, if you find for the plaintiffs, the plaintiffs are entitled to recover \$10 a day for each day unpaid for, together with interest at the rate of 8 per cent. per annum from the date payment should have been made to the date of trial."

Gregory L. & H. T. Smith, for appellant. Fitts & Leigh, for appellees.

DOWDELL, C. J. This is an action on the common counts. The pleas are the general issue and payment. There is no dispute as to the terms of the contract, which was verbal, for the rent of the boat and holst. The rent was at the rate of \$10 per day while the boat and holst were operated. It was agreed in open court that \$750 had been paid on the rent under the verbal contract, fixing it at the rate of \$10 per day while the machine was in use, and which said contract covered a period from September 28, 1903, to April 5, 1904. The real controversy is as to the number of days the machine was in use.

In establishing their claim the plaintiffs introduced in evidence certain book entries, set out in the transcript before us, showing the number of days that the machine was operated by the defendant. Peppers, one of the plaintiffs, examined as a witness, testified that he made the entries, and that he made them from weekly statements made to him by Steadham, the engineer in charge of the boat and holst. The witness testified to the correctness of the entries as made by him from Steadham's statements. Steadham testified to making weekly statements to Peppers, and that Peppers entered them in the book as he made them to him. This witness

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the number of days the boat and hoist were used by the defendant. On this state of the evidence, it was on the former appeal in this case (*Murray & Peppers v. Dickens*, 149 Ala. 240, 42 South. 1031) ruled that the original entries so made were competent and admissible, citing authorities in support of the ruling; and we now adhere to that decision.

It is insisted, however, by the appellant, that the evidence showed that the witness Steadham was sick and absent from the work for three weeks from the 28th day of September, 1903, and could not have had any personal knowledge of the number of days that the boat and hoist were used during that period, and that the trial court therefore erred in overruling the appellant's motion to exclude from the evidence that portion of the book entries made by Peppers, showing the number of days of work during said period. The witness Steadham testified that he carried the boat to Dickens' landing, and returned to Mobile, and was sick and absent three weeks; but he did not state when he carried the boat to Dickens' landing, and, for aught that appears from his testimony, it might have been three weeks before he began to make any statements to Peppers. He testified that the statements he made to Peppers, as to the dates the boat and hoist worked, were correct; and Peppers testified that the entries were made from the statements given in to him by Steadham. It is true that, after the motion to exclude had been ruled on, the defendant, testifying as a witness in his own behalf, stated that Steadham was absent for three weeks from the 28th day of September; but no motion to exclude was made after the introduction of this evidence. Moreover, the motion to exclude was single and entire as to three weeks commencing with September 28th, and there was evidence by the defendant himself that he sent in to the plaintiffs a statement of the first week's work, which corresponded with the entry admitted in evidence. Certainly there was no injury to the defendant in the refusal to exclude this part of the memorandum offered, and which was included in the motion to exclude. We fail to see that any error was committed in the trial court's action in overruling the defendant's motion to exclude the book entries that was prejudicial to the defendant.

It was not competent for the defendant, when testifying in his own behalf to state what Steadham told him as to the number of days the boat worked during a particular week, when he (witness) was absent. There was no effort in this evidence to impeach Steadham, and what Steadham told the witness was purely hearsay evidence.

During the course of the examination of the defendant as a witness, he was asked by

sworn: "On February 1st, total, 10 1/2 days, for which I sent a check for \$165." The plaintiffs moved to exclude this answer on several stated grounds, which motion the court sustained, and the defendant excepted; and thereupon the court qualified its ruling by stating, "I exclude that portion of the answer which was a conclusion of the witness," and to this the defendant reserved an exception. The court did not, as it should have done, indicate what portion of the answer it held to be a conclusion. It should not have left that a question for the jury. But, be this as it may, we are unable to see that any injury resulted from this action to the defendant. There was no issue of accord and satisfaction in the case. There was no controversy as to the amount of payments. The \$165 payment mentioned in the answer of the witness was otherwise shown, and not disputed, by the introduction in evidence of the check through which it was made.

We have examined the several written charges given the jury at the request of the plaintiffs, and we find no fault with them. They each correctly stated the law. If they, or any one of them, possessed any misleading tendency, it was with the defendant to meet this by a counter or explanatory charge.

We find no error in the record prejudicial to the rights of the defendant, and the judgment will be affirmed.

Affirmed.

ANDERSON, SAYRE, and EVANS, JJ., concur.

#### NOTE.

[a] (U. S. 1906) In an action for libel, the testimony of a witness to conversations with third persons, in which such persons stated that they had read the alleged libelous article, and the impressions made by it on their minds is hearsay and incompetent either upon the question of damages generally, or to show publication or the extent of circulation.—*Salem News Pub. Co. v. Caliga*, 75 C. C. A. 673, 144 Fed. 965.

[b] (Ark. 1906) One of two partners sold his interest to his sister, who sold her interest to another, and the sales led up to the giving of a note by the original firm, on which the latter firm became surety, and the members of the original firm gave indemnity notes to the new firm. Held that, in an action on one of such notes against the partner who sold to his sister, it was incompetent to permit the witness to detail at length conversations between himself and defendant and his sister to whom he sold his interest as evidence against plaintiff.—*Lovell & Co. v. Speed*, 79 Ark. 204, 95 S. W. 157.

[c] (Cal. 1896) In an action by an attorney to recover fees, conversations between defendant and another attorney, who was associated with plaintiff in the case in which the services were rendered, are inadmissible against plaintiff, such conversations having taken place in the absence of and without the knowledge of plaintiff.—*Chapman v. Neary*, 115 Cal. 79, 46 Pac. 867.

[d] (Cal. 1899) Where a witness, asked to



state how a conversation between himself and one F. began, and who spoke first, etc., answered that he could not say who spoke first, but the matter came up while they were discussing circumstances attending a request by F.'s father to pay a certain sum to plaintiff's intestate, at which the witness was not present, and that he then incidentally asked her if she had paid such sum, the granting of a motion to strike out evidence of the event narrated, as hearsay, was proper.—*Cauhape v. Security Sav. Bank*, 127 Cal. 197, 59 Pac. 589.

[e] (Cal. 1905) A conversation between a mortgagor and a purchaser of the land, who agreed to assume and renew the mortgage, which took place in the absence of the mortgagee, was not competent evidence against the mortgagee as to the purchaser's understanding of her obligations.—*Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073.

[f] (Colo. 1897) It is not error to strike from a deposition testimony on behalf of plaintiff of a conversation between witness and a third person, where defendant was not present at the conversation.—*Lee-Clark-Andreesen Hardware Co. v. Yankee*, 9 Colo. App. 443, 48 Pac. 1050.

[g] (Conn. 1899) In interpleader between the indorsee of a note and the payee, whose treasurer had negotiated it without authority, the admission of conversations between the treasurer and another officer of the payee company relative to the making of the note and its purpose, and the instructions to the treasurer as to its use, was error; the indorsee not being shown to have knowledge of these facts.—*Standard Cement Co. v. Windham Nat. Bank*, 71 Conn. 668, 42 Atl. 1006.

### COOK v. PHONOHARP CO.

(Supreme Court of Alabama. Dec. 16, 1909.)

EXCEPTIONS, BILL OF (§ 36\*)—SIGNATURE OR AUTHENTICATION.

A paper in the record, which is not signed or otherwise authenticated, will not be considered as a bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94-96; Dec. Dig. § 56.\*]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Action by the Phonoharp Company against Mattie C. Cook. Plaintiff had judgment, and defendant appeals. Appeal dismissed.

See, also, 157 Ala. 501, 47 South. 1035.

M. Peters, for appellant. Sorrell & Dennis, for appellee.

MAYFIELD, J. The only judgment shown by the transcript in this case is that appearing as a part of what purports to be, and is called, the bill of exceptions. But this is not a bill of exceptions, because it is not signed by the trial judge, does not purport to be signed by any one, and is not in any other manner sufficiently authenticated to be known or considered by this court as a bill of exceptions. In view of this condition of the record, there is nothing for us to review.

The appeal is dismissed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

### BIRMINGHAM RY., LIGHT & POWER CO. v. ANDERSON.

(Supreme Court of Alabama. Nov. 25, 1909.)

1. CARRIERS (§ 333\*)—CARRYING PASSENGER BEYOND DESTINATION—SETTING DOWN AT UNUSUAL PLACE.

Where a carrier, taking a passenger beyond his destination, stops the train and lets him off, he may assume that the place selected is reasonably safe for the purpose.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1388; Dec. Dig. § 333.\*]

2. DAMAGES (§ 62\*)—DUTY OF INJURED PERSON TO PREVENT.

In general, it is the duty of one injured by the negligence of another to exercise ordinary care to reduce the damages, and he is bound to take such care of personal injuries as a reasonably prudent person would in like circumstances, and can only recover such damages as would have been sustained had such care been taken, and whether he should submit to a surgical operation to effect a cure must depend upon his judgment, exercised in good faith.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 120-122; Dec. Dig. § 62.\*]

3. DAMAGES (§ 163\*)—MITIGATION—BURDEN OF PROOF.

The burden is on one sued for injuries to prove its contention that the injuries were aggravated by negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 456; Dec. Dig. § 163.\*]

4. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

In an action for injuries to a passenger, where the question whether plaintiff's damages should be abated because they had been negligently allowed to accumulate was not in issue, the refusal of a charge that it was plaintiff's duty not to aggravate his injuries by negligence, and to use reasonable care to cure his injuries, though correct in the abstract, was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 595; Dec. Dig. § 251.\*]

5. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.

The giving of charges that plaintiff's failure, if any, to have a surgical operation as promptly as should have been done, cannot be considered to reduce damages to which he is entitled, if any, and that plaintiff owed defendant no duty to have the surgical operation, though erroneous, was harmless, where the question of mitigation of damages was not in issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by J. C. Anderson against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts sufficiently appear in the opinion of the court. The following charges were given at the instance of the plaintiff: (2) "Plaintiff's failure, if any, to have a surgical operation as promptly as should have been done, cannot be considered by you as reducing the amount of damages to which plaintiff is entitled, if any." (6) "Plaintiff owed defendant no duty to have the surgical op-

eration." The following charge was refused to the defendant: (2) "It was the duty of the plaintiff not to aggravate his injuries by his own neglect, and to use reasonable care to cure his injuries."

Tillman, Grubb, Bradley & Morrow, for appellant. George Huddleston, for appellee.

SAYRE, J. Plaintiff's case was that, having been carried somewhat beyond his destination, the car upon which he was a passenger was negligently stopped for him to alight at a place where it was not reasonably safe for him to do so, and that in making the effort to reach the point where, in regular course, he would have alighted, by the only practicable way, he fell into a stock gap and received injury. The defendant's second plea averred that "plaintiff himself was guilty of negligence which proximately contributed to his injury, in this: That he negligently walked along defendant's track in the nighttime at a place where there was an open stock gap in the track, into which he fell and was injured, of the existence of which he had knowledge, or of which he would have known by the exercise of reasonable diligence, at and before the time of his injury." This plea, in its second alternative, assumed that it was the duty of the plaintiff to have informed himself of the dangers of the place at which he alighted, whereas he had a right to assume that it was reasonably safe for that purpose. The use of the word "negligently" does not save the plea. The plea must be taken to mean that the act of the plaintiff in walking along the track and falling into the stock gap was negligent, in view of, and as conditioned upon, the duty alleged to rest upon him to exercise diligence at and before the time of his injury to learn the danger from the stock gap. As we have said, no such duty rested upon him. The plea was therefore bad. *Montgomery St. Ry. Co. v. Mason*, 133 Ala. 508, 32 South. 261; *Melton v. Birmingham Ry., L. & P. Co.*, 153 Ala. 95, 45 South. 151, 16 L. R. A. (N. S.) 467.

In general, it is the duty of one injured by the negligent act of another to exercise an ordinary degree of care and prudence to prevent the accumulation of damages. Where his injuries are personal, he is bound to take such care of them as a reasonably prudent person would in like circumstances, and can only recover such damages as would have been sustained had such care been taken. *Gulf, C. & S. F. Ry. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492. He must employ such medical or surgical aid as ordinary prudence would require under the circumstances. *Kennedy v. Busse*, 60 Ill. App. 440. If the contention is that plaintiff's injury was aggravated by negligence, the burden is upon the defendant to show that fact in mitigation of damages. *Louisville, etc., Ry. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Chicago, etc., R. R. Co. v. Meech*, 163 Ill. 305,

45 N. E. 290; *Bradford v. Downs*, 126 Pa. 622, 17 Atl. 884. If the plaintiff resorts to medical or surgical aid, consulting such a physician or surgeon as a reasonably prudent man would, and follows the treatment prescribed, certainly he discharges every duty he owes to the tort-feasor. *Stover v. Bluehill*, 51 Me. 439; *Loesor v. Humphrey*, 41 Ohio St. 378, 52 Am. Rep. 86. Whether the duty rests upon one who has suffered personal injury to submit himself to a surgical operation for the purpose of effecting a cure, and thus limiting damages, must depend upon his judgment exercised in good faith. In *Blate v. Third Avenue R. R. Co.*, 44 App. Div. 103, 60 N. Y. Supp. 732, the defendant insisted that the plaintiff should submit to a surgical operation for the relief of his injury. Medical experts differed as to the probability of a cure and the danger involved. The court said: "While the person who inflicts the damage has the right to say that sure and safe means to diminish the evil results of the accident must be used, that is the extent of his right. Whether further means should be resorted to is for the plaintiff to determine. In making that determination the plaintiff has the right to consider the nature of the means used to effect a cure and the possible or probable effect upon himself. He has to determine for himself whether he is to resort to those means in view of those considerations." And further: "The jury, in getting at the damages, are to say, not only what they are, but whether the means used by the plaintiff to reduce the damages were such as an ordinarily prudent man would use. They cannot say that he should or should not have taken the advice of any particular physician, nor that he should have obtained any particular kind of treatment." This case is quoted with apparent approval in *Sutherland on Damages*, § 90. We think it states a correct and reasonable rule for such cases.

Charges 2 and 6, given to the plaintiff, and charge 2, refused to the defendant, did not go to the plaintiff's right of recovery, but only to the measure of damages as affected by plaintiff's hypothetical neglect and delay in having an operation performed upon his leg. Without rehearsing the testimony upon this subject, but upon careful consideration of it, nevertheless, we are of opinion that the testimony would not have justified the jury in a finding that the plaintiff had been neglectful in the ordinary treatment of his wound or had deferred the operation in order that damages might accumulate. Charge 2, refused to the defendant, certainly stated a correct proposition of law; but in the state of the evidence to which we have referred it was a mere abstraction. Charges 2 and 6, given to the plaintiff, needed qualification; but we cannot see that the giving of them was harmful to the defendant. They were abstract also. Their acceptance by the jury could not have tended to increase the

amount of damages assessed. The question which the defendant sought to bring into issue was whether the damages suffered by plaintiff should be abated, because they had been negligently allowed to accumulate. As we have seen, there was no warrant in the evidence for this issue, and the court's refusal to introduce it by the denial of a charge which stated correctly an abstract proposition of law, or, on the other hand, its definite removal from the cause by giving charges which did not accurately state the full reason why it should be removed, were alike free from error. 2 Mayf. Dig. p. 565, § 69. It is not to be supposed that the jury, assessing damages on the evidence, would have assessed them at a less figure, although they had been told that in a certain event, not in proof, they should have been less.

Other charges made the subject of assignments of error are to be disposed of, as counsel concedes, upon the principle adverted to in the discussion of the demurrer to the defendant's second plea.

The judgment of the court below is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

# STEVENSON & HERZFELD et al. v. DAVIS et al.

(Supreme Court of Alabama. Nov. 11, 1909.)

## 1. LOGS AND LOGGING (§ 3\*)—SALE OF STANDING TIMBER—CONSTRUCTION OF CONTRACT.

A contract for the sale of standing timber provided that the purchaser was to have all the trees suitable for sound timber that would square 10 inches at the little end, on a certain described tract of land, for \$500, each tree to be counted at 50 cents, and if there were not trees enough of the proper size to amount to \$500 at that rate the purchaser could cut such timber as he desired to make up the deficiency, counting it in proportion to the other timber. *Held* that, if there was a deficiency of lumber squaring 10 inches, the sellers had the option to return a proportion of the amount of the money received, but that such option was not enforceable by the purchaser, who was only entitled to cut other timber in such a case.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.\*]

## 2. APPEAL AND ERROR (§ 1029\*)—HARMLESS ERROR—PLEADING AND EVIDENCE.

In an action on a contract which furnishes no basis for a recovery by plaintiff, errors as to pleading and evidence are immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4035; Dec. Dig. § 1029.\*]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Assumpsit by Stevenson & Herzfeld and others against Jonathan Davis and others. Judgment for defendants and plaintiffs appeal. Affirmed.

The contract alluded to in the opinion is as follows: "State of Alabama, Tallapoosa County. Know all men by these presents, that for and in consideration of \$500 in hand paid us by J. M. Stevenson, the receipt whereof we do hereby acknowledge, we do hereby give, grant, bargain, sell, enfeoff, and confirm unto the said J. M. Stevenson all the white oak and poplar and the best red oak that is suitable to make sound and good lumber, all that is square 10 inches at little end, and each tree to be counted in size as above, at 50 cents; each growing and being upon the following described land, lying in the county of Tallapoosa, state of Alabama, to wit: [Here follows description of the land.] The said J. M. Stevenson shall have full right and unlimited egress and ingress upon said lands for the purpose of moving said timber until December 25, 1908, and shall have the right to open roads upon, over, and across said lands, and also the rights of mill seats when desired by J. M. Stevenson, and the right to move all buildings and timber upon said land, and in the event there is not enough timber on the described land that will square 10 inches at the little end, oak and poplar as above described, to amount to \$500 at 50 cents per tree, then we agree to let J. M. Stevenson cut such timber as he wishes off the above-described land, counting it in proportion to the other timber. In case we prefer, we have the right to pay him cash. Should there be more timber than will square 10 inches, on the said land, than said Stevenson has paid for, then said Stevenson is to pay the balance that might be due after it is cut. We also grant right of hauling other timber across said land in case J. M. Stevenson plants a mill on said land. [Here follows the habendum clause and covenant of title as to the lands on which the timber is situated.]" This contract was transferred to Stevenson & Herzfeld.

D. H. Riddle, for appellants. J. P. Oliver. J. W. Strother, and Thomas L. Bulger, for appellees.

SIMPSON, J. This is an action by the appellants against the appellees, the basis of which is the contract copied in the statement of the case by the reporter. A number of questions are raised on the pleading and on the sustaining of objections to evidence.

The plaintiffs base their claim on the contention that the contract of sale of the timber was at so much per thousand feet of timber, and, as there was not enough timber on the land to make the amount of \$500, which was paid, the plaintiffs are entitled to recover the difference. An inspection of the contract (made "Exhibit A" to the complaint) shows that "in consideration of \$500" cash, "in hand paid, the receipt whereof" is acknowledged, the defendants sold to the plain-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexer

tiffs "all the white oak and poplar and the best red oak that is suitable to make sound and good timber, all that will square 10 inches at little end," and then states: "And each tree to be counted in size as above at 50 cents." After describing the plaintiffs' rights, of ingress and egress, etc., the contract states that, "In the event there is not enough timber on the above-described lands that will square 10 inches at little end, oak and poplar as described above, to amount to \$500 at 50 cents per each tree, then we agree to let J. M. Stevenson cut such timber as he wishes off the above-described land, counting it in proportion to the other timber."

No provision is made for the payment of anything, in case the entire timber on the land does not, at such rate, amount to \$500. While the defendants reserve the option to pay in cash, rather than have the small timber cut, yet they do not assume any obligation to do so. While the parties both evidently thought that there was at least \$500 worth of timber on the land, yet there was no warranty to that effect, and no agreement to return any part of the money in case they should be mistaken as to that matter. The sale of the timber was simply for the \$500, and the seller protected himself against the contingency of there being more 10-inch timber than would amount to that, yet the purchaser did not protect himself against a mistaken calculation in the other direction, except to the extent of reserving the right to cut the small timber.

The contract furnishes no basis for a recovery by the plaintiffs, and, that being the case, the questions of pleading and evidence are immaterial, as, in any event, the defendants were entitled to the general affirmative charge, which was given by the court. The judgment of the court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

#### CRAWFORD v. SIMONTON & CO.

(Supreme Court of Alabama. Nov. 10, 1909.)

##### 1. APPEAL AND ERROR (§ 917\*) — QUESTIONS REVIEWABLE—PRESUMPTIONS.

Where the judgment entry does not show that the court below passed on demurrers, the court on appeal will not presume that it passed on them, and will not review the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3707; Dec. Dig. § 917.\*]

##### 2. APPEAL AND ERROR (§ 916\*) — QUESTIONS REVIEWABLE — JUDGMENT RECITALS — PRESUMPTIONS.

Where the judgment in an action on a note recited that replications were filed to pleas 4 and 5, the latter of which alleged a material alteration of the note and that issues were joined thereon, the court on appeal must accept the record as true that there was a replication to plea 5, on which issue was joined, and must

presume the correctness of the ruling of the trial court; the replication not being shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3701; Dec. Dig. § 916.\*]

##### 3. ALTERATION OF INSTRUMENTS (§ 5\*)—MATHEMATICALITY.

A note "with interest at — per cent. per annum" draws interest at the legal rate from the date thereof, so that the subsequent addition in the blank of the legal rate and the word "date" does not change the effect of the note, and the alteration is immaterial.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. § 24; Dec. Dig. § 5.\*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by Simonton & Co. against W. H. Crawford. From a judgment for plaintiffs, defendant appeals. Affirmed.

Espy & Farmer, for appellant. R. D. Crawford, for appellees.

SIMPSON, J. This action is by the appellee against the appellant on a promissory note. A number of pleas were filed by the defendant, among them plea 5, which alleged a material alteration of the note since its execution. The judgment entry recites that: "Plaintiff files replications to pleas 4 and 5, and issue being joined thereon," etc. Replications to other pleas are set out in the record, but the replication to plea 5 does not appear.

The only insistence by the appellee is that "the court will hold that plaintiff filed said replication to plea 4 only, leaving plea 5 in the record without any demurrer or replication to it," and that the issue joined will be construed to mean only on the pleas to which no replication had been filed, and the replication to which no joinder has been made; in other words, that the issue was only on plea 5, which it is claimed was proved, and, whether material or immaterial, the judgment should have been for the defendant, and the general affirmative charge was improperly given for the plaintiff. The cases cited by the appellee hold merely that, where the judgment entry does not show that the court passed upon the demurrers, this court will not presume that it did pass on the demurrers, and will not review said action (Ala. Nat. Bank v. Hunt et al., 125 Ala. 512, 23 South. 488; Birmingham Railway & Elec. Co. v. Baker, 126 Ala. 135, 28 South. 87; M. & C. R. Co. v. Martin, Adm'r, etc., 131 Ala. 269, 30 South. 827); also that "demurrer found in the file, and neither called to the attention of the court nor ruled on, must be regarded as abandoned." Elyton Land Co. v. Morgan & Co., 88 Ala. 434, 7 South. 249.

The present case is just the converse of the cases cited. The judgment recites that replications were filed to pleas 4 and 5, and issue joined thereon. We must take the record as true that there was a replication to plea 5, on which issue was joined, and, not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

knowing what that replication was, we must presume that the court was right in giving the charge. *Pabst Brewing Co. v. Erdreich*, 48 South. 397. At any rate, the supposed alteration, if made, was immaterial. If the note read, "with interest at ——— per cent. per annum," the law would fix the rate of interest at 8 per cent., and the expression "with interest" would mean from date; so that the addition of the figure "8" and the word "date" would not change the legal effect of the note, and, as the pleading did not set out the note, this matter could not be raised until the note was introduced.

The judgment of the court is affirmed.  
Affirmed.

DOWDELL, C. J., and MCOLELLAN and MAYFIELD, JJ., concur.

### BURROUGHS v. BURROUGHS.

(Supreme Court of Alabama. Nov. 18, 1909.)  
VENDOR AND PURCHASER (§ 254\*)—VENDOR'S LIEN.

A grantor has no vendor's lien, where the consideration of a conveyance, though recited to be a certain sum of money, is the grantee's agreement to care for and support the grantor for life; it being necessary for such a lien that there be a promise to pay a certain definite amount, or that the parties agree on a fixed, definite, monetary substitute, to be effective in case the grantee fails to perform his covenant.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 646; Dec. Dig. § 254.\*]

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

Suit by Martha C. Burroughs against James B. Burroughs. Decree for complainant, and defendant appeals. Reversed and rendered.

Oliver, Verner & Rice, for appellant. Daniel Collier, for appellee.

MCOLELLAN, J. The decree appealed from declared, and directed the enforcement of, a vendor's lien as prayed in complainant's (appellee's) bill. The bill, in paragraph 4, expressly alleges that the consideration for the conveyance of her land, by complainant to J. B. Burroughs, "was that Burroughs should support and maintain the complainant for the balance of her life; that the support and maintenance of the complainant for the period of her natural life was and is the agreed purchase price for the said lands"; or that the consideration was that Burroughs should furnish reasonable amount necessary to her support during her life. The bill, in the cited paragraph, pointedly alleges that the sum recited in the deed exhibited with the bill, viz., \$150, was not the consideration for the conveyance and that it never was paid. Following the first stated averments, the true consideration for the conveyance is alleged as quoted above. Accordingly the

cause must be considered without reference to the argued inquiry, based on one of the principles treated in *Hooper v. S. & M. R. R. Co.*, 69 Ala. 529, whether a vendor's lien arises where the promise or covenant of the grantee has, by agreement of the parties, a fixed, certain, monetary substitute, to be effective upon the contingency of a failure of the grantee to perform as he covenanted or agreed to do. There being no allegations in the bill on which to predicate the application of the principle mentioned, a decree rested on the principle cannot be sustained. Much of the argument of the solicitors in the cause becomes inapt on the state of the pleading here.

The question, then, is: Has a grantor a lien upon the subject of the sale and conveyance, when the sole consideration therefor is the agreement of the grantee to care for and support the grantor during life? We think there can be no doubt that one essential condition to the creation of a vendor's lien is that there is a definite, "ascertained, absolute debt, owing alone for the purchase price of the land conveyed;" on the contrary, that no such lien arises where the consideration for the conveyance is an uncertain, indefinite, contingent demand. 3 Pom. Eq. §§ 1250, 1251, and authorities cited in notes thereto. Under this doctrine, the complainant, as upon the averments of this bill, had nor has a vendor's lien. No debt, ascertained and definite, was created by the agreement between the parties for the sale and conveyance of the land. Her remedy was "on the undertaking," as *Gardner v. Knight*, 124 Ala. 273, 274, 27 South. 298, adjudges.

The decree is reversed, and a decree will be here rendered dismissing the bill.

Reversed and rendered.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

### BRIGGS v. TENNESSEE COAL, IRON & R. CO.

(Supreme Court of Alabama. Nov. 18, 1909.)

#### 1. MASTER AND SERVANT (§ 262\*)—INJURIES TO SERVANT—PLEADING.

In a servant's action for injuries, a plea that, after discovering the danger, plaintiff remained in the service, etc., necessarily meant that he remained voluntarily, and was not forced to so remain; and hence the plea was not defective for failing to state that plaintiff voluntarily remained in the service.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 262.\*]

#### 2. PLEADING (§ 8\*)—CONCLUSIONS—CONTRIBUTORY NEGLIGENCE.

In a servant's action for injuries, a plea that plaintiff was himself guilty of negligence, which proximately contributed to cause the injury, in negligently failing to exercise the proper care to keep from falling from a trestle, al-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

leged a mere conclusion of the pleader, and not facts showing contributory negligence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 13; Dec. Dig. § 8; \* Negligence, Cent. Dig. § 182.]

**3. MASTER AND SERVANT (§ 222\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.**

An employé, who with full knowledge and appreciation of the danger enters on a perilous work, assumes the risk, notwithstanding he may have been ordered so to do by one having superintendence, and to whose orders he was bound to conform and did conform.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651; Dec. Dig. § 222.\*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by Millage Briggs against the Tennessee Coal, Iron & Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The damages are alleged to have been caused by slipping through a trestle, and the negligence is alleged to be a defect in the ways, works, etc. The second count alleges the injuries to have been caused by a negligent order, to which the plaintiff was bound to conform, and to which he did conform. Plea 2 is as follows: "Plaintiff knew of the defect or negligence complained of, and of the danger arising therefrom, and with such knowledge remained in the service of defendant after the expiration of a reasonable time for remedying same, whereby he assumed the risk." Plea 3: "To the first and second counts separately and severally: Plaintiff was himself guilty of negligence, which proximately contributed to cause the injuries complained of, in negligently failing to exercise proper care to keep from falling from said trestle." Plea 4: "Defendant says plaintiff was injured by falling or slipping on one of defendant's trestles where he had been sent to work, and defendant states that plaintiff was ordered to go on said trestle and do said work, and did so in daylight, and that the danger of him slipping or falling while there was an obvious danger, known to plaintiff, and that he was injured as a result of said danger, while voluntarily and with knowledge of it undertaking said work."

Denson & Denson, for appellant. Percy, Benners & Burr, for appellee.

**SIMPSON, J.** This action was brought by the appellant against the appellee for damages resulting from an injury received by plaintiff as an employé of defendant. There is no bill of exceptions; the appeal being on rulings of the court in regard to pleadings.

The first assignment of error is that the

court erred in overruling the demurrer to plea 2, as an answer to count 1 of the complaint. The insistence of the appellant is that said plea fails to state that the plaintiff "voluntarily" remained in the service, etc. This cause of action arose before the adoption of the present Code. We hold that the allegation that he remained in the service, etc., necessarily means that he remained voluntarily, and was not forced to so remain. There was no error in overruling the demurrer to said plea 2, and for the same reason there was no error in overruling the demurrer to said plea as an answer to the fourth count of the complaint.

Plea 3 alleges the mere conclusion of the pleader, and not any facts showing contributory negligence. Consequently the court erred in overruling the demurrer to said plea. *Osborne, Adm'r, v. Ala. Steel & Wire Co.*, 135 Ala. 573, 575, 33 South. 687; *So. Ry. v. Guyton*, 122 Ala. 235, 239, 25 South. 34; *Johnson v. L. & N. R. Co.*, 104 Ala. 242, 244, 16 South. 75, 53 Am. St. Rep. 39.

The demurrer to plea 4 was properly overruled. While the general principle is asserted, in several of our cases, that the employé "does not assume the risk incident to the negligence of a superintendent, or of a person to whose orders he was bound to conform, and did conform," also that "an employé, by entering upon the performance of his duties, whatever may be the danger incident thereto, does not assume a risk created by the employer's negligence," also that "he does not assume the risk incident to the negligence of any person in the service or employment of the master or employer who has superintendence intrusted to him, whilst in the exercise of such superintendence" (*Woodward Iron Co. v. Andrews*, 114 Ala. 257, 21 South. 440; *Ala. Great So. R. R. Co. v. Brooks, Adm'r*, 135 Ala. 407, 33 South. 181; *Ala. Steel Wire Co. v. Wrenn*, 136 Ala. 494, 34 South. 970), yet these expressions must be taken with the qualification that when an employé, with full knowledge and appreciation of the danger, enters upon a perilous work, he assumes the risk, notwithstanding he may have been ordered so to do by one who has superintendence, and to whose orders he was bound to conform and did conform. 1 *Labatt on Master & Servant*, § 438, pp. 1234-1236; *Coosa Mfg. Co. v. Williams*, 133 Ala. 606, 611, 32 South. 232.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

**DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.**

**MALLOY v. STATE.**

(Supreme Court of Alabama. Dec. 16, 1909.)

**INTOXICATING LIQUORS (§ 198\*)—PROSECUTION—AFFIDAVIT—SUFFICIENCY.**

An affidavit charging the illegal retailing of liquors, reciting that M., being sworn, stated on oath that he had probable cause for believing and did believe that the offense of selling or otherwise disposing of such liquors contrary to law has been committed in the county by a certain person, sufficiently alleged that the affiant had probable cause for believing the person guilty, as expressly required by Code 1907, § 6703.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 198.\*]

Appeal from Law and Equity Court, Lee County; A. E. Barnett, Judge.

Pat Malloy was convicted of illegally retailing spirituous, vinous, or malt liquors, and appeals. Affirmed.

The affidavit was as follows (omitting caption): "Before me, Albert E. Barnett, judge of the Lee county court of law and equity, personally appeared J. L. Moon, who, being first duly sworn, deposes and says on oath that he has probable cause for believing and does believe that the offense of killing or otherwise disposing of spirituous, vinous, malt, or other intoxicating liquors contrary to law has been committed in said county by Pat Malloy." Signed, etc. The demurrer is that the affidavit fails to allege that the affiant has probable cause for believing the defendant is guilty.

Barnes & Denson and R. C. Smith, for appellant. Alexander M. Garber, Atty. Gen., for the State.

**SIMPSON, J.** The only question raised in this case is as to the correctness of the ruling of the court in overruling the demurrer to the affidavit. The affidavit is in accordance with section 6703, Code of 1907, and the demurrer was properly overruled.

The judgment of the court is affirmed. Affirmed.

**DOWDELL, C. J.,** and **McCLELLAN** and **MAYFIELD, JJ.,** concur.

**HUTCHERSON v. STATE.**

(Supreme Court of Alabama. Dec. 16, 1909.)

**1. CRIMINAL LAW (§ 721½\*)—TRIAL—STATEMENT OF COUNSEL.**

In a prosecution for murder, accused testified that a doctor named was attending her, and that she was sick at the time of the killing. The doctor lived within the state, and it did not appear that he was not as accessible to the prosecution as to the defense. *Held*, that a query in the argument of counsel for the state as to why the accused did not bring the doctor to the trial was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. § 721½.\*]

**2. HOMICIDE (§ 191\*)—SELF-DEFENSE—ADMISSIBILITY OF EVIDENCE.**

In a prosecution of a wife for the murder of her husband, in which she set up self-defense, evidence that deceased had on other occasions beat her was properly excluded.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 191.\*]

**3. HOMICIDE (§ 300\*)—INSTRUCTIONS—SELF-DEFENSE.**

In a prosecution of a wife for the murder of her husband, in which she set up self-defense, the court charged orally that before defendant "can avail herself of it she must reasonably satisfy you that her life was in danger, either real or apparent, and that she had no safe mode of escape." In charge 1 the court said that "when the wife is living with her husband in his house, his home is her home, and the law imposed no duty upon her to retreat to avoid a difficulty, even with her husband, if she was free from fault in bringing on the difficulty." *Held*, that the oral charge was erroneous, and that charge 1 was correct.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 300.\*]

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

Cora Hutcherson was convicted of murder in the second degree, and appealed. Reversed and remanded.

The oral charge of the court, excepted to, is as follows: "The defendant sets up self-defense in this case, and before she can avail herself of it she must reasonably satisfy you that her life was in danger, either real or apparent, and that she had no safe mode of escape." Charge 1, referred to, is as follows: "I charge that, when the wife is living with the husband in his house, his home is her home, and the law imposed no duty upon her to retreat to avoid a difficulty, even with her husband, if she was free from fault in bringing on the difficulty."

Hybart & Burns, for appellant. Alexander M. Garber, Atty. Gen., for the State.

**McCLELLAN, J.** The defendant was adjudged guilty of the murder (second degree) of her husband; the tragedy taking place within their common abode. The justification set up was self-defense. There was evidence tending to support this defense.

In argument to the jury, the representative of the state said: "Gentlemen of the jury, why didn't the defendant bring Dr. Mason here, and show you by him that he was doctoring her?" Seasonable objection and motion to exclude this statement were overruled. It appears that the defendant testified to Dr. Mason's professional attendance upon her, and that she was sick at the time of the killing. From the bill it appears that Dr. Mason's place of residence was Excel, Ala. It does not appear that this physician was not as accessible to the prosecution as to the defense. Under such circumstances as this record shows, the solicitor's quoted statement was improper, and should have been disallowed. *Crawford v. State*, 112 Ala. 1, 23, 21

South. 214; Bates v. Morris, 101 Ala. 282, 13 South. 138; Brock v. State, 123 Ala. 24, 26 South. 329.

The fact, if so, that deceased had, on other occasions, beat her, was properly excluded.

The part of the oral charge excepted to was erroneous.

Charge 1, given for the defendant, announced the law applicable to the nonduty of the defendant to retreat under the circumstances hypothesized.

For the error first indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

#### ANTHONY v. STURDIVANT et al.

(Supreme Court of Alabama. Nov. 16, 1909.)

##### 1. WITNESSES (§ 139\*)—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.

One maker of a note, who is joined in an action thereon with the executor of his joint maker, is incompetent, under Code 1907, § 4007, to testify as to any transaction with or statements by deceased relative to the subject-matter of the action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.\*]

##### 2. WITNESSES (§ 139\*)—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED—REMOVAL OF DISABILITY—"ADJUDICATION OF HIS BANKRUPTCY."

The dismissal of the action as to a joint maker of the note in suit, on a suggestion of "adjudication of his bankruptcy," does not render him competent to testify in the action against the executor of the deceased joint maker as to transactions with or statements by deceased relative to the giving of the note, as the "adjudication of his bankruptcy" is not equivalent of a discharge in bankruptcy, and does not remove his disqualifying interest.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 193, 194.]

##### 3. WITNESSES (§ 140\*)—COMPETENCY—REMOVAL OF DISQUALIFICATION.

That no relief is sought against the joint maker of a note, and that he is called as a witness by plaintiff in an action on the note against the executor of the other joint maker, does not remove his disqualification, under Code 1907, § 4007, to testify as to any transaction with or statement by deceased relative to the giving of the note.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 612; Dec. Dig. § 140.\*]

Appeal from Law and Equity Court, Lee County; A. E. Barnett, Judge.

Action by T. S. Sturdivant and others against Phabra Anthony, executrix, and another. Plaintiffs had judgment, and defendant executrix appeals. Reversed.

Barnes & Denson, for appellant. Bulger & Rylance, for appellees.

DOWDELL, C. J. This is an action in assumpsit on three several promissory waive

notes described in the complaint. The suit as originally commenced was against the appellant, Phabra Anthony, as executrix of W. A. Anthony, deceased, and S. W. Anthony, jointly. Subsequently, as the judgment recites, the plaintiffs amended their complaint by striking therefrom the name of S. W. Anthony as a defendant, on his suggestion by plea of "his adjudication of bankruptcy." The defendant Phabra Anthony, as executrix, etc., filed a plea of non est factum, on which issue was taken and the cause tried, and judgment was rendered for the plaintiffs.

There is but one question presented by the record for our consideration, and that goes to the competency of S. W. Anthony, called as a witness by the plaintiffs, to testify, against the objection of the defendant Phabra Anthony, as to any transaction between the witness and defendant's testator, W. A. Anthony, or as to any statement made by deceased to said witness, relative to the subject-matter of the suit. The complaint avers that S. W. Anthony was a joint maker of the notes with the said W. A. Anthony, deceased. To fix a joint liability would be to lessen the burden of S. W. Anthony, and consequently he had a direct pecuniary interest in the result of the suit. To fix such liability was unquestionably opposed to the interest of the estate of W. A. Anthony, deceased. The facts bring the case within the letter and spirit of the statute. Section 4007 of the Code of 1907. The witness was rendered incompetent under the statute to testify as to any transaction with or statement by the deceased, and the court committed reversible error in admitting this evidence against the objection of the defendant.

Nor was the situation relieved by the amendment of the complaint in striking out S. W. Anthony as a codefendant, on the suggestion of "his adjudication of his bankruptcy." The disqualifying interest remained the same. The "adjudication of his bankruptcy" is not the equivalent of a discharge in bankruptcy. We are not to be understood, however, as intimating that a discharge in bankruptcy would have removed the disqualification. As to this we express no opinion.

It is contended by appellees that, being called to testify by the plaintiffs, he was called by one opposed in interest, and thereby was made competent within the language of the statute. This contention is without merit. The calling to testify by one opposed in interest is not sufficient, where there is another opposed in interest objecting. See Browning v. Kelly et al., 124 Ala. 645, 27 South. 391, and cases there cited.

For error indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.



(Supreme Court of Alabama. Nov. 18, 1909.)

1. EQUITY (§ 150\*)—PLEADING—MULTIFARIOUS BILL.

Under Code 1907, § 3095, as amended, providing that a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject-matter between the same parties, etc., a bill by a corporation, which in one aspect alleges that mortgages, executed in its name by a third person, are void because executed without authority and without consideration, and which in another aspect alleges that the mortgagees are creditors of the corporation, and which prays that the mortgages be declared a general assignment for the benefit of all creditors of the corporation, and to have the corporation declared insolvent, is multifarious, because the parties which are necessary parties to the bill in one aspect are unnecessary parties to it in the other.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 371-379; Dec. Dig. § 150.\*]

2. EQUITY (§ 145\*)—PLEADING—MULTIFARIOUS BILL.

A bill in equity may be filed in different aspects, but each aspect must make a good bill; and where either is bad the whole is bad on demurrer on that ground, and each alternative of a bill should entitle complainant to the same relief in kind, if not in degree, so that, on the bill being confessed, the court, in decreeing the relief on one state of facts, should also respond and grant the relief appropriate to the other alternative state of facts.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 339; Dec. Dig. § 145.\*]

3. EQUITY (§ 273\*)—PLEADING—MULTIFARIOUS BILL.

Where the original bill by a corporation alleged that mortgages executed in its name by a third person were void, because executed without authority and without consideration, an amendment to the bill alleging that the mortgagees were creditors of the corporation, and seeking to have the mortgages declared a general assignment for the benefit of all creditors and to have the corporation declared insolvent, made a new cause of action, and changed the rights and character of the demands, and the repugnancy between the original bill and the amendment rendered the amended bill bad on demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 561-563; Dec. Dig. § 273.\*]

4. EQUITY (§ 273\*)—PLEADING—MULTIFARIOUS BILL.

An amendment to a bill in equity must not present a new case from that originally presented.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 561-563; Dec. Dig. § 273.\*]

Appeal from Chancery Court, Marshall County; W. H. Simpson, Chancellor.

Suit by the Tennessee Live Stock Company against Joe L. Henry and others. From a decree for complainant, defendants appeal. Reversed and remanded.

Street & Isbell, for appellants. John A. Lusk, for appellee.

MAYFIELD, J. The bill as originally filed was to declare void and annul certain mortgages, contracts, or conveyances pur-

porting to be executed in the name of the complainant corporation, by one Grizzell, to the defendants, Sam Henry & Son, and to Joe L. Henry, because said Grizzell had no authority to execute such documents for the corporation, and because there was no consideration to support them, and that they were obtained by undue influence, etc., and to have the said grantees, mortgagees, etc., account to the corporation for the property thereby acquired and that they be declared and held as trustees ex malificio of such property, and required to account for the value of that part disposed of by them. A demurrer was sustained to the bill, because it did not offer to do equity by paying the debts intended to be secured by the mortgages. The bill was then amended by adding four paragraphs thereto, from 21 to 24, inclusive, which sought to have these mortgages, contracts, conveyances etc., declared a general assignment for the benefit of all the creditors of the corporation, and to have the corporation declared insolvent, and all its assets declared a trust fund, to be marshaled and administered by the court in payment of the debts due from the corporation.

The bill as amended is clearly and certainly multifarious. In one aspect it alleges that the respondents are creditors of the corporation, and in another that they are not. In one aspect it alleges that the mortgages, contracts, and conveyances are valid, and in another that they are void. The bill as amended shows neither the right nor necessity of the corporation to maintain a bill to declare itself to be insolvent and to ask the court to administer its assets. The bill is therefore clearly multifarious, even under section 3095 of the Code as amended. While inconsistent, the reliefs grow partly out of the same contract or transaction and relate partly to the same property, it is not between the same parties; but the necessary parties are different in the two cases. The creditors of the corporation are necessary parties to the bill in one aspect, and unnecessary parties to it in the other.

A bill in equity may be filed in different aspects, but each aspect must make a good bill, and if either aspect is bad then the whole is bad, and subject to demurrer upon that ground. 3 Mayfield's Digest, p. 256; Curran v. Olmstead, 101 Ala. 692, 14 South. 398; Mountain v. Whitman, 103 Ala. 630, 16 South. 15; Beddow v. Sheppard, 118 Ala. 474, 23 South. 662; Taylor v. Dwyer, 131 Ala. 91, 32 South. 509. Each alternative of a bill should entitle the complainant to the same relief, in kind, if not in degree, so that, if the bill be confessed the court, in decreeing the relief on one state of facts, should also respond and grant the relief appropriate to the other alternative state of facts. 3 Mayfield's Digest, p. 285. The amendment

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made a new cause of action. It changed the rights and the character of the demands sought to be enforced, and varied materially the relief sought. *Glass v. Glass*, 76 Ala. 368; *Ward v. Patton*, 75 Ala. 207; *Scott v. Ware*, 64 Ala. 174.

Repugnancy and inconsistency between the original bill and the amendment render the amended bill bad. The amendment must not present a new case from that originally presented. 3 *Mayfield's Digest*, p. 297, §§ 2265, 2266.

It follows that the demurrers should have been sustained to the amended bill. The decree of the chancellor is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

**ALABAMA GREAT SOUTHERN R. CO. v. AMBROSE.**

(Supreme Court of Alabama. Nov. 18, 1909.)  
CORPORATIONS (§ 503\*)—ACTION FOR DEATH—JURISDICTION—VENUE.

Code 1896, § 4207, provides that a foreign or domestic corporation may be sued in any county in which it does business by agent, and the amending act of March 5, 1903 (Acts 1903, p. 182), provides that all actions for personal injuries must be brought in the county where the injury occurred or in the county where plaintiff resided, provided that such corporation does business by agent in the county of plaintiff's residence. *Held*, that the provision applies to a suit by an administrator for personal injury resulting in death, so that such action must be brought in the county where the injury occurred or where plaintiff resides, notwithstanding the first clause of such statute, or Const. 1901, § 232, providing, generally that a corporation may be sued in any county where it does business by agent.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 503.\*]

Appeal from City Court of Bessemer; Williams Jackson, Judge.

Action by W. L. Ambrose, as administrator, against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant appealed. Reversed and remanded.

A. G. & E. D. Smith, for appellant. Frank S. White & Sons, for appellee.

SIMPSON, J. This action is by the appellee against the appellant for damages on account of a personal injury to plaintiff's intestate, resulting in his death. Pleas to the jurisdiction were interposed, alleging that the injury occurred in Bibb county, that the intestate resided in said county, and said administrator, the plaintiff, also resided in said county. Demurrers were interposed to said pleas, which demurrers were sustained.

Section 4207 of Code of 1896 provided that

"a foreign or domestic corporation may be sued in any county in which it does business by agent." The act of March 5, 1903, amended that section by adding: "Provided, that all actions for personal injuries must be brought in the county where the injury occurred, or in the county where the plaintiff resided; provided, further, that such corporation does business by agent in the county of plaintiff's residence." Acts 1903, p. 182. The appellee insists that this provision does not apply to a suit brought by a personal representative.

We can see no reason to justify such a holding. The objects sought by the statute are just as applicable to the case of an action by a personal representative as one by the party injured himself. Besides, the wording of the statute is clear and explicit, and there is no room for any construction beyond its language. Although the personal injury has resulted in death, yet the action is for the personal injury, the administrator is the plaintiff, and the action must be brought either "in county where the injury occurred, or the county where the plaintiff resides." The fact that the first clause of the section, and section 232 of the Constitution of 1901, provide generally that a corporation may be sued in any county where it does business by agent, does not in the least affect the particular provision that in this class of cases the action must be brought in the counties designated. The demurrers should have been overruled.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

**GARDEN v. HOUSTON BROS.**

(Supreme Court of Alabama. Nov. 11, 1909.)

1. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—FACTS OTHERWISE SHOWN.

Any error in admitting testimony to show the agency of defendant's brother for defendant in taking the horse was harmless, in trespass and trover for taking the horse, where defendant admitted that he sent his brother for it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4164; Dec. Dig. § 1051.\*]

2. APPEAL AND ERROR (§ 544\*)—RECORD—BILL OF EXCEPTIONS—RULINGS ON PLEADINGS.

Error in refusing to permit a plea of set-off to be filed cannot be considered on appeal, where the court's action was not shown by bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412; Dec. Dig. § 544.\*]

3. EVIDENCE (§ 171\*)—BEST EVIDENCE—COURT RECORDS—COLLATERAL INQUIRY.

Where the inquiry as to facts of a former suit between the parties was merely incidental and collateral to the issues, parol evidence show-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

even if the record therein was the best evidence of the facts sought to be shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460, 528; Dec. Dig. § 171.\*]

**4. TRESPASS (§ 56\*)—EXEMPLARY DAMAGES.**

Exemplary damages may be allowed, when a trespass was wantonly or recklessly committed, or committed with such reckless indifference to another's rights as to amount to an intentional violation thereof.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 144; Dec. Dig. § 56.\*]

**5. TRESPASS (§ 56\*)—TROVER AND CONVERSION (§ 60\*)—PUNITIVE DAMAGES—TRESPASS TO PERSONALTY.**

If defendant retook a horse after the purchase-money notes, retaining title in him until the notes were paid, had in fact been paid, the jury could allow punitive damages in trespass and trover for taking the horse.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 144; Dec. Dig. § 56;\* Trover and Conversion, Cent. Dig. §§ 281, 282; Dec. Dig. § 60.\*]

**6. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMING FACTS.**

In trespass and trover for taking a horse through another, a charge that defendant was not responsible for the unauthorized trespass of such other unless he afterwards ratified it was erroneous, as assuming that the trespass was unauthorized, which was contrary to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 428; Dec. Dig. § 191.\*]

Appeal from Circuit Court, Walker County; James J. Ray, Judge.

Action by Houston Bros. against M. Garden. From a judgment for plaintiffs, defendant appeals. Affirmed.

The action was for the taking of a horse, and the defense attempted to be pleaded was that the taking was done under a bill of sale retaining title to the horse, etc. The defendant also offered to file a plea of set-off, which the court refused to allow; but this effort is shown only by the record, and not by the bill of exceptions. The evidence tended to show that the horse was taken by one N. Garden, brother of the defendant, and the court permitted evidence to be introduced showing that N. Garden was around and about the store of M. Garden, that he was attending to stock there, and also collected for M. Garden. The evidence concerning the taking tended to show that in taking the horse N. Garden went to the house of plaintiff's wife, and the horse was tied near the back door of the house; that plaintiff was away from home, but the wife told Garden that he could not get the horse, and started towards the horse, when Garden pulled out a pistol and told her to stop. Whereupon she did stop, and Garden untied the horse and carried him away. The evidence further tended to show that the notes were paid, and that there was nothing due thereon. The evidence for the defendant tended to contradict these several matters. Charge 6 is as follows:

is not responsible for the unauthorized trespass committed by N. Garden, unless he afterwards ratified such trespass with full knowledge of its tortious nature." The other charges referred to limit the damages to the value of the animal taken.

Leith & Gunn, for appellant. Acuff & Cooner, for appellees.

**McCLELLAN, J.** Trespass and trover. The defendant (appellant) pleaded his right to retake the animal in question under an instrument showing a conditional sale thereof to the plaintiff. One of the issues of fact on the trial was payment vel non of the notes before the taking. This the court properly submitted to the jury. Another was the agency vel non of the defendant's brother in taking the animal as and when he did. The defendant admitted, testifying as a witness, that he sent his brother to get the horse. This admission, of course, avoided any error, if any, in allowing questions tending to elicit evidence of the brother's relation to taking the animal to the defendant.

The assignment of error based upon the refusal of the court to permit the defendant to file his plea of set-off cannot be considered; the action of the court not being shown by the bill of exceptions.

There was no error in admitting parol evidence relative to the suit instituted by appellant against appellee in the justice's court. If the record was the best evidence of the facts inquired about, the subject of the inquiries was merely incidental, collateral, to the issues in the cause; and hence secondary evidence was admissible in reference thereto. Pollak v. Gunter & Gunter, 50 South. 155.

Exemplary damages may be awarded, when the trespass was wantonly or recklessly accomplished, or in such "reckless indifference to the rights of others, which is equivalent to an intentional violation of them." Lienkauf v. Morris, 66 Ala. 406; 13 Cyc. p. 105 et seq., and citations in notes.

There was testimony tending to show that the foundation of defendant's asserted right to retake the animal, viz., notes evidencing a retention of title thereto had been fully paid, operating, of course, the cancellation of defendant's rights and privileges thereunder. It also appeared from tendencies of the evidence that the defendant knew this fact. While there was, as indicated, keen dispute as to these facts, it was open to the jury to conclude thereon against the defendant. If they so found, and notwithstanding the defendant caused the animal to be taken, the jury were authorized to impose, under the rules before stated, exemplary damages; and this independent of any other acts of aggravation (if so) committed by the defendant's

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

agent when he took the animal from plaintiff's wife. *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411, 425, 31 South. 947, 57 L. R. A. 720, 91 Am. St. Rep. 38. The special charges, requested by defendant, forbidding the recovery of exemplary damages, were, on this record, properly refused.

Charge 6 was faulty in this particular, if not others: It assumes that Noah Garden's act or trespass was unauthorized.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

## BIRMINGHAM PAINT & ROOFING CO. v. GILLESPIE.

(Supreme Court of Alabama. Nov. 18, 1909.)

### 1. CHATTEL MORTGAGES (§ 172\*)—RIGHTS OF PARTIES — ACTION FOR POSSESSION — DEFENSES.

Under Code 1907, § 3791, authorizing defendant in detinue on a chattel mortgage to plead any defense which might be made to the debt if sued on, defendant may plead that the mortgage was given to guarantee the delivery of goods sold, and that plaintiff mortgagee countermanded the order and refused to accept delivery before the limit of the guaranty.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 312; Dec. Dig. § 172.\*]

### 2. CHATTEL MORTGAGES (§ 172\*)—ACTION FOR POSSESSION—DEFENSES.

The defendant, in detinue on a chattel mortgage executed by himself alone, may plead facts showing that the mortgage has been rendered nugatory, although it was given to secure the performance of a contract by himself and his partners.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 312; Dec. Dig. § 172.\*]

### 3. EVIDENCE (§ 471\*)—CONCLUSION OF WITNESS.

It is permissible to ask a witness whether money was "lent or paid" by one party to a contract to the other, when the fact is material.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2173, 2174; Dec. Dig. § 471.\* *Witnesses*, Cent. Dig. §§ 833-836.]

### 4. CONTINUANCE (§ 7\*)—DISCRETION.

The granting of a continuance is within the sound discretion of the court.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 17, 18; Dec. Dig. § 7.\*]

### 5. EVIDENCE (§ 471\*) — OPINIONS — CONCLUSION OR FACT.

Where a witness, referring to certain graphite, testified that an iron building had been painted with it several years ago, and on that stated that it was good, his stating that he "knew it was good" was not objectionable as an opinion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2161; Dec. Dig. § 471.\* *Witnesses*, Cent. Dig. §§ 833-836.]

### 6. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

An objection to testimony is not available, where the witness has already been allowed to testify to the same matter without objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160, 4168; Dec. Dig. § 1050.\*]

### 7. TRIAL (§ 242\*)—MISLEADING INSTRUCTIONS. Misleading instructions are properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 569; Dec. Dig. § 242.\*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by the Birmingham Paint & Roofing Company against J. F. Gillespie. From a judgment for defendant, plaintiff appeals. Affirmed.

The following pleas were filed: (3) "Defendant says that the mortgage on which this suit is brought, referred to in the complaint, was executed to guarantee the delivery of one car load of graphite by George R. Wainwright, J. D. Tyson, and defendant to the plaintiff, and after the mortgage was given the plaintiff countermanded the order and refused to accept the graphite before the time limit of said guaranty." (4) "The defendant says there is an entire failure of consideration to the mortgage on which the suit is brought, and which is referred to in said complaint." (6) "That plaintiff bought from the defendant and George R. Wainwright and J. D. Tyson the car load of graphite at and for the sum of \$20 per ton, and paid thereon the sum of \$160, said graphite to be delivered to plaintiff in 60 days, and that in performance of said contract the defendant, acting in copartnership with said Wainwright and Tyson, undertook to get out said graphite, and did get out a large part thereof, placed machinery in the mines, and expended the said sum of \$150 and more in the pursuance of said contract in good faith; but plaintiff, not regarding said contract, countermanded said contract and order, and refused to pay for said graphite before the time for shipping same expired, and notified defendant that he would not take the graphite. And defendant avers that the note given by said Wainwright, Tyson, and defendant for \$150, secured by the mortgage sued on in this case, was given and intended to guarantee the prompt delivery of said graphite within the time agreed upon. And defendant avers that by refusing to accept such graphite and by countermanding said order plaintiff waived the conditions of said mortgage and rendered the same nugatory."

Bush & Bush, for appellant. J. F. Gillespie, for appellee.

SIMPSON, J. This action of detinue was brought by the appellant against the appellee. The action is based upon a mortgage of personal property. The defense set up by pleas is that the mortgage was given to guarantee the delivery of a car load of graphite which had been sold by the defendant, Wainwright, and Tyson, which they had been and are ready to deliver, but that the plaintiff countermanded the order for the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

same, and refused to accept the same, before the limit of the guaranty. There was no error in the refusal to strike pleas 3 and 4 to the complaint. Section 3791 of Code of 1907 authorizes any defense which might be made to the debt, if sued on, except the statute of limitation. *McDaniel v. Sullivan & Bramlett*, 144 Ala. 533, 39 South. 355; *Hooper & Nolen v. Birchfield et al.*, 115 Ala. 227, 22 South. 68.

There was no error in overruling the demurrer to the third and sixth pleas. The mortgage in this case was executed alone by Gillespie, and he alone is sued in this case, and the fact that it was given to secure the performance of a contract by himself and his partners does not change the personal liability of the defendant, nor his right to show any fact tending to prove that the mortgage has been satisfied or rendered nugatory. The case of *Kirby v. Spiller*, 83 Ala. 481, 3 South. 700, has no analogy to this case. That case was one in which several joint makers of a note were sued, and a part of them pleaded set-off and recoupment as to themselves, and not as to the others. These pleas were not subject to the grounds of demurrer assigned.

The pleas sufficiently state the facts relied on. The case of *Hooper & Nolen v. Birchfield*, 115 Ala. 226, 22 South. 68, states only that such facts should be stated in a special plea, which is done in this case, and that if, on the evidence, anything remains due on the mortgage debt, the plaintiff is entitled to recover. It is true that there is no dispute about the fact that Gillespie received the \$150, and that it has not been paid back; but the theory and testimony of the defendant is that there was no agreement or intention that the money was ever to be repaid, but that it was paid in part payment for a car load of graphite purchased, and that the mortgage was simply to guarantee the delivery of the same, and, although the defendants have offered and are ready and willing to deliver the same, the plaintiff refuses to receive it.

There was no error in overruling the objection to the question to the witness Tyson: "Did, or not, Mr. Rogers lend Mr. Gillespie the money, or did he pay it on a car load of graphite?" It was a fact, material to the issues involved, as to whether the money was lent, or paid for the graphite, and the witness could properly testify to it. The same is true with regard to the statement by the witness Gillespie as to what the consideration for the note was.

The matter of the continuance of the case was within the sound discretion of the court, and we cannot see that said discretion was abused.

There was no error in overruling the motion to exclude the statements of Gillespie, as a witness, as to what was done subse-

quently to the execution of the mortgage, facts related were material to the point as to compliance by the defendant with the terms of his guarantee.

From what has been said, assignments of error numbered from 10 to 21, inclusive, are without merit.

Referring specially to the twentieth assignment, the statement by the witness Wainwright that "he knew it was good" was not given as that of an expert, but was merely the conclusion of his sentence that the corrugated iron house had been painted with it four or five years ago, and on that he stated it was good. Besides, said witness had already been allowed to state, without objection, that it was "good high-grade graphite, good for the making of paints," etc.

The charges requested by the plaintiff, if not bad for other reasons, were misleading, and were properly refused.

There was no error in the refusal to grant a new trial. The case was tried by both parties on the theory that the question of fact is, What was the real consideration of the mortgage? and we have treated the points raised in argument.

The judgment of the court is affirmed.  
Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

#### DARDEN et al. v. MANN.

(Supreme Court of Alabama. Nov. 18, 1909.)

#### 1. CONSPIRACY (§ 19\*)—ACTIONS—ADMISSION OF EVIDENCE.

Where plaintiff claimed, in trespass and trover for a horse, that defendants conspired together to defraud him of his horse by having one defendant offer him a certain sum for worthless notes, falsely representing that they were about to be paid, by reason of which offer plaintiff agreed to trade his horse for the notes and was deceived, so that defendant got possession of the horse without his consent, evidence was admissible as to what the defendant was worth who offered to purchase the notes, to show the intention of the parties in the transaction.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. § 25; Dec. Dig. § 19.\*]

#### 2. CONSPIRACY (§ 21\*)—ACTIONS—INSTRUCTIONS.

Where the complaint alleged, in trespass and trover for a horse, that defendants conspired together to defraud plaintiff of his horse by having one defendant offer him a certain sum for worthless notes, falsely representing that they were about to be paid, by reason of which offer plaintiff agreed to trade his horse for the notes, and, though the trade was not consummated, defendants deceived him by such promise to buy the notes, so as to get possession of the horse without his consent, no one of the defendants was liable for the conversion of the horse unless he aided or abetted in converting it pursuant to the conspiracy, though defendants conspired to trade the notes to plaintiff for the horse, so that it was error to charge that if defendants conspired together to trade

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff the worthless notes for his horse, by false representations made by one defendant that certain notes were about to be paid off and such defendant would pay a certain sum therefor, when defendants knew the notes were worthless, and plaintiff tendered back the notes in a reasonable time after learning of the fraud, the verdict should be for plaintiff for the reasonable value of the horse.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 29; Dec. Dig. § 21.\*]

**3. TRIAL (§ 136\*)—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.**

An affirmative charge for either defendant was properly refused, where it was a jury question whether either of them converted the property as alleged.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 320; Dec. Dig. § 136.\*]

Appeal from Circuit Court, Coosa County; A. H. Alston, Judge.

Action by T. J. Mann against John A. Darden and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

The following charge was given for plaintiff: "(A) The court charges the jury that, if you believe from the evidence that the defendants colluded or conspired together to trade off on the plaintiff, or aid Sellers in trading to plaintiff, worthless notes for his stallion, by false representations made by Walker, as that the father of C. C. Pitts was in town and wanted to take up the note of C. C. Pitts for \$250, and that said Walker would pay \$245 for said note, and the defendants knew that said notes were worthless, and plaintiff tendered back said notes in a reasonable time after learning of the fraud, you should find your verdict for the plaintiff for the reasonable market value of the horse, with interest thereon."

The following charges were refused to the defendant: (B) Affirmative charge to find for John A. Darden on the first count of the complaint. (C) Affirmative charge for all of the defendants on the first count. (D and E) Same.

Lackey & Bridges, for appellants. D. H. Riddle, for appellee.

SIMPSON, J. This action is by the appellee against the appellants, the first count being in trespass and the second in trover, for the conversion of a horse. The only assignments of error insisted on relate to the giving of charge A at the request of the plaintiff, and the refusal to give certain charges requested by the defendants, unless the remarks in the brief of appellants may be considered as insisting on error in overruling the exception to the question to the witness W. R. Walker, "What was Phil Walker worth?"

Phil Walker was one of the defendants, and the claim of plaintiff is that all of the defendants conspired to defraud him of his horse, by having Phil Walker to come in and

offer to give \$245 for the Pitts note of \$250, making the false statement that the father of Pitts was in town for the purpose of paying the note off; that the trade was not actually consummated, but that plaintiff only agreed to make the trade of the horse for the notes provided said Phil Walker would pay the \$245 in cash; and that they deceived him with this promise, until they got possession of the horse, without his knowledge or consent. It was, then, a material circumstance, in reaching a conclusion as to the facts and intention of the transaction, to show whether or not Phil Walker's promise was worth anything. The court erred in giving charge A on request of the plaintiff.

This action is for trespass and trover, and, even though the defendants have conspired to trade worthless notes to the plaintiff for the horse, yet unless each defendant aided or abetted in the taking, or in the conversion of the horse, or the same was done in pursuance of the conspiracy, he could not be guilty of the taking or conversion, as charged in the complaint. It was a question for the jury to determine, from all the circumstances detailed by the witness, whether or not Darden, or any of the other defendants, were guilty of the trespass or the conversion, and there was no error in the refusal of the court to give charges B, C, D, and E.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

**PARSONS LUMBER CO. v. WEST-STE-GALL GRAIN & MILLING CO.**

(Supreme Court of Alabama. Dec. 16, 1909.)

**JUDGMENT (§ 130\*)—BY DEFAULT—PROOF OF CAUSE OF ACTION.**

Code 1907, § 3971, provides that, if a writ of inquiry is dispensed with on default in an action on an account, the plaintiff shall file an itemized statement of said account "verified by affidavit of a competent witness," unless there are depositions on file. In an action on an open account, the complaint contained the statement: "This suit is based upon an itemized sworn statement of account." The judgment entry by default stated that "plaintiff have and recover of the defendant upon a verified account" a specified sum. *Held*, that the judgment, not stating that it was entered on the required affidavit, was erroneous.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 130.\*]

Appeal from Circuit Court, Chilton County; W. W. Pearson, Judge.

Action by the West-Stegall Grain & Milling Company against the Parsons Lumber Company. Judgment by default, and defendant appeals. Reversed and remanded.

Coleman, Dent & Well, for appellant. Fred S. Ball and A. C. Smith, for appellee.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

SIMPSON, J. The suit in this case, by the appellee against the appellant, is on an open account, and at the foot of the complaint is the statement: "This suit is based upon an itemized sworn statement of account." Judgment by default was taken, and the amount ascertained by the court without a writ of inquiry; the judgment entry stating that "plaintiff have and recover of the defendant, upon a verified account, the sum of \$253.20."

We have held that under this statute, in a case wherein it was stated, at the end of the complaint, "The account is verified by affidavit," and in which the judgment entry did not state that the statute had been complied with, a judgment by the court without a writ of inquiry was erroneous. Greer & Walker et al. v. Lilpfer Scales Co., 156 Ala. 572, 47 South. 307. The only authority for dispensing with the writ of inquiry is section 3971 of the Code of 1907, and we must presume that each of the requirements therein laid down was deemed material by the Legislature, to wit: The plaintiff "shall file \* \* \* an itemized statement of said account, verified by the affidavit of a competent witness, made before and certified by an officer having authority under the laws of this state to take and certify affidavits," unless there are depositions on file that prima facie prove the correctness of the account. It will be noticed that neither in the statement at the end of the account nor in the judgment entry is there any intimation of a compliance with that part of the statute which we have italicized.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

#### MOBILE LIGHT & R. CO. v. MACKAY.

(Supreme Court of Alabama. Dec. 16, 1909.)

##### 1. STREET RAILROADS (§ 114\*)—INJURIES TO ANIMALS ON TRACK—NEGLIGENCE.

Proof that an electric car track was straight for several blocks on both sides of the place where a mule was killed, that the mule was found on the track in a mutilated condition shortly after the accident, and that a derailed car was about 10 feet from the mule, raised a prima facie case of the killing of the mule by the car, and of negligence in the operation of the car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

##### 2. STREET RAILROADS (§ 90\*) — INJURIES TO ANIMALS—ANIMALS NEAR TRACK—CARE REQUIRED.

It is not necessary to stop or check an electric car when an animal is seen near the track, unless the circumstances indicate that the animal is likely to move onto the track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-192; Dec. Dig. § 90.\*]

##### 3. STREET RAILROADS (§ 117\*)—ANIMALS NEAR TRACK—INJURIES—CARE REQUIRED—QUESTIONS FOR JURY.

Whether an animal near a street railroad track showed a likelihood of moving onto the track, so as to require the car to be stopped or its speed slackened, is a question for the jury, in an action for killing it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 243, 246, 251; Dec. Dig. § 117.\*]

##### 4. STREET RAILROADS (§ 117\*)—INJURIES TO ANIMALS ON TRACK—NEGLIGENCE.

Whether an electric railroad was liable for the killing of a mule by a car held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 243, 246, 251; Dec. Dig. § 117.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by Alec Mackay against the Mobile Light & Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gregory L. & H. T. Smith, for appellant. Bestor, Bestor & Young, for appellee.

SIMPSON, J. This is an action by the appellee for the killing of a mule by the electric car of the defendant on a street in the city of Mobile. There is no assignment of error to the action of the court in overruling the demurrer to the complaint, and the only assignment of error insisted upon is to the refusal of the court to give the general affirmative charge in favor of the defendant.

The evidence shows that the track was perfectly straight for several blocks, on both sides of the place where the mule was killed; that the mule was found, shortly after the accident, in a mutilated condition on the defendant's track, and the car, derailed, about 10 feet east of the mule—thus raising a prima facie case of the killing of the mule by the car and of negligence. The motorman and the conductor not being obtainable, the only evidence introduced by the defendant was that of a passenger on the car, who testified that when the car was near Claiborne street he saw two mules on the sidewalk, which is about 15 feet from the track; "that as the car neared them they commenced to run, and ran on the sidewalk, and when the car got very close to them one of them started in front of the car, and the car struck it and ran over it; that immediately the motorman began setting up his brakes; that he appeared to work vigorously at his brakes, and, as far as he could see, was doing all he could to stop the car; that he did not know whether or not the motorman had shut off the electricity," or had reversed the car, nor how long the mules had been running on the sidewalk before he saw them; that it was about 9 o'clock at night; that he saw them by the electric lights; "that the motorman at once

applied the brakes and appeared to be doing all he could to stop the car, and one of the mules ran on the track just immediately ahead of the car, and the car collided with it before the motorman could stop."

It will be observed that the witness does not state just when the motorman applied the brakes. In fact, according to his first statement it was not until the car had struck the mule; and according to his second statement it would seem that the brakes were applied as soon as the passenger saw the mules on the corner. At any rate, it is not shown how long they had been running along the sidewalk when the motorman first saw them, nor whether he shut off the electricity at all or not. This court has said that when an animal is seen near the track it is not necessary to stop or check unless the circumstances indicate that the animal is likely to move on the track, but also that "the likelihood of its moving on the track would depend, of course, upon the circumstances, proximity or remoteness from the track, what it is doing, and the disposition it manifested at the time; and this likelihood, dependent upon circumstances, is for the jury to determine." In this case we think it was a question for the jury. The general charge was properly refused, and the judgment of the court is affirmed.

Affirmed.

ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur.

#### LEWIS LAND & LUMBER CO. v. INTERSTATE LUMBER CO.

(Supreme Court of Alabama. Dec. 16, 1909.)  
APPEAL AND ERROR (§ 907\*)—RECORD—BILL OF EXCEPTIONS.

Where a cause is tried by a court without a jury, and the bill of exceptions does not purport to set out all the evidence, the court on appeal will presume any state of the evidence which will sustain the judgment of the trial court on the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3673-3678; Dec. Dig. § 907.\*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Interstate Lumber Company against the Lewis Land & Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gregory L. & H. T. Smith, for appellant. Stevens & Lyons, for appellee.

DOWDELL, C. J. This case was tried by the court below without the intervention of a jury, and a judgment was rendered in favor of the plaintiff. The defendant appeals, and the only assignment of error is the rendition of the judgment.

The bill of exceptions does not purport to

contain all, or substantially all, of the evidence introduced on the trial. In *Shafer & Co. v. Hausman*, 139 Ala. 240, 35 South. 691, we said: "When on appeal the bill of exceptions fails to recite that it contains all of the evidence, this court will presume any state of the evidence which will sustain the giving or refusal of an instruction to the jury by the trial court. *Postal, etc., Co. v. Hulsey*, 115 Ala. 193 [22 South. 854]; *Sanders v. Stein*, 128 Ala. 633 [29 South. 586]; *Randall v. Wadsworth*, 130 Ala. 633 [31 South. 555]. For the same reasons this court will sustain the judgment of the trial court on the facts, where the cause is tried without a jury." In the present instance the bill of exceptions fails to recite that it contains all of the evidence. The case of *Southern Mutual Insurance Co. v. Holcombe's Adm'r*, 35 Ala. 328, is in point as to the recital in the bill after the statement of the evidence in the case before us. On the authorities cited, the judgment appealed from must be affirmed.

Affirmed.

SIMPSON, ANDERSON, McCLELLAN, MAYFIELD, and SAYRE, JJ., concur.

#### SOUTHERN HARDWARE & SUPPLY CO. v. BLOCK BROS.

(Supreme Court of Alabama. Dec. 16, 1909.)

1. PLEADING (§ 339\*)—WITHDRAWAL OF PLEA—DISCRETION OF TRIAL COURT.

Where, in an action against two defendants for negligent injuries, one pleaded the general issue, it was within the trial court's discretion to refuse to allow it to withdraw that plea and file a demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1038; Dec. Dig. § 339.\*]

2. TRIAL (§ 251\*)—INSTRUCTIONS—CONFORMITY TO ISSUES.

Where by the plea of the general issue one defendant in a personal injury action in effect admitted joint liability for the damages resulting, charges requested by such defendant that defendants were improperly joined were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

3. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—FAILURE TO INSTRUCT—DECISION CORRECT ON MERITS.

Where the jury found that appellant only was negligent, failure to instruct as to the joint negligence of appellant and another defendant could not have injured appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.\*]

4. TRIAL (§ 328\*)—VERDICT.

In an action against two defendants for negligent injuries, a verdict may go against one defendant and not against the other.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 771-773; Dec. Dig. § 328.\*]

5. NEW TRIAL (§ 104\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

The court will not be placed in error for denying a new trial on the ground of newly

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes



discovered evidence which was merely cumulative.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.\*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Block Bros., as copartners, against the Southern Hardware & Supply Company and another. From a judgment against the defendant named, it appeals. Affirmed.

The pleas interposed by the Ogburn-Griffin Grocery Company are the general issue and several special pleas not necessary to be set out. The Southern Hardware & Supply Company filed only the general issue. Subsequently it entered a motion for leave to withdraw its plea of the general issue and to file certain demurrers to the complaint, which demurrers are set out in the transcript, which motion was disallowed. Charges 1 and 2 are as follows: (1) "The court charges the jury that if you believe from all the evidence that there was no joint act of the defendant, and that there was no joint purpose to be accomplished by them, then your verdict should be for the defendant." (2) "If the jury is reasonably satisfied from all the evidence that there was no joint act performed by these defendants, and that their acts did not co-operate together to produce the injurious results complained of, then your verdict should be for the defendants."

McIntosh & Rich, for appellant. Gregory L. & H. T. Smith, for appellees.

SIMPSON, J. This suit was brought by appellees against the appellant and Ogburn-Griffin Grocery Company for damages for injury to an automobile. The complaint alleges that the Ogburn-Griffin Grocery Company, through their agents and servants, negligently allowed a team, consisting of a mule and a dray, to stand upon a street of Mobile without being tied or attended; that appellant, through its agent, etc., negligently allowed a portion of the load on one of its drays to strike the mule of the Ogburn-Griffin Grocery Company, which striking, together with the fact that said mule was not tied or attended, caused said mule to run away, and that, in so running, it or the dray ran into the automobile, causing the damage complained of. The verdict was against appellant only.

The appellant filed a plea of the general issue, and afterward filed a motion to allow to withdraw the plea and interdemurrer, which motion was overruled by the court. This was a matter within the discretion of the court, and not reversible error. *Gaines v. Bank*, Minor, 50; *Martin v. I*, 1 Stew. 479; *Hair v. Moody*, 9 Ala. 317; *Steele v. Tutwiler*, 57 Ala. 113; *Donald & Co. v. Nelson & Sons*, 95 Ala. 111, 10 South. 317; *Foster v. Bush & Co.*, 104 Ala. 6 South. 625.

The first and second assignments of error relate to the refusal to give charges 1 and 2, which raise the defense that there was no such joint act or purpose as to justify the joining of the two defendants in one. As before stated, the refusal of the court to allow the withdrawal of the plea and the granting of a demurrer was entirely discretionary with the court; the reason being that the plea of the general issue admitted the truth of the complaint "as a charge of tort against them, confessing, in other words, that if the separate negligence and fault of each defendant were proved they were answerable in damages," as well as seen in *Richmond & Danville Railroad Co. v. Wood*, 99 Ala. 511, 14 South. 495. If the defendant filed the plea, carrying with it such admission, the defendant could not claim it as a ground for withdrawal of the plea. The defendant could not file a demurrer, though the court could have allowed it, as the court could not see proper to do so, allow such withdrawal. As the record stands, then, the defendant must abide by the consequences of its plea and could not test the question of joint liability by the charges requested.

It may be said, also, that as the finding of the jury was in effect that the appellant was the only party liable for the negligence, the failure to instruct as to joint negligence could not injure it. This court has always recognized the propriety of a verdict against one, and not against the other, in a case like this. *Richmond & Danville Railroad Co. v. Greenwood*, supra.

The newly discovered evidence claim is overruled. The application for a new trial was denied. The application for a new trial was cumulative, and the court will not be in error for refusing it.

The judgment of the court is affirmed. Affirmed.

ANDERSON, McCLELLAN, and FIELD, JJ., concur.

## MEMORANDUM DECISIONS.

**ABRAHAM v. CRENSHAW.** (Supreme Court of Alabama. Dec. 16, 1909.) Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge. Ray Rushton, for appellant. L. A. Sanderson, for appellee.

**PER CURIAM.** Affirmed for want of assignment of errors.

**BEALL et al. v. McCLENDON.** (Supreme Court of Alabama. Dec. 16, 1909.) Appeal from Chancery Court, Russell County; L. D. Gardner, Chancellor.

**PER CURIAM.** Affirmed on certificate.

**Ex parte CAWHORN.** (Supreme Court of Alabama. June 10, 1909.) Petition in the Supreme Court to require B. H. Lewis, Judge of the Andalusia City Court, to certify his incompetency to hear and determine a certain cause pending therein. A. R. Powell and A. W. Whaley, for petitioner. W. O. Mulkey, for respondent.

**PER CURIAM.** Dismissed for want of prosecution.

**CENTRAL OF GEORGIA RY. CO. v. SIMS.** (Supreme Court of Alabama. Dec. 16, 1909.) Appeal from Chancery Court, Russell County; A. A. Evans, Chancellor.

**PER CURIAM.** Affirmed on certificate.

**HALSELL et al. v. BARNES.** (Supreme Court of Alabama. Nov. 24, 1909.) Appeal from Circuit Court, Sumter County; Samuel H. Sprott, Judge. James A. Mitchell, for appellants. C. J. Brockaway and A. S. Van Degraaf, for appellee.

**PER CURIAM.** Appeal dismissed for want of prosecution.

**HENDERSON et al. v. ALLEN.** (Supreme Court of Alabama. June 8, 1909.) Appeal from Chancery Court, Coffee County; J. A. Carnley, Special Chancellor. M. Sollie, for appellants. J. F. Sollie, for appellee.

**DOWDELL, C. J.** The question presented is purely one of fact. A careful consideration of the evidence fails to disclose the charge of fraud alleged as a reason for reforming the former decree. The action of the trial court in dismissing the bill was without error. Affirmed.

**SIMPSON, DENSON, and MAYFIELD, JJ., concur.**

**HENRY v. FROHLICHSTEIN.** (Supreme Court of Alabama. Nov. 9, 1909.) Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge. Ervin & McAleer, for appellant. Gregory L. & H. T. Smith, for appellee.

**PER CURIAM.** A motion to establish bill of exceptions having been heretofore denied, the appeal is dismissed for want of prosecution.

**LINDSEY v. LINDSEY.** (Supreme Court of Alabama. June 18, 1909.) Appeal from Chancery Court, Choctaw County; Thomas H. Smith, Chancellor. W. F. Glover and Tyson, Wilson

& Martin, for appellant. Gunter & Gunter, for appellee.

**PER CURIAM.** Appeal dismissed on motion of appellee.

**ODOM v. ATLANTIC COAST LINE RY.** (Supreme Court of Alabama. Dec. 16, 1909.) Appeal from City Court of Montgomery; William H. Thomas, Judge. W. R. Brassel and W. B. Andrew, for appellant. A. H. Arrington and John R. Tyson, for appellee.

**PER CURIAM.** Affirmed for want of assignment of errors.

**PIERCE et al. v. HAAS.** (Supreme Court of Alabama. June 30, 1909.) Appeal from Probate Court, Mobile County; Price Williams, Judge. Action between Annie Pierce and others and George R. Haas, as administrator, etc. From the judgment, said Pierce and others appeal. Appeal dismissed. Gregory L. & H. T. Smith, for appellants. Pillans, Hanaw & Pillans and William Cowley, for appellee.

**PER CURIAM.** Appeal dismissed by appellant.

**ROGERS v. MOBILE AUTO CO.** (Supreme Court of Alabama. Nov. 11, 1909.) Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge. Inge & Armbricht, for appellant. Elliott G. Rickaby, for appellee.

**PER CURIAM.** Assumpsit by Mobile Auto Company against H. Ross Rogers. Affirmed for want of assignment of errors.

**SMITH v. MOON.** (Supreme Court of Alabama. Nov. 25, 1909.) Appeal from Law and Equity Court, Lee County; A. E. Barnett, Judge.

**PER CURIAM.** Affirmed on certificate.

**SMITH v. SOUTHERN LIME & CEMENT CO.** (Supreme Court of Alabama. Dec. 16, 1909.) Appeal from City Court of Montgomery; William H. Thomas, Judge. D. H. Seay, for appellant. J. Sternfeld, for appellee.

**PER CURIAM.** Affirmed for want of assignment of errors.

**SOUTHERN RY. CO. v. HOLMAN.** (Supreme Court of Alabama. Nov. 15, 1909.) Appeal from Chancery Court, Sumter County; Thomas H. Smith, Chancellor. Weatherly & Stokely and James A. Mitchell, for appellant. Patton & Patton, for appellee.

**PER CURIAM.** Dismissed by agreement of parties on file.

**STATE ex rel. HERVEY v. WILLIAMS.** Judge of Probate. (Supreme Court of Alabama. June 30, 1909. Rehearing Denied Dec. 16, 1909.) Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge. Leslie Hall and F. O. Hoffman, for appellant. Nicholas E. Stallworth, for appellee.

**PER CURIAM.** Affirmed for want of assignment of errors.

(Supreme Court of Alabama. Nov. 25, 1909.) Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

**PER CURIAM.** Affirmed on certificate.

**BOYETT v. BOYETT.** (Supreme Court of Florida. April 27, 1909.) In Banc. Appeal from Circuit Court, Santa Rosa County; J. Emmet Wolfe, Judge. T. F. West, for appellee.

**PER CURIAM.** The bill in this case was filed by the appellee against the appellant. There was decree for the complainant, and the defendant appealed. Appeal dismissed on motion of counsel for appellee.

**D'ALEMBERTE et al. v. MALONE.** (Supreme Court of Florida. Oct. 20, 1908.) In Banc. Petition for prohibition. Reeves & Watson, for petitioners.

**PER CURIAM.** Original proceeding by petition for prohibition filed by petitioners and dismissed on præcipe of attorneys for petitioners.

**FAULKNER et al. v. TAYLOR COUNTY STATE BANK.** (Supreme Court of Florida. May 18, 1909.) In Banc. Error to Circuit Court, Taylor County; Bascom H. Palmer, Judge. W. B. Davis, for defendant in error.

**PER CURIAM.** This action was brought by the defendant in error against the plaintiffs in error. There was judgment for the plaintiff, and the defendants take writ of error. Writ of error dismissed on motion of counsel for the defendant in error.

**HAMPTON et al. v. FIRST NAT. BANK OF PERRY.** (Supreme Court of Florida. May 18, 1909.) In Banc. Error to Circuit Court, Taylor County; Bascom H. Palmer, Judge. W. B. Davis, for defendant in error.

**PER CURIAM.** This action was brought by the defendant in error against the plaintiffs in error. There was judgment for the plaintiff,

error dismissed on motion of counsel for the defendant in error.

**PROUT et al. v. DADE COUNTY SECURITY CO.** (Supreme Court of Florida. May 7, 1909.) In Banc. Appeal from Circuit Court, Dade County; Minor S. Jones, Judge. Geo. A. Worley, for appellants.

**PER CURIAM.** The bill in this case was filed by the appellee against the appellants. There was decree for the complainant, and the defendants appealed. Appeal dismissed on motion of counsel for appellants. See, also, 55 Fla. 816, 47 South. 12.

**SLIGH et al. v. MASTERS.** (Supreme Court of Florida. April 20, 1909.) In Banc. Error to Circuit Court, St. Johns County; Rhydon M. Call, Judge. M. C. Jordan, for plaintiffs in error.

**PER CURIAM.** This action was brought by the defendant in error against the plaintiffs in error. There was judgment for the plaintiff, and the defendants took writ of error. Writ of error dismissed on motion of counsel for plaintiffs in error.

**SMITH v. SMITH.** (Supreme Court of Florida. May 4, 1909.) In Banc. Appeal from Circuit Court, De Soto County; Joseph B. Wall, Judge. Treadwell & Treadwell, Sparkman & Carter, and Wall & McKay, for appellee.

**PER CURIAM.** The bill in this case was filed by the appellant against the appellee. There was decree for the defendant, and the complainant appealed. Appeal dismissed on motion of counsel for appellee.

**STATE ex rel. ELLIS v. ATLANTIC COAST LINE R. CO.** (Supreme Court of Florida. Oct. 6, 1908.) In Banc. Mandamus. W. H. Ellis, Atty. Gen., for relator. W. E. Kay and Sparkman & Carter, for respondent.

**PER CURIAM.** This proceeding was instituted in the Supreme Court by the Attorney General of the state of Florida and dismissed on his motion.



# INDEX-DIGEST.

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## ABATEMENT.

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§ 45. Where, pending an appeal in an action to restrain a city from entering into a paving contract, the succession of plaintiff, who died before answer, was closed, and the property turned over to his heirs and his executor, who had been made a party to the suit, discharged, *held*, that the suit was not abated by the executor's discharge.—Gurley v. City of New Orleans (La.) 411.

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Actions on accounts as such, see Account, Action on.

Proceedings in actions of assumpsit, see Assumpsit, Action of.

Proceedings to compel accounting, see Account.

§ 1. Essentials of an account stated.—Jasper Trust Co. v. Lampkin (Ala.) 337.

§ 3. Money paid at the time of stating an account could not be a part of the subject of an account stated, as the basis of recovery on an account stated is a promise to pay money.—Jasper Trust Co. v. Lampkin (Ala.) 337.

§ 7. A payment on an account after it has become stated does not operate to denude it of that character.—Pollak v. Gunter & Gunter (Ala.) 155.

## ACCRETION.

Rights and liabilities of life tenants as to accretions to property, see Life Estates, § 15.

## ACCRUAL.

Of liability on bonds or undertakings in judicial proceedings, see Injunction, § 235.

Of right of action or defense as affecting limitation, see Limitation of Actions, §§ 46, 55.

## ACCUSATION.

Of crime, indictment or information, see Indictment and Information.

Of crime, preliminary complaint or affidavit, see Criminal Law, § 211.

## ACKNOWLEDGMENT.

Of indebtedness as suspending limitations or reviving debt barred, see Limitation of Actions, § 146.

Operation and effect of admissions as evidence, see Evidence, §§ 213-258.

### I. NATURE AND NECESSITY.

Defectively acknowledged deed as color of title, see Adverse Possession, § 71.

### III. OPERATION AND EFFECT.

§ 55. The certificate of a notary is presumptive evidence, and cannot be contradicted; nor can the acknowledgment itself be contradicted.—Martin v. Evans (Ala.) 997.

## ACTION.

Abatement, see Abatement and Revival.

Accrual, as affecting limitations, see Limitation of Actions, §§ 46, 55.

Assignment of choses in action, see Assignments, § 24.

Bar by former adjudication, see Judgment, §§ 540-584.

Constitutional guaranties of remedies, see Constitutional Law, §§ 327, 329.

Damages recoverable, see Damages.

Election of remedy, see Election of Remedies.

Jurisdiction of courts, see Courts.

Limitation by statutes, see Limitation of Actions.

Penal and qui tam actions, see Penalties, § 40.

Right to trial by jury, see Jury, §§ 10-25.

Survival, see Abatement and Revival, § 52.

*Actions between parties in particular relations.*

See Attorney and Client, § 167; Landlord and Tenant, §§ 48, 231; Master and Servant, §§ 236-295.

Bailor and bailee, see Bailment, § 31.

Corporate officers or agents and stockholders, see Corporations, § 320.

Co-tenants, see Partition, §§ 19-109.

Mortgagor and mortgagee, see Chattel Mortgages, § 172; Mortgages, § 390.

Principal and agent in general, see Principal and Agent, § 78.

Principal and broker, see Brokers, §§ 82, 85.

*Actions by or against particular classes of persons.*

See Carriers, §§ 76, 103, 275, 277, 314-321, 347; Corporations, §§ 503-522, 672; Executors and Administrators, §§ 423-454; Infants, §§ 93, 94; Landlord and Tenant, §§ 48, 231; Master and Servant, §§ 256-295, 328, 332, 341; Municipal Corporations, §§ 816, 993; Partnership, § 213; Railroads, §§ 114, 297, 344-351, 394, 396, 430-446, 478-484; Street Railroads, §§ 110-118.

Attorneys, see Attorney and Client, § 167.

Electric light or power companies, see Electricity, § 19.

Foreign corporations, see Corporations, § 672.

Heirs or distributees, see Descent and Distribution, § 90.

Insurance companies, see Insurance, §§ 815-826.

Life tenants, see Life Estates, § 28.

Mortgagors or mortgagees, see Chattel Mortgages, §§ 172, 177; Mortgages, § 390.

Officers and agents of corporations in general, see Corporations, § 320.

Seller of goods on condition, see Sales, § 480.

Stockholders, see Corporations, § 320.

Sureties on bail bonds or undertakings, see Bail, § 90.

Sureties on bonds of public officers, see Sheriffs and Constables, § 171.

Taxpayers, see Municipal Corporations, § 993.

Telegraph or telephone companies, see Telegraphs and Telephones, §§ 20, 28, 60-74.

*Actions relating to particular species of property or estates.*

See Life Estates, § 28.

Demised premises, see Landlord and Tenant, §§ 48, 231.

Mortgaged property, see Chattel Mortgages, §§ 172, 177; Mortgages, § 390.

*Particular causes or grounds of action.*

See Account Stated; Assault and Battery, § 34; Bailment, § 31; Bills and Notes, §§ 475-524; Conspiracy, §§ 19, 21; False Imprisonment, §§ 27, 30; Forcible Entry and Detainer, §§ 9-34; Fraud, § 49; Fraudulent Conveyances, §§ 206-299; Insurance, §§ 624-665, 815-826; Libel and Slander, § 89; Money Lent; Torts, § 26; Trespass, §§ 27-68.

Appropriation of property for public use, see Eminent Domain, §§ 274, 281.

Bail bonds, see Bail, § 90.

Bonds in general, see Bonds, §§ 122-142.

Bonds of public officers, see Sheriffs and Constables, § 171.

Bonds to keep the peace, see Breach of the Peace, §§ 20, 21.

Breach of contract, see Contracts, § 346.

Breach of contract for carriage of passenger, see Carriers, §§ 275, 277.

Breach of contract of lease, see Landlord and Tenant, § 48.

Breach of contract of sale, see Sales, § 417.

Breach of covenant, see Covenants, § 130.

Cloud on title, see Quietting Title.

Compensation of attorneys, see Attorney and Client, § 167.

Compensation of broker, see Brokers, §§ 82, 85.

Conditional contract of sale, see Sales, § 480.

Conversion of or injury to mortgaged property, see Chattel Mortgages, § 177.

see Master and Servant, § 341.  
 Deceit, see Fraud, § 49.  
 Delay in transportation or delivery of goods, see Carriers, § 103.  
 Failure or refusal to furnish telegraph or telephone service, see Telegraphs and Telephones, § 28.  
 Injuries at railroad crossings, see Railroads, §§ 344-351.  
 Injuries by servants, see Master and Servant, §§ 328, 332.  
 Injuries from accidents to trains, see Railroads, § 297.  
 Injuries from construction or maintenance of railroad, see Railroads, § 114.  
 Injuries from defects or obstructions in streets, see Municipal Corporations, § 816.  
 Injuries from fires caused by operation of railroad, see Railroads, §§ 478-484.  
 Injuries to animals on or near railroad tracks, see Railroads, §§ 439-446.  
 Injuries to passengers, see Carriers, §§ 314-321, 347.  
 Injuries to persons on or near railroad tracks, see Railroads, §§ 394, 396.  
 Injuries to persons on or near street railroad tracks, see Street Railroads, §§ 110-118.  
 Injuries to servants, see Master and Servant, §§ 256-295.  
 Insurance premiums, see Insurance, § 188.  
 Negligence in general, see Negligence, §§ 117-139.  
 Negligence in operation of railroad, see Railroads, §§ 297, 344-351, 394, 396, 439-446, 478-484.  
 Negligence in operation of street railroad, see Street Railroads, §§ 110-118.  
 Negligence in production or use of electricity, see Electricity, § 19.  
 Negligence of master, see Master and Servant, §§ 256-295.  
 Negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 60-74.  
 Negligence or misconduct of servant, see Master and Servant, §§ 328, 332.  
 Negligent or wrongful use of street, see Municipal Corporations, § 706.  
 Obstruction in highway, see Highways, § 158.  
 Obstruction of street, see Municipal Corporations, § 698.  
 Purchase money on sale of goods, see Sales, §§ 354-364.  
 Purchase money on sale of land, see Vendor and Purchaser, § 303.  
 Recovery of possession of land by vendor, see Vendor and Purchaser, § 209.  
 Recovery of possession of mortgaged property, see Chattel Mortgages, § 172.  
 Rent, see Landlord and Tenant, § 231.  
 Services, and materials furnished incident thereto, see Work and Labor.  
 Usurious contract, see Usury, § 103.  
 Wrongful conversion of personal property, see Trover and Conversion, §§ 22-60.

#### *Particular forms of action.*

See Account, Action on; Assumpsit, Action of; Detinue; Ejectment; Forcible Entry and Detainer, §§ 9-34; Quietting Title; Real Actions; Trespass, §§ 27-68; Trover and Conversion.  
 Petitory actions, see Real Actions, § 8.

#### *Particular forms of special relief.*

See Divorce; Injunction; Mandamus; Partition, §§ 19-109; Prohibition; Quo Warranto; Specific Performance.  
 Abatement of tax, see Taxation, § 499.  
 Accounting, see Account.  
 Accounting by agent, see Principal and Agent, § 78.  
 Cancellation of instrument, see Cancellation of Instruments.  
 Confirmation or trial of tax title, see Taxation, § 805.

see Taxation, §§ 486-499.  
 Enforcement of penalty in general, see Penalties, § 40.  
 Enforcement of regulations in respect to interstate transportation, see Carriers, § 18.  
 Enforcement of taxes, see Taxation, § 623.  
 Establishment and protection of easement, see Easements, § 61.  
 Foreclosure of mortgage, see Mortgages, § 390.  
 Quietting title, see Quietting Title.  
 Reformation of instrument, see Reformation of Instruments.  
 Removal of cloud, see Quietting Title.  
 Sale of property of decedent, see Executors and Administrators, §§ 343, 349.  
 Setting aside sale of public land, see Public Lands, § 152.  
 Setting aside transfers in fraud of creditors or subsequent purchasers in general, see Fraudulent Conveyances, §§ 206-209.

#### *Particular proceedings in actions.*

See Continuance; Costs; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Jury; Limitation of Actions; Parties; Pleading; Removal of Causes; Stipulations; Trial.  
 Assessment of damages, see Damages, §§ 208, 216.  
 Bill of particulars, see Pleading, § 326.  
 Default, see Judgment, §§ 108-130.  
 Offer of judgment, see Judgment, § 82.  
 Sales under judgment, order, or decree of court, see Execution, § 272.  
 Verdict, see Trial, §§ 328-349.

#### *Particular remedies in or incident to actions.*

See Attachment; Discovery; Garnishment; Injunction; Receivers; Sequestration; Set-Off and Counterclaim; Tender.  
 Grounds for and right to damages, see Damages, § 1.

#### *Proceedings in exercise of special or limited jurisdictions.*

Criminal prosecutions, see Criminal Law.  
 Suits in equity, see Equity.  
 Suits in justices' courts, see Justices of the Peace, §§ 64, 75.

#### *Review of proceedings.*

See Appeal and Error; Certiorari; Exceptions, Bill of; Justices of the Peace, § 174; New Trial.

## **II. NATURE AND FORM.**

Of proceeding, to foreclose mortgages, see Mortgages, § 390.

§ 27. A complaint in an action against a telegraph company for negligence in transmitting a message held to state a cause of action in tort.—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

§ 27. An action against a telegraph company for delay in delivering a message held not necessarily *ex contractu*.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 27. An action under Code 1907, § 6037, for the statutory penalty for destruction of or injury to fruit trees, is for a tort.—*Wright v. Sample* (Ala.) 268.

## **III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.**

Election between causes of action, see Pleading, § 369.

Indivisibility of cause of action for destruction of insured property on subrogation of insurers to extent of payments made, see Insurance, § 606.

Presentation in lower court of grounds of review as to consolidation of actions, see Appeal and Error, § 189.

§ 57. Two suits between the same parties involving the same issues *held* properly consolidated, though the consolidation was not expressly authorized by Code Prac. art. 422.—Union Garment Co., Limited, v. Newburger (La.) 740.

#### IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

Commencement within period of limitation, see Limitation of Actions, §§ 119, 127.  
Stay on appeal or writ of error, see Appeal and Error, §§ 460-489.

#### ACTS.

See Statutes.

#### ACTUAL CONTROVERSY.

Requisite to mandamus, see Mandamus, § 16.

#### ADEQUATE REMEDY AT LAW.

Adequacy of ordinary remedy as affecting right to prohibition, see Prohibition, § 3.  
Constitutional guaranties of remedies, see Constitutional Law, §§ 327, 329.

#### ADJOINING LANDOWNERS.

See Boundaries; Fences.  
Easements, see Easements.

#### ADJOURNMENT.

Of civil causes in general, see Continuance.  
Of criminal causes in general, see Criminal Law, §§ 575-615.

#### ADJUDICATION.

Decisions of courts in general, see Courts, §§ 93, 106; Judgment.  
Operation and effect of former adjudication, see Judgment, §§ 540-584, 668-715.

#### ADMEASUREMENT OF DOWER.

See Dower, § 55.

#### ADMINISTRATION.

Of charity, see Charities, § 43.  
Of estate assigned for benefit of creditors, see Assignments for Benefit of Creditors, § 208.  
Of estate of decedent, see Executors and Administrators.  
Of estate of insolvent, see Insolvency, § 73.  
Of public finances, see Counties, § 154.  
Of trust property, see Trusts, §§ 203, 243.

#### ADMISSIONS.

See Stipulations.  
As evidence, see Evidence, §§ 213-258.  
By exceptions to pleadings, see Pleading, § 228.  
In pleadings, see Pleading, §§ 36, 129.

#### ADOPTION.

Of statutes, see Statutes, §§ 8½-64.

#### ADULTERY.

Evidence in civil actions, see Divorce, § 129.  
Hearsay evidence, see Criminal Law, § 420.

#### ADVANCEMENTS.

See Descent and Distribution, §§ 102, 109.

#### ADVANCES.

In general, see Money Lent.  
Liens on crops for advances, see Agriculture, § 12.

#### ADVERSE CLAIM.

Determination of claims to real property, see Quieting Title.

#### ADVERSE POSSESSION.

See Limitation of Actions.

By co-tenant, see Tenancy In Common, § 15.  
By or under life tenant, see Life Estates, § 8.  
To sustain ejectment, see Ejectment, § 10.

##### I. NATURE AND REQUISITES.

###### (A) Acquisition of Rights by Prescription in General.

§ 4. Under the common law, limitations do not run against a municipality by reason of mere adverse possession, and Const. 1890, § 104, is but declaratory of the common-law rule.—City of Lexington v. Hoskins (Miss.) 561.

§ 7. Where the certificate or final receipt and title to government land had not been issued 10 years when ejectment was brought, a claim of adverse possession was unavailable.—Swift v. Doe ex dem. Williams (Ala.) 123.

§ 11. The only requisite of good faith or motive in adverse possession is to show that the claimant actually intended to claim the land as his own to the absolute exclusion of others, and it is not necessary that the claim of title should be honestly believed to be good.—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.

§ 13. Where a lot has been permitted to remain in the uninterrupted possession of another under a deed translatiue of title for over 10 years, a claim to the lot is barred by prescription.—Tabernacle Baptist Church v. Green (La.) 1.

###### (B) Actual Possession.

§ 27. A plaintiff by suing in ejectment admits that defendant is then in possession of the premises.—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.

§ 27. In trover for the conversion of logs cut on land claimed by plaintiff, evidence *held* not to show plaintiff's actual possession of the land, nor to justify an inference of general or special property in the logs.—C. W. Zimmerman Mfg. Co. v. Dunn (Ala.) 906.

###### (C) Duration and Continuity of Possession.

§ 43. Privity, showing continuity of adverse possession, may be established by a transfer of possession alone, without any conveyance or agreement.—Oliver v. Williams (Ala.) 937.

###### (F) Hostile Character of Possession.

§ 70. "Color of title" and "Claim of title" defined.—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.

§ 71. The fact that the acknowledgment of a deed was defective did not render it ineffectual as color of title.—Clark v. Dunn (Ala.) 93.

§ 71. An absolutely void instrument may be good color of title.—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.

§ 75. A partition is merely declamatory and not translatiue of ownership and cannot serve as a basis for prescription.—Pearce v. Ford (La.) 771.

§ 79. In trover for conversion of logs cut on land claimed by plaintiff under a tax deed, the tax deed, though void, *held* admissible in evidence.—C. W. Zimmerman Mfg. Co. v. Dunn (Ala.) 906.



## II. OPERATION AND EFFECT.

### (A) Extent of Possession.

§ 100. One in possession of land under ineffectual deed constituting color of title *held* to have possession to the described boundaries.—Clark v. Dunn (Ala.) 93.

§ 100. Claim of title without color may ripen into title to the land actually occupied, while with color it may ripen into title not only to the land actually occupied, but may extend to all land described in the color of title, if that actually occupied be a part thereof.—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.

§ 100. Nature of color of title as evidence of adverse possession, stated.—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.

§ 101. Each 40 acres in a conveyance does not constitute a separate tract, and the fact that a stranger claimed to own a part of the land conveyed, but not the whole, would not operate to make two tracts of it so as to affect the question of adverse possession.—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.

§ 101. Fact that legal title to parts of a tract described in a deed was in others than the grantor would not prevent the grantee's possession of a part of the tract from extending to the whole tract so as to constitute color of title thereto, since it is not necessary that the grantor should have title to the whole or a part of the entire tract described in order to give the grantee color of title thereto.—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.

§ 101. If a grantor had legal title to one of several 40's described in the deed, the possession of the grantee of that 40 under the deed would not extend to the other 40's so as to give him color of title thereto.—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.

## III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 113. On an issue as to defendant's adverse possession, tax records showing payment of taxes by him were admissible in evidence.—Clark v. Dunn (Ala.) 93.

## AFFIDAVITS.

See Depositions.

Recitals as to verification of account in judgment by default, see Judgment, § 130.

Validity of statute authorizing prosecution by affidavit, see Indictment and Information, § 2.

### Particular proceedings or purposes.

Allowance of appeal or writ of error, see Appeal and Error, § 361.

Change of venue, see Criminal Law, § 134.

For default judgment, see Judgment, § 128.

New trial, see Criminal Law, §§ 956-958.

Preliminary affidavit in criminal prosecution, see Criminal Law, § 211.

Verification of pleading, see Pleading, §§ 291, 304.

§ 9. An affidavit must disclose the name of the officer, either by the recitals in the body thereof or by his signature to the jurat.—Sellers v. State (Ala.) 340.

## AFFIRMANCE.

Of judgment or order in criminal prosecutions, see Criminal Law, § 1182.

## AFTER-ACQUIRED TITLE.

Estoppel to assert, see Estoppel, §§ 38, 39.

## AGENCY.

In general, see Principal and Agent.

## AGGRAVATED ASSAULT.

See Assault and Battery, § 54.

## AGREEMENT.

See Contracts.

## AGRICULTURAL SCHOOLS

Laws providing for taxation of property colored persons for support of schools white persons only as abridgment of rights and immunities of citizenship, see Constitutional Law, § 206; as denial of equal protection of law, see Constitutional Law, § 206.

## AGRICULTURE.

Drainage of lands, see Drains.

Nature of action for penalty for destruction or injury to fruit trees, whether in contract or tort, see Action, § 27.

§ 12. Under Act No. 51, p. 43, of 1890 that a notarial act to secure money advance make a crop must be recorded in the privileges.—Henry Lochte Co. v. Lefebvre 26.

## ALCOHOLIC LIQUORS.

Regulation of manufacture, use and sale, toxicating Liquors.

## ALDERMEN.

Council or other governing body of municipal corporation, see Municipal Corporation.

## ALIENATION.

Of married woman's separate property, separate estate and Wife, § 193.

## ALLOWANCE.

Of appeal or writ of error, see Appeal and Error, §§ 361, 364.

Of bill of exceptions, see Criminal Law, Exceptions, Bill of, §§ 38, 39.

## ALMANAC.

Computation of time, see Time.

## ALTERATION.

Of geographical or political divisions, see Territories, § 16.

## ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

Payment of altered paper by bank, see Bank and Banking, § 148.

§ 5. Alteration of a note held not to its legal effect.—Crawford v. Simonton (Ala.) 1024.

## ALTERNATIVE JUDGMENT

In detinue, see Detinue, § 25.

## ALTERNATIVE RELIEF.

See Specific Performance, § 127.

## AMBASSADORS AND CONSULS.

Exclusive or concurrent jurisdiction of courts of proceedings against, see Courts, § 489.

**AMBIGUITIES.**

Parol or extrinsic evidence to construe ambiguous instruments, see Evidence, § 450.

**AMENDMENT.**

*In particular remedies or special jurisdictions.*  
See Parties, § 95.

In appellate court, see Appeal and Error, § 654.

*Of particular acts, instruments, or proceedings.*  
See Indictment and Information, § 161; Statutes, §§ 135-147.

Assessments, see Taxation, §§ 474-490.

Constitution, see Constitutional Law, §§ 6, 9, 16.

Corporate charter, see Corporations, §§ 38, 84.  
Pleading, see Equity, § 273; Pleading, §§ 237-254.

Record in criminal prosecutions, see Criminal Law, § 996.

Record on appeal or writ of error, see Appeal and Error, § 654.

**AMOUNT IN CONTROVERSY.**

Jurisdictional amount, see Courts, § 121; Justices of the Peace, § 44.

**ANGUISH.**

Element of damages in actions for negligence in transmission of message, see Telegraphs and Telephones, § 68.

Element of damages in general, see Damages, § 49.

**ANIMALS.**

Fence laws, see Fences.

Injuries to animals from operation of railroads, see Railroads, §§ 439-446.

§ 45. In a prosecution for killing a hog with intent to steal, proof of actual stealing includes proof of the intent to steal.—*State v. Brown* (La.) 813.

§ 45. Acts 1902, p. 162, No. 107, § 5, grading the crime of larceny, does not affect and repeal Acts 1870, Ex. Sess., p. 50, No. 8, § 3, relating to the killing of an animal, the property of another, with intent to steal.—*State v. Brown* (La.) 813.

§ 45. The offense denounced by Acts 1870, Ex. Sess., p. 50, No. 8, § 3, is the killing of an animal with intent to steal, and is distinct from the crime of larceny.—*State v. Brown* (La.) 813.

**ANNULMENT.**

Actions to annul written instruments, see Cancellation of Instruments.

**ANSWER.**

In general, see Pleading, §§ 85-143, 253.

To interrogatories to jury, see Trial, § 349.

**APPEAL AND ERROR.**

See Certiorari; Exceptions, Bill of; New Trial.  
Appellate jurisdiction of particular state courts, see Courts, §§ 210-224.

Boards of review of tax assessments, see Taxation, § 493.

Mandamus to control acts of court, judge, or judicial officer in reference to proceedings for review, see Mandamus, § 57.

Remedy by appeal or writ of error as affecting right to habeas corpus, see Habeas Corpus, § 4.

Remedy by appeal or writ of error as affecting right to mandamus, see Mandamus, § 4.

Remedy by appeal or writ of error as affecting right to prohibition, see Prohibition, § 3.

*Review in particular civil actions.*

On bonds to keep the peace, see Breach of the Peace, § 21.

*Review in special proceedings.*

See Habeas Corpus, § 113.

Contempt proceedings, see Contempt, § 66.

*Review of criminal prosecutions.*

See Criminal Law, §§ 1019-1180.

By habeas corpus, see Habeas Corpus.

Violations of municipal ordinances, see Municipal Corporations, § 642.

*Review of proceedings of justices of the peace.*

See Justices of the Peace, § 174.

**I. NATURE AND FORM OF REMEDY.**

§ 2. The defeated party in an action for false imprisonment, prior to the taking effect of Code 1907, had a year in which to appeal.—*Gray v. Strickland* (Ala.) 152.

**II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.**

Criminal prosecutions, see Criminal Law, §§ 1019, 1020.

§ 21. The question of a judgment which will support an appeal is jurisdictional in the Supreme Court and cannot be waived.—*Meyers v. Martinez* (Ala.) 351.

**III. DECISIONS REVIEWABLE.**

Criminal prosecutions, see Criminal Law, § 1023.

**(C) Amount or Value in Controversy.**

Affecting jurisdiction of particular courts, see Courts, § 224.

**(D) Finality of Determination.**

§ 66. Under Gen. St. 1906, § 1691, where there is no final judgment in a case brought up by writ of error, it will be dismissed.—*Pensacola Bank & Trust Co. v. National Bank of St. Petersburg* (Fla.) 414.

§ 66. Where record fails to show final judgment, writ of error will be dismissed, under Gen. St. 1906, § 1691.—*Louisville & N. R. Co. v. Berry* (Fla.) 414.

§ 66. Under Gen. St. 1906, §§ 1691, 1695, a writ of error lies only to a final judgment in an action at law or to an order granting a new trial.—*Blanton v. West Coast Ry. Co.* (Fla.) 945.

§ 76. No appeal lies from an order dissolving an injunction on bond under Code Prac. art. 307, where it does not appear that petitioners will suffer irreparable injury.—*Jeanerette Lumber & Shingle Co. v. Police Jury of Parish of St. Martin* (La.) 404; *In re Jeanerette Lumber & Shingle Co.*, Id.

§ 73. Petitioners' allegation that they will suffer irreparable injury if injunctive relief is not granted is not conclusive of the question on an application for an appeal from an order dissolving the injunction on bond.—*Jeanerette Lumber & Shingle Co. v. Police Jury of Parish of St. Martin* (La.) 404; *In re Jeanerette Lumber & Shingle Co.*, Id.

§ 78. Judgment for costs alone, where the action is not disposed of, held not a final judgment.—*Blanton v. West Coast Ry. Co.* (Fla.) 945.

**(E) Nature, Scope, and Effect of Decision.**

§ 105. An order overruling a motion to dismiss a bill for want of jurisdiction appearing on its face held not to support an appeal.—*Meyers v. Martinez* (Ala.) 351.

§ 122. An appeal cannot be taken from the part of a decree condemning defendant to pay the costs.—*Deal v. Hodge* (La.) 820.

§ 122. Where, in an election contest, the decree condemned defendant to pay costs, it was an integral part of the judgment and could not be made the subject of a separate partial appeal.—*Deal v. Hodge* (La.) 820.

**(F) Mode of Rendition, Form, and Entry of Judgment or Order.**

§ 124. Presumed admission of indebtedness by failure of garnishee to answer *held* not a confession of judgment, in such sense as to deprive garnishee of the right to appeal.—*H. L. Bain & Co. v. Oliphant* (La.) 588.

§ 133. An entry following a verdict, and reciting that judgment is rendered for defendant, and that defendant do have his costs now assessed at, etc., is, at most, an order for entry of judgment and an adjudication for costs, and is not a final judgment supporting a writ of error.—*Pensacola Bank & Trust Co. v. National Bank of Petersburg* (Fla.) 414.

**IV. RIGHT OF REVIEW.**

**(A) Persons Entitled.**

§ 150. Curator *held* to have no appealable interest in a controversy, authorizing an appeal from a judgment recognizing the widow as heir.—*Succession of King* (La.) 735.

**V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.**

Criminal prosecutions, see Criminal Law, §§ 1028-1056.

**(A) Issues and Questions in Lower Court.**

Criminal prosecutions, see Criminal Law, § 1028.

§ 171. A party trying a cause on the theory that his cause of action is under the employer's liability act (Code 1907, §§ 3910-3913) *held* not entitled to urge on appeal that the action is under the homicide statute.—*Travis v. Sloss-Sherfield Steel & Iron Co.* (Ala.) 108.

§ 172. Parties must confine themselves to the points raised in the lower court, and cannot present new grounds in the Supreme Court.—*Hartford Fire Ins. Co. v. Hollis* (Fla.) 985.

§ 173. Parties must confine themselves to the points raised in the lower court, and cannot present new objections in the Supreme Court.—*Hartford Fire Ins. Co. v. Hollis* (Fla.) 985.

**(B) Objections and Motions, and Rulings Thereon.**

Criminal prosecution, see Criminal Law, §§ 1035, 1037.

§ 189. Objection to the transfer of a case to another division of the civil district court and its consolidation with an action there pending cannot be first made on appeal.—*Union Garment Co., Limited, v. Newburger* (La.) 740.

§ 192. The Supreme Court cannot consider questions of pleadings in a justice's court as to which no objections were there taken.—*Central of Georgia Ry. Co. v. Williams* (Ala.) 328.

§ 193. The court on appeal may make orders as to a defective pleading, though its sufficiency was not presented for review.—*Prall v. Prall* (Fla.) 867.

§ 194. In reviewing a ruling sustaining a demurrer to a plea, the appellate court will be confined to the ground stated in the demurrer.—*Hartford Fire Ins. Co. v. Hollis* (Fla.) 985.

§ 204. Only such objections to evidence as were made in the court below will be considered.—*Brown v. Bowie* (Fla.) 637.

§ 205. To put the trial court in error in excluding a question, it must have been suggested to the court what it was proposed to prove, and how it would be relevant and competent.—*Harris v. Basden* (Ala.) 321.

§ 216. A misleading charge cannot be complained of on appeal, where its misleading effect could have been obviated by an explanatory charge, which was not requested.—*Green v. Southern States Lumber Co.* (Ala.) 917.

§ 223. Objection that judgment was rendered for more than claimed in the complaint cannot be made for the first time on appeal.—*Andrews v. Burton* (Ala.) 350.

§ 230. Where there was a joint appeal, and errors were assigned separately and severally, and presumably before the case was submitted, and appellee did not object to a severance in the assignment without permission before submission, he was precluded from subsequently objecting.—*Fies v. Rosser* (Ala.) 287.

§ 231. Where some parts of documentary evidence were admissible, to render exceptions to it available, the objection should go to the admission of the improper parts.—*Louisville & N. R. Co. v. Britton* (Ala.) 350.

§ 237. Where evidence was admitted on counsel's statement that its materiality would thereafter be shown, and this was not done, and no motion was made in the lower court to exclude such evidence, the error cannot be reviewed on appeal.—*Maddox v. Dunklin* (Ala.) 277.

§ 242. A party cannot complain of the overruling of his motion to exclude all of the evidence of a witness, on failure to invoke a ruling as to some of the objections to the testimony, or to except when a ruling was made.—*Republic Iron & Steel Co. v. White* (Ala.) 141.

**(C) Exceptions.**

Criminal prosecutions, see Criminal Law, §§ 1055, 1056.

§ 250. Error in not sustaining objections cannot be considered on appeal, where no exceptions are saved.—*Climax Lumber Co. v. Bay City Mach. Works* (Ala.) 935.

§ 254. Under the express provisions of Gen. St. 1906, § 1694, it is not necessary to take an exception to a judgment upon demurrer.—*Hartford Fire Ins. Co. v. Hollis* (Fla.) 985.

**VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.**

**(A) Time of Taking Proceedings.**

On certiorari, see Certiorari, §§ 39, 40.

§ 338. The right to appeal within a year from the rendition of the judgment, expressly given by Code 1896, § 436, *held* to continue as to a judgment rendered prior to Code 1907, in view of section 10 thereof, notwithstanding section 2868.—*Montgomery Moore Mfg. Co. v. Leeth* (Ala.) 210.

§ 339. An appeal from a decree on demurrer, taken more than 30 days from the rendition of the decree, is not taken in time, and the appeal must be dismissed.—*Underwood v. Underwood* (Ala.) 305.

§ 344. Since a judgment appointing a receiver should be signed, the time for an appeal is not counted from the day the judge *quo orally* announces his appointment.—*New Orleans, Ft. J. & G. I. R. Co. v. New Orleans Southern Ry. Co.* (La.) 467.

(B) *Petition or Prayer, Allowance, and Certificate or Affidavit.*

§ 361. A verbal application by telephone for a suspensive appeal cannot serve as the basis of a proceeding in the Supreme Court to compel the granting thereof.—*Friscoville Realty Co. v. Police Jury of Parish of St. Bernard* (La.) 590.

§ 361. Section 4, Act No. 159, p. 314, of 1898, providing that any person, who by affidavit appears to be interested on giving bond, may appeal from an order appointing a receiver of a corporation, does not apply to the parties to a suit for the appointment of a receiver; and, where the appeal is by one of them, no affidavit is necessary.—*Semple v. Frisco Land Co.* (La.) 619.

§ 364. Where the return day of an appeal is fixed by the judge, appellant is not responsible if a mistake be committed.—*New Orleans, Ft. J. & G. I. R. Co. v. New Orleans Southern Ry. Co.* (La.) 467.

(C) *Payment of Fees or Costs, and Bonds or Other Securities.*

Wife as surety on appeal bond for husband, see *Husband and Wife*, § 87.

§ 383. Where the judgment appealed from and thereby suspended is not a judgment for money, a bond for costs suffices.—*Succession of Drysdale* (La.) 30.

(D) *Writ of Error, Citation, or Notice.*

§ 405. A stipulation that the court may render judgment in vacation does not dispense with citation of an appeal granted at a subsequent term.—*McGaw v. O'Bierne* (La.) 819.

## VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

Criminal prosecutions, see *Criminal Law*, § 1083.

(A) *Powers and Proceedings of Lower Court.*

§ 452. The trial court *held* authorized to disregard an appeal from the sustaining of a demurrer to the bill with leave to amend allowed by the register at a time no appeal could be taken.—*Underwood v. Underwood* (Ala.) 305.

(B) *Jurisdiction Acquired by Appellate Court.*

§ 454. When an appeal is taken to the Supreme Court, any subsequent disposition made of the case can only be made with its consent.—*Sivley v. Sivley* (Miss.) 552.

§ 456. The Supreme Court, after obtaining jurisdiction on appeal, will not allow any disposition of the cause by the nominal parties, where the equitable interest of third persons will be prejudiced.—*Sivley v. Sivley* (Miss.) 552.

§ 456. An attorney, prosecuting to judgment an action for a contingent fee for an insolvent client, *held* to possess an equitable interest in the litigation, and the Supreme Court on appeal will retain the cause for hearing on its merits.—*Sivley v. Sivley* (Miss.) 552.

## IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

Suspensive appeal from order appointing provisional custodian of succession property, see *Courts*, § 202.

§ 460. Where a suspensive appeal is dismissed for failure to file bond in the amount required, no appeal thereafter allowed from the dismissal can suspend the judgment originally appealed from.—*Interstate Trust & Banking Co. v. Powell Bros. & Sanders Co.* (La.) 605.

§ 465. The execution of an order of seizure and sale for a specific sum cannot be suspended by an appeal bond for costs.—*Interstate Trust & Banking Co. v. Powell Bros. & Sanders Co.* (La.) 605.

§ 475. The district court has jurisdiction, subject to appeal, to inquire into the sufficiency of a suspensive appeal bond.—*Benedict v. Pasley* (La.) 591.

§ 488. A temporary restraining order pending the hearing of a rule to set aside an order of seizure and sale *held* to expire with the rule's dismissal and cannot be kept alive by a suspensive appeal from the dismissal.—*Interstate Trust & Banking Co. v. Powell Bros. & Sanders Co.* (La.) 605.

§ 489. Right of possession of receiver appointed for business corporation *held* not affected by an appeal under Acts 1898, p. 314, No. 159, § 4.—*Blaise v. Security Brewing Co.* (La.) 816.

## X. RECORD AND PROCEEDINGS NOT IN RECORD.

Review of criminal prosecutions, see *Criminal Law*, §§ 1088-1128.

(A) *Matters to be Shown by Record.*

§§ 494, 501. Under Gen. Acts 1907, p. 570, § 17, *held*, that a judgment of the law and equity court of Mobile in a trial of a law case without a jury cannot be reviewed, where the bill of exceptions does not contain the conclusions and judgment of the court upon the evidence, nor show any exception reserved.—*Davis v. Simpson Coal Co.* (Ala.) 368.

(B) *Scope and Contents of Record.*

Review of criminal prosecutions, see *Criminal Law*, § 1088.

§ 518. Pleas offered with motion to vacate judgment by default which are not filed should be evidenced by a proper bill of exceptions.—*Fidelity & Deposit Co. of Maryland v. Aultman* (Fla.) 991.

§ 532. In view of appeal bond on appeal from justice to circuit court, *held*, the record on appeal from the circuit court did not show no judgment was rendered by the justice.—*Andrews v. Burton* (Ala.) 359.

§ 538. The record of a suit filed with a Supreme Court clerk may by order be annexed to, and form a part of, the appeal in another case, where relating to the same issues.—*Reynolds v. Egan* (La.) 589.

(C) *Necessity of Bill of Exceptions, Case, or Statement of Facts.*

Making and filing of bill of exceptions, see *Exceptions*, Bill of.

Review of criminal prosecutions, see *Criminal Law*, §§ 1090-1092.

§ 544. Error in refusing to permit a plea of set-off to be filed cannot be considered on appeal, where the court's action was not shown by bill of exceptions.—*Garden v. Houston Bros.* (Ala.) 1030.

§ 545. Motions based on matters de hors the record and matters in pais in support of the motions should be brought up on appeal by bill of exceptions.—*Fidelity & Deposit Co. of Maryland v. Aultman* (Fla.) 991.

(D) *Contents, Making, and Settlement of Case or Statement of Facts.*

§ 565. Under Code 1906, § 797, notice of the filing of the stenographer's notes may be given to the attorneys personally by one designated for that purpose by the circuit clerk.—*Hines v. Shumaker* (Miss.) 564.

§ 565. Under Code 1906, § 797, requiring a notice of the filing of the stenographer's notes to be given to each attorney or firm interested, *held*, that notice to one of a firm who were appellee's attorneys of record was sufficient, though the firm dissolved after the suit was begun.—Hines v. Shumaker (Miss.) 564.

§ 565. Formal notice to appellee's counsel of the filing of the stenographer's notes, as required by Code 1906, § 797, was unnecessary, where his leading counsel had retained the notes for examination for more than five days, and returned them to the circuit clerk without correction.—Hines v. Shumaker (Miss.) 564.

**(F) Making, Form, and Requisites of Transcript or Return.**

Liability of clerk of court for penalty for failure to make correct transcript, see Clerks of Courts, § 72.

§ 606. Rule 26 (Code 1907, p. 1512), requiring a transcript of the record to be prefaced by an index, and also to have marginal references, should be observed.—Green v. Bessemer Coal, Iron & Land Co. (Ala.) 289.

**(G) Authentication and Certification.**

Review of criminal prosecutions, see Criminal Law, § 1105.

**(H) Transmission, Filing, Printing, and Service of Copies.**

§ 630. If the court is unable to review the judgment appealed from because a material part of the record has been lost, without appellant's fault, the appeal will not be dismissed, but the case will be remanded for a new trial.—Union Garment Co., Limited, v. Newburger (La.) 740.

**(I) Defects, Objections, Amendment, and Correction.**

Liability of clerk of court for penalty for failure to make correct transcript, see Clerks of Courts, § 72.

§ 635. Writ of error dismissed, where transcript shows no entry of final judgment.—Blanton v. West Coast Ry. Co. (Fla.) 945.

§ 654. Where the clerk of the district court has omitted from the transcript a copy of appellant's motion, order of appeal, and a copy of the bond, appellant *held* entitled to an order to have the same supplied.—Reynolds v. Egan (La.) 589.

**(J) Conclusiveness and Effect. Impeaching and Contradicting.**

Review of criminal prosecutions, see Criminal Law, § 1111.

**(K) Questions Presented for Review.**

Review of criminal prosecutions, see Criminal Law, §§ 1116-1124.

§ 681. The sustaining of a demurrer to a plea as amended cannot be considered, where the plea is not in the appeal record.—Deleon v. Walter (Ala.) 934.

§ 690. Where an objection to a question is overruled, but the record fails to show what answer witness made, if any, the ruling is not reversible on appeal.—Harris v. Basden (Ala.) 321.

**XI. ASSIGNMENT OF ERRORS.**

Review of criminal prosecutions, see Criminal Law, § 1129.

§ 719. Rulings sustaining demurrers to pleas cannot be considered, in the absence of assignments of error.—Sanders v. Williams (Ala.) 893.

§ 743. Assignments of error *held* too general to be considered.—Southern Ry. Co. v. Arnold

(Ala.) 293; Climax Lumber Co. v. Bay City Mach. Works (Ala.) 935.

§ 754. Where there are no assignments of error as to striking out certain part of defendant's answer to the interrogatories propounded by plaintiff, though exceptions were reserved, the same will not be reviewed except for the purpose of aiding in another trial.—Prestwood v. Carlton (Ala.) 254.

**XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.**

Mandamus to compel reinstatement, see Mandamus, § 57.

Review of criminal prosecutions, see Criminal Law, § 1131.

§ 801. The court has no power to dismiss a case on appeal and order a writ of procedendo to issue, without calling appellant and giving him an opportunity to defend.—Wilson v. Town of Hansboro (Miss.) 982.

**XV. HEARING AND REHEARING.**

§ 832. A petition for rehearing suggesting nothing that has not been fully considered will be denied.—Hull v. Burr (Fla.) 754.

**XVI. REVIEW.**

Criminal prosecutions, see Criminal Law, §§ 1134-1179.

On certiorari, see Certiorari, §§ 65, 66.

**(A) Scope and Extent in General.**

Criminal prosecutions, see Criminal Law, § 1134.

§ 842. A judgment on an issue of fact will not be disturbed, unless clearly erroneous.—Louisiana-Texas Oil & Pipe Line Co. v. Atlanta Oil & Gas Co. (La.) 409.

§ 843. On appeal the court discusses only those questions that are necessary to a decision of the case, and does not attempt to further lay down rules for the bench and bar of the state.—Maddox v. Dunklin (Ala.) 277.

§ 854. Prior to Laws 1909, p. 56, c. 5912, if a demurrer could have been sustained on any ground, it was immaterial that it was sustained on a wrong ground.—Hartford Fire Ins. Co. v. Hollis (Fla.) 985.

§ 867. Upon writ of error to an order granting a new trial, the only questions to be considered are those involved in such order.—Owens v. Wilson (Fla.) 674.

**(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.**

§ 872. On appeal from a dismissal, with a writ of procedendo to the mayor's court, no review can be had of the question of the court's power to correct a former judgment overruling a demurrer, and in lieu thereof enter a judgment sustaining it.—Wilson v. Town of Hansboro (Miss.) 982.

§ 874. On appeal from an interlocutory order, errors assigned on other interlocutory orders not specifically appealed from will not be considered.—Prall v. Prall (Fla.) 867.

**(C) Parties Entitled to Allege Error.**

Criminal prosecutions, see Criminal Law, § 1137.

§ 877. A party against whom there was no decree as to a mechanic's lien cannot complain as to the rulings thereon.—Keily v. Smith (Ala.) 145.

§ 882. A party who has invoked a particular action or ruling of the trial court cannot complain thereof on appeal, though it be erroneous.—Western Union Telegraph Co. v. Griffith (Ala.) 91.

tions asked the witness and allow him to answer the questions, but appellant declined the offer, it could not on appeal complain of the rulings on the objections to the questions.—*Southern Ry. Co. v. Arnold* (Ala.) 293.

**(D) Amendments, Additional Proofs, and Trial of Cause Anew.**

Right to trial by jury, see Jury, § 17.  
Trial de novo on appeal from justices' courts, see Justices of the Peace, § 174.

**(E) Presumptions.**

Review of criminal prosecutions, see Criminal Law, § 1144.

§ 900. The superior court must presume in favor of the trial court's ruling.—*Harris v. Basden* (Ala.) 321.

§ 901. Burden *held* on appellant to show that the judgment complained of is incorrect.—*Hanton v. New Orleans & C. R., Light & Power Co.* (La.) 544.

§ 907. Unless the bill of exceptions shows that it contains all of the evidence, the court on appeal will presume that there was evidence justifying the court's charge.—*Maddox v. Dunklin* (Ala.) 277.

§ 907. Where a cause is tried to the court, and the bill of exceptions does not purport to set out all the evidence, the court on appeal will presume any state of the evidence which will sustain the judgment.—*Lewis Land & Lumber Co. v. Interstate Lumber Co.* (Ala.) 1036.

§ 909. In the absence of a bill of exceptions purporting to contain all the evidence, it will be presumed that the description in a deed sufficiently definite to permit its further identification was assisted by parol.—*Swift v. Doe ex dem. Williams* (Ala.) 123.

§ 916. The court on appeal *held* required to take as true the recital in the judgment that there was a replication to a plea, on which issue was joined.—*Crawford v. Simonton & Co.* (Ala.) 1024.

§ 917. Where a judgment sustaining a demurrer to a plea is not limited to any particular ground, the court cannot be put in error for sustaining it, if the plea is subject to any one of the grounds of demurrer assigned.—*Louisville & N. R. Co. v. Wilson* (Ala.) 188.

§ 917. It will be presumed that demurrers filed, but not acted upon by the trial court, were waived.—*Higdon v. Garrett* (Ala.) 323.

§ 917. Where the judgment entry does not show that the court passed on demurrers, the court on appeal will not presume that it passed on them, and will not review the same.—*Crawford v. Simonton & Co.* (Ala.) 1024.

§ 928. The court on appeal cannot put the trial court in error as to an instruction directing the jury to find such damages as they deem reasonable, for the court on appeal must presume that the trial court previously instructed as to the proper elements of damages.—*Beard v. Hicks* (Ala.) 232.

§ 931. A final decree on findings of fact will not be reversed unless clearly erroneous.—*Sarasota Ice, Fish & Power Co. v. Lyle & Co.* (Fla.) 993.

**(F) Discretion of Lower Court.**

§ 969. The court's ruling in granting or refusing a view of the plans where an injury happened will not be reviewed on appeal.—*Louisville & N. R. Co. v. Wilson* (Ala.) 188.

§ 970. The trial court's discretion in the matter of allowing other testimony after a par-

der of the introduction of evidence will not be interfered with unless an abuse is shown.—*Atlantic Coast Line R. Co. v. Partridge* (Fla.) 634.

§ 974. The Supreme Court will not review the refusal to recommend a special verdict.—*Florida East Coast Ry. Co. v. Lassiter* (Fla.) 428.

**(G) Questions of Fact, Verdicts, and Findings.**

Review of criminal prosecutions, see Criminal Law, §§ 1158-1160.

§ 1002. Where the evidence is conflicting, verdict *held* entitled to great weight, both on the facts and quantum of damages.—*Harvey v. Harvey* (La.) 592.

§ 1004. A verdict for \$700 for placing a blind passenger with a first-class ticket in the smoking car, whereby he was nauseated and caused to vomit, *held* not so excessive as to require the interference of the Supreme Court, after approval by the trial court.—*Louisville & N. R. Co. v. Weathers* (Ala.) 268.

§ 1004. A verdict in a personal injury action, approved by the trial judge, *held* not excessive.—*Navailles v. Dielmann* (La.) 449.

§ 1004. The quantum of damages in a personal injury action will not be disturbed, unless manifestly excessive or inadequate.—*Taylor v. E. O. Palmer & Co.* (La.) 522.

§ 1005. That a verdict is merely against the preponderance of the evidence is insufficient to justify the reversal of an order denying a motion for a new trial because the verdict is contrary to the evidence.—*Birmingham Ry., Light & Power Co. v. Denison* (Ala.) 316.

§ 1005. Where the jury found for plaintiff, and the court refused to disturb the verdict, and the jury might well have found such verdict, it will not be disturbed.—*Phoenix Ins. Co. of Brooklyn, N. Y., v. Bryan* (Fla.) 576.

§ 1005. Contributory negligence is for the jury, and its verdict, approved by the trial court, will not be set aside, unless clearly wrong.—*Taylor v. E. C. Palmer & Co.* (La.) 522.

§ 1009. Finding of chancellor, supported by the evidence, will not be disturbed.—*Bothamly v. Queal* (Fla.) 415.

§ 1009. Where, in a suit to reform a deed, the evidence is conflicting, a finding for defendant will not be set aside.—*Prior v. Davis* (Fla.) 535.

§ 1009. Findings of chancellor, based on report of master, should not be disturbed, unless clearly erroneous.—*Mock v. Thompson* (Fla.) 673.

§ 1009. A decree based largely on questions of fact will not be reversed, unless clearly erroneous.—*Mock v. Thompson* (Fla.) 673.

§ 1009. Findings of a chancellor where the evidence is taken by a master should not be disturbed unless clearly erroneous.—*Sarasota Ice, Fish & Power Co. v. Lyle & Co.* (Fla.) 993.

§ 1010. Findings of the court on questions of fact, supported by evidence, will not be reviewed.—*Tennessee Fertilizer Co. v. City Council of Montgomery* (Ala.) 123.

§ 1010. An order discharging a garnishee on the facts will be affirmed, if there was sufficient evidence to support the finding of no indebtedness.—*Jenkins v. McGeever* (Ala.) 142.

§ 1010. Judgment of a district court, which is supported by the evidence, will not be reviewed.—*Basile v. Taranto* (La.) 649.

§ 1012. The constitutional jurisdiction of the Supreme Court over the facts imposes the duty of reversing a judgment manifestly contrary to the preponderance of the evidence.—*Von Eye v. Byrnes* (La.) 708.

§ 1015. In determining whether the trial court properly set aside the verdict for excessive damages, the question for determination is not whether the Supreme Court would have so ruled, sitting as a trial court, but whether the trial court, with its superior opportunities for determining the question, erred in its ruling.—*Cox v. Birmingham Ry., Light & Power Co.* (Ala.) 975.

§ 1017. A referee's findings upon questions of fact *held* entitled to the same weight as a verdict.—*Brown v. Bowie* (Fla.) 637.

§ 1019. Referee's finding *held* entitled to the same weight as a verdict.—*Atlantic Coast Line R. Co. v. Partridge* (Fla.) 634.

§ 1022. Decree of chancellor, dismissing the bill on the evidence without prejudice, will be affirmed, where no errors of law appear.—*Robertson v. Silver Springs & W. R. Co.* (Fla.) 677.

#### (H) Harmless Error.

Criminal prosecutions, see Criminal Law, §§ 1166-1173.

§ 1029. In view of evidence, any errors *held* harmless.—*Latham v. Boyles* (Ala.) 1001.

§ 1029. In an action on a contract which furnishes no basis for a recovery by plaintiff, errors as to pleading and evidence are immaterial.—*Stevenson & Hertzfeld v. Davis* (Ala.) 1023.

§ 1030. Where there was a failure of proof, though the parties were examined fully, erroneous rulings on pleas were not prejudicial.—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

§ 1040. If there was error in overruling a demurrer to a replication, it was harmless, where no testimony was offered to sustain the replication.—*Louisville & N. R. Co. v. Huffstutler* (Ala.) 146.

§ 1040. Error in sustaining a demurrer to a count was without injury where its legal effect was not changed by the amendment made to meet the demurrer.—*Green v. Bessemer Coal, Iron & Land Co.* (Ala.) 289.

§ 1040. No possible injury could have resulted from sustaining a demurrer to a plea, where the cause was tried on another plea putting in issue all matter that the former could have.—*Central of Georgia Ry. Co. v. Williams* (Ala.) 328.

§ 1040. Where a plea passed out on demurrer, the overruling of a demurrer to a special replication to it, if error, was harmless.—*Davis v. Simpson Coal Co.* (Ala.) 368.

§ 1040. Where a plea was so defective that it could not be cured by amendment, the sustaining of a general demurrer was harmless.—*Deleon v. Walter* (Ala.) 934.

§ 1040. Defendant was not prejudiced by the sustaining of a demurrer to the plea, where he had the benefit of the same matter in other pleas.—*Deleon v. Walter* (Ala.) 934.

§ 1040. Where a demurrer was interposed to a plea when a motion to strike out would have been the proper practice, but the court would have been justified in striking it out, the sustaining of the demurrer was harmless error.—*Hartford Fire Ins. Co. v. Hollis* (Fla.) 985.

§ 1041. In an action against a telephone company for negligence in transmitting a message, allowance of an amendment to the complaint *held* not beneficial or prejudicial to either party.—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

§ 1046. Remarks of trial court *held*, in part, of an instruction correcting them, not reversible error.—*Weinacker Ice & Fuel Co. v. Ott* 901.

§ 1048. On the issue whether a sale of merchandise was in fraud of creditors, the making of an objection to a question answered the negative *held* not erroneous.—*Montgomery Moore Mfg. Co. v. Leeth* (Ala.) 210.

§ 1048. In an action for injuries, the question, "What has plaintiff had to say about injury?" *held* not prejudicial, where the answer simply was that plaintiff complained of a day of his leg, etc., hurting him.—*Wester Car & Foundry Co. v. Bean* (Ala.) 1012.

§ 1050. In an action for the death of a traveler against an electric railroad company, evidence as to the number of cars operated on the line at the time of the accident *held* not prejudicial.—*Birmingham Ry., Light & Power Co. v. Morris* (Ala.) 198.

§ 1050. In an action against an electric trolley company for the death of a traveler, evidence as to the number of people traveling in defendant's cars at certain hours *held* not prejudicial to it.—*Birmingham Ry., Light & Power Co. v. Morris* (Ala.) 198.

§ 1050. Though, in an action for injuries sustained in a railroad crossing accident, certain evidence may not have been material or prejudicial, that it was of no detriment to defendant *held* not reversible error.—*Louisville & N. R. Co. v. Davaner* (Ala.) 146.

§ 1050. In an action for conversion of gaged property, the admission in evidence of mortgages other than the one under which the plaintiff claimed did not prejudice defendant, where no judgment was sought or obtained on any of any property not included in plaintiff's gage.—*Maddox v. Dunklin* (Ala.) 277.

§ 1050. Under the facts, *held*, admission of evidence could not be said to be harmless.—*Alabama Coal, Iron & R. Co. v. Kelly* (Ala.) 289.

§ 1050. An objection to testimony is not reversible error, where the witness has already been allowed to testify to the same matter without objection.—*Birmingham Paint & Roofing Co. v. Gillespie* (Ala.) 1032.

§ 1051. Error, if any, in the admission of certain evidence, *held* harmless, when the facts otherwise appeared.—*Napier v. Napier* (Ala.) 148.

§ 1051. Reversible error *held* not committed in overruling objections to questions, where the same evidence had already been given without objection.—*Napier v. Elliott* (Ala.) 148.

§ 1051. It is not error to overrule an objection to a question asked a witness who has previously without objection practically answered the question.—*New Connellsville Coke Co. v. Kilgore* (Ala.) 205.

§ 1051. In an action for rent of a boat, refusal to exclude a memorandum showing the days the boat was worked *held* not prejudicial to defendant.—*Dickens v. Murray & Phipps* (Ala.) 1019.

§ 1051. Any error in admitting testimony showing the agency of defendant's brother in taking the horse was harmless, where the defendant admitted that he sent his brother to take the horse.—*Garden v. Houston Bros.* (Ala.) 210.

§ 1053. An instruction that a chattel mortgage had been paid *held* to render harmless error in rulings on evidence as to the foreclosure or payment of the mortgage.—*Stevenson & Hertzfeld v. Davis* (Ala.) 41.

§ 1053. In an action on a life policy, error in admitting certain evidence tending to show that the premium had been paid by insured

not cured by a charge.—Fidelity Mut. Life Ins. Co. v. Satterfield (Ala.) 132.

§ 1053. Exclusion of evidence previously erroneously admitted cures the error.—Birmingham Ry., Light & Power Co. v. Morris (Ala.) 198.

§ 1056. Exclusion of evidence, in an action for causing the death of plaintiff's intestate, *held* not harmless error.—Lovelady v. Birmingham Ry., Light & Power Co. (Ala.) 96.

§ 1056. It is not reversible error to exclude immaterial evidence which could not affect the case one way or the other.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 1057. In trespass for the removal of timber and digging certain holes on the land, the exclusion of a deed to defendant *held* not cured by a concession that defendant was the owner of the timber on land described.—Wilmer Lumber Co. v. Eisely (Ala.) 225.

§ 1058. Any error in the exclusion of evidence *held* harmless, where witness testified without objection to the identical facts sought to be elicited.—Central of Georgia Ry. Co. v. Simons (Ala.) 50.

§ 1058. Error in sustaining an objection to a question was without injury, where the question called merely for a repetition of what witness had just said.—United States Cast Iron, Pipe & Foundry Co. v. Granger (Ala.) 159.

§ 1058. There is no available error in sustaining an objection to a question, where the witness subsequently answers the question.—United States Cast Iron, Pipe & Foundry Co. v. Granger (Ala.) 159.

§ 1058. Subsequent allowance in substance of a question erroneously excluded cures the error.—Birmingham Ry., Light & Power Co. v. Morris (Ala.) 198.

§ 1058. Sustaining objection to question *held* harmless, where the answer was given in full and not ruled out.—Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.) 958.

§ 1058. The error, if any, in sustaining objections to evidence, was cured by the court reversing its ruling and offering to the party the opportunity of introducing the evidence.—Davis v. Anderson (Ala.) 1002.

§ 1060. It was prejudicial error not to sustain objection to counsel's argument commenting on the opposite party's failure to produce a witness whose testimony would have been merely cumulative.—Jordan v. Austin (Ala.) 70.

§ 1061. If on the evidence a verdict for plaintiff could lawfully have been rendered, the direction of a verdict for defendant is error.—Bass v. Ramos (Fla.) 945.

§ 1064. Where plaintiff in ejectment was entitled to a verdict, the affirmative charge in his favor was not reversible error, though he could not recover the entire subject-matter claimed in the complaint.—Swift v. Doe ex dem. Williams (Ala.) 123.

§ 1064. An instruction on the issue whether a sale was fraudulent against creditors *held* not ground for reversal, though misleading.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 1064. *Held* not reversible error to give certain request by plaintiff in an action for the price of timber, though confused, indefinite, and uncertain.—Harris v. Basden (Ala.) 321.

§ 1066. Abstract charges are not reversible error, unless it is apparent that the jury were misled thereby.—Fleming v. Lunsford (Ala.) 921.

§ 1066. In a personal injury action by a passenger, the giving of certain charges on a question not in issue *held* harmless.—Birmingham Ry., Light & Power Co. v. Anderson (Ala.) 1021.

§ 1067. Where plaintiff was not entitled to recover punitive damages, the refusal of a request to charge on that subject was not prejudicial.—Sledge v. Western Union Tel. Co. (Ala.) 886.

§ 1068. Error in refusing a charge *held* cured by verdict.—Jordan v. Austin (Ala.) 70.

§ 1068. Where the jury found that appellant only was negligent, failure to instruct as to the joint negligence of appellant and another defendant could not have injured appellant.—Southern Hardware & Supply Co. v. Block Bros. (Ala.) 1036.

§ 1068. In an action against a street railroad for the death of a child struck by a car, the error in an instruction *held* not prejudicial.—Pascagoula St. Ry. & Power Co. v. Brondum (Miss.) 97.

#### (I) Error Waived in Appellate Court.

Criminal prosecutions, see Criminal Law, § 1178.

§ 1078. Assignments of error not insisted on in argument will not be considered.—St. Louis & S. F. R. Co. v. Savage (Ala.) 113.

§ 1078. An assignment of error not insisted on in appellant's brief will be treated as waived.—Tippett v. Gandy (Ala.) 331; McCrary v. Brown (Ala.) 402; Johnson v. Frederick (Ala.) 910.

§ 1078. Only those grounds of demurrer insisted on in argument will be considered by the Supreme Court.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

§ 1078. It is insufficient to repeat the error assigned, and state that the ruling of the court was erroneous; but counsel must call the court's attention to the specific points relied on.—Phoenix Ins. Co. of Brooklyn, N. Y., v. Bryan (Fla.) 576.

§ 1078. In passing on an assignment, the overruling of a motion for new trial, the Supreme Court will consider only such grounds thereof as are argued.—Phoenix Ins. Co. of Brooklyn, N. Y., v. Bryan (Fla.) 576.

§ 1078. Only such of the objections made to evidence in the court below as are argued will be considered by the Supreme Court.—Brown v. Bowie (Fla.) 637.

#### (J) Decisions of Intermediate Courts.

Criminal prosecutions, see Criminal Law, § 1179.

§ 1082. Objection that an officially signed statement of case and of the judgment rendered by a justice was not returned by him to the circuit court *held* waived, under Code 1907, § 4720, by not being made in the circuit court.—Andrews v. Burton (Ala.) 359.

§ 1088. It is unnecessary for the Supreme Court to pass upon the sufficiency of counts in a justice's court, where an appeal was taken and trial de novo had in the circuit court on a practically new complaint.—Central of Georgia Ry. Co. v. Williams (Ala.) 323.

§ 1092. Under Code 1896, § 2831, taxation of costs by the circuit court on certiorari to review the judgment of a justice of the peace *held* discretionary, and not subject to review.—Atlantic Coast Line R. Co. v. Saunders Hardware Co. (Ala.) 886.

§ 1094. Under the Constitution the Supreme Court will not review a decision of a Court of Appeal based on questions of fact.—Davenport v. T. B. Allen & Co. (La.) 433; *In re* T. B. Allen & Co., *Id.*

#### XVII. DETERMINATION AND DISPOSITION OF CAUSE.

Review of criminal prosecutions, see Criminal Law, §§ 1182, 1189.



**(A) Decision in General.**

§ 1123. Where members of court sitting on writ of error are equally divided, judgment of the lower court will be affirmed.—*Western Union Telegraph Co. v. Merritt* (Fla.) 621.

**(B) Affirmance.**

Review of criminal prosecutions, see Criminal Law, § 1182.

**(D) Reversal.**

Effect of reversal of order on liability for contempt for its violation, see Contempt, § 20.  
Review of criminal prosecutions, see Criminal Law, § 1189.

**(F) Mandate and Proceedings in Lower Court.**

§ 1203. On remand on reversal for want of jurisdiction over one of the defendants where he thereafter appears and admits all the allegations of the bill, an order allowing the use of the testimony taken on the former trial *held* not error.—*Sarasota Ice, Fish & Power Co. v. Lyle Co.* (Fla.) 993.

§ 1205. Where a decree was merely corrected in amount, the trial court on remand properly took the original date of the decree as a rest period from which to figure interest.—*Montgomery Iron Works v. Capital City Ins. Co.* (Ala.) 358.

§ 1206. A devolutive appeal from original judgment *held* not to affect judgment on appeal of third party, so as to authorize the trial judge to refuse to carry it into effect.—*Corbitt v. Hanson* (La.) 435; *In re Law*, Id.

§ 1206. In mandamus to compel the enforcement of a judgment, a contention that the moving party should have proceeded by rule *held* untenable.—*Corbitt v. Hanson* (La.) 435; *In re Law*, Id.

**XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.**

Liability of wife as surety for husband on appeal bond, see Husband and Wife, § 87.

**APPLIANCES.**

Defective and dangerous appliances, liability of master for injuries to servant, see Master and Servant, §§ 101-118.  
For transportation of passengers, sufficiency and safety, see Carriers, § 290.

**APPLICATION.**

For enactment of special or local law, notice of intention, see Statutes, § 8½.  
For public improvement, see Municipal Corporations, § 292.  
Of assets of partnership to liabilities, see Partnership, §§ 178, 186.  
Of instructions to case, see Criminal Law, § 814; Trial, §§ 248-253.

*For particular remedies or forms of relief.*

Allowance of appeal or writ of error, see Appeal and Error, § 361.  
Change of venue, see Criminal Law, §§ 134, 135.  
Continuance, see Criminal Law, § 603.  
Election between causes of action, counts, or defenses, see Pleading, § 369.  
Judgment by default, see Judgment, § 123.  
New trial, see Criminal Law, §§ 951-958.  
Sale of property of decedent, see Executors and Administrators, §§ 343, 349.  
Striking out pleading or defense. see Pleading, §§ 352-358.

**APPOINTMENT.**

Of executors or administrators, see Executors and Administrators, § 22.  
Of receivers for insolvent corporations, see Corporations, § 553.

**APPREHENSION.**

Of danger as defense to prosecution for homicide, see Homicide, §§ 116, 194.

**APPROPRIATION.**

Of property to public use, see Eminent Domain.

**APPROVAL.**

By engineer or other officer of work done under contract for public improvement, see Municipal Corporations, § 358.  
Of findings of referee, master, commissioner, or auditor, as affecting power of appellate court to review questions of fact, see Appeal and Error, § 1022.  
Of verdict by trial court as affecting power of appellate court to review questions of fact, see Criminal Law, § 1160.

**APPURTENANCES.**

Easements in general, see Easements.

**ARBITRATION AND AWARD.**

**III. AWARD.**

Sufficiency of plea of award as set-off, see Pleading, § 142.

**ARGUMENTATIVENESS.**

In instructions, see Criminal Law, § 807; Trial, § 240.

**ARGUMENT OF COUNSEL.**

In civil actions, see Trial, §§ 122, 131.  
In criminal prosecutions, see Criminal Law, §§ 706-730.

**ARRAIGNMENT.**

See Criminal Law, §§ 261-292.

**ARRAY.**

Challenge to array of jurors, see Jury, § 116.

**ARREST.**

See Bail.  
Homicide in making arrest, see Homicide, § 105.  
Illegal arrest, see False Imprisonment.

**II. ON CRIMINAL CHARGES.**

Warrant for arrest in criminal prosecutions, see Criminal Law, § 218.

**ARSON.**

§ 31. Hostilities between the families of the person whose dwelling is burned and those accused of the arson are admissible to show motive.—*Clinton v. State* (Fla.) 580.

**ASSAULT AND BATTERY.**

**I. CIVIL LIABILITY.**

(A) Acts Constituting Assault or Battery and Liability Therefor.

On passenger, liability of carrier, see Carriers, §§ 283, 284, 314.

§ 12. Provocation by insulting words may go in mitigation of damages for assault.—Harvey v. Harvey (La.) 592.

§ 13. The rule that, where a capital crime is attempted to be committed by force, it may be prevented by force, has been extended to other forcible felonies, such as burglary and arson.—Scheuermann v. Scharfenberg (Ala.) 335.

#### (B) Actions.

Action for assault on passenger by servants of carriers, see Carriers, § 314.

§ 34. Provocation by insulting words may go in mitigation of damages for assault.—Harvey v. Harvey (La.) 592.

### II. CRIMINAL RESPONSIBILITY.

Assault with intent to rape, see Rape, § 16.

#### (A) Offenses.

§ 54. Statement by accused held to constitute an aggravated assault or not, depending on other circumstances.—Cox v. State (Fla.) 875.

#### (B) Prosecution and Punishment.

§ 77. An indictment, while not good as one for assault and battery under Code 1906, § 1044, held good as one for common assault and battery.—State v. Spigener (Miss.) 977.

### ASSENT.

Of parties to contracts in general, see Contracts, §§ 94, 99.

Of parties to jurisdiction of court, see Appeal and Error, § 21.

### ASSESSMENT.

Of damages in general, see Damages, §§ 208, 216.

Of expenses of public improvements, see Municipal Corporations, §§ 407-446.

Of taxes, see Taxation, §§ 253, 347-499.

On members of mutual benefit insurance association, see Insurance, § 750.

### ASSETS.

Of partnership, see Partnership, §§ 178, 186.

### ASSIGNMENT OF DOWER.

See Dower, § 55.

### ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 719-754; Criminal Law, § 1129.

### ASSIGNMENTS.

For benefit of creditors, see Assignments for Benefit of Creditors.

In bankruptcy, see Bankruptcy, §§ 149, 151.

Of bills of lading, see Carriers, § 58.

#### I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

§ 24. In a cause of action for personal injuries surviving the claimant's death, an assignment by him of an interest therein is valid.—Wells v. Edwards Hotel & City Ry. Co. (Miss.) 628.

#### III. RIGHTS AND LIABILITIES OF PARTIES.

§ 93. Effect of an assignment of a claim for personal injuries stated.—Wells v. Edwards Hotel & City Ry. Co. (Miss.) 628.

### ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, §§ 149-191; Insolvency, § 73

#### I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Trusts for Creditors.

Multifariousness in pleading in an action to have mortgage declared assignment, see Equity, § 150.

#### IV. ADMINISTRATION OF ASSIGNED ESTATE.

§ 268. A committee elected by creditors to take charge of the business of the debtor does not have the authority of a syndic and cannot sue and hold a creditor bound who took no part in the proceedings.—Casanova v. Audubon Hotel Co. (La.) 714.

### ASSOCIATIONS.

Mutual benefit insurance associations, see Insurance, §§ 723-826.

### ASSUMPSIT, ACTION OF.

Particular implied contracts as grounds of action, see Account Stated; Money Lent; Work and Labor.

§ 5. Indebitatus assumpsit, under the common counts, cannot be maintained on a sealed instrument.—Smith v. Sharp (Ala.) 381.

§ 6. To maintain indebitatus assumpsit, plaintiff must have performed all of the stipulations of the contract on his part.—Smith v. Sharp (Ala.) 381.

§ 19. A common count for work and labor which fails to aver, as in Code 1896, p. 944, form 10, that the work and labor was done at defendant's request is demurrable.—McCrory v. Brown (Ala.) 402.

### ASSUMPTION.

As to facts by trial court in instructing jury, see Criminal Law, § 761; Trial, § 191.

Of risk by employé, see Master and Servant, §§ 203-222, 295.

### ATTACHMENT.

See Execution; Garnishment; Sequestration. Exemptions, see Exemptions.

#### I. NATURE AND GROUNDS.

(A) Nature of Remedy, Causes of Action, and Parties.

§ 1. In attachment, plaintiff seeks to subject the chattels to a satisfaction of his demand, and invokes judicial power to convert the chattels into a means of satisfaction.—Johnson v. New Enterprise Co. (Ala.) 911.

#### (B) Grounds of Attachment.

§ 30. Contemplated removal of a debtor from the state with his property, etc., held to authorize an attachment.—Grigsby Const. Co. v. Colly (La.) 855.

#### II. PROPERTY SUBJECT TO ATTACHMENT.

Exemptions, see Exemptions.

§ 63. Levy of an attachment on property conveyed by the defendant for a valuable consideration prior to the date of the levy held invalid.—Grigsby Const. Co. v. Colly (La.) 855.

## **V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.**

Right of purchaser at attachment sale to equitable relief against judgment in senior attachment, see Judgment, § 452.

## **VI. PROCEEDINGS TO SUPPORT OR ENFORCE.**

Collateral attack on judgment, see Judgment, § 518.

Persons entitled to equitable relief against judgment, see Judgment, § 452.

## **ATTENDANCE.**

Of witnesses, see Witnesses, § 10.

## **ATTESTATION.**

Acknowledgments in general, see Acknowledgment.

## **ATTORNEY AND CLIENT.**

Argument and conduct of counsel at trial, see Criminal Law, §§ 706-730; Trial, §§ 122, 131.

Attorneys as public officers, see District and Prosecuting Attorneys.

Disqualification of counsel to act as judge, see Judges, § 47.

Notice to attorneys of filing of stenographer's notes, see Appeal and Error, § 565.

Privileged communications, see Witnesses, § 204.

## **I. THE OFFICE OF ATTORNEY.**

### **(B) Privileges, Disabilities, and Liabilities.**

§ 17. Under Civ. Code, art. 3042, as amended by Acts 1870, p. 109, No. 67, and article 3064, an attorney may become a surety on his client's bail bond, notwithstanding a rule of court.—State v. Babin (La.) 825.

§ 17. Acts 1880, p. 18, No. 11, *held* not to prohibit an attorney from becoming surety on his client's bail bond.—State v. Babin (La.) 825.

## **II. RETAINER AND AUTHORITY.**

Admissions by attorney as to termination of relation, see Evidence, § 246.

## **IV. COMPENSATION AND LIEN OF ATTORNEY.**

### **(A) Fees and Other Remuneration.**

Attorney's fee in suit for specific performance of contract, see Specific Performance, § 129.

Interest on fees as element of costs, see Costs, § 159.

Jurisdiction of appellate court to protect attorney prosecuting action for contingent fee from settlement by parties, see Appeal and Error, § 456.

§ 133. An attorney's claim for services must rest on a contract of employment, express or implied, made with the person sought to be charged or his authorized agent.—Irvin v. Strother (Ala.) 969.

§ 107. In an action by an attorney for compensation for services in conducting litigation, *held* a question for the jury whether plaintiff was looking to defendant for compensation, or whether defendant understood that he was so doing.—Irvin v. Strother (Ala.) 969.

## **AUCTIONS AND AUCTIONEERS.**

Power of agent to sell through auctioneer, see Principal and Agent, § 103.

## **AUDITA QUERELA.**

Relief against judgment by equitable proceedings, see Judgment, §§ 419-461.

## **AUDITORS.**

City auditor, authority of council to remove Municipal Corporations, § 155.

## **AUTHENTICATION.**

Of documents offered in evidence, see Evidence, §§ 370, 372.

Of record for purpose of review, see Criminal Law, § 1105.

## **AUTHORITY.**

Of agents, see Principal and Agent, §§ 78-122.

Of executors or administrators, see Executors and Administrators, §§ 119-130.

Of justices of the peace, see Justices of Peace, § 44.

Of officers and agents of corporations in general, see Corporations, §§ 399-432.

Of partner to represent firm, see Partners, §§ 146, 156.

Of trustees, see Trusts, §§ 203, 243.

To make admission binding another, see Evidence, §§ 242-246.

## **AUTOMOBILES.**

On streets, liabilities for injuries, see Municipal Corporations, §§ 705, 706.

## **AUTREFOIS ACQUIT AND CONVICTED.**

See Criminal Law, §§ 178-197, 291, 292.

## **AVOIDANCE.**

Of contract, see Contracts, §§ 266, 270.

Of insurance policy, see Insurance, §§ 229-273.

Pleading matter in avoidance, see Pleading, § 136.

## **BAIL.**

### **II. IN CRIMINAL PROSECUTION.**

Presumption on appeal as to release on bail, Criminal Law, § 1144.

§ 39. If a person convicted of crime is large under bond, his whereabouts is the concern of his sureties alone, and they may permit him to go beyond the limits of the state.—v. Boasberg (La.) 162.

§ 43. The purpose of Const. Declaration of Rights, § 9, *held* to be to secure the right to bail in all cases except where it appears with reasonable certainty that accused is guilty of a capital offense.—Ex parte Nathan (Fla.) 38.

§ 43. In certain cases bail should be allowed to persons charged with a capital offense.—Ex parte Nathan (Fla.) 38.

§ 43. In habeas corpus by a person charged an accessory before the fact to murder to be admitted to bail, *held*, that upon the showing petitioner was entitled to bail.—Ex parte Nathan (Fla.) 38.

§ 49. On an application by a person charged with a capital offense to be admitted to bail, quantum of proof required declared.—Ex parte Nathan (Fla.) 38.

§ 49. On the application of a person charged with a capital offense to be admitted to bail, burden is on him to show that he is entitled thereto.—Ex parte Nathan (Fla.) 38.

§ 79. Accused, voluntarily appearing within time allowed for the continuance of a case, *held* entitled to have forfeiture of his bond set aside.—*State v. Berlin* (La.) 687.

§ 80. Code 1907, § 6351, *held* to supersede the common-law right of bail to arrest their principal without process.—*Gray v. Strickland* (Ala.) 152.

§ 80. Bail were entitled at common law to arrest their principal and surrender him without process.—*Gray v. Strickland* (Ala.) 152.

§ 90. Under Code 1906, § 1466, the forfeiture of bond *held* without authority under the evidence.—*McCaleb v. State* (Miss.) 555.

## BAILMENT.

*Particular species of bailments, and bailments incident to particular occupations.*

See Pawnbrokers; Pledges.

Carriage of goods, see Carriers, §§ 40-159.

§ 14. A gin company *held* not liable to the owner for the loss of a bale of cotton after it was baled and placed in the company's yard with notice to the owner; there being no showing of negligence.—*Batesville Gin Co. v. Whitten* (Miss.) 695.

§ 31. Mere delivery of a bale of cotton to a gin company, and failure of the owner to receive it, *held* not sufficient to make out a prima facie case of liability.—*Batesville Gin Co. v. Whitten* (Miss.) 695.

§ 35. A bailee has such special property in goods that he may sue for damage thereto.—*Atlantic Coast Line R. Co. v. Partridge* (Fla.) 634.

## BANKRUPTCY.

See assignments for Benefit of Creditors; Insolvency.

## II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

### (A) Jurisdiction and Course of Procedure in General.

§ 32. Where trustee in bankruptcy submits question of exemption to state court, the bankrupt before distribution of his assets may amend his schedule to claim exemptions.—*Harrelson v. Webb* (La.) 833.

### (B) Voluntary Proceedings.

§ 42. A partnership is a legal entity, which may be adjudged a bankrupt in either voluntary or involuntary proceedings, irrespective of any adjudication as to individual members of the firm.—*Lacey v. Cowan* (Ala.) 281.

§ 51. The bankrupt court, in proceedings to declare one partner a bankrupt, cannot declare the partnership or the other partner a bankrupt.—*Lacey v. Cowan* (Ala.) 281.

## III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

### (B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 149. Where one or more of partners, not including all, are adjudged bankrupt, the partnership property cannot be administered in the proceeding, unless by consent of the other partners.—*Lacey v. Cowan* (Ala.) 281.

§ 149. Proceeds of the property of a bankrupt partnership should first be appropriated to the payment of partnership debts, and the property of the individual estate should be appropriated first to the payment of individual debts.—*Lacey v. Cowan* (Ala.) 281.

§ 149. The trustee in bankruptcy of the estate of one partner cannot maintain an action to subject the funds of the partnership, so long as the partnership remains unsettled.—*Lacey v. Cowan* (Ala.) 281.

§ 151. A trustee in bankruptcy does not acquire any right other than what the bankrupt had.—*Blank v. Blank* (La.) 745.

### (C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 191. Under Act No. 128, p. 163, of 1894, rent *held* secured by lessor's privilege for one year, whether the premises be occupied or not the whole time by the officers in charge of the bankruptcy proceedings against lessee.—*I. Trager Co. v. Cavaroc Co.* (La.) 598.

## V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 399. Where trustee in bankruptcy submits question of exemption to state court, the failure of the bankrupt to make a claim in his schedule will not waive his homestead right.—*Harrelson v. Webb* (La.) 833.

§ 432. That a corporation has been adjudged a bankrupt does not relieve stockholders of debts contracted as partners.—*Virginia-Carolina Chemical Co. v. Fisher* (Fla.) 504.

## BANKS AND BANKING.

Evidence of other offenses in prosecution of defrauding bank, see Criminal Law, § 372.

## III. FUNCTIONS AND DEALINGS.

### (B) Representation of Bank by Officers and Agents.

§ 109. A bank cashier *held* not to have authority to mortgage or transfer the bank's assets.—*Bank of Gloster v. Hindman* (Miss.) 65.

§ 116. Knowledge of the bookkeeper of a firm of its dissolution *held* not notice to a bank of which the bookkeeper was the assistant cashier and bookkeeper.—*Morris v. First Nat. Bank* (Ala.) 137.

### (C) Deposits.

§ 148. That canceled checks returned to a depositor were, except the signature, in a handwriting entirely different from that of the depositor or his clerk, *held* to require him to notify the bank, and he could not recover for forged checks subsequently paid by it.—*Israel v. State Nat. Bank of New Orleans* (La.) 783.

§ 148. That the year was not filled out on a forged check *held* not sufficient to put the bank on inquiry so as to make it liable for its payment.—*Israel v. State Nat. Bank of New Orleans* (La.) 783.

### (D) Collections.

Admissions by cashier as evidence against bank, see Evidence, § 244.

## BAR.

Of action by former adjudication, see Judgment, §§ 540-584.

## BARROOMS.

See Intoxicating Liquors.

## BASTARDS.

## I. ILLEGITIMACY IN GENERAL.

Competency of wife as witness on question of paternity in prosecution for abandonment of wife and child, see Witnesses, § 61.

See Assault and Battery.

## BAWDY HOUSE.

See Disorderly House.

## BELIEF.

Of intent of deceased to take life of accused as affecting right of self-defense, see Homicide, § 194.

## BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance association, see Insurance, §§ 723-826.

## BENEFICIARIES.

Of trust, see Trusts.

## BENEFIT SOCIETIES.

See Insurance, §§ 723-826.

## BEQUESTS.

See Wills.

To charities, see Charities.

## BEST AND SECONDARY EVIDENCE.

See Criminal Law, § 398; Evidence, §§ 171-185.

## BETTERMENTS.

Public improvements, see Drains; Levees; Municipal Corporations, §§ 266-446.

## BIAS.

Of witness, ground for impeachment, see Witnesses, §§ 363-374.

## BILL.

Introduction and passage of legislative bills, see Statutes, §§ 8½-64.

## BILL IN EQUITY.

See Equity, §§ 145-153.

## BILL OF DISCOVERY.

See Discovery, § 3.

## BILL OF EXCEPTIONS.

See Criminal Law, §§ 1090-1092; Exceptions, Bill of.

## BILL OF EXCHANGE.

See Bills and Notes.

## BILL OF LADING.

See Carriers, §§ 58, 62.

## BILL OF PARTICULARS.

In civil actions in general, see Pleading, § 326. In criminal prosecutions, see Indictment and Information, § 121.

## BILL OF RIGHTS.

See Constitutional Law.

Alteration, see Alteration of Instruments. Authority of partner to make and indorse for firm, see Partnership, § 146. Bills of lading, see Carriers, §§ 58, 62. Notes of married woman, see Husband and Wife, § 85. Stipulations for confession of judgment, see Judgment, §§ 46, 53.

## I. REQUISITES AND VALIDITY.

(A) Form and Contents of Bills of Exchange, Drafts, Checks, and Orders.

Evidence of payment, admissions, see Evidence, § 244.

## III. MODIFICATION, RENEWAL, AND RESCISSION.

§ 140. Where machinery bought was not shipped until after the time agreed upon, and was accepted without objection, and payments made, and notes given for the balance, the delay in shipment was no defense to the notes. —Hyer v. York Mfg. Co. (Fla.) 435.

## IV. NEGOTIABILITY AND TRANSFER.

Bills of lading, see Carriers, § 58.

(A) Instruments Negotiable.

§ 164. Note construed, and held negotiable. —First Nat. Bank v. Alexander (Ala.) 45.

## V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(D) Bona Fide Purchasers.

§ 332. A transferee of notes securing a mortgage fraudulently given upon property which the mortgagor had agreed should be sold for the benefit of creditors of his firm held not a bona fide holder. —Union Garment Co., Limited, v. Newburger (La.) 740.

## VII. PAYMENT AND DISCHARGE.

Payment of forged or altered paper by bank, see Banks and Banking, § 148.

## VIII. ACTIONS.

Admissions as evidence, see Evidence, § 244. Competency of witnesses in action against estate of decedent, see Witnesses, § 139. Pleading conclusions, see Pleading, § 8.

§ 475. Under rule 65 of the rules of circuit court in common-law actions, held, that a plea in an action on notes by defendants as a partnership, simply denying that the notes were executed by defendants as a partnership, and not denying a joint liability, presents no defense. —Virginia-Carolina Chemical Co. v. Fisher (Fla.) 504.

§ 484. In an action on a negotiable note by the indorsee, a plea held a plea of payment in money. —First Nat. Bank v. Alexander (Ala.) 45.

§ 511. In an action on a note, evidence concerning certain work, introductory to testimony that the work was paid for and the money appropriated to the payment of the note sued on, held admissible. —First Nat. Bank v. Alexander (Ala.) 45.

§ 524. In an action on a note against the maker, plaintiff's introduction of the note corresponding with the complaint established a prima facie case. —Deleon v. Walter (Ala.) 934.

## BLASPHEMY.

§ 3. An affidavit charging use of profane language held required to state the particular pub-

Municipal departments in general, see Municipal Corporations, § 183.  
Poor-law boards, see Paupers, § 6.  
Review of tax assessments, see Taxation, §§ 474-493.  
School boards, see Schools and School Districts, § 53.

## BONA FIDE PURCHASERS.

Grantees in fraudulent conveyances, see Fraudulent Conveyances, § 169.  
Of bills or notes, see Bills and Notes, § 332.  
Of mortgaged property, see Chattel Mortgages, § 153.  
Of property sold on execution, see Execution, § 272.  
Of public lands, see Public Lands, § 152.  
Of real property in general, see Vendor and Purchaser, §§ 227-244.

## BONDS.

Drainage district bonds, see Drains, § 18.  
Levee bonds, deposit of proceeds of sale of, see Levees, § 32.  
To keep the peace, see Breach of the Peace, § 19.

*Bonds for performance of duties of trust or office.*

See Sheriffs and Constables, §§ 157, 171.  
County officers, see Counties, § 98.

*Bonds in judicial proceedings.*

See Bail; Injunction, § 235.  
Appeal or writ of error in general, see Appeal and Error, §§ 383, 465, 475.

## V. ACTIONS.

Effect of failure to verify denial of execution, see Pleading, § 291.

§ 122. Where a bond is the joint and several undertaking of two or more parties, the obligors may be sued severally or all jointly.—*Fidelity & Deposit Co. of Maryland v. Aultman* (Fla.) 991.

§ 124. In an action upon a bond containing conditions precedent to be performed by plaintiff, the declaration should allege performance of such conditions or a valid excuse.—*United States Fidelity & Guaranty Co. v. District Grand Lodge No. 27 of Grand United Order of Odd Fellows* (Fla.) 952.

§ 124. Method of pleading performance of conditions precedent and excuse for their non-performance stated, under Gen. St. 1906, § 1436.—*United States Fidelity & Guaranty Co. v. District Grand Lodge No. 27 of Grand United Order of Odd Fellows* (Fla.) 952.

§ 124. In an action on a bond, where the liability is limited, it is immaterial on demurrer that the ad damnum clause states an amount in excess of such liability.—*Fidelity & Deposit Co. of Maryland v. Aultman* (Fla.) 991.

§ 142. In an action on a bond, requested charges held properly refused as confusing.—*Fidelity & Deposit Co. of Maryland v. Aultman* (Fla.) 991.

## BOOKS.

Assessment books, see Taxation, § 415.

## BOOKS OF ACCOUNT.

Competency as evidence, see Evidence, § 354.  
Requirement of insurance policy as to keeping books by insured, see Insurance, § 335.

## BOUNDARIES.

See Fences.

Of counties, see Counties, § 16.

## I. DESCRIPTION.

§ 3. Distances in a description of land will always yield to fixed boundaries clearly established.—*Page v. Whatley* (Ala.) 116.

## BREACH.

Of conditions of bonds or undertakings in judicial proceedings, see Injunction, § 235.

Of conditions of insurance policies, see Insurance, §§ 282, 328-335, 723.

Of contract in general, see Contracts, §§ 295-322.

Of contract for transportation of passenger, see Carriers, §§ 275, 277.

Of contract of lease, see Landlord and Tenant, § 48.

Of contract of sale, see Sales, §§ 163, 176; Vendor and Purchaser, § 142.

Of covenant, see Covenants, § 130.

Of warranty in insurance policy, see Insurance, § 723.

## BREACH OF THE PEACE.

See Assault and Battery, §§ 54, 77.

Review of proceedings in intermediate appellate court, see Criminal Law, § 1179.

§ 19. Under Code 1906, § 1548, relating to peace bonds, jurisdiction held to lie in any county or justice district where the party makes the threats, or in which occurs the hostile action leading to the apprehension that the party charged intends to commit an offense against the person or property of another.—*Ford v. State* (Miss.) 497.

§ 20. In a proceeding under Code 1906, § 1548, relating to peace bonds, the court should solve any reasonable doubt in favor of the preservation of the peace and require the bond to be given, the amount thereof to be measured by the gravity of the situation and the condition of the parties.—*Ford v. State* (Miss.) 497.

§ 21. Under Code 1906, § 1548, relating to peace bonds, the submission of the issue to a jury on appeal to the circuit court held error; the trial being for the judge only.—*Ford v. State* (Miss.) 497.

## BRIBERY.

§ 6. An information for bribery held not fatally defective for failure to affirmatively allege certain matters.—*Tillman v. State* (Fla.) 675.

## BROKERS.

Insurance brokers, see Insurance, § 95.

Subject and title of statutes imposing license tax on money brokers, see Statutes, § 114.

## IV. COMPENSATION AND LIEN.

§ 40. The promise made by a landowner to a broker held without consideration.—*Cronin v. American Securities Co.* (Ala.) 915.

§ 42. That a broker employed to sell land had not taken out a broker's license held not to invalidate his contract.—*Smith v. Sharp* (Ala.) 381.

§ 44. An authority to sell land may be revoked at any time before sale, and the owner will not thereby incur any obligation to the

agent.—Cronin v. American Securities Co. (Ala.) 915.

§ 46. The owner of real estate, by employing an agent to effect a sale thereof, does not thereby preclude himself from employing other agents to sell it, or from selling it himself, provided he acts in good faith.—Smith v. Sharp (Ala.) 381.

§ 46. A broker *held* not entitled to commissions for sale of land.—Cronin v. American Securities Co. (Ala.) 915.

§ 54. A broker employed to sell land is entitled to his compensation, if he brings to the seller a purchaser able, ready, and willing to purchase on the terms named, or if he brings the parties together and a sale is afterwards consummated by the seller himself.—Smith v. Sharp (Ala.) 381.

§ 54. Agent *held* not entitled to commissions unless he produces a purchaser able, ready, and willing to buy on the terms specified.—Carter v. Owens (Fla.) 641.

§ 56. A broker employed to sell land is entitled to his compensation, if he brings to the seller a purchaser able, ready, and willing to purchase on the terms named, or if he brings the parties together and a sale is afterwards consummated by the seller himself.—Smith v. Sharp (Ala.) 381.

§ 57. One selling land to a purchaser introduced by the seller's broker for less than the terms named in the contract of employment waives the terms of the contract in that respect, and is liable for a reasonable commission.—Smith v. Sharp (Ala.) 381.

§ 65. The rule prohibiting a real estate agent from recovering compensation for selling property, where he was agent of both buyer and seller, applies unless both parties know of his inconsistent relation and consent thereto.—Green v. Southern States Lumber Co. (Ala.) 917.

§ 65. Agent to sell land *held* bound to disclose to his principal any material fact known to him.—Carter v. Owens (Fla.) 641.

§ 65. Broker, sending customer to his principal to negotiate directly, without communicating to the principal his knowledge that the customer was resolved to pay the price asked, *held* to forfeit any right to commissions.—Carter v. Owens (Fla.) 641.

§ 65. Evidence *held* insufficient to show fraudulent concealment of facts by broker so as to preclude him from recovering compensation for a sale of land as against the owner.—Furlow v. Benoit (La.) 785.

## V. ACTIONS FOR COMPENSATION.

§ 82. In an action by a broker for commissions, *held*, that no substantial variance existed between the pleading and proof.—Smith v. Sharp (Ala.) 381.

§ 85. Where an owner sells land to a purchaser introduced by the seller's broker for less than the terms named in the contract of employment, such contract is admissible in evidence, in an action by the broker for his commissions, as a basis for the ascertainment of reasonable compensation.—Smith v. Sharp (Ala.) 381.

§ 85. In an action for commissions for procuring a purchaser for realty, who, pursuant to an agreement with the owner, afterwards canceled the contract to purchase, a question to the purchaser claimed to have been procured, whether his habit was to abandon his obligations without notice, was properly excluded.—Green v. Southern States Lumber Co. (Ala.) 917.

## BROTHEL.

See Disorderly House.

## BURDEN OF PROOF.

In civil actions, see Evidence, § 96.  
Showing error on appeal or writ of error Appeal and Error, § 901.

## BURGLARY.

Charge of, as distinguished from larceny Larceny, § 38.

Liability of owner of store for injuries to glar caused by spring guns, see Trespass

## I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 3. To constitute breaking and entering storehouse with intent to commit a misdemeanor, accused must have intended to commit misdemeanor in the house; otherwise breaking and entering is a trespass only. kins v. State (Fla.) 582.

## II. PROSECUTION AND PUNISHMENT

Res gestæ, see Criminal Law, § 364.

§ 31. Evidence of the facts and circumstances on defendant's breaking and entering admissible.—State v. Perry (La.) 799.

§ 35. In a prosecution for breaking and entering with intent to kill, evidence of a connection between prosecutrix and another in defendant's presence *held* admissible to identify State v. Perry (La.) 799.

§ 42. Unexplained possession of property recently stolen does not create a conclusive law of guilt of accused.—Thompson v. (Fla.) 507.

§ 42. Possession of stolen property without warrant a conviction of entering building intent to steal.—Thompson v. State (Fla.)

§ 45. Criminal intent to commit a misdemeanor therein *held* not necessarily inferred from breaking and entering a storehouse. kins v. State (Fla.) 582.

§ 45. In a prosecution for breaking and entering with intent to kill, defendant's intention for the jury.—State v. Perry (La.) 799.

## BURNING.

Criminal responsibility, see Arson.

## BURNT-RECORD ACT.

See Records, § 17.

## BUSINESS.

Carrying on business, by foreign corporations in general, see Corporations, § 642.

Married women carrying on business, see Band and Wife, § 97.

Regulation of conduct of business as regulation of commerce, see Commerce, § 61.

## BYSTANDERS.

Summoning as jurors, see Jury, § 72.

## CALENDARS.

Computation of time, see Time.

## CALLS.

In deeds, see Boundaries, § 3.

## CANCELLATION OF INSTRUMENTS.

See Quieting Title; Reformation of Instruments.

Setting aside transfer, in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 200-299.

*Grounds for cancellation and cancellation or rescission of particular instruments by act of parties.*

Contracts of sale, see Vendor and Purchaser, § 102.

Insurance policies, see Insurance, § 229.

Tax deeds, see Taxation, § 805.

## I. RIGHT OF ACTION AND DEFENSES.

§ 18. A grantor *held* not estopped from setting up invalidity of the conveyance on the ground of fraud, undue influence, and lack of consideration.—*Martin v. Evans* (Ala.) 997.

§ 24. Previous tender of price *held* not required in a suit to set aside a sale for fraud.—*See v. Hackley, Hume & Joyce* (La.) 772.

§ 30. Under the facts, *held*, in a suit to cancel a deed, that defendant was responsible for conduct that amounted to duress and led to the conveyance.—*Martin v. Evans* (Ala.) 997.

## II. PROCEEDINGS AND RELIEF.

§ 60. The condition of a cause and pleading *held* such that a deed would be set aside, as sought by complainant. Code 1907, §§ 3163, 3754.—*Martin v. Evans* (Ala.) 997.

## CAPITAL.

Corporate capital in general, see Corporations, § 84.

## CAPTION.

Of petition for public improvement, see Municipal Corporations, § 294.

## CARELESSNESS.

See Negligence.

## CARNAL KNOWLEDGE.

See Rape; Seduction.

## CARRIERS.

As employers, see Master and Servant.

Construction, regulation, and operation of railroad in general, see Railroads.

Construction, regulation and operation of street railroads in general, see Street Railroads.

Construction, regulation, and operation of telegraph and telephone lines, see Telegraphs and Telephones.

## I. CONTROL AND REGULATION OF COMMON CARRIERS.

### (A) In General.

Denial of due process of law by regulations as to equipment of cars, see Constitutional Law, § 297.

Denial of equal protection of laws, see Constitutional Law, § 241.

Deprivation of property without due process of law, see Constitutional Law, § 297.

Laws relating to equipment of lumber cars as denial of right of acquiring, possessing and protecting property, see Constitutional Law, § 87.

Coast Line R. Co. (Fla.) 509.  
§ 10. The valid administrative orders of the railroad commissioners should be obeyed, and those subject thereto violate them at their peril.—*State v. Florida East Coast Ry. Co.* (Fla.) 425.

§ 15. Authority given railroad commissioners *held* to include the power to make reasonable regulations requiring facilities for making connections between different roads.—*State v. Florida East Coast Ry. Co.* (Fla.) 425.

§ 18. An order of the railroad commissioners will not be enforced though the carrier disregarded it before applying for relief to the railroad commissioners, where its enforcement will be injurious to the public and violate the carrier's constitutional rights.—*State v. Florida East Coast Ry. Co.* (Fla.) 425.

§ 18. If an order of railroad commissioners under changed conditions will operate arbitrarily, it will not be enforced.—*State v. Florida East Coast Ry. Co.* (Fla.) 425.

§ 18. In seeking relief from orders of the railroad commissioners, a carrier should apply to the railroad commissioners for modification before resorting to the courts.—*State v. Florida East Coast Ry. Co.* (Fla.) 425.

§ 18. Unreasonable regulations *held* not within the authority conferred upon the railroad commissioners and they will not be enforced by the courts.—*State v. Florida East Coast Ry. Co.* (Fla.) 425.

§ 18. Rules and regulations adopted by railroad commissioners *held* subject to review, not by appeal or writ of error, but in mandamus and other appropriate proceedings.—*State v. Florida East Coast Ry. Co.* (Fla.) 425.

## II. CARRIAGE OF GOODS.

Denial of due process of law by regulations as to equipment of cars, see Constitutional Law, § 297.

Denial of equal protection of laws by regulations as to equipment of cars, see Constitutional Law, § 241.

### (A) Delivery to Carrier.

§ 40. Carrier's duty to furnish reasonable adequate facilities *held* commensurate with the powers and privileges conferred on it and the just requirement of the public.—*State v. Florida East Coast Ry. Co.* (Fla.) 425.

### (B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 58. A transferee of a bill of lading *held* to acquire only the title of transferor to the goods described.—*First Nat. Bank v. Wilkesbarre Lace Mfg. Co.* (Ala.) 153.

§ 58. Under the facts, a bank *held* not liable to the purchaser of cotton for a deficiency in weight, where the bill of lading of the cotton was sent to the bank with draft attached.—*First Nat. Bank v. Wilkesbarre Lace Mfg. Co.* (Ala.) 153.

§ 62. A carrier, classifying goods received for shipment with knowledge of their character, and collecting the freight for the shipment and delivery of the goods under such classification, cannot avoid the contract, or its liability for failure to ship according to the contract, on the ground that the goods did not belong to the class named.—*St. Louis & S. F. R. Co. v. Cash Grain Co.* (Ala.) 81.

### (C) Custody and Control of Goods.

§ 76. The owner of crates of pears intrusted as a commissionman with other crates, such crates together making up a car, can sue for



any damage thereto.—Atlantic Coast Line R. Co. v. Partridge (Fla.) 634.

(E) **Delay in Transportation or Delivery.**  
Ancillary jurisdiction of equity to enforce reciprocal demurrage charges, see Equity, § 39.

§ 103. In an action against a carrier for failure to deliver freight within a reasonable time, a plea *held* bad.—St. Louis & S. F. R. Co. v. Cash Grain Co. (Ala.) 81.

(F) **Loss of or Injury to Goods.**

Opinion evidence in action for loss of or injuries to goods, see Evidence, § 472.

§ 123. The failure of a carrier to move a car load of lumber renders it liable for the loss of the lumber by its subsequent destruction by fire without the carrier's fault.—Green v. Louisville & N. R. Co. (Ala.) 937.

(H) **Limitation of Liability.**

§ 159. A stipulation in a bill of lading, limiting the time within which claims for damages shall be presented, is valid, provided the time fixed is reasonable.—Nashville, C. & St. L. Ry. v. H. M. Long & Son (Ala.) 130.

§ 159. A stipulation in a contract for the transportation of freight, limiting the time for presenting claims for damages, *held* invalid, because unreasonable.—Nashville, C. & St. L. Ry. v. H. M. Long & Son (Ala.) 130.

#### IV. CARRIAGE OF PASSENGERS.

(A) **Relation Between Carrier and Passenger.**

§ 245. In an action against a railroad company, where the complaint alleged the relation of carrier and passenger, and the proof showed the relation of master and servant, it was error to refuse affirmative charge for defendant.—Birmingham Ry., Light & Power Co. v. Stanfield (Ala.) 51.

§ 248. A reasonable rule may be enforced by a carrier in such an arbitrary manner as to make it liable in damages.—Louisville & N. R. Co. v. Berry (Fla.) 579.

(B) **Fares, Tickets, and Special Contracts.**

§ 249. Carrier *held* not entitled to demand 5 cents additional fare of a passenger.—Louisville & N. R. Co. v. Berry (Fla.) 579.

§ 249. Custom to permit a minister of the gospel to travel at a rate lower than that given to the general public, by a carrier, imposes upon a railroad no obligation to give such permission.—Illinois Cent. R. Co. v. Dunnigan (Miss.) 443.

(C) **Performance of Contract of Transportation.**

§ 275. A count in a complaint in an action by a passenger against a carrier *held* sufficient.—Louisville & N. R. Co. v. Weathers (Ala.) 268.

§ 277. In an action for damages for being put off at a wrong station, plaintiff *held* not entitled to recover punitive damages.—Yazoo & M. V. R. Co. v. Hughes (Miss.) 627.

(D) **Personal Injuries.**

Applicability of instructions to pleadings and issues, see Trial, § 251.

Application of instructions to case, see Trial, § 252.

§ 280. The law does not impose on carriers the duty of absolutely warranting the safety of passengers, and for casualties against which human sagacity cannot provide, nor the utmost prudence prevent, a carrier is not liable.—Irwin v. Louisville & N. R. Co. (Ala.) 62.

§ 283. The contract of carriage of female passengers implies that the carrier will protect

them against obscenity, immodest conduct, or wanton approach.—Birmingham Ry., Light & Power Co. v. Parker (Ala.) 55.

§ 283. The carrier's duty to protect female passengers from indecent assaults by its servants should not be frittered away by nice questions as to whether the servants were acting within the scope of their authority.—Birmingham Ry., Light & Power Co. v. Parker (Ala.) 55.

§ 284. General rule stated as to the duty and liability of carriers as to injuries to passengers by strangers.—Irwin v. Louisville & N. R. Co. (Ala.) 62.

§ 286. A station must be made safe for a passenger coming to take a train.—Illinois Cent. R. Co. v. Daniels (Miss.) 721.

§ 290. Carriers of passengers must provide vehicles as safe as skill and foresight can reasonably make them, and appliances must be kept in a safe and suitable condition; and if a passenger is injured by any defect or unsafe condition the carrier is liable.—Irwin v. Louisville & N. R. Co. (Ala.) 62.

§ 290. A carrier must provide cars and appliances of the most approved type in general use by others engaged in a similar occupation, and exercise a high degree of care to maintain and keep them in suitable repair and efficient for their purpose.—Irwin v. Louisville & N. R. Co. (Ala.) 62.

§ 297. As respects safety of passengers, a rate of speed may be dangerous and negligent.—St. Louis & S. F. R. Co. v. Savage (Ala.) 113.

§ 302. A railroad company *held* not to be liable for an injury to a passenger caused by a missile thrown through a car window, where there is no showing that such an assault or injury could have been reasonably anticipated at the time and place at which it happened.—Irwin v. Louisville & N. R. Co. (Ala.) 62.

§ 305. If a passenger's injury is the result of the concurring negligence of a stranger and the carrier, the latter is liable.—Irwin v. Louisville & N. R. Co. (Ala.) 62.

§ 314. An allegation in the complaint in a passenger's action for assault by the conductor *held* to sufficiently charge a wanton assault.—Birmingham Ry., Light & Power Co. v. Parker (Ala.) 55.

§ 314. An allegation in the complaint in a passenger's action that the conductor wantonly assaulted plaintiff by, etc., *held* to charge only one assault.—Birmingham Ry., Light & Power Co. v. Parker (Ala.) 55.

§ 316. In an action for injuries to a passenger, burden *held* on defendant to show that the wreck in which plaintiff was injured was not due to its negligence.—St. Louis & S. F. R. Co. v. Savage (Ala.) 113.

§ 317. In an action for injuries to a passenger, evidence that the train was behind time was admissible as tending to show that it was being operated at an unusual and immoderate rate of speed.—St. Louis & S. F. R. Co. v. Savage (Ala.) 113.

§ 317. The evidence called for by a question to a witness *held* to involve facts and purposes foreign to the issue.—St. Louis & S. F. R. Co. v. Savage (Ala.) 113.

§ 318. In an action by a passenger on an electric street car for personal injuries, evidence *held* to show that the company failed to use ordinary care.—Pensacola Electric Co. v. Alexander (Fla.) 673.

§ 318. Under Code 1906, § 1985, a carrier *held* required to clearly show how an injury to a passenger, injured by the running of a locomotive, occurred.—Easley v. Alabama Great Southern Ry. Co. (Miss.) 491.

§ 319. Passenger *held* entitled to punitive damages for conduct of a conductor.—*Yazoo & M. V. R. Co. v. Fitzgerald* (Miss.) 631.

§ 319. A recovery of \$2,500 damages for conduct of a railroad conductor towards a passenger *held* excessive.—*Yazoo & M. V. R. Co. v. Fitzgerald* (Miss.) 631.

§ 320. In an action for injuries to a passenger, the question whether the starting of the car was wanton *held* for the jury.—*Birmingham Ry., Light & Power Co. v. Moore* (Ala.) 115.

§ 320. Evidence, in an action by a passenger on an electric car for personal injuries, *held* to make the question of defendant's negligence one for the jury.—*Pensacola Electric Co. v. Alexander* (Fla.) 673.

§ 321. In an action for injuries to a street car passenger, an instruction *held* erroneous.—*Birmingham Ry., Light & Power Co. v. Moore* (Ala.) 115.

§ 321. Under the statute, a requested instruction, in an action by a passenger injured, that the burden of proof is on plaintiff to show that the accident was due to defendant's negligence, *held* properly refused.—*Pensacola Electric Co. v. Alexander* (Fla.) 673.

#### (E) Contributory Negligence of Person Injured.

§ 323. A passenger *held* authorized to assume the carrier will exercise the highest degree of care in providing for his safety.—*Illinois Cent. R. Co. v. Daniels* (Miss.) 721.

§ 327. A passenger, while going to the depot to take passage on a train scheduled to stop there at the very instant, may assume that a train on a parallel track will not be running in excess of the maximum speed limit, and that the carrier will not run its trains over the parallel track in such a way as to subject him to unusual danger.—*Illinois Cent. R. Co. v. Daniels* (Miss.) 721.

§ 327. Whether a passenger killed while running to a depot to catch a train was guilty of contributory negligence *held* to depend upon whether he exercised ordinary precaution in view of the circumstances.—*Illinois Cent. R. Co. v. Daniels* (Miss.) 721.

§ 333. Where a carrier, taking a passenger beyond his destination, stops the train and lets him off, he may assume that the place selected is reasonably safe for the purpose.—*Birmingham Ry., Light & Power Co. v. Anderson* (Ala.) 1021.

§ 347. It is not negligence per se for a passenger to fail to stop, look, and listen while going to the depot to take passage on a train scheduled to stop there at the very instant he goes there.—*Illinois Cent. R. Co. v. Daniels* (Miss.) 721.

§ 347. Whether a passenger running to a depot to catch a passenger train was guilty of contributory negligence in failing to stop, look, and listen before stepping on a parallel track *held* for the jury.—*Illinois Cent. R. Co. v. Daniels* (Miss.) 721.

### CARRYING ON BUSINESS.

In state by foreign corporation, see Corporations, § 642.

### CARS.

In general, see Carriers; Railroads.

### CATTLE.

See Animals.

Fence laws in general, see Fences.

Injuries to, by operation of railroad, see Railroads, §§ 439-446.

### CATTLE GUARDS.

Along railroad rights of way, see Railroads, § 103.

### CAUSE OF ACTION.

See Action; Attachment, § 1; Injunction, § 23.

### CERTIFICATE.

By engineer or other officer approving of work done under contract for public improvement, see Municipal Corporations, § 358.

Of record for purpose of review, see Criminal Law, § 1105.

### CERTIORARI.

#### I. NATURE AND GROUNDS.

§ 5. Certiorari will not be granted in general where there is an adequate remedy by appeal.—*Ex parte Dickens* (Ala.) 218.

§ 15. In the absence of statute, determinations on questions of fact by the trial court cannot be reviewed on certiorari.—*Ex parte Dickens* (Ala.) 218.

§ 15. Certiorari *held* available to review legal questions affecting the merits.—*Ex parte Dickens* (Ala.) 218.

§ 29. The question whether the district court found correctly in holding that certain parties were guilty of contempt in interfering with the receiver in charge of the property of a corporation will not be reviewed in the Supreme Court on application for certiorari.—*Blaise v. Security Brewing Co.* (La.) 816.

#### II. PROCEEDINGS AND DETERMINATION.

§ 39. Unless application for review of a judgment of a Court of Appeal be made within the delay allowed by Const. art. 101, the Supreme Court is prohibited from exercising such jurisdiction.—*Landry v. Ramos Lumber & Mfg. Co.* (La.) 593; *Aucoin v. Same* (La.) 594; *Simoneaux v. Same* (La.) 595.

§ 39. The delay within which an application for review of a judgment of a Court of Appeal must be made *held* to run from judgment in the Court of Appeal.—*Landry v. Ramos Lumber & Mfg. Co.* (La.) 593; *Aucoin v. Same* (La.) 594; *Simoneaux v. Same* (La.) 595.

§ 40. Supreme Court *held* without jurisdiction to review Court of Appeal judgment, where application is made after the delay allowed by Const. art. 101.—*Aucoin v. Ramos Lumber & Mfg. Co.* (La.) 594; *Simoneaux v. Same* (La.) 595.

§ 65. A trial on certiorari is not de novo.—*Ex parte Dickens* (Ala.) 218.

§ 66. It will be presumed that a judgment of a Court of Appeal was entered on the minutes on the same day it was rendered and filed.—*Landry v. Ramos Lumber & Mfg. Co.* (La.) 593.

### CESTUI QUE TRUST.

See Trusts.

### CHAIRMAN.

Of county board, see Counties, § 51.

### CHANCE.

Disposition of money or property by chance, see Lotteries.

### CHANCERY.

See Equity.

**CHANGE OF VENUE.**

See Criminal Law, §§ 134, 135.

**CHARACTER.**

Of accused or other persons, evidence in criminal prosecutions, see Criminal Law, § 379; Homicide, § 188.  
Of parties as determining jurisdiction of federal courts, see Removal of Causes, § 61.  
Of parties or other persons, evidence of in civil actions in general, see Evidence, § 106.  
Of witness, see Witnesses, §§ 337-358.

**CHARGE.**

Criminal accusation, see Indictment and Information.  
Instructions to jury, see Criminal Law, §§ 754-764, 778-823, 825-830, 844; Trial, §§ 191-205.  
Instructions to jury, right to take to consultation room, see Criminal Law, § 858.  
Of indebtedness on married women's separate property, see Husband and Wife, § 171.

**CHARITIES.****II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.**

§ 43. The courts will not take jurisdiction of matters concerning charitable associations, except to protect some property right.—Houston v. Howze (Ala.) 266.

**CHARTER.**

Corporate charters in general, see Corporations, § 38.

**CHASTITY.**

Libelous statements relating to, see Libel and Slander, § 155.

**CHATTEL MORTGAGES.**

See Pledges.  
Of married woman's separate property, see Husband and Wife, § 171.  
Right of chattel mortgagee to proceeds of sale by administrator, see Executors and Administrators, § 402.  
Transfers operating to hinder, delay, or defraud creditors in general, see Fraudulent Conveyances.

**I. REQUISITES AND VALIDITY.****(A) Nature and Essentials of Transfers of Chattels as Security.**

§ 5. Gen. St. 1906, § 2494, providing that all bills of sale or other instruments in writing conveying personal property to secure the payment of money shall be deemed mortgages, should be liberally construed to carry out the legislative intent.—Hull v. Burr (Fla.) 754.

§ 6. Agreement *held* not a mortgage, but a conditional sale.—Higdon v. Garrett (Ala.) 323.

§ 34. In case of doubt whether a written instrument was intended to be an absolute bill of sale, conditional sale, or a mortgage, equity will hold the transaction to be a mortgage.—Hull v. Burr (Fla.) 754.

**III. CONSTRUCTION AND OPERATION.****(D) Lien and Priority.**

§ 153. Under Code 1896, § 1009, a buyer of personal property in good faith for value and without notice of an unrecorded chattel mortgage thereon *held* to acquire title.—Dixie v. Harrison (Ala.) 284.

**IV. RIGHTS AND LIABILITIES OF PARTIES.**

§ 169. A bona fide buyer of personalty on which there was an unrecorded chattel mortgage *held* entitled to sue the mortgagee for conversion.—Dixie v. Harrison (Ala.) 284.

§ 172. A defense set up by defendant in detinue on a chattel mortgage *held* to have been authorized by Code 1907, § 3791.—Birmingham Paint & Roofing Co. v. Gillespie (Ala.) 1032.

§ 172. A defense pleaded by defendant in detinue on a chattel mortgage *held* available, though it was given to secure the performance of a contract by himself and his partners.—Birmingham Paint & Roofing Co. v. Gillespie (Ala.) 1032.

§ 177. In an action by a chattel mortgagee for conversion of the property, there was no error in admitting the original mortgages in evidence, where it appeared that the mortgage under which plaintiff claimed was given in renewal.—Maddox v. Dunklin (Ala.) 277.

§ 177. In an action by a chattel mortgagee for conversion, measure of damages determined.—Maddox v. Dunklin (Ala.) 277.

**VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.****(A) Rights and Liabilities of Parties.**

§ 220. Whether plaintiffs had given the mortgagor of certain mules unconditional authority to sell them *held* for the jury.—Stevenson & Herzfeld v. Whatley (Ala.) 41.

§ 220. In an action by mortgagees for conversion of certain mules, evidence *held* admissible on the issue of the mortgagor's authority to sell them.—Stevenson & Herzfeld v. Whatley (Ala.) 41.

**(B) Criminal Responsibility.**

§ 230. That proceeds only paid rent and laborers *held* no defense to selling a mortgaged crop without the mortgagee's consent.—Hooks v. State (Fla.) 586.

**IX. FORECLOSURE.**

§ 250. A chattel mortgage construed, and foreclosure *held* authorized on default in payment of either of the notes secured.—Gernert v. Limbach (Ala.) 903.

**CHATELS.**

Gift, see Gifts.  
Pledge, see Pledges.  
Sale, see Sales.

**CHEAT.**

See False Pretenses.

**CHECKS.**

In general, see Bills and Notes.

**CHILDREN.**

See Infants.  
Care required of children as against negligence of others in general, see Negligence, § 85.  
Care required of master as to infant servant, see Master and Servant, §§ 91, 153.  
Effect as against posthumous child of commencement of limitations against ancestor, see Limitation of Actions, § 80.

**CHOSE IN ACTION.**

Assignment of, see Assignments, § 24.

**CHURCHES.**

See Religious Societies.

**CIRCUMSTANTIAL EVIDENCE.**

Weight and sufficiency, see Evidence, § 587.

**CITATION.**

On appeal, see Appeal and Error, § 405.

**CITIES.**

See Municipal Corporations.

**CITIZENS.**

Citizenship as ground of jurisdiction of United States courts, see Removal of Causes, § 61.

Equal protection of laws, see Constitutional Law, §§ 209-245.

Privileges and immunities, see Constitutional Law, § 206.

**CITY TREASURER.**

Quo warranto to try title to office, see Quo Warranto, § 11.

**CIVIL ACTION.**

See Action.

**CIVIL RIGHTS.**

Constitutional guaranty of civil rights, see Constitutional Law, §§ 83, 87.

Constitutional guaranty of trial by jury, see Jury, §§ 10-28.

Denial of equal protection of laws, see Constitutional Law, §§ 209-245.

Deprivation of life, liberty, or property without due process of law, see Constitutional Law, §§ 284-301.

Privileges or immunities and class legislation, see Constitutional Law, § 206.

**CLAIMS.**

Against county, see Counties, § 204.

Against estate of decedent, see Executors and Administrators, §§ 221, 272.

Against exempt property, see Exemptions, § 76.

**CLERKS OF COURTS.**

§ 72. The penalty prescribed by Code 1907, § 2850, *held* not recoverable where it could not be said that the transcript was, because of the omission of certain words, so defective that the Supreme Court could not proceed thereon, and it did not appear that the decision of the court would have been different if such words had been included.—Holmes v. Lamberth (Ala.) 140.

**CLIENTS.**

See Attorney and Client.

**CLOUD ON TITLE.**

See Quieting Title.

**CODES.**

Construction, see Statutes, § 231.

**COLLATERAL ATTACK.**

On judgment, see Judgment, §§ 495, 518.

On partition, see Partition, § 108.

On validity of incorporation, see Corporations, § 29.

**COLLATERAL SECURITY.**

See Pledges.

**COLLATERAL UNDERTAKING.**

Application of statute of frauds, see Frauds, Statute of, § 26.

**COLLEGES AND UNIVERSITIES.**

Schools in general, see Schools and School Districts.

**COLLISION.**

Of street car with animals or vehicles, see Street Railroads, § 90.

**COLORED PERSONS.**

Abridgment of privileges or immunities of, see Constitutional Law, § 206.

Discrimination by reason of color as denial of equal protection of laws, see Constitutional Law, §§ 220, 221.

**COLOR OF TITLE.**

See Adverse Possession.

**COMBINATIONS.**

See Conspiracy.

**COMMERCE.**

Carriage of goods and passengers, see Carriers.

**II. SUBJECTS OF REGULATION.**

§ 41. Where accused ordered four quarts of liquor in Tennessee, two for himself and two for another, and the liquor was received in one box, the shipment became subject to the state laws when accused removed it from the box.—Vernon v. State (Ala.) 57.

**III. MEANS AND METHODS OF REGULATION.**

§ 61. Gen. St. 1906, §§ 2864, 2865, 2866, requiring a carrier to equip its cars furnished to haul lumber with supports sufficient to keep it firmly in place, *held* not to constitute a burden upon interstate commerce.—King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co. (Fla.) 509.

**COMMERCIAL PAPER.**

See Bills and Notes.

**COMMISSION.**

Drainage and reclamation commissions, see Drains, § 18.

Railroad commission, regulations as to connecting carriers, see Carriers, § 15.

Railroad commission, review of regulations, see Carriers, § 18.

Railroad commissioners, supervision of railroads as carriers, see Carriers, § 10.

**COMMISSIONERS.**

County commissioners, see Counties, § 51.

Railroad commissioners, regulations as to connecting carriers, see Carriers, § 15.

Railroad commissioners, review of regulations, see Carriers, § 18.

Railroad commissioners, supervision of railroads as carriers, see Carriers, § 10.

**COMMISSIONS.**

Of broker, see Brokers, §§ 40-65, 82, 83.

## COMMITTEE.

Assignees for benefit of creditors, see Assignments for Benefit of Creditors, § 268.

## COMMON CARRIERS.

See Carriers.

## COMMON COUNCIL.

See Municipal Corporations, § 97.

## COMMON COUNTS.

See Assumpsit, Action of.

## COMMON KNOWLEDGE.

Judicial notice of matters of common knowledge, see Evidence, §§ 14, 32.

## COMMON LANDS.

Joint estates in lands, see Tenancy in Common.

## COMMON LAW.

§ 14. Only the general principles of the common law which are adapted to the situation, government, and institutions of the state, and not inconsistent with the policy thereof, are of force.—*Scheuermann v. Scharfenberg* (Ala.) 335.

§ 17. English decisions, to be binding as evidence of the common law, must be clear and unequivocal.—*Ex parte Beville* (Fla.) 685.

## COMMON NUISANCE.

See Nuisance, §§ 72, 75.

## COMMON SCHOOLS.

See Schools and School Districts, § 53.

## COMMONWEALTH.

See States.

## COMMUNITY PROPERTY.

See Husband and Wife, § 274.

## COMPANIES.

See Corporations; Partnership.

## COMPARISON.

Of handwritings, see Criminal Law, § 491.

## COMPENSATION.

Compensatory damages, see Damages, §§ 40-62.  
For property taken for public use, see Eminent Domain, § 84.

*Of particular classes of officers or other persons.*

See Notaries, § 3.

Attorneys, see Attorney and Client, §§ 133, 167.  
Brokers, see Brokers, §§ 40-65, 82, 85.

County officers and agents, see Counties, § 74.  
Municipal officers, see Municipal Corporations, § 164.

## COMPENSATORY DAMAGES.

See Damages.

## COMPETENCY.

Of contradictory testimony, see Witnesses, § 406.

Of evidence, see Criminal Law, §§ 384, 390.

Of expert witnesses, see Criminal Law, Evidence, § 539.

Of impeaching testimony, see Witnesses Of juror, see Jury, §§ 90-116.

Of witnesses, see Witnesses, §§ 37-204.

## COMPETITION.

Contracts of municipal corporations to mitted to competition, see Municipal Conditions, § 330.

## COMPLAINT.

In civil actions, see Equity, §§ 145-153; ing.

In criminal prosecution, preliminary conference see Criminal Law, § 211.

In criminal prosecutions, see Indictment Information.

Of pain as part of *res gestæ*, see Evidence, § 127.

## COMPROMISE AND SETTLEMENT.

See Payment; Release.

Admissibility of evidence of offer to compromise as an admission, see Evidence, § 213.

## COMPUTATION.

Of period of limitation of civil actions, see Limitation of Actions, §§ 46-127.

Of time, see Time.

## CONCLUSION.

Effect of exceptions to pleadings as admission of conclusions of law, see Pleading, § 2.  
Of witness, see Criminal Law, §§ 448, 449.  
Evidence, §§ 471-501.

Pleading conclusions, see Pleading, § 8.

## CONCLUSIVENESS.

Of allegations or admissions on party pleading, see Pleading, § 36.

Of certificate of acknowledgment, see Acknowledgment, § 55.

Of election of remedy, see Election of Remedy, § 14.

Of judgment, see Judgment, §§ 668-715.  
Of verdicts and findings, see Appeal and Error, §§ 1002-1022.

## CONCURRENT JURISDICTION.

Of courts in general, see Courts, § 489.

## CONCURRENT REMEDIES.

See Election of Remedies.

## CONDEMNATION.

Taking property for public use, see Eminent Domain.

## CONDITIONAL SALES.

See Sales, §§ 465, 480.

## CONDITIONS.

*In contracts and conveyances.*

See Deeds, § 155; Gifts, § 41.

Insurance policies, see Insurance, §§ 283-335, 723.

Sale, see Sales, §§ 465, 480.

*Precedent to actions or other proceedings.*  
By stockholder against corporate officers or Corporations, § 320.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 60.  
 For price of land sold, see Vendor and Purchaser, § 303.  
 To cancel written instrument, see Cancellation of Instruments, § 24.  
 To recover possession of land, see Vendor and Purchaser, § 299.  
 To rescind contract, see Contracts, § 203.

## CONDUCT.

Of counsel at trial, see Criminal Law, §§ 706-730.  
 Of jury, see Criminal Law, § 858.  
 Of witness as ground of impeachment, see Witnesses, §§ 337-358.

## CONFEDERACY.

See Conspiracy.

## CONFESSION.

Of judgment, see Judgment, §§ 46, 53.  
 Pleading by way of confession and avoidance, see Pleading, § 136.

## CONFIDENTIAL COMMUNICATIONS.

Disclosure, see Witnesses, §§ 188, 204.

## CONFIDENTIAL RELATIONS.

See Brokers; Partnership; Principal and Agent; Trusts.  
 Disclosure of communications, see Witnesses, §§ 188, 204.

## CONFIRMATION.

Of tax title, see Taxation, § 805.

## CONFLICTING CLAIMS.

Determination of conflicting claims to real property, see Quieting Title.

## CONFLICT OF LAWS.

As to requisites of will, see Wills, § 70.  
 Conflicting jurisdiction of courts, see Courts, § 489.  
 Contracts in general, see Contracts, § 101.  
 Contracts for transmission and delivery of telegrams, see Telegraphs and Telephones, § 27.  
 Liability for negligence or default in transmission or delivery of telegrams, see Telegraphs and Telephones, § 27.

## CONJUGAL RIGHTS.

See Husband and Wife.

## CONSENT.

Judgment by, see Judgment, § 82.  
 Jurisdiction conferred by consent, see Appeal and Error, § 21.  
 Of parties to contracts in general, see Contracts, §§ 94, 99.

## CONSEQUENTIAL DAMAGES.

See Damages, §§ 40, 49.

## CONSIDERATION.

Of deed, see Deeds, § 18.  
 Of mortgage, see Mortgages, § 25.  
 Parol or extrinsic evidence to show nature of consideration of contracts, see Evidence, § 419.

Restoration of consideration on cancellation of instrument, see Cancellation of Instruments, § 24.

Restoration of consideration on rescission of contracts in general, see Contracts, § 203.

## CONSOLIDATION.

Of actions, see Action, § 57.

## CONSPIRACY.

Acts and declarations of conspirators as evidence against co-conspirators in general, see Criminal Law, § 424.

### I. CIVIL LIABILITY.

#### (B) Actions.

§ 19. In trespass and trover for a horse, which plaintiff claimed defendants conspired to defraud him of, by having one of them offer him a certain sum for worthless notes, whereby defendants got possession of the horse, evidence *held* admissible as to what the defendant who made the offer was worth.—*Darden v. Mann* (Ala.) 1033.

§ 21. In view of the allegations of the complaint, in trespass and trover for a horse which plaintiff claimed defendants conspired to defraud him of by inducing him to trade it for worthless notes, which a defendant agreed to purchase, *held*, that no one of the defendants was liable unless he aided and abetted in converting it pursuant to the conspiracy.—*Darden v. Mann* (Ala.) 1033.

## CONSTABLES.

See Sheriffs and Constables.

## CONSTITUTIONAL LAW.

Constitutional questions as ground of appellate jurisdiction, see Courts, § 224.  
 Status of states under Constitution of United States, see States, § 4.

#### Provisions relating to particular subjects.

See Indictment and Information, § 2; Intoxicating Liquors, § 17.

Enactment and validity of statutes, see Statutes, §§ 8½-64.

Subjects and titles of statutes, see Statutes, §§ 108-123.

### I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

Amendment relating to disposition of fines, see Fines, § 1.

§ 6. Power to amend or revise state Constitution *held* limited only by federal constitutional prohibitions.—*Louisiana Ry. & Navigation Co. v. Madere* (La.) 609.

§ 9. The railroad tax exemption granted by Const. 1898, art. 230, *held* not to violate any of the restrictions of the enabling act of 1896 (Laws 1896, p. 85, No. 52), and that act has no application to the constitutional amendment of 1904, granting a like exemption.—*Louisiana Ry. & Navigation Co. v. Madere* (La.) 609.

### II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

Operation of statute unconstitutional in part, see Statutes, § 64.

§ 12. Rules applicable in construing statutes apply, in general, in construing a Constitution.—*Mugge v. Warnell Lumber & Veneer Co.* (Fla.) 645.

§ 13. In construing a Constitution, the leading purpose should be to ascertain and effectuate the intent.—*Mugge v. Warnell Lumber & Veneer Co. (Fla.)* 645.

§ 14. Where words in a Constitution may import different meanings, they should have the meaning designed to be given them, as it appears by a fair consideration of the whole context.—*Mugge v. Warnell Lumber & Veneer Co. (Fla.)* 645.

§ 15. In determining the meaning of words in a Constitution, they should not be taken in conjunction with other words.—*Mugge v. Warnell Lumber & Veneer Co. (Fla.)* 645.

§ 16. In construing a constitutional amendment, it is proper to consider the circumstances which led to its adoption and the purpose designed to be accomplished.—*Board of Public Instruction of Polk County v. Board of Com'rs of Polk County (Fla.)* 574.

§ 24. A constitution may be impliedly amended.—*Board of Public Instruction of Polk County v. Board of Com'rs of Polk County (Fla.)* 574.

§ 24. Where there is a repugnancy between a constitutional amendment and some provision in the original, *held*, that the original must be deemed repealed.—*Board of Public Instruction of Polk County v. Board of Com'rs of Polk County (Fla.)* 574.

§ 24. "Amendment of Constitution" defined.—*Board of Public Instruction of Polk County v. Board of Com'rs of Polk County (Fla.)* 574.

§ 24. Prior constitutional provisions repugnant to amendment *held* controlled thereby.—*Board of Public Instruction of Polk County v. Board of Com'rs of Polk County (Fla.)* 574.

§ 24. Effect should be given to the intent of the lawmaking power, even if it results in a repeal or modification of an older repugnant provision of the Constitution.—*Board of Public Instruction of Polk County v. Board of Com'rs of Polk County (Fla.)* 574.

§ 24. To the extent that a fair construction of a constitutional amendment discloses repugnancy to an older provision, the amendment controls.—*Board of Public Instruction of Polk County v. Board of Com'rs of Polk County (Fla.)* 574.

### III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

#### (A) Legislative Powers and Delegation Thereof.

§ 50. There is no limit to the legislative power of the state government, except such as appears in the state or federal Constitution.—*State v. Bley (Ala.)* 263.

### IV. POLICE POWER IN GENERAL.

Regulation of carrier, see Carriers, § 1.  
Regulation of taxation, see Taxation, § 1.

### V. PERSONAL CIVIL AND POLITICAL RIGHTS.

§ 83. An order imprisoning a party for contempt for failure to pay over certain money *held* in violation of the constitutional provision forbidding imprisonment for debt.—*Ex parte Dickens (Ala.)* 218.

§ 87. The constitutional right of acquiring and protecting property *held* not infringed by valid governmental regulations of the use of property employed in a public service.—*King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co. (Fla.)* 509.

§ 87. Gen. St. 1906, §§ 2864, 2865, 2866, requiring a carrier to equip its cars furnished to haul lumber with supports sufficient to keep

it firmly in place, *held* not to deprive a carrier of the constitutional right of acquiring and protecting property.—*King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co. (Fla.)* 509.

§ 87. The permission given by Act No. 178, p. 250, of 1908, to electricians without a license to find employment with lighting and electric railway companies and the department of police and public buildings of New Orleans, while, if another electrician is called by another employer, he must produce a license, *held* repugnant to the constitutional requirement that all persons be protected in their right of property, including the right to earn a livelihood.—*State v. Gantz (La.)* 524.

### IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

Special or local laws, see Statutes, § 87.

§ 206. Laws 1908, p. 92, c. 102, authorizing a county to establish an agricultural high school for its white youth, to be supported by tax on all taxable property, *held* to abridge the privileges or immunities of a certain class of citizens and thus to contravene Const. U. S. Amend. 14, § 1.—*McFarland v. Goins (Miss.)* 493.

### X. EQUAL PROTECTION OF LAWS.

§ 209. The rule requiring classifications made by statutes to be reasonable has reference to those affected by a regulation, and not merely to the subject regulated.—*King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co. (Fla.)* 509.

§ 209. Where a regulation affects alike all similarly situated, a wide discretion is accorded the Legislature.—*King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co. (Fla.)* 509.

§ 220. Laws 1908, p. 92, c. 102, authorizing a county to establish an agricultural high school for its white youth, to be supported by tax on all taxable property, *held* to deny a certain class of citizens the equal protection of the laws, and thus to contravene Const. U. S. Amend. 14, § 1.—*McFarland v. Goins (Miss.)* 493.

§ 221. Exclusion of disreputable negroes as jurors *held* no ground of complaint in a criminal prosecution, whether against white or colored.—*State v. Lawrence (La.)* 406.

§ 230. The permission given by Act No. 178, p. 250, of 1908, to lighting and electric railway companies and the department of police and public buildings of New Orleans to employ electricians without a license, while others have no such right, *held* a denial of the equal protection of the laws.—*State v. Gantz (La.)* 524.

§ 240. Valid governmental regulations affecting property employed in a public service do not deny the equal protection of the laws.—*King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co. (Fla.)* 509.

§ 241. Gen. St. 1906, §§ 2864, 2865, 2866, requiring a carrier to equip its cars furnished to haul lumber with supports sufficient to keep it firmly in place, *held* not to deny the equal protection of the laws.—*King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co. (Fla.)* 509.

§ 245. Gen. St. 1906, § 3150, making a railroad liable for injuries to employés by coemployes, *held* not to deny the equal protection of the law, guaranteed by Const. U. S. Amend. 14.—*Florida East Coast Ry. Co. v. Lassiter (Fla.)* 428.

### XI. DUE PROCESS OF LAW.

§ 284. Act Sept. 30, 1903 (Gen. Acts 1903, p. 295) § 1, authorizing appeal by the tax commissioner from an order dismissing an assess-

ment proceeding, *held* not unconstitutional.—State v. Bley (Ala.) 263.

§ 284. Valuation of property for taxation is not such an exercise of judicial authority as involves the right of appeal to judicial tribunals.—State v. Bley (Ala.) 263.

§ 284. It is not necessary to due process of law in taxation proceedings that the taxpayer have a right to have the assessment reviewed by the courts or to appeal.—State v. Bley (Ala.) 263.

§ 296. Valid governmental regulations affecting property employed in a public service do not amount to a taking without due process of law.—King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co. (Fla.) 509.

§ 297. Gen. St. 1906, §§ 2864, 2865, 2866, requiring a carrier to equip its cars furnished to haul lumber with supports sufficient to keep it firmly in place, *held* not to deprive a carrier of property without due process of law.—King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co. (Fla.) 509.

§ 301. Gen. St. 1906, § 3150, making a railroad liable for injury to its employes by co-employes, *held* not to deny due process of law, in violation of Const. U. S. Amend. 14.—Florida East Coast Ry. Co. v. Lassiter (Fla.) 428.

## XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

§ 327. The requirement of the administration of justice without delay means without unreasonable and unnecessary delay.—Ex parte Ryan (La.) 385.

§ 327. Delays in proceedings upon an application for habeas corpus *held* not to amount to a "denial of justice," or show that the trial court would not try the case fairly and as promptly as possible.—Ex parte Ryan (La.) 385.

§ 329. A writ of error in a criminal case will not be dismissed when its purpose is to delay a review of the case in violation of the constitutional provision that justice shall be administered without delay.—Owen v. State (Fla.) 639.

## CONSTRUCTION.

Of statutes, see Statutes, §§ 209-241.

Parol or extrinsic evidence to aid construction of written instruments, see Evidence, § 450.

Of contracts, instruments, or judicial acts or proceedings.

See Dedication, § 64; Wills, §§ 457, 614.

Constitutional provisions, see Constitutional Law, §§ 12-24.

Contracts, see Contracts, §§ 147, 162.

Deeds, see Boundaries, § 3; Deeds, §§ 90-155.

Instructions, see Criminal Law, §§ 822, 823; Trial, § 295.

Judgment or order, see Judgment, § 525.

Leases, see Landlord and Tenant, §§ 40-48.

Mortgages, see Mortgages, § 142.

Pleadings, see Pleading, § 34.

Powers, see Powers, §§ 33, 43.

Public contracts, see Municipal Corporations, § 352.

Verdict or findings, see Criminal Law, § 893.

Warranties, see Sales, § 280.

Of buildings or other works.

See Street Railroads, § 36; Telegraphs and Telephones, §§ 15, 20.

Fences or cattle guards along railroad right of way, see Railroads, § 103.

## CONSTRUCTIVE NOTICE.

To grantee, of fraud as to creditors, see Fraudulent Conveyances, § 158.

To purchaser of land of claims or liens against property, see Vendor and Purchaser, § 232.

## CONSTRUCTIVE POSSESSION.

Under color of title, see Adverse Possession, §§ 100, 101.

## CONTEMPORANEOUS AGREEMENTS.

Evidence of parol agreements affecting written instruments, see Evidence, §§ 441, 442.

## CONTEMPT.

Disobedience of injunction, see Injunction, §§ 216, 228.

### I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 4. "Civil contempt," defined.—Ex parte Dickens (Ala.) 218.

§ 20. An order convicting a party for contempt for failing to perform an order directing the delivery of certain bonds to a receiver *held* erroneous.—Ex parte Dickens (Ala.) 218.

### II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

Habeas corpus to review proceedings, right to writ, see Habeas Corpus, § 22.

§ 30. The court has an inherent right to publish as for contempt the violation of an order lawfully made to maintain the efficiency of the law.—Ex parte Beville (Fla.) 685.

§ 33. The court's right to punish for contempt rests on its right to protect its dignity, whether the contempt is civil or criminal.—Ex parte Dickens (Ala.) 218.

§ 33. The estate of a firm being administered in a court which had appointed a receiver, it was the court's duty to adopt such measures as were necessary to enable the receiver to get possession of the firm's assets.—Ex parte Dickens (Ala.) 218.

§ 66. A proceeding for contempt is a collateral proceeding and cannot be reviewed on an appeal in the main case.—Ex parte Dickens (Ala.) 218.

§§ 66, 67. A commitment for contempt is reviewable on certiorari or, in proper cases by habeas corpus, and not by appeal.—Ex parte Dickens (Ala.) 218.

### III. PUNISHMENT.

Commitment until payment of amount equal to that wrongfully appropriated as imprisonment for debt, see Constitutional Law, § 83.

§ 72. Code 1907, § 3057, limiting punishment for contempt, *held* not to apply to civil contempts.—Ex parte Dickens (Ala.) 218.

§ 79. Where a party refused to comply with a chancery order, the court had jurisdiction to imprison him until he had complied, or the purpose of the order had been accomplished by other means.—Ex parte Dickens (Ala.) 218.

## CONTEST.

Of election, see Elections, § 307.

## CONTINUANCE.

Of criminal prosecutions, see Criminal Law, §§ 575-615.

Review of discretionary rulings on motion for, see Criminal Law, § 1151.

§ 7. The granting of a continuance is within the sound discretion of the court.—Birmingham Paint & Roofing Co. v. Gillespie (Ala.) 1032.



**CONTRACTORS.**

Independent contractors, see Master and Servant, § 316.

**CONTRACTS.**

Agreements within statute of frauds, see Frauds, Statute of.

Alteration, see Alteration of Instruments.

Assignment, see Assignments.

As subject of set-off or counterclaim, see Set-Off and Counterclaim, § 27.

Cancellation of written contracts, see Cancellation of Instruments.

Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, § 450.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, §§ 408, 419.

Parol or extrinsic evidence to show invalidity of written contract, see Evidence, §§ 434, 436.

Reformation, see Reformation of Instruments.

Separate or subsequent oral agreement affecting written contract, see Evidence, §§ 441-445.

Specific performance, see Specific Performance.

*Contracts of particular classes of persons.*

See Carriers, §§ 58, 62, 249; Corporations, §§ 487, 657; Husband and Wife, § 193; Municipal Corporations, §§ 330-374; Principal and Agent, §§ 101, 103; Railroads, § 131.

Foreign corporations, see Corporations, § 657.

Insurance companies, see Insurance.

Married women, see Husband and Wife, §§ 85-89.

Mutual benefit insurance association, see Insurance, § 723.

Officers and agents of banks, see Banks and Banking, §§ 109, 116.

Officers and agents of corporations in general, see Corporations, §§ 399-432.

*Contracts relating to particular subjects.*

See Insurance.

Compensation of broker, see Brokers, §§ 40-65.

Married women's separate property, see Husband and Wife, § 193.

Public improvements, see Municipal Corporations, §§ 330-374.

Standing timber, see Logs and Logging, § 3.

Transportation of goods, see Carriers, §§ 58, 62.

Transportation of passengers, see Carriers, § 249.

*Particular classes of express contracts.*

See Bailment; Bills and Notes; Bonds; Covenants; Deeds; Partnership; Sales.

Agency, see Principal and Agent.

Bills of lading, see Carriers, §§ 58, 62.

Insurance policies, see Insurance.

Leases, see Landlord and Tenant.

Sales of realty, see Vendor and Purchaser.

Sales of standing timber, see Logs and Logging, § 3.

Stipulations in actions, see Stipulations.

*Particular classes of implied contracts.*

See Account Stated; Assumpsit, Action of; Money Lent; Work and Labor.

*Particular modes of discharging contracts.*

See Payment; Release; Tender.

**I. REQUISITES AND VALIDITY.****(C) Formal Requisites.**

Of deed, see Deeds, § 62.

**(D) Consideration.**

Of mortgage, see Mortgages, § 25.

Parol or extrinsic evidence to show nature of consideration, see Evidence, § 419.

Restoration of consideration on cancellation of written contracts, see Cancellation of Instruments, § 24.

**(E) Validity of Assent.**

Parol or extrinsic evidence to show invalidity, see Evidence, §§ 434, 436.

To contract of sale, see Sales, §§ 38, 40.

To deed, see Deeds, §§ 69-78.

To release, see Release, § 17.

§ 94. While equity will not permit fraud and undue misrepresentation; yet where the parties rely on their own judgment, or are not unduly imposed on by others, it will leave them where they place themselves.—*Crooker v. White* (Ala.) 227.

§ 94. Misrepresentation amounting to fraud authorizing equity to rescind a contract defined.—*Crooker v. White* (Ala.) 227.

§ 94. Ignorance of the contents of a contract at time of signing may be set up in defense if the execution was procured by misrepresentation of the other party.—*Prestwood v. Carlton* (Ala.) 254.

§ 94. Innocently misrepresenting a fact by one party to a contract inducing another to sign it held to be a fraud.—*Prestwood v. Carlton* (Ala.) 254.

§ 99. Fraudulent representations justifying the cancellation of a contract must be established by clear and convincing proof, and equity cannot grant relief on a mere preponderance of the evidence.—*Crooker v. White* (Ala.) 227.

**(F) Legality of Object and of Consideration.**

Contracts negotiated, executed or performed on Sunday, see Sunday, § 13.

§ 101. Provisions in a contract made in another state held enforceable only to the extent that the contract is lawful in the state where it is sought to enforce it.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 136. An executory contract unlawful when made or contracting for the doing of an unlawful act, is not enforceable by either party.—*O'Byrne v. Henley* (Ala.) 83.

**II. CONSTRUCTION AND OPERATION.**

Effect of express contract on implied obligation to pay for services rendered and materials furnished incident thereto, see Work and Labor, § 14.

*Particular classes of contracts.*

See Chattel Mortgages, § 153; Mortgages, §§ 142, 151.

Deeds, see Boundaries, § 3; Deeds, §§ 90-155.

Leases, see Landlord and Tenant, §§ 40-48.

Public contracts, see Municipal Corporations, § 352.

Warranties, see Sales, § 280.

**(A) General Rules of Construction.**

Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, § 450.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, §§ 408, 419.

Separate or subsequent oral agreement affecting written contract, see Evidence, §§ 441-445.

§ 147. Rules for construing written contracts so as to reach the intent of the makers as disclosed by the entire instrument stated.—*Hull v. Burr* (Fla.) 754.

§ 162. Where two sentences in a contract appear to conflict, they should be construed to-

gether.—Union Ferry Co. v. Southern Improvement & Ferry Co. (La.) 704.

§ 162. Lessee of a ferry *held* not bound to pay the retiring lessee for a sidewalk and pavement for which the retiring lessee was not entitled to be paid under his lease.—Union Ferry Co. v. Southern Improvement & Ferry Co. (La.) 704.

#### (E) Conditions.

In insurance policies, see Insurance, §§ 282, 328-335, 723.

### IV. RESCISSION AND ABANDONMENT.

Cancellation of written contracts in equity, see Cancellation of Instruments.

Recovery on quantum meruit for part performance of services where contract is rescinded or abandoned, see Work and Labor, § 14.

Rescission of contract of sale, see Vendor and Purchaser, § 102.

Rescission of insurance policy, see Insurance, § 229.

§ 266. A party who has been fraudulently betrayed into making a contract, may resume possession of the property on returning that which he himself has received.—Duy v. Higdon (Ala.) 878.

§ 270. One seeking to rescind a contract must be reasonably diligent, and must allege precisely the basis of the complaint.—Duy v. Higdon (Ala.) 878.

### V. PERFORMANCE OR BREACH.

Enforcement of specific performance, see Specific Performance.

Measure of damages for breach, see Damages, § 123.

Recovery on quantum meruit on part performance where contract for services is rescinded or abandoned or full performance is prevented, see Work and Labor, § 14.

#### Particular classes of contracts.

See Mortgages, §§ 298, 311.

Conditions in bonds or undertakings in judicial proceedings, see Injunction, § 235.

Conditions in insurance policies, see Insurance, §§ 328-335, 723.

Employment of broker, see Brokers, §§ 54-57.

Leases, see Landlord and Tenant, § 48.

Sales, see Sales, §§ 163, 176; Vendor and Purchaser, § 142.

Transportation of passengers, see Carriers, §§ 275, 277.

With municipal corporation, see Municipal Corporations, §§ 356-363.

§ 295. As to a building contract, the contractor may sue where he can show a substantial performance.—Walstrom v. Oliver-Watts Const. Co. (Ala.) 46.

§ 303. A contract to repair a locomotive construed, and *held* to bind plaintiff to put the locomotive in complete salable condition for \$1,250.—Marx v. Kilby Locomotive & Machine Works (Ala.) 136.

§ 303. Contractors for painting defendant's house *held* not justified in abandoning the contract.—Maxwell & Delehomme v. Moore (Ala.) 882.

§ 304. The mere occupancy of a building and part payment, without more, *held* not an acceptance of the work as done in compliance with the contract.—Walstrom v. Oliver-Watts Const. Co. (Ala.) 46.

§ 304. Unauthorized acceptance of work by an architect *held* not to waive owner's right to damages for failure to fully perform.—Walstrom v. Oliver-Watts Const. Co. (Ala.) 46.

§ 305. An owner may by act or word, of a failure to act or speak, accept partial performance and render himself liable on a quantum meruit, less such damages as he may sustain from the contractor's breach.—Walstrom v. Oliver-Watts Const. Co. (Ala.) 46.

§ 319. That which will make an owner liable on a quantum meruit *held* not necessarily to waive his right to recoup damages for the contractor's breach.—Walstrom v. Oliver-Watts Const. Co. (Ala.) 46.

§ 319. Default in compliance with supplemental contract *held* not to affect rights of party in original contract.—Louisiana-Texas Oil & Pipe Line Co. v. Atlanta Oil & Gas Co. (La.) 406.

§ 322. In an action for breach of contract to repair a locomotive, evidence as to the cost of such repair and defendant's reason for failing to complete the work *held* immaterial.—Marx v. Kilby Locomotive & Machine Works (Ala.) 136.

§ 322. In an action for work and materials done and furnished in the construction of a building, certain evidence *held* admissible under the issues to show an alteration of the contract by defendants' agreement and acquiescence, pursuant to a provision permitting alterations by consent of the parties.—Fleming v. Lunsford (Ala.) 921.

### VI. ACTIONS FOR BREACH.

Actions of assumpsit, see Assumpsit, Action of Damages, measure, see Damages, § 123.

Dismissal of action as to one or more codefendants, see Dismissal and Nonsuit, § 26.

Distinguished from action on tort, see Action, § 27.

Effect of express contract on right to recover on quantum meruit, see Work and Labor, § 14.

Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, § 450.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, §§ 408, 419.

Parol or extrinsic evidence to show invalidity of contract, see Evidence, §§ 434, 436.

Separate or subsequent oral agreement affecting written contract, see Evidence, §§ 441-445.

Statutory limitations, see Limitation of Actions, §§ 46, 55.

§ 346. Variance between contract sued on and that offered in evidence *held* immaterial.—Harris v. Basden (Ala.) 321.

§ 346. Plaintiff must recover on the contract alleged.—Green v. Southern States Lumber Co. (Ala.) 917.

### CONTRADICTION.

Of witness, see Witnesses, §§ 405, 406.

### CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 80, 85, 117.

### CONTROVERSY.

Amount in controversy as affecting jurisdiction of courts, see Courts, § 121; Justices of the Peace, § 44.

Want of actual controversy ground for denying mandamus, see Mandamus, § 16.

### CONVERSION.

Wrongful conversion of personal property, see Trover and Conversion.

## CONVEYANCES.

Absolute deed as mortgage, see Mortgages, §§ 32, 33.  
Application of statute of frauds, see Frauds, Statute of, §§ 56, 75.  
Conclusiveness, as against grantee, of judgment against grantor, see Judgment, § 682.  
Contracts to convey, see Vendor and Purchaser.  
Declarations by grantor as evidence against grantee or subsequent purchasers, see Evidence, § 230.  
Description of boundaries, see Boundaries.  
Estoppel by deed, see Estoppel, §§ 38, 39.  
Parol or extrinsic evidence to show invalidity, see Evidence, §§ 434, 436.  
Reformation, see Reformation of Instruments.  
Separate or subsequent oral agreement affecting conveyance, see Evidence, §§ 441-445.  
Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

### *Conveyances by or to particular classes of persons.*

Life tenants, see Life Estates, § 23.  
Married women, see Husband and Wife, § 193.  
Purchasers at tax sales, see Taxation, § 765.

### *Conveyances of particular species of, or estates or interests in, property.*

See Easements, § 14.  
Married women's separate property, see Husband and Wife, § 188.  
Personal property in general, see Chattel Mortgages; Sales.  
Public lands, see Public Lands, § 152.  
Real property in general, see Deeds; Mortgages; Vendor and Purchaser.  
Standing timber, see Logs and Logging, § 3.

### *Particular classes of conveyances.*

See Assignments; Assignments for Benefit of Creditors; Chattel Mortgages; Deeds; Mortgages.

Tax deeds, see Taxation, § 765.

## CONVICTS.

Competency of dying declaration of ex-convict, see Homicide, § 213.  
Nature and extent of punishment, see Criminal Law, § 1218.  
Statutory provisions as to working out costs of prosecution, see Costs, § 285.

§ 13. A convict, sentenced to hard labor for a specified number of days at 30 cents a day to pay costs, as provided by Code 1896, § 5426, held not entitled to recover from the county the difference between such rate and the rate paid by the convict contractor to the county under a contract executed pursuant to Code 1896, §§ 4520-4545.—Bibb County v. Ward (Ala.) 907.

## CORN.

Exemption of, for use for current year, see Exemptions, § 39.

## CORPORATIONS.

### *Particular classes of corporations.*

See Carriers; Municipal Corporations; Railroads; Religious Societies.  
Banks, see Banks and Banking.  
Insurance companies, see Insurance.  
Mutual benefit insurance associations, see Insurance, §§ 723-826.  
School districts, see Schools and School Districts, § 53.  
Street railroad companies, see Street Railroads.  
Telegraph or telephone companies, see Telegraphs and Telephones.

## I. INCORPORATION AND ORGANIZATION.

§ 29. The existence of a corporation generally be tested by a direct proceeding that purpose, as to vacate its charter, officers, etc.—Rudolph v. City of Elyton 80.

## II. CORPORATE EXISTENCE FRANCHISE.

§ 38. A stockholder consenting to an amendment of the charter is concluded thereby; *ananas v. Audubon Hotel Co. (La.) 714.*

## IV. CAPITAL, STOCK, AND DIVIDENDS.

### (B) Subscription to Stock.

§ 84. Amendment of corporate chart not a radical change having the effect of leasing a stockholder from his subscription; *Casanas v. Audubon Hotel Co. (La.) 71*

## V. MEMBERS AND STOCKHOLDERS.

### (A) Rights and Liabilities as to Corporation.

Insurable interest of stockholder in corporate property, see Insurance, § 115.

### (D) Liability for Corporate Debts and Acts.

§ 255. Where a creditor of a corporation, the corporation, and garnishes a stockholder an unpaid balance on his stock, the burden on the creditor to show that there is so due on the stock.—*Trotter Bros. v. (Ala.) 130.*

§ 255. A stockholder, who purchases stock from the original holder, is not liable for garnishment in a suit against the corporation unless the original holder has not purchased the stock; and it is immaterial what the purchaser paid the original holder.—*Trotter Bros. v. Blount (Ala.) 130.*

§ 255. Evidence in a suit against a corporation, in which one of its stockholders was garnished, held insufficient to show that the corporation owes the corporation from the stockholder on the stock, which he had transferred to the garnishee.—*Trotter Bros. v. (Ala.) 130.*

## VI. OFFICERS AND AGENTS.

Of insurance companies, see Insurance,

### (C) Rights, Duties, and Liabilities of Officers and Members of Corporation and Its Members.

§ 310. The law does not require the presence of a private corporation to reside in the county of its domicile, nor does it forbid the corporation ministering its affairs through agents or attorneys.—*Semple v. Frisco Land Co. (La.) 619.*

§ 320. A stockholder, suing a corporation, is not an officer for an accounting by the corporation; not to show an excuse for not applying to the stockholders as a body to redress the wrong complained of.—*Hagood v. Smith (Ala.)*

§ 320. A stockholder held not entitled to sue in his own name to redress wrongs committed against a corporation, without first seeking relief within the corporation itself.—*Ha Smith (Ala.) 374.*

## VII. CORPORATE POWERS AND LIABILITIES.

Of banks, see Banks and Banking, §§ 1

### (A) Extent and Exercise of Powers and Liabilities.

§ 370. A corporation possesses only those powers which its charter confers on it

expressly or by implication.—Robert Gair Co. v. Columbia Rice Packing Co. (La.) 8.

§ 370. Implied powers of corporation defined.—Robert Gair Co. v. Columbia Rice Packing Co. (La.) 8.

§ 387. An ultra vires contract, like any other contract, may be impeached as in fraud of creditors.—Bank of Berwick v. George Vinson Shingle & Mfg. Co., Limited (La.) 823.

**(B) Representation of Corporation by Officers and Agents.**

Bank officers and agents, see Banks and Banking, §§ 109, 116.

Declarations by officers and agents as evidence against corporation, see Evidence, § 244.

Notice to officer or agent of insurance company as notice to company, see Insurance, § 95.

§ 399. Persons dealing with the president of a corporation held entitled to assume that he had been actually invested with certain powers.—Robert Gair Co. v. Columbia Rice Packing Co. (La.) 8.

§ 416. A corporation held without implied power to guaranty the contracts of another corporation.—Robert Gair Co. v. Columbia Rice Packing Co. (La.) 8.

§ 432. Evidence held to show that the guaranty of a corporation, given by its secretary, was given with the knowledge and acquiescence of the president and directors.—Robert Gair Co. v. Columbia Rice Packing Co. (La.) 8.

§ 432. The authority of a subordinate agent of a corporation may be established by proof of the usage which the corporation had permitted to grow up in its business with the acquiescence of the board of directors charged with the duty of supervising and controlling the business.—Robert Gair Co. v. Columbia Rice Packing Co. (La.) 8.

**(C) Property and Conveyances.**

Of religious societies, see Religious Societies, § 20.

**(D) Contracts and Indebtedness.**

§ 487. Contracts made by a corporation beyond the scope of its express or implied powers are void.—Robert Gair Co. v. Columbia Rice Packing Co. (La.) 8.

**(E) Torts.**

*Particular classes of corporations or associations.*

See Carriers, §§ 103, 123, 159, 280-321; Railroads, §§ 113, 114, 260, 297, 310-351, 355-396, 439-446, 459, 484; Street Railroads, §§ 81-118.

**(F) Civil Actions.**

Declarations by officers and agents as evidence against corporation, see Evidence, § 244.

Multifariousness in pleading, see Equity, § 150.

*By or against particular classes of corporations or associations.*

See Carriers, §§ 76, 103, 275, 277, 314-321, 347; Railroads, §§ 114, 297, 344-351, 394, 396, 439-446, 478-484; Street Railroads, §§ 110-118.

Electric companies, see Electricity, § 19.

Insurance companies, see Insurance, §§ 624-665.

Telegraph or telephone companies, see Telegraphs and Telephones, § 20.

§ 503. Under Code 1896, § 4207, as amended by Acts 1903, p. 182, an action by an administrator for personal injuries resulting in death must be brought either in the county where the injury occurred or where the plaintiff resides, notwithstanding Const. 1901, §

232.—Alabama Great Southern R. Co. v. Ambrose (Ala.) 1030.

§ 509. Citation in garnishment addressed to officers of unnamed corporation held not effective as against the corporation.—Bank of Monroe v. Ouachita Valley Bank (La.) 718.

§ 522. Under Code 1907, § 5303, the court rendering a judgment against a corporation held presumed, in view of a return of the sheriff and the wording of the decree, to have had jurisdiction of the defendant by proper service.—Roman v. Morgan (Ala.) 273.

§ 522. Under Code 1907, § 5303, to sustain a default judgment against a corporation, the record must show that the court ascertained, by proof that the person served was an officer or agent of the corporation.—Roman v. Morgan (Ala.) 273.

**VIII. INSOLVENCY AND RECEIVERS.**

Certiorari to review orders in proceedings for obstructing receiver, see Certiorari, § 29.

Necessity of affidavit on appeal from orders refusing to appoint receiver, see Appeal and Error, § 361.

Prohibition to review orders in proceedings for obstruction of receiver, see Prohibition, § 11.

§ 553. Remedy, where errors in the settlement proposed by a person to whom parties in interest have referred the matter are so gross and palpable as to amount to fraud, held to be the judicial adjustment of the accounts, and not the appointment of a receiver for a corporation organized to work out the settlement.—Semple v. Frisco Land Co. (La.) 619.

§ 553. The failure of a secretary of a corporation to properly keep the minutes held not ground for appointing a receiver, especially in the absence of any suggestion of loss having resulted therefrom.—Semple v. Frisco Land Co. (La.) 619.

§ 553. Conduct of a secretary of a corporation held not to amount to maladministration, justifying the appointment of a receiver.—Semple v. Frisco Land Co. (La.) 619.

**XII. FOREIGN CORPORATIONS.**

§ 642. The doing of a single act of business in the exercise of a corporate function by a foreign corporation not having complied with Code 1907, §§ 3642, 3644, is prohibited.—Alabama Western R. Co. v. Talley-Bates Const. Co. (Ala.) 341.

§ 657. A foreign corporation's contract, so long as it is executory, cannot be enforced, where the corporation has not complied with Code 1907, §§ 3642, 3644.—Alabama Western R. Co. v. Talley-Bates Const. Co. (Ala.) 341.

§ 657. A foreign corporation, contracting to build a railroad in Alabama, must comply with Code 1907, §§ 3642, 3644, before it does any act toward the performance of the contract.—Alabama Western R. Co. v. Talley-Bates Const. Co. (Ala.) 341.

§ 661. Foreign corporations may not sue until they have put themselves in a position to be sued in domestic courts by complying with Code 1907, §§ 3642, 3644.—Alabama Western R. Co. v. Talley-Bates Const. Co. (Ala.) 341.

§ 661. That a foreign railroad constructing corporation, not having complied with Code 1907, §§ 3642, 3644, let out a contract in another state to build a railroad in Alabama to independent subcontractors, did not entitle it to sue on the contract.—Alabama Western R. Co. v. Talley-Bates Const. Co. (Ala.) 341.

§ 672. In a suit by bank on a note executed to it by defendants, a plea that it was a foreign corporation, that the note was executed and delivered in this state, and that plaintiff had not

its articles, *held* wholly insufficient.—*Bank of Waynesboro v. Healing Springs Mercantile Co.* (Ala.) 882.

## CORRECTION.

Of assessment of taxes, see *Taxation*, §§ 474-499.

Of record on appeal or writ of error, see *Appeal and Error*, § 654.

## CORROBORATION.

Of testimony of accomplices in criminal prosecution, see *Criminal Law*, § 511.

Of testimony of female in prosecution for seduction, see *Seduction*, § 46.

Of testimony of witnesses in general, see *Witnesses*, § 318.

## CORRUPTION.

In general, see *Bribery*; *Fraud*.

## CO-SERVANTS.

See *Master and Servant*, §§ 177-196.

## COSTS.

Appeal from part of judgment relating to costs, see *Appeal and Error*, § 122.

Judgment for costs alone as final judgment authorizing appeal, see *Appeal and Error*, § 78.

Payment or security on taking appeal or other proceeding for review, see *Appeal and Error*, § 383.

Review of discretion of intermediate court as to costs, see *Appeal and Error*, § 1092.

## I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 8. Costs are the creatures of statutory law.—*Deal v. Hodge* (La.) 823.

### IV. SECURITY FOR PAYMENT.

Security to perfect appeal or other proceeding for review, see *Appeal and Error*, § 383.

### V. AMOUNT, RATE, AND ITEMS.

§ 159. One cannot recover interest on the amount of attorney's fees sought to be recovered, where there is no proof that the fees have been paid or that interest is claimed.—*Fidelity & Deposit Co. of Maryland v. Art Metal Const. Co.* (Ala.) 186.

## VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

Security to perfect appeal or other proceeding, see *Appeal and Error*, § 383.

### VIII. PAYMENT AND REMEDIES FOR COLLECTION.

Payment or security on taking appeal or other proceeding for review, see *Appeal and Error*, § 383.

## IX. IN CRIMINAL PROSECUTIONS.

§ 285. Act Nov. 30, 1907 (Gen. Acts Sp. Sess. 1907, p. 179; Cr. Code 1907, p. 422, note), *held* to repeal the former law fixing the rate at which convicts shall be sentenced for costs at 30 cents.—*Phillips v. State* (Ala.) 326.

## CO-TENANCY.

See *Tenancy in Common*.

See *Municipal Corporations*, § 97.

## COUNSEL.

See *Attorney and Client*; *District and Prosecuting Attorneys*.

## COUNTERCLAIM.

See *Set-Off and Counterclaim*.

## COUNTERFEITING.

See *Forgery*.

## COUNTIES.

See *Schools and School Districts*, § 53.

## I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 16. Even if Code 1896, §§ 1398, 1399, should be held inapplicable to render a new county liable, as such, for the debts of a county from which taken, and to operate only upon those of its inhabitants taken from such other county, such defense would be available at law, and hence a bill by a new county founded on that theory is without equity.—*Houston County v. Henry County* (Ala.) 311.

## II. GOVERNMENT AND OFFICERS.

### (C) County Board.

Collateral attack on qualifications, see *Officers*, § 80.

§ 51. Under Gen. St. 1906, § 769, *held*, that county commissioners may elect a chairman as often as they see fit.—*Brewer v. Kellum* (Fla.) 581.

### (D) Officers and Agents.

Clerks of courts, see *Clerks of Courts*.

Prosecuting attorneys, see *District and Prosecuting Attorneys*.

Sheriffs, see *Sheriffs and Constables*.

§ 65. Where a parish treasurer was elected for two years, under Acts 1898, p. 178, No. 121, he was entitled to hold over until his successor has qualified.—*State ex rel. Wilkinson v. Hingle* (La.) 616.

§ 74. Under Ann. Code 1892, § 2016, *held* that, though there are two county treasurers in a year, they can together have only \$1,000 compensation.—*Davis v. Adams* (Miss.) 568.

§ 98. A county treasurer *held* liable, under Ann. Code 1892, § 907, for double the amount for receiving and retaining excessive compensation, though it was allowed by the county board.—*Davis v. Adams* (Miss.) 568.

§ 98. A county treasurer *held* to have willfully retained excessive compensation, so as to allow recovery of penalty, under Ann. Code 1892, § 907.—*Davis v. Adams* (Miss.) 568.

## III. PROPERTY, CONTRACTS, AND LIABILITIES.

### (A) Public Buildings and Other Property.

Liability of courthouse square to assessments for public improvements, see *Municipal Corporations*, § 420.

Reversion to grantor on discontinuance of use of property for purposes specified in deed and offering same for sale, see *Deeds*, § 155.

### (B) Contracts.

Construction of laws embodied in revisions or codes relating to contracts for feeding prisoners, see *Statutes*, § 231.

#### IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 154. Under Const. 1898, art. 270, the police jury cannot order an election for special taxes in aid of a railroad in a justice of the peace ward, forming a part of the regular ward.—*Daigle v. Opelousas, G. & N. E. Ry. Co. (La.) 846.*

#### V. CLAIMS AGAINST COUNTY.

§ 204. The audit and allowance of claims against a county is the exercise of administrative or executive, not of judicial, power.—*State v. Goldsmith (Ala.) 394.*

#### COUNTS.

Separate counts in pleading, necessity and sufficiency of election, see Pleading, § 369.

#### COUNTY ATTORNEYS.

See District and Prosecuting Attorneys.

#### COUNTY BOARD.

See Counties, § 51.

#### COUNTY COMMISSIONERS.

See Counties, § 51.

#### COUNTY TREASURER.

Compensation, see Counties, § 74.  
Liabilities of sureties on bond of, see Counties, § 98.

#### COURSES AND DISTANCES.

See Boundaries.

#### COURTHOUSES.

Liability of courthouse square to assessments for public improvements, see Municipal Corporations, § 426.

#### COURTS.

See Judgment.

Contempt of court, see Contempt.

Judges, see Judges.

Mandamus to inferior courts, see Mandamus, §§ 26-61.

Province of court and jury, see Criminal Law, §§ 753-764; Trial, §§ 130-145, 191, 194.

Removal of action from state court to United States court, see Removal of Causes.

Right to trial by jury, see Jury, §§ 10-28.

*Jurisdiction of particular actions or proceedings.*

See Habeas Corpus, §§ 44-113.

Insolvency proceedings, see Insolvency, § 73.

*Special jurisdictions and particular classes of courts.*

See Justices of the Peace, § 44.

Appellate jurisdiction, see Appeal and Error, § 21.

Equity jurisdiction, see Equity, §§ 17, 39.

#### I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

Presumptions as to superior or general jurisdiction upon collateral attack on judgment, see Judgment, § 495.

#### II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

Clerks of courts, see Clerks of Courts.  
Judges, see Judges.

§ 42. Laws 1907, p. 302, c. 5771, creating the criminal court of record for Suwannee county, was duly enacted.—*Rushton v. State (Fla.) 486.*

(D) Rules of Decision, Adjudications, Opinions, and Records.

Ancient English decisions as evidence of common law, see Common Law, § 17.

Decision by divided court on appeal or writ of error, see Appeal and Error, § 1123.

Record of judgments, see Judgment, § 286.

Secondary evidence of judicial records, see Evidence, § 171.

§ 93. Principles laid down by the courts in the interpretation of statutes should not be recalled except for the most cogent reasons.—*Board of Com'rs of Bayou Terre-Aux-Bœufs Drainage Dist. v. Baker (La.) 16.*

§ 106. Appellee held to have waived its right to insist that the opinion in the case be prepared by a member of the court who heard the oral argument, as required by Code 1907, § 4628.—*Alabama Western R. Co. v. Talley-Bates Const. Co. (Ala.) 341.*

#### III. COURTS OF GENERAL ORIGINAL JURISDICTION.

Presumptions as to jurisdiction upon collateral attack on judgment, see Judgment, § 495.

(A) Grounds of Jurisdiction in General.

§ 121. The law of remission of enough of a claim to bring it within the jurisdiction of the court is common, and not statutory.—*Central of Georgia Ry. Co. v. Williams (Ala.) 328.*

#### V. COURTS OF PROBATE JURISDICTION.

Sale of property of decedent, see Executors and Administrators, §§ 343, 349.

§ 202. A suspensive appeal will not lie from an order appointing a provisional keeper of succession property pending a contest over the appointment of an administrator.—*Succession of Pavey (La.) 518; In re Coco, Id.*

#### VI. COURTS OF APPELLATE JURISDICTION.

Appellate jurisdiction in general, see Appeal and Error, § 21.

Decisions reviewable, see Appeal and Error, §§ 66-133; Criminal Law, § 1023.

Jurisdiction acquired by appeal or other proceeding for review, see Appeal and Error, §§ 454, 456.

Jurisdiction of habeas corpus proceedings, see Habeas Corpus, § 44.

(B) Courts of Particular States.

§ 210. At common law, power is vested in the Supreme Court to review proceedings and judgments of all inferior courts and tribunals and pass on questions of their jurisdiction and decisions.—*Ex parte Dickens (Ala.) 218.*

§ 216. Intent of constitutional provisions held to be to confer on Supreme Court appellate jurisdiction in all civil cases that the circuit court exercises original jurisdiction of and determines, and to vest in the circuit court appellate jurisdiction in all civil cases that the county court exercises original jurisdiction of and determines.—*Mugge v. Warnell Lumber & Veneer Co. (Fla.) 645.*

§ 216. The words "originating" and "arising," as used in the section of the Constitution relating to appellate jurisdiction of the Supreme Court and the circuit court, refer to cases which the circuit and county courts, respectively, exercise original jurisdiction of and determine.—*Mugge v. Warnell Lumber & Veneer Co. (Fla.) 645.*

§ 216. Where, before establishment of the county court, an action had been commenced in the circuit court over which the county court was given jurisdiction, the jurisdiction of the circuit court *held* to cease, and over such action the circuit court, and not the Supreme Court, has exclusive appellate jurisdiction.—*Mugge v. Warnell Lumber & Veneer Co. (Fla.)* 645.

§ 216. The circuit court, not the Supreme Court, has appellate jurisdiction of a judgment of a county court, in an action commenced in the circuit court and transferred by operation of law to the county court upon its creation.—*Mugge v. Warnell Lumber & Veneer Co. (Fla.)* 645.

§ 224. To warrant an application to the Supreme Court for a writ of certiorari to review a judgment of the Court of Appeal, the case must present exceptional features, or otherwise the determination of the Court of Appeal will be deemed final.—*Fuller Bros. v. Duke (La.)* 433; *S. S. Gullatt & Bros. v. Same, Id.*; *In re Mathews, Id.*

§ 224. The mere raising of a constitutional question in a criminal case does not vest the Supreme Court with appellate jurisdiction, under Const. 1898, art. 85.—*State v. Price (La.)* 647.

§ 224. In an election contest, no appeal lies to the Court of Appeal from a judgment ordering defendant to pay the costs.—*Deal v. Hodge (La.)* 820.

§ 224. A decree denying relator's application to cancel two judgments for \$250 each on appearance bonds *held* unappealable, if regarded as a civil proceeding.—*State ex rel. Hinds v. Leonard (La.)* 854.

## VII. UNITED STATES COURTS.

### (C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

Citizenship or alienage as ground for removal of cause to federal court, see Removal of Causes, § 61.

## VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

### (A) Courts of Same State, and Transfer of Causes.

Change of venue, see Criminal Law, §§ 134, 135. Presentation in lower court of grounds of review, see Appeal and Error, § 189.

Removal of action from state court to United States court, see Removal of Causes.

### (B) State Courts and United States Courts.

§ 489. Since Act Cong. Feb. 18, 1875, c. 80, 18 Stat. 316, repealing Rev. St. U. S. § 711, subd. 8, the jurisdiction of the federal courts of suits against consuls is concurrent with that of the state courts.—*Deleon v. Walter (Ala.)* 934.

## COVENANT, ACTION OF.

Covenants on which the action may be maintained, see Covenants.

## COVENANTS.

Conditions and restrictions in deeds, see Deeds, § 155.

Conveyance with covenants as estoppel to assert after-acquired title, see Estoppel, § 38.

In lease, construction and operation in general, see Landlord and Tenant, § 44.

## IV. ACTIONS FOR BREACH.

§ 130. On breach of covenant by the vendor of land, the vendee can recover only the amount of payments made, with interest and costs.—*Prestwood v. Carlton (Ala.)* 254.

## COVERTURE.

See Husband and Wife.

## CREDIBILITY.

Of witness, see Witnesses, §§ 318-406.

Of witnesses as affecting weight and sufficiency of evidence, see Evidence, § 588.

## CREDITORS.

See Assignments for Benefit of Creditors; Attachment; Bankruptcy; Execution; Exemptions; Fraudulent Conveyances; Garnishment; Homestead; Insolvency; Payment; Release.

Application of firm assets to liabilities, see Partnership, §§ 178, 186.

Of decedent, see Executors and Administrators, §§ 221, 272.

Of husband, rights as to wife's property, see Husband and Wife, § 171.

Of married woman, rights as to separate property, see Husband and Wife, § 171.

## CREDITORS' SUIT.

Remedies in cases of fraudulent transfers, see Fraudulent Conveyances, §§ 208-299.

## CRIMES.

See Criminal Law.

## CRIMINAL LAW.

Bail, see Bail, §§ 39-90.

Competency and challenge to jurors, see Jury, §§ 90-116.

Convicts, see Convicts.

Costs in criminal prosecutions, see Costs, § 285.

Fines, see Fines.

Grand jury, see Grand Jury.

Habeas corpus to review proceedings, see Habeas Corpus.

Impaneling jury, see Jury, § 149.

Indictment, information, or complaint, see Indictment and Information.

Mandamus to control acts of court, judge, or judicial officer in reference to criminal prosecutions, see Mandamus, § 61.

Penalties, see Penalties.

Prosecuting officers, see District and Prosecuting Attorneys.

Right to trial by jury, see Jury, § 23.

Subjects and titles of acts relating to crimes and criminal prosecutions and punishments, see Statutes, § 118.

Summoning, attendance, discharge, and compensation of jurors, see Jury, §§ 66-82.

Words imputing crime as constituting libel or slander, see Libel and Slander, § 7.

### Offenses by particular classes of persons.

See Infants, § 66.

Mortgagors, see Chattel Mortgages, § 230.

### Particular offenses.

See Arson; Blasphemy; Breach of the Peace; Burglary; Contempt; Disorderly House; False Pretenses; Forgery; Gaming, § 97; Homicide: Libel and Slander, §§ 152, 155; Rape, § 16; Seduction, § 46; Vagrancy.

Abandonment of wife by husband, see Husband and Wife, §§ 305-313.

Assault and battery, see Assault and Battery, §§ 54, 77.

Assault with intent to commit rape, see Rape, § 16.

Bribery, see Bribery.

Injuring or killing animals, see Animals, § 45.

Larceny, see Larceny.

Maintaining lotteries, see Lotteries, §§ 20, 21.

Removal or transfer of mortgaged property by mortgagor, see Chattel Mortgages, § 230.  
Violations of liquor laws, see Intoxicating Liquors, §§ 146-167, 198-231.  
Violations of municipal regulations, see Municipal Corporations, § 642.

## II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

Capacity of infant to form criminal intent, see Infants, § 66.

§ 53. It is a good defense to breaking and entering a storehouse with intent to commit petit larceny that accused was too intoxicated to form such an intent.—Jenkins v. State (Fla.) 582.

### V. VENUE.

#### (B) Change of Venue.

§ 134. In view of a showing made on a motion to change the venue, based on hostile public sentiment, *held*, that there was no error in denying it.—Howard v. State (Ala.) 954.

§ 135. The refusal of the trial judge to hear argument on a motion for a change of venue is not assignable as error.—State v. Blount (La.) 12.

## VII. FORMER JEOPARDY.

As ground for prohibition, see Prohibition, § 3.

§ 178. Under Const. 1890, § 22, a nolle prosequi, entered after the jury is impeached and proof offered, is no bar to a subsequent indictment.—State v. Kennedy (Miss.) 978.

§ 184. The discharge of the jury in a capital case for illness of the judge *held* a discharge from necessity, so that accused was not placed in jeopardy.—State v. Varnado (La.) 661.

§ 197. An indictment of a fiduciary, under Code 1906, § 1436, for embezzlement, having the effect of arraigning him on all acts prior to its finding, *held*, an acquittal thereon was a bar to a prosecution for any single act of embezzlement during the same period.—State v. Caston (Miss.) 569.

## VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

In prosecution for violation of liquor laws, see Intoxicating Liquors, § 198.

§ 211. An affidavit for a warrant of arrest, stating that affiant has "good reason to believe," rather than, as required by Code 1907, § 6703, "probable cause for believing," *held* insufficient to support a conviction.—City of Bessemer v. Eidge (Ala.) 270.

§ 218. Where the warrant was returned to the court before which the trial was had, it was not a fatal defect that it was made returnable to the judge.—Carnley v. State (Ala.) 362.

## IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 261. If there has been no arraignment, and no plea of guilty interposed by defendant, it would be fatal to conviction on appeal.—Howard v. State (Ala.) 954.

§ 261. Where the record on appeal affirmatively shows accused was arraigned, as required by Code 1907, §§ 7566, 7840, it was unnecessary to arraign him again by reading the indictment to him at the time trial was begun and having issue joined on his plea.—Howard v. State (Ala.) 954.

§ 263. Capias issued on information actually lodged with criminal court clerk *held* not

illegal because no file mark was placed upon the information.—Johnson v. State (Fla.) 529.

§ 264. According to the present prevailing practice, the arraignment is merely the calling of accused to the bar of the court and reading and explaining the indictment; its only purpose being to obtain from him his answer or plea thereto.—Howard v. State (Ala.) 954.

§ 265. A motion to quash an indictment should be disposed of before requiring defendant to plead to the merits.—Allen v. State (Ala.) 279.

§ 291. A plea of former conviction *held* properly filed after the state's case was closed.—Wadley v. State (Miss.) 494.

§ 292. Under Code 1906, § 1762, a plea of former conviction of unlawfully retailing liquor *held* good as against a demurrer.—Wadley v. State (Miss.) 494.

## X. EVIDENCE.

Competency of witnesses in general, see Witnesses, §§ 37-204.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, §§ 318-406.

Cross-examination of witnesses, see Witnesses, §§ 267-287.

Examination of witnesses, see Witnesses, §§ 236-287.

#### In particular criminal prosecutions.

See Arson, § 31; Burglary, §§ 31, 35; Forgery, § 44; Gaming, § 97; Homicide, §§ 156-252; Larceny, §§ 45-65; Libel and Slander, § 155; Seduction, § 46.

Crimes by infant, see Infants, § 66.

Violations of liquor laws, see Intoxicating Liquors, §§ 224, 231.

#### (A) Judicial Notice, Presumptions, and Burden of Proof.

Burden of proof on application for bail, see Bail, § 49.

In prosecution for offense against liquor laws, see Intoxicating Liquors, § 224.

Presumptions as to capacity of infant, see Infants, § 66.

§ 309. An instruction on the presumptions as to defendant's character *held* properly refused.—Griffin v. State (Ala.) 962.

#### (B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 338. Any legal evidence from which the jury may deduce guilt or innocence is admissible, if from the other evidence its relevancy appears.—Thompson v. State (Fla.) 507.

§ 355. Questions not limited to the condition of accused as to intoxication, but tending to raise the immaterial issue of the use of liquor by "the boys," *held* properly excluded.—Jenkins v. State (Fla.) 582.

§ 359. Evidence which does not tend to connect a third person with the crime charged is inadmissible to show motive on the part of such person.—State v. Brady (La.) 806.

§ 364. On a trial for murder, certain evidence *held* admissible as a part of the res gestæ.—Holland v. State (Ala.) 215.

§ 364. In a prosecution for breaking and entering with intent to kill, evidence that defendant called at prosecutrix's house just previous to the time in question *held* admissible as res gestæ.—State v. Perry (La.) 799.

§ 366. On a trial for murder, certain evidence *held* not a part of the res gestæ.—Holland v. State (Ala.) 215.

§ 366. Exclamation of a person who had been shot within two minutes after the firing and



just prior to his death *held* admissible as part of the *res gestæ*.—*Williams v. State* (Fla.) 749.

§ 368. A conversation between persons as to a proposed purchase of liquor from defendant, but not in his presence or hearing, *held* not *res gestæ* of an alleged subsequent purchase.—*Pace v. State* (Ala.) 333.

**(C) Other Offenses, and Character of Accused.**

Character of accused as ground of impeachment as witness, see *Witnesses*, § 337.

§ 369. Where three persons were killed at the same time by the same person or persons, evidence as to the whole occurrence *held* admissible on a trial of a charge of murder of either.—*State v. Blount* (La.) 12.

§ 369. In a prosecution for assault with intent to rape, evidence of other assaults of accused upon prosecuting witness at other times and places is inadmissible.—*State v. Riggio* (La.) 600.

§ 370. Evidence of the commission of another offense than the one charged is inadmissible to show defendant's guilt, unless guilty knowledge is an element.—*Cox v. State* (Ala.) 398.

§ 372. On a trial for abetting another in defrauding a bank, evidence tending to establish a continued series of fraudulent transactions of a similar character between the same parties *held* admissible.—*Charles v. State* (Fla.) 419.

§ 379. In a trial for writing a defamatory letter, evidence that defendant's character was bad for writing libelous letters *held* inadmissible to impeach his general reputation.—*Cox v. State* (Ala.) 398.

**(D) Materiality and Competency in General.**

§ 384. The trial court may exclude testimony deemed relevant which appears to be too remote.—*State v. Bouvy* (La.) 849.

§ 390. Accused cannot testify as to his uncommunicated intentions.—*Pate v. State* (Ala.) 357.

**(E) Best and Secondary and Demonstrative Evidence.**

§ 398. Where it is sought to prove that a written order for the payment of money was made, parol evidence *held* admissible.—*Camp v. State* (Fla.) 537.

**(F) Admissions, Declarations, and Hearsay.**

Dying declarations, see *Homicide*, §§ 203-218.

§ 413. Accused cannot show self-serving acts before or subsequent to the crime.—*Jenkins v. State* (Fla.) 582.

§ 413. Declarations of accused are admissible in his favor, only where a part of the *res gestæ*.—*State v. Blount* (La.) 12.

§ 414. Where the state introduces evidence of defendant's statements just before the killing, defendant is entitled to the whole conversation.—*Holland v. State* (Ala.) 215.

§§ 419, 420. In a prosecution for abandonment, adultery of the wife cannot be proved by hearsay testimony or rumors.—*Carnley v. State* (Ala.) 362.

§§ 419, 420. A question to a witness *held* to call for purely hearsay evidence.—*Howard v. State* (Ala.) 954.

§ 421. The insanity of a person cannot be proved by reputation in the family or general reputation.—*State v. Charles* (La.) 699.

**(G) Acts and Declarations of Conspirators and Codefendants.**

§ 424. Even though there was evidence that accused and his brother-in-law were practicing shooting the day before the killing, so as to tend to show premeditation and a conspiracy to kill decedent, evidence that after the killing the brother-in-law fled from the place of the killing was not admissible against accused.—*Lowman v. State* (Ala.) 43.

**(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.**

§ 432. Where a written instrument is relevant evidence, the name by which it is called *held* immaterial.—*Telfair v. State* (Fla.) 573.

**(I) Opinion Evidence.**

§ 448. Witness' answer *held* to give enough facts to relieve it from the objection of being merely his opinion.—*Copeland v. State* (Fla.) 621.

§ 452. Opinion of a nonexpert as to the insanity of accused, based on his knowledge of accused for 50 years, *held* not objectionable for remoteness.—*Bacot v. State* (Miss.) 500.

§ 479. Physician, though stating he had not had any personal experience with case of strychnine poisoning, *held* properly allowed to give certain expert evidence.—*Copeland v. State* (Fla.) 621.

§ 479. One may be qualified by study without practice, or by practice without study, to give an opinion on a medical question.—*Copeland v. State* (Fla.) 621.

§ 491. In a trial for writing a defamatory letter, other letters claimed to have been written by defendant *held* inadmissible for the purposes of a comparison of the handwriting.—*Cox v. State* (Ala.) 398.

**(J) Testimony of Accomplices and Codefendants.**

Corroboration of testimony of female in prosecution for seduction, see *Seduction*, § 46.

§ 511. Evidence of a witness *held* sufficient corroboration of an accomplice to sustain a conviction, under Code 1907, § 7897.—*McDaniels v. State* (Ala.) 324.

**(L) Evidence at Preliminary Examination or at Former Trial.**

§ 543. Though, pending appeal from a police court to the circuit court, a witness has removed from the state, *held*, his testimony against defendant in the former court may not be used on the trial in the latter court.—*Holifield v. City of Laurel* (Miss.) 488.

**(M) Weight and Sufficiency.**

Credibility, impeachment, corroboration, and contradiction of witnesses, see *Witnesses*, §§ 318-406.

*In particular criminal prosecutions.*

See *Burglary*, § 42; *Forgery*, § 44; *Homicide*, §§ 250, 252; *Larceny*, §§ 58, 65; *Seduction*, § 46.

§ 561. That one juror has a reasonable doubt does not require an acquittal.—*Phillips v. State* (Ala.) 326.

**XI. TIME OF TRIAL AND CONTINUANCE.**

§ 575. Acts 1886-87, p. 183, *held* not to prevent the trial of a criminal case during the first week of the term.—*Griffin v. State* (Ala.) 962.

§ 589. The fact that a decision of the trial court that an affidavit alleging a violation of a criminal statute charged an offense thereunder

was error would be no ground for staying proceedings in subsequent prosecutions under the statute pending an appeal in the first case; the proper remedy being by appeal.—*State v. Rose* (La.) 520; *In re Rose*, *Id.*

§ 589. An accused, pending his appeal from a conviction of violating a statute, is not entitled to a stay of proceedings against him upon other charges for violations of the same statute.—*State v. Rose* (La.) 520; *In re Rose*, *Id.*

§ 594. Denial of an application for continuance on the ground of an absent witness, though the witness was then beyond the jurisdiction of the court, *held* error.—*Cade v. State* (Miss.) 554.

§ 595. A continuance was properly denied when asked for the purpose of producing certain books which had no bearing upon the issue involved.—*State v. Smith* (La.) 842.

§ 596. The refusal to grant a continuance on the ground of the absence of a witness *held* erroneous.—*Anderson v. State* (Miss.) 554.

§ 603. To obtain a continuance, a motion for the same must be made in due form, and supported by an affidavit.—*State v. Smith* (La.) 842.

§ 615. In a trial for rape, the setting aside of an order of continuance *held* error.—*Campbell v. State* (Miss.) 499.

## XII. TRIAL.

Competency of and challenge to jurors, see *Jury*, §§ 90-116.

Impaneling jury, see *Jury*, § 149.

Summoning, attendance, discharge, and compensation of jurors, see *Jury*, §§ 66-82.

### *In particular criminal prosecutions.*

See *Burglary*, § 45; *Homicide*, §§ 269-314; *Larceny*, § 77.

### (A) Preliminary Proceedings.

Effect of insanity of juror pending prosecution, see *Jury*, § 149.

§ 625. Arraignment of accused and setting case for trial will not be set aside, where commission to determine sanity subsequently reported that accused was not insane.—*State v. Charles* (La.) 699.

§ 625. Where plea of present insanity is made, the judge may appoint commission of experts, or refer the issue to a jury.—*State v. Charles* (La.) 699.

§ 627. Service of a copy of a special venire on defendant on Saturday and a copy of the indictment on Sunday *held* sufficient, under Code 1907, § 7840; the trial being set for the succeeding Tuesday.—*Roberson v. State* (Ala.) 345.

### (B) Course and Conduct of Trial in General.

Validity of information filed by attorney appointed to act instead of district attorney, see *Indictment and Information*, § 39.

§ 636. The absence of accused, on trial for murder, during a part of the time of the impaneling of the jury, *held* fatal error.—*Warfield v. State* (Miss.) 561.

§ 636. Absence of accused from the courtroom during the examination of a witness for the state *held* fatal error.—*McLendon v. State* (Miss.) 864.

§ 639. A judge, under section 2 of Act No. 35, p. 35, of 1877, and Act No. 74, p. 113, of 1886, *held* not authorized to recuse the district attorney in a prosecution because the attorney did not believe that any law had been violated.—*State v. Boasberg* (La.) 162.

§ 649. Under the facts, *held*, a postponement should have been granted in a murder case.—*Casey v. State* (Miss.) 978.

§ 657. *Held* improper as a penalty for contempt of court by counsel pending a trial to deprive defendant of his services by suspending him, and proper practice stated.—*Charles v. State* (Fla.) 419.

§ 658. Arrest of witnesses for perjury *held* not ground for a new trial, where not made in the jury's presence and other witnesses were not aware thereof.—*State v. Williams* (La.) 711.

### (C) Reception of Evidence.

Examination of witnesses, see *Witnesses*, §§ 236-287.

§ 666. The state is not bound to examine a witness in whom it has lost confidence, though subpoenaed by it.—*State v. Brady* (La.) 806.

§ 670. Testimony whose relevancy is not shown *held* properly excluded.—*Logan v. State* (Fla.) 536.

§ 680. The order and method of submission of evidence is within the discretion of the presiding judge.—*Charles v. State* (Fla.) 419.

§ 683. The purpose of rebuttal testimony is to disprove and discredit evidence adduced in behalf of accused.—*State v. Blount* (La.) 12.

§ 683. The allowance of evidence in rebuttal is left largely to the discretion of the trial judge.—*State v. Blount* (La.) 12.

### (D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 693. Objections to evidence must be made when it is offered, and an objection to a question after it had been answered comes too late.—*Williams v. State* (Fla.) 749.

§ 695. An objection to evidence as irrelevant is the weakest of all objections.—*State v. Labry* (La.) 700.

§ 695. The prosecuting officer's failure to state the grounds of objection to testimony and the judge's failure to state fully his reasons for excluding it, in the absence of objection, *held* not error.—*State v. Bouvy* (La.) 849.

§ 696. Evidence impeaching a witness will not be stricken, because its probative force has been weakened on cross-examination.—*Clin-ton v. State* (Fla.) 580.

### (E) Arguments and Conduct of Counsel.

§ 706. That witnesses were told that the district attorney had said he would prosecute for perjury if they did not tell the truth, *held* not ground to set aside a conviction.—*State v. Williams* (La.) 711.

§ 719. Argument of counsel *held* ground for reversal.—*State v. Riggio* (La.) 600.

§ 720. Argument of counsel that the dying declaration tended to show motive of the crime is not ground for reversal, unless it was outside of all reasonable bounds.—*State v. Brady* (La.) 806.

§ 720. Statement by prosecuting attorney in his argument that the reason he had not called a certain witness subpoenaed for the prosecution was because he was going to lie is not ground for reversal.—*State v. Brady* (La.) 806.

§ 721. Argument of district attorney *held* not a reference to failure of accused to testify, in violation of Act No. 29, p. 39, of 1886.—*State v. Williams* (La.) 648.

§ 721. A remark of the district attorney in argument *held* reversible error, as a comment on accused's failure to testify.—*Harris v. State* (Miss.) 626.

§ 721½. The query of the state's attorney, in his argument in a prosecution for murder,

ness named, was erroneous.—Hutcherson v. State (Ala.) 1027.

§ 723. In a prosecution for breaking and entering with intent to kill, remarks of the district attorney in his closing argument *held* prejudicial error.—State v. Perry (La.) 799.

§ 723. Remarks of assistant district attorney on examination of jury *held* not ground for reversal.—State v. Brady (La.) 806.

§ 723. Remarks of the district attorney, in the prosecution of a negro for shooting a white man with intent to kill, *held* appeals to race prejudice, and reversible error.—Harris v. State (Miss.) 626.

§ 724. Act of the district attorney, in a prosecution for assault with intent to rape, in referring to accused and his son as "these brutes," is not necessarily ground for reversal.—State v. Riggio (La.) 600.

§ 730. Remarks of prosecuting attorney by way of argument or in reply to attorney for defendant *held* not ground for reversal.—State v. Satcher (La.) 835.

#### (F) Province of Court and Jury in General.

In prosecution for burglary, see Burglary, § 45. In prosecution for homicide, see Homicide, §§ 269-282.

§ 753. Where the evidence justified the refusal of affirmative charges for accused as to both counts of the indictment, the refusal to give the affirmative charge as to one count *held* not erroneous, because such a charge was given as to the other count.—Webb v. State (Ala.) 356.

§ 753½. Remarks of judge in his charge *held* not erroneous as a comment on the evidence.—State v. Smith (La.) 842.

§ 756. It is proper to refuse an instruction which asserts that there is evidence of certain facts.—Griffin v. State (Ala.) 962.

§ 761. A charge assuming as a fact that the accused carried a pistol for defensive purposes is properly refused.—Williams v. State (Ala.) 59.

§ 761. Request to charge that certain facts might be looked to, to show prosecutor's biased feelings in testifying against defendant, *held* properly refused.—Phillips v. State (Ala.) 326.

§§ 763, 764. A requested charge, which required the court to charge, as matter of law, that there was no corroborative evidence as to an accomplice's testimony, as required by law, was for this reason properly refused.—Howard v. State (Ala.) 954.

#### (G) Necessity, Requisites, and Sufficiency of Instructions.

In prosecution for homicide, see Homicide, §§ 284-300.

In prosecution for larceny, see Larceny, § 77. Mandamus to compel filing of written instructions, see Mandamus, § 16.

§ 778. On a trial for larceny, no error *held* committed in refusing to charge as requested by defendant.—Bass v. State (Fla.) 531.

§ 780. Where defendant's conviction depended on W.'s corroboration of the evidence of an accomplice, a request to charge that, if W.'s testimony was not believed, defendant could not be convicted, should have been given.—McDaniels v. State (Ala.) 324.

§ 782. An instruction as to the weight to be given to evidence of nonexperts as to the insanity of accused *held* objectionable, as withdrawing from the jury the consideration of the nonexpert's opinion.—Bacot v. State (Miss.) 500.

a witness and defendant's guilt was not dependent upon his testimony, certain requested charge *held* properly refused.—Phillips v. State (Ala.) 194.

§ 785. In a prosecution for the illegal sale of whisky, an instruction as to the credibility of witnesses should have been given at the request of defendant.—Turner v. State (Miss.) 620.

§ 789. A requested instruction, predicated acquittal on a mere belief by the jury of a reasonable doubt, was properly refused.—Hill v. State (Ala.) 41.

§ 789. A charge as to reasonable doubt *held* properly refused.—Williams v. State (Ala.) 59.

§ 789. Requested charge as to reasonable doubt *held* properly refused.—Phillips v. State (Ala.) 194.

§ 789. An instruction in a criminal case *held* properly refused, because it failed to hypothesize materiality of the evidence referred to.—Webb v. State (Ala.) 356.

§ 789. An instruction in a criminal case on the subject of reasonable doubt *held* properly refused, because misleading.—Webb v. State (Ala.) 356.

§ 789. An instruction that it is the jury's duty to accept the theory of the case favorable to defendant *held* properly refused.—Runnels v. State (Miss.) 499.

§ 796. An instruction in a criminal case *held* properly refused, because of the use of the word "must," instead of the word "may."—Webb v. State (Ala.) 356.

§ 798. A charge requiring an acquittal if any one juror had a reasonable doubt of guilt *held* bad.—Howard v. State (Ala.) 954.

§ 799. A party cannot require the court to avoid the effect of erroneous argument of counsel by giving charges refuting it.—Hill v. State (Ala.) 41.

§ 807. A request to charge *held* properly refused as argumentative.—Phillips v. State (Ala.) 326; Roberson v. Same (Ala.) 345; Griffin v. Same (Ala.) 962; Bass v. Same (Fla.) 531.

§ 807. Requested charge on criminal trial *held* properly refused as argumentative and misleading.—Phillips v. State (Ala.) 194.

§ 809. Requested charge on criminal trial *held* properly refused as argumentative and misleading.—Phillips v. State (Ala.) 194.

§ 809. Requested charge *held* properly refused, where confusing and involved.—Bass v. State (Fla.) 531.

§ 811. It is proper to refuse an instruction which gives undue prominence to certain facts or phases of the evidence.—Griffin v. State (Ala.) 962.

§ 813. In a prosecution for false pretenses, a request to charge *held* properly refused as abstract.—Cook v. State (Ala.) 319.

§ 814. A request to charge, not supported by any evidence, is properly refused.—Phillips v. State (Ala.) 326.

§ 814. Request to charge, on trial for uttering a forged instrument, *held* properly refused, as not within the issue.—Telfair v. State (Fla.) 573.

§ 814. Where information states that a better description of the stolen property is unknown, accused cannot be acquitted because the solicitor could easily have known a better description.—Enson v. State (Fla.) 948.

§ 815. A charge, in a homicide case, asserting defendant's right to acquittal on failure of the prosecution to prove his guilt, *held* misleading.—Williams v. State (Ala.) 59.

§ 815. A charge asserting defendant's right to an acquittal on failure to prove his guilt as charged, the indictment charging murder and the evidence justifying a conviction of manslaughter, is misleading.—*Williams v. State* (Ala.) 59.

§ 815. In a prosecution for murder, in which the state relied on the corroborated testimony of an accomplice, *held*, that there was no error in refusing charges predicated an acquittal on a reasonable doubt as to whether accused and others conspired to kill deceased on a certain night at the house of one of the conspirators.—*Howard v. State* (Ala.) 954.

§ 821. A request to charge *held* properly refused as unintelligible.—*Phillips v. State* (Ala.) 326.

§ 822. A charge must be taken as a whole, and its prejudicial effect determined from that standpoint.—*State v. Blount* (La.) 12.

§ 823. Charge that burden was on defendant to raise a reasonable doubt as to whether he knew what he was doing, and whether it was right or wrong, *held* not reversible error, in view of another portion of the charge.—*Johnson v. State* (Fla.) 529.

#### (H) Requests for Instructions.

§ 825. A general objection to a charge on the subject of insanity, accompanied by no request for special instruction, is unavailing.—*State v. Charles* (La.) 609.

§ 829. Requested instruction *held* properly refused, where covered by other instructions.—*Lowman v. State* (Ala.) 43; *Williams v. State* (Ala.) 59; *Bass v. State* (Fla.) 531; *Cox v. State* (Fla.) 875; *Anglin v. State* (Miss.) 492; *Runnels v. State* (Miss.) 499.

§ 830. In a prosecution for murder *held*, that a requested charge as to corroborative evidence of an accomplice was not a correct statement in its entirety.—*Howard v. State* (Ala.) 954.

§ 830. A request to charge a hypothetical statement of facts on which no proposition of law was predicated was properly refused.—*State v. Blount* (La.) 12.

#### (I) Objections to Instructions or Refusal Thereof, and Exceptions.

§ 844. Where two distinct propositions in a charge are excepted to as a whole, the exception must fail, if either is correct.—*Bass v. State* (Fla.) 531.

§ 844. An assignment en masse on a refusal to give instructions containing separate propositions cannot be considered further than to ascertain if any one of the instructions was properly rejected.—*Telfair v. State* (Fla.) 573.

#### (J) Custody, Conduct, and Deliberations of Jury.

§ 858. It is not improper for the jury to take with them into their consultation room the written charge of the court.—*State v. Rigio* (La.) 600.

#### (K) Verdict.

In prosecution for homicide, see Homicide, §§ 312, 314.

§ 881. A verdict, not sufficiently certain to show what the jury intended, is fatally defective.—*Bunch v. State* (Fla.) 534.

§ 893. When the jury's intention can be ascertained, such effect should be given to its findings as conforms thereto.—*Bunch v. State* (Fla.) 534.

### XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 912½. Amendment of information, pending trial, without objection, *held* not ground for new trial.—*State v. Behler* (La.) 483.

§ 921. A new trial will not be granted because the court permitted further testimony to be introduced after both sides had closed and argument commenced, unless prejudice is shown.—*Charles v. State* (Fla.) 419.

§ 923. Overruling motion for new trial because of incompetency of juror *held* error, and case remanded for rehearing on such motion.—*State v. Latham* (La.) 780.

§ 938. *Held* error not to grant a new trial for newly discovered evidence, which would impeach the state's principal witness, whose testimony was sharply contradicted, and corroborate accused's witnesses.—*Watson v. State* (Miss.) 627.

§ 939. Motion for new trial for newly discovered evidence *held* properly overruled for failure to show diligence.—*Enson v. State* (Fla.) 948.

§ 951. The right of a defendant in a criminal case to move for a new trial *held* not forfeited by the fact that sentence had been pronounced prior to the making of the motion.—*Tillman v. State* (Fla.) 675.

§ 956. Applications for new trial for newly discovered evidence should be supported by affidavits setting up the facts.—*Thompson v. State* (Fla.) 507.

§ 957. A juror, who testified on his voir dire that he was a resident of the parish where the case was tried, cannot be called on to impeach the verdict by testifying that he was not a resident.—*State v. Labry* (La.) 700.

§ 957. Jurors cannot be heard to impeach their verdict.—*State v. Williams* (La.) 711.

§ 958. A motion for new trial for newly discovered evidence will be denied, where it has no other support than the affidavit of defendant.—*Posey v. State* (Fla.) 530.

§ 958. Denial of motion for newly discovered evidence, where affidavits of proposed witnesses are not produced, will not be reviewed.—*Posey v. State* (Fla.) 530.

§ 970. Under Gen. St. 1906, § 3962, an information for assault with intent to commit murder *held* sufficient as against a motion in arrest.—*Gray v. State* (Fla.) 538.

§ 970. Judgment on information for shooting into a railroad car will be arrested, where information fails to allege that the car was being used or occupied by any person or persons.—*Thomas v. State* (Fla.) 934.

§ 970. An objection that the grand jury were not sworn *held*, under Code 1906, §§ 1413, 1426, 1427, waived, where not raised until a motion to arrest the judgment.—*Hays v. State* (Miss.) 557.

### XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

Review on habeas corpus, see Habeas Corpus, § 22.

§ 977. Where the indictment is void, the judgment in a criminal case is also void.—*Stephens v. State* (Ala.) 42.

§ 993. The trial judge in a criminal case may modify the sentence imposed on defendant during the same term of court and before defendant has begun to serve his term.—*Tillman v. State* (Fla.) 676.

§ 995. A judgment of conviction *held* in substantial compliance with Code 1907, § 6720.—*State v. Jeter* (Ala.) 330.

§ 996. A judgment may be amended at a subsequent term *nunc pro tunc*, even pending an appeal therefrom, and an amendment will be considered as curative of defects in the record as it originally appeared in the Supreme Court.—*Phillips v. State* (Ala.) 194.

§ 996. A judgment entry may be amended nunc pro tunc from entries on the docket, as quasi record evidence.—*Phillips v. State* (Ala.) 194.

## XV. APPEAL AND ERROR, AND CERTIORARI.

Mandamus to compel bringing matters into record, see Mandamus, § 16.

Mandamus to review nonappealable orders, see Mandamus, § 61.

Remedy by appeal or writ of error as affecting right to habeas corpus, see Habeas Corpus, § 4.

Review in prosecution for violations of municipal ordinances, see Municipal Corporations, § 642.

### (A) Form of Remedy, Jurisdiction, and Right of Review.

Constitutional questions as ground of appellate jurisdiction, see Courts, § 224.

§ 1019. In misdemeanor cases under Const. 1898, art. 85, the Supreme Court has no appellate jurisdiction unless a fine exceeding six months has been imposed, or an ordinance or law has been declared under the Constitution.—*State v. Gillan* (La.) 846.

§ 1020. Appellate jurisdiction of Supreme Court in criminal cases, under Const. 1898, art. 85, defined.—*State v. Price* (La.) 647.

§ 1020. Costs follow sentence, but are no part of the "fine actually imposed," within Const. art. 85.—*State v. Price* (La.) 794.

§ 1020. The word "fine" ordinarily means a pecuniary penalty, and has such meaning in Const. art. 85, and hence the forfeiture pursuant to section 7 of the Gay-Shattuck law (Act No. 176, p. 239, of 1908) imposed in addition to the fine prescribed by section 6, for its violation forms no part of such fine, the amount of which determines jurisdiction of an appeal.—*State v. Price* (La.) 794.

§ 1020. The Supreme Court is without jurisdiction under Const. art. 85, of an appeal from an adverse judgment on a motion to set aside the forfeiture of an appearance bond of \$1,000, in a prosecution where the offense is not punishable with death or imprisonment at hard labor, and no penalty has been actually imposed.—*State v. Shoots* (La.) 842.

§ 1020. A judgment denying an application to discharge certain judgments on appearance bonds for larceny held not appealable, if regarded as a criminal proceeding, under Const. art. 85.—*State ex rel. Hinds v. Leonard* (La.) 854.

§ 1023. Nonsupport by a husband, in violation of Acts 1902, p. 42, No. 34, held a criminal offense, so that a judgment finding him guilty, and requiring him to pay a specified sum weekly, was not a final, appealable judgment.—*State v. Gersdorf* (La.) 528.

### (B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1028. The validity of legislation which affects the practice of the lower court or compensation of its officers cannot be raised for the first time in the appellate court.—*Rushton v. State* (Fla.) 486.

§ 1035. Where defendant in a criminal case fails to object in the lower court to the authority or jurisdiction of the judge called from another county to preside over the trial, he cannot raise the question on appeal.—*Tillman v. State* (Fla.) 675.

§ 1037. Objection, urged for the first time on motion for a new trial, to the remarks of district attorney, held not in time.—*State v. Williams* (La.) 711.

§ 1055. Complaint as to argument of prosecuting attorney will not be reviewed, where no proper bill of exceptions was taken.—*State v. Washington* (La.) 600.

§ 1056. Error, in that the court, upon refusal of a requested instruction, did not "declare in writing to the jury his ruling thereon," in compliance with Gen. St. 1906, § 1498, held waived by failure to reserve an exception there-to before verdict.—*Weaver v. State* (Fla.) 539.

### (C) Proceedings for Transfer of Cause, and Effect Thereof.

§ 1083. If the same legal questions happen to be involved in several separate cases against the same accused, pendency of an appeal in one of the cases does not deprive the trial court of jurisdiction of the other cases.—*State v. Rose* (La.) 520; *In re Rose*, Id.

### (D) Record and Proceedings Not in Record.

§ 1088. An arraignment and plea must be shown by the record proper on appeal, and not by the bill of exceptions; and hence, if recitals of the record proper and of a bill differ as to this matter, the recitals of the record proper must control.—*Howard v. State* (Ala.) 954.

§ 1090. Where all the pleadings and evidence are in the transcript, a formal bill of exceptions is not necessary for review of a ruling below on a motion to recuse the district judge.—*State v. Perkins* (La.) 805.

§ 1091. An assignment upon the overruling of an objection to a question as to a letter must fail, when it is not shown that accused was thereby prejudiced, and the letter is not in the bill of exceptions.—*Bass v. State* (Fla.) 531.

§ 1091. A bill of exceptions to the overruling of a motion for new trial, dealing entirely with the sufficiency of the evidence, presents nothing for review.—*State v. Lawrence* (La.) 406.

§ 1091. A bill of exceptions, covering a general exception to the charge as a whole, with no assignment of grounds, is insufficient.—*State v. Riggio* (La.) 600.

§ 1092. Mandamus will not issue to a trial judge to correct statements in bill of exceptions, where the bills are not produced.—*State v. Miller* (La.) 481; *In re Arthur*, Id.

§ 1092. In explaining a bill of exceptions, the judge must state facts, and let the appellate court judge know of their importance, and a mere statement that a bill complaining of the district attorney's argument does not contain the full statement made by the district attorney is insufficient.—*State v. Riggio* (La.) 600.

§ 1105. An appeal to the circuit court, not certified as required by Code 1906, § 85, held properly dismissed.—*City of Greenwood v. Weaver* (Miss.) 981.

§ 1111. An arraignment and plea must be shown by the record proper on appeal, and not by the bill of exceptions; and hence, if recitals of the record proper and of a bill differ as to this matter, the recitals of the record proper must control.—*Howard v. State* (Ala.) 954.

§ 1111. Under the rule that recitals of a bill of exceptions as drafted by counsel must be accepted as correct, unless contradicted by the judge, they must be considered correct, where the judge merely states that he cannot remember whether an objection was made as stated in a bill.—*State v. Riggio* (La.) 600.

§ 1116. Denial of a motion to strike portions of an indictment, not mentioned in the judgment entry, but shown only by bill of exceptions, cannot be reviewed.—*Cook v. State* (Ala.) 319.

§ 1121. The sufficiency of the evidence will not be considered, where the bill of exceptions does not contain the motion for new trial.—*Gilbert v. State* (Fla.) 535.

§ 1122. Where all charges are not brought up on appeal, refusal to give a requested charge will not be reviewed.—*Thompson v. State* (Fla.) 507.

§ 1122. Where the record does not show the entire charge, the Supreme Court cannot say that a requested charge was erroneously refused.—*Weaver v. State* (Fla.) 539.

§ 1124. Evidence debors the record in support of a motion for new trial must be incorporated in the bill of exceptions, to be considered on review.—*Telfair v. State* (Fla.) 573.

§ 1128. Recital in a motion for a new trial of the ground of challenge of a juror held not evidence of itself that the matters recited transpired during the trial.—*Weaver v. State* (Fla.) 539.

#### (E) Assignment of Errors and Briefs.

§ 1129. An assignment of error embracing refusals to give two or more instructions asserting distinct propositions will be overruled if any one of them was correctly refused.—*Charles v. State* (Fla.) 419.

§ 1129. In preparing assignments of error, each error should be distinctly specified and separately assigned.—*Williams v. State* (Fla.) 749.

§ 1129. A single assignment of error to many rulings is unavailing unless all are erroneous.—*Williams v. State* (Fla.) 749.

§ 1129. An assignment of error "for errors apparent by an examination of the record" presents nothing for consideration on appeal.—*Williams v. State* (Fla.) 749.

#### (F) Dismissal, Hearing, and Rehearing.

§ 1131. While, in view of Code 1906, § 1495, an appeal from a conviction for a misdemeanor will be dismissed, where accused escapes pending appeal, an appeal from a felony conviction will not be dismissed or acted upon on accused's escape pending appeal.—*Harding v. State* (Miss.) 694.

#### (G) Review.

§ 1134. In criminal cases, motions for new trials, or rulings thereon, cannot be reviewed by the Supreme Court on appeal.—*Howard v. State* (Ala.) 954.

§ 1134. The court will not discuss a question not essential to a disposition of the case.—*City of Greenwood v. Weaver* (Miss.) 981.

§ 1137. Where state's witness testifies only to reputation for truth, defense cannot complain of evidence as to general bad character elicited only in cross-examination.—*Clinton v. State* (Fla.) 580.

§ 1138. Under Const. art. 5, § 11, circuit courts have appellate jurisdiction only in cases arising before county courts, and have no authority to permit the filing of new or amended affidavits.—*State v. Bullock* (Fla.) 418.

§ 1139. Under Const. art. 5, § 11, circuit courts have appellate jurisdiction only in cases arising before county courts, and have no authority to try a case de novo.—*State v. Bullock* (Fla.) 418.

§ 1144. Where an accused was set at liberty by the trial court, it must be presumed that he was under bond, since the court would be without authority to release him on any other condition, under Rev. St. § 1010.—*State v. Boasberg* (La.) 162.

§ 1144. The case having gone to trial without objection that the affidavit, which charged that defendant permitted gambling, did not set forth a place in which it was prohibited by Act

No. 176, p. 236, of 1908, held, that the Supreme Court would presume that the place was shown to be within the act.—*State v. Apfel* (La.) 613.

§ 1144. Where it is in doubt on which of two statutes prosecution is based, it will be presumed it was under a statute entitling accused to an appeal.—*State v. Berlin* (La.) 667.

§ 1150. Denial of accused's application for a change of venue will not be reversed, unless the Supreme Court can clearly see that the determination was erroneous.—*McDaniels v. State* (Ala.) 324.

§ 1151. Denial of a continuance held no ground for reversal, where the legal rights of accused were not prejudiced.—*State v. Satcher* (La.) 835.

§ 1153. Much must be left to the trial court's discretion in the control of cross-examination, and error in allowing too great latitude must be clearly prejudicial to justify reversal.—*Lowman v. State* (Ala.) 43.

§ 1153. The extent of the cross-examination of a witness and his interrogation as to matters irrelevant, to issues, to test his memory, sincerity, etc., rests in the sound discretion of the court.—*Cox v. State* (Ala.) 398.

§ 1153. Exercise of a trial court's discretion in the allowance of leading questions cannot avail as ground of error.—*Camp v. State* (Fla.) 537.

§ 1153. The appellate court will only interfere with the trial court's discretion as to recalling a witness, after his testimony has been closed, to establish matters not in rebuttal, where injustice has been done.—*Jenkins v. State* (Fla.) 582.

§ 1153. The trial judge's discretion in the allowance of evidence in rebuttal will not be disturbed except in extreme cases.—*State v. Blount* (La.) 12.

§ 1153. Exercise of the court's discretion as to the latitude of cross-examination will not be interfered with unless abused.—*State v. Bouvy* (La.) 849.

§ 1154. The court restrains counsel when their remarks are intemperate, and they generally afford no ground for complaint on appeal.—*State v. Williams* (La.) 711.

§ 1154. Discretion of trial judge in ruling on objections to argument of district attorney will not be overruled, unless the remarks were legally prejudicial to defendant.—*State v. Smith* (La.) 842.

§ 1156. The ruling on a motion for a new trial will not be disturbed except for an abuse of discretion.—*State v. Blount* (La.) 12.

§ 1158. A motion for a change of venue overruled on evidence preponderating in favor of the state presents nothing for review.—*State v. Blount* (La.) 12.

§ 1158. Affidavit of accused in support of a continuance on the ground that the inflamed condition of the public mind would operate to his prejudice cannot outweigh the opinion to the contrary of the trial judge.—*State v. Washington* (La.) 600.

§ 1158. Whether a sufficient basis was laid for an alleged voluntary confession is a question of fact, on which the trial judge's ruling will not be disturbed, unless against preponderance of evidence.—*State v. Woods* (La.) 671.

§ 1159. Findings by a jury on conflicting evidence will not be reviewed on appeal.—*Roberson v. State* (Ala.) 345.

§ 1159. Where there is evidence from which the jury might legally have inferred all the essential elements of the crime, a verdict of guilty will not be disturbed.—*Thompson v. State* (Fla.) 507.

§ 1159. A conviction on conflicting evidence will not be disturbed, where there is evidence from which all the elements of the crime charged may be legally inferred.—Posey v. State (Fla.) 530.

§ 1159. Evidence *held* insufficient to show illegal sale of liquor.—Graham v. State (Fla.) 531.

§ 1159. A second conviction, which there is evidence to sustain, no errors appearing, will not be set aside.—Telfair v. State (Fla.) 573.

§ 1159. Where the evidence entirely fails to connect accused with the crime, the Supreme Court will set aside the conviction.—Stewart v. State (Fla.) 642.

§ 1159. The sufficiency of evidence to sustain a conviction cannot be reviewed on appeal.—State v. Le Blanc (La.) 814.

§ 1160. A conviction, which there is some evidence to support, approved by the trial court, will not be set aside.—Logan v. State (Fla.) 536.

§ 1160. A conviction of breaking and entering a storehouse with intent to commit petit larceny, approved by the trial judge, will not be set aside.—Jenkins v. State (Fla.) 582.

§ 1160. A verdict supported by the evidence will not be disturbed in absence of showing that the jurors were improperly influenced.—Williams v. State (Fla.) 749.

§ 1160. Refusal to grant a new trial for insufficiency of the evidence will not be reversed unless the preponderance of the evidence against the verdict clearly shows that it is wrong.—Williams v. State (Fla.) 749.

§ 1160. If reasonable men might have found the verdict in question, and it has been sanctioned by the trial court, it will not be disturbed.—Williams v. State (Fla.) 749.

§ 1160. In reviewing denial of new trial for insufficiency of the evidence, the question is whether the jury as reasonable men could have found a verdict from the evidence adduced.—Williams v. State (Fla.) 749.

§ 1166. Notwithstanding the order directing the sheriff to serve a copy of the venire upon defendant was not in conformity with Code 1907, § 7265, yet *held* that, under section 6264, a reversal was not required.—Phillips v. State (Ala.) 194.

§ 1166. Where, in a venire for petit jurors, the name of a juror appeared but once, while in the sheriff's return upon the venire it appeared twice, *held*, that the error was self-correcting and harmless to defendant.—Phillips v. State (Ala.) 194.

§ 1166½. Remark of court to counsel during argument *held* not an abuse of discretion, calling for a reversal.—Telfair v. State (Fla.) 573.

§ 1166½. Forcing an accused to trial in violation of an agreement between counsel *held* reversible error.—Burrell v. State (Miss.) 694.

§ 1169. Even if the evidence was insufficient to show, *prima facie*, conspiracy between accused and another to kill decedent at the time evidence was admitted of threats by such other against decedent, so as to make their admission error, it was harmless, where the subsequent evidence was sufficient to make out a *prima facie* case.—Lowman v. State (Ala.) 43.

§ 1169. Error in permitting a witness to testify that defendant executed a certain mortgage was without prejudice, where the witness produced the mortgage.—Cook v. State (Ala.) 319.

§ 1169. Where an alleged forged instrument was admitted in evidence, there was no reversible error in receiving testimony as to its former and then condition.—Telfair v. State (Fla.) 573.

§ 1170. Error in excluding a question *held* without injury, when the same question is af-

terwards answered without objection.—Jenkins v. State (Fla.) 582.

§ 1170½. Where, in a criminal prosecution, accused restricted a witness in direct examination to whether or not the original affidavit made before him specified any date for the alleged offense, error, if any, in permitting him to answer on cross-examination that prosecuting witness said that she was uncertain as to the date, was harmless.—State v. Riggio (La.) 600.

§ 1172. Remarks of judge on instructing as to the penalty following the verdict of guilty without capital punishment *held* not ground for reversal.—State v. Satcher (La.) 835.

§ 1173. Accused *held* in no position to complain of modification of requested charge, where too favorable to him.—Bass v. State (Fla.) 531.

§ 1178. An assignment of error on denial of a new trial will be deemed abandoned, where no argument is made as to any of the grounds of the motion.—Bass v. State (Fla.) 531.

§ 1178. An assignment of error not argued will be treated as abandoned.—Copeland v. State (Fla.) 621.

§ 1178. On appeal in a criminal case, failure of counsel to call attention to the special points on which he relies to show error will be considered as an abandonment of the assignment, unless the error is so patent that no argument is needed to demonstrate it.—Tillman v. State (Fla.) 675.

§ 1179. Under Code 1906, § 1548, relating to peace bonds, the submission on appeal to the circuit court of the issue to a jury *held* harmless, where the facts fully warranted the court in requiring the bond, since in approving the verdict of the jury the judge himself necessarily passed on the facts, and the judgment would be treated as his judgment.—Ford v. State (Miss.) 497.

#### (H) Determination and Disposition of Cause.

§ 1182. Where the record proper is regular and valid, and shows all things necessary to support a judgment of conviction and sentence, and there is no bill of exceptions, the judgment and sentence will be affirmed.—Smith v. State (Ala.) 326.

§ 1182. Where no error of law appears, and the evidence supports the conviction, it will be affirmed.—Waldo v. State (Fla.) 487.

§ 1182. On motion to dismiss by plaintiff in error for the purpose of delay, where no errors appear and no bill of exceptions was made, the judgment will be affirmed.—Owen v. State (Fla.) 630.

§ 1189. Conviction on trial for murder reversed and remanded for insufficiency of the evidence.—Williams v. State (Fla.) 749.

§ 1189. Conviction will be reversed and cause remanded where the court cannot conclude that the verdict was founded on the evidence.—Williams v. State (Fla.) 749.

#### XVII. PUNISHMENT AND PREVENTION OF CRIME.

Contempt of court, see Contempt, §§ 72, 79.  
Convicts, see Convicts.  
Fines in general, see Fines.

§ 1218. Where the primary sentence imposed is fine and costs, the court should fix the period of imprisonment in the county jail, instead of the penitentiary, for default in payment, under Gen. St. 1906, § 4011.—Enson v. State (Fla.) 348.

#### CRIMINAL LIBEL.

See Libel and Slander, §§ 152, 155.

## CROPS.

See Agriculture.

Exemption from execution, see Exemptions, § 37.

## CROSS-BILL.

See Equity, § 195.

## CROSS-DEMANDS.

See Set-Off and Counterclaim.

## CROSS-EXAMINATION.

Of witnesses in general, see Witnesses, §§ 267-287, 329, 330, 349, 353, 372.

## CROSSINGS.

Railroad crossings, see Railroads, § 103.

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Street railroad crossings, right of way over tracks, see Street Railroads, § 85.

## CRUELTY.

Ground for divorce, see Divorce, § 27.

## CUMULATIVE EVIDENCE.

See Trial, § 56.

Newly discovered cumulative evidence as ground for new trial, see New Trial, § 104.

## CUMULATIVE REMEDIES.

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## CURRENT YEAR.

See Time, § 4.

## CURSING.

See Blasphemy.

## CURTESY.

See Dower.

Husband as tenant by curtesy and not tenant in common as to deceased wife's separate estate, see Tenancy in Common, § 3.

## CUSTODY.

Of children, see Infants, § 13.

Of children on divorce of parents, see Divorce, § 308.

Of goods in course of transportation, see Carriers, § 76.

Of property by bailee, see Bailment, § 14.

## CUSTOMS AND USAGES.

Customary law, see Common Law.

Customary violation of rules of employment as affecting liability of master for injuries to servant, see Master and Servant, § 144.

## CUTTING TIMBER.

See Logs and Logging, § 3.

## DAMAGES.

Compensation for property taken for public use, see Eminent Domain, § 84.

Release of claim for damages, see Release.

*Damages for particular injuries.*

Breach of contract for carriage of passenger, see Carriers, § 277.

Breach of covenant, see Covenants, § 130.

Breach of covenants in lease, see Landlord and Tenant, § 48.

Detention of real property, see Ejectment, § 127.

Failure of railroad company to maintain cattle guards in good repair, see Railroads, § 114.

Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 67-71.

Injuries from negligent or wrongful use of street, see Municipal Corporations, § 706.

Injuries to passengers, see Carriers, § 319.

Obstruction of street, see Municipal Corporations, § 698.

Taking or detention of personal property, see Trover and Conversion, § 60.

Trespass, see Trespass, §§ 50, 56.

*Recovery in particular actions or proceedings.*

See Ejectment, § 127; Trespass, §§ 50, 56; Trover and Conversion, § 60.

To enforce specific performance, see Specific Performance, § 129.

## I. NATURE AND GROUNDS IN GENERAL.

§ 1. Rule as to theory of damages stated.—*Prestwood v. Carlton*, (Ala.) 254.

## III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) *Direct or Remote, Contingent, or Prospective, Consequences or Losses.*

§ 40. Certain damages to a lessee, in that a storeroom, as constructed, was of less dimensions than contracted for, *held* too remote and uncertain.—*Bromberg v. Eugenio Const. Co.* (Ala.) 314.

§ 49. Damages for mental suffering *held* not recoverable, where no recoverable damages for injuries to plaintiff's person, reputation, or estate are alleged.—*Western Union Telegraph Co. v. Jackson* (Ala.) 316.

(B) *Aggravation, Mitigation, and Reduction of Loss.*

§ 62. Duty of one injured by the negligence of another to prevent damages stated.—*Birmingham Ry., Light & Power Co. v. Anderson* (Ala.) 1021.

(C) *Interest, Costs, and Expenses of Litigation.*

Attorney's fees in suit for specific performance, see Specific Performance, § 129.

## V. EXEMPLARY DAMAGES.

For conversion, see Trover and Conversion, § 60.

For injuries from negligence or default in transmission or delivery of telegraph or telephone messages, see Telegraphs and Telephones, § 69.

§ 87. The nature of the jury's discretion in allowing punitive damages stated.—*Cox v. Birmingham Ry., Light & Power Co.* (Ala.) 975.

## VI. MEASURE OF DAMAGES.

*For particular injuries.*

Breach of covenants in lease, see Landlord and Tenant, § 48.

Failure of railroad company to maintain cattle guards in good repair, see Railroads, § 114.

Trespass, see Trespass, §§ 50, 56.

(C) *Breach of Contract.*

§ 123. In an action for the value of work and materials furnished in constructing a building, which were not included in the contract, the



measure of damages. Damages called for by the contract was the difference in the value of the building constructed or work done and that contracted for, and hence evidence of the market value of the building constructed was properly admitted.—*Fleming v. Lunsford* (Ala.) 921.

## VII. INADEQUATE AND EXCESSIVE DAMAGES.

Excessive damages for injuries from negligence or default in transmission or delivery of telegraph and telephone message, see *Telegraphs and Telephones*, § 71.

Ground for new trial, see *New Trial*, § 76.

§ 130. In a personal injury action, a verdict for \$1,000 held not excessive.—*Western Steel Car & Foundry Co. v. Bean* (Ala.) 1012.

## VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

### (A) Pleading.

§ 162. An objection that no averment of damage appears in the complaint should be taken to the pleading, and not by a requested charge.—*W. T. Adams Mach. Co. v. Turner* (Ala.) 308.

### (B) Evidence.

§ 163. The burden is on one sued for injuries to prove its contention that the injuries were aggravated by negligence.—*Birmingham, Ry., Light & Power Co. v. Anderson* (Ala.) 1021.

§ 168. In an action for injuries, held proper to receive evidence of plaintiff's physical condition within a reasonable time prior and subsequent to the injury.—*St. Louis & S. F. R. Co. v. Savage* (Ala.) 113.

§ 168. In an action for injuries, held proper to admit evidence of plaintiff's loss of weight, suffering, and insomnia.—*St. Louis & S. F. R. Co. v. Savage* (Ala.) 113.

§ 168. In an action for injuries, it was proper not to permit a physician to testify as to whether he had seen a chance on plaintiff's person, where the question to the witness was not limited to a time somewhere near the date of the injury.—*St. Louis & S. F. R. Co. v. Savage* (Ala.) 113.

§ 168. In an action for injuries, held not error to refuse to permit a physician to be asked whether plaintiff was a hard drinker.—*St. Louis & S. F. R. Co. v. Savage* (Ala.) 113.

§ 173. In an action for injuries, it was proper to admit evidence that since the accident plaintiff had done no work, and could do none.—*St. Louis & S. F. R. Co. v. Savage* (Ala.) 113.

### (C) Proceedings for Assessment.

§ 208. In an action for injuries, the weight of evidence as to impairment of plaintiff's eyesight held for the jury.—*St. Louis & S. F. R. Co. v. Savage* (Ala.) 113.

§ 216. In charging upon prospective losses due to diminished earning capacity, held, that the jury should be directed to reduce such losses to their present value.—*Florida East Coast Ry. Co. v. Lassiter* (Fla.) 428.

### (D) Computation and Amount, Double and Treble Damages, and Remission.

Review of amount of recovery, see *Appeal and Error*, § 1004.

## DATION EN PAIEMENT.

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## DEATH.

As suspending running of statute of limitation, see *Limitation of Actions*, § 80.

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Testimony as to transactions with persons since deceased, see *Witnesses*, §§ 139, 140.

## II. ACTIONS FOR CAUSING DEATH.

(B) Jurisdiction, Venue, and Limitations.

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## DEBTOR AND CREDITOR.

See *Assignments for Benefit of Creditors*; *Attachment*; *Bankruptcy*; *Execution*; *Exemptions*; *Fraudulent Conveyances*; *Garnishment*; *Homestead*; *Insolvency*; *Payment*; *Release*.

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## DECEDENTS.

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## DECLARATION.

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## DECLARATIONS.

As evidence, see *Criminal Law*, § 424.

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## DECREE.

In equity, see *Equity*, §§ 420, 422.

Judgments in general, see *Judgment*.

## DEDICATION.

### I. NATURE AND REQUISITES.

§ 19. A road within city limits held dedicated as a public highway by the platting of adjacent lots by the owner and filing maps thereof showing the road as a public highway, so that one purchasing land with reference to such plat cannot question the public character of the highway.—*Rudolph v. City of Elyton* (Ala.) 80.

### II. OPERATION AND EFFECT.

§ 64. The word "conditions," as used in Civ. Code, art. 1559, providing for the revocation of donations for nonfulfillment of eventual conditions, held synonymous with the word "charges."—*Voinche v. Town of Marksville* (La.) 662.

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Declarations by grantor as evidence against grantee, or subsequent purchasers, see Evidence, § 230.

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Estoppel by deed, see Estoppel, §§ 38, 39.

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*Deeds by or to particular classes of persons.*

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*Deeds of particular species of, or estates or interest in, property.*

See Easements, § 14.

Married women's separate property, see Husband and Wife, § 193.

Standing timber, see Logs and Logging, § 3.

*Particular classes of deeds.*

Of trust, see Assignments for Benefit of Creditors.

Tax deeds, see Taxation, § 765.

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### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials of Conveyances in General.

Restoration of consideration on cancellation in equity, see Cancellation of Instruments, § 24.

§ 18. The grantor *held*, under the facts, entitled to have a deed set aside for want of consideration.—Martin v. Evans (Ala.) 997.

#### (C) Execution.

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Tax deeds, see Taxation, § 765.

#### (D) Delivery.

§ 62. A grantor, conveying land to a trustee for a company, *held* to waive full compliance with conditions on which a deed might be delivered to the company.—Jackson v. Badham (Ala.) 131.

#### (E) Validity.

Cancellation for invalidity in general, see Cancellation of Instruments, § 60.

Parol or extrinsic evidence to show invalidity, see Evidence, §§ 434, 436.

Persons as against whom instrument may be canceled, see Cancellation of Instruments, § 30.

§ 69. Facts *held* to justify reformation of the description in a deed for mistake.—Page v. Whatley (Ala.) 116.

§ 70. Misrepresentation by a grantee or lessee in obtaining the grantor's signature *held* a fraud available at law.—Prestwood v. Carlton (Ala.) 254.

§ 71. The grantor *held*, under the facts, entitled to have a deed set aside for duress.—Martin v. Evans (Ala.) 997.

§ 72. The grantor *held*, under the facts, entitled to have a deed set aside for undue influence.—Martin v. Evans (Ala.) 997.

§ 78. The invalidity of a deed on the ground of the fraud of the grantee *held* for the jury.—Touart v. Rickert (Ala.) 896.

### III. CONSTRUCTION AND OPERATION.

Dedication of property to public use, see Dedication, § 64.

Estoppel by deed, see Estoppel, §§ 38, 39.

#### (A) General Rules of Construction.

Separate or subsequent oral agreement affecting instruments, see Evidence, §§ 441-445.

§ 90. Words in a deed are to be taken most strongly against him who uses them.—Soria v. Harrison County (Miss.) 443.

§ 96. The parties to a deed are bound by the recitals therein, but others are not.—Hughes v. Rose (Ala.) 899.

#### (B) Property Conveyed.

Description of boundaries, see Boundaries, § 3.

#### (D) Exceptions and Reservations.

Creation of easement by exception or reservation, see Easements, § 14.

In conveyances of timber, see Logs and Logging, § 3.

#### (E) Conditions and Restrictions.

§ 155. To create a condition subsequent, the breach of which will cause the land to revert, it must clearly appear that such was the grantor's intention.—Soria v. Harrison County (Miss.) 443.

§ 155. The provisions of a deed *held* not to create a condition subsequent, the breach of which would cause the land to revert.—Soria v. Harrison County (Miss.) 443.

### IV. PLEADING AND EVIDENCE.

Parol or extrinsic evidence to show invalidity, see Evidence, §§ 434, 436.

Separate or subsequent oral agreement affecting instrument, see Evidence, §§ 441-445.

§ 196. In an action to set aside a conveyance for undue influence, evidence *held* to show that a relation of trust existed between the parties, thereby throwing on the defendant burden of proving that undue influence was not exerted.—Harrison v. Rogers (Ala.) 364.

§ 200. On an issue whether a deed had been actually delivered, certain evidence *held* competent.—Napier v. Elliott (Ala.) 148.

§ 200. On an issue of whether a deed had been actually delivered, certain evidence *held* not competent against grantee.—Napier v. Elliott (Ala.) 148.

### DE FACTO OFFICERS.

See Justices of the Peace, § 6.

### DEFAMATION.

See Libel and Slander.

### DEFAULT.

Decree in equity pro confesso, see Equity, § 420.

In actions for divorce, see Divorce, § 160.

In payment of insurance premium or assessment, see Insurance, § 750.

In performance of contracts in general, see Contracts, §§ 295-322.

Judgment, see Judgment, §§ 108-130.

### DEFEASANCE.

Constituting absolute deed a mortgage, see Mortgages, § 33.

### DEFECTS.

In parties, see Parties, § 95.

In performance of contracts in general, see Contracts, § 305.

In record on appeal or writ of error, see Appeal and Error, §§ 635, 654.

**DEFENDANTS.**

See Parties, § 35.

**DEFILEMENT.**

Of female, see Rape; Seduction.

**DEFRAUD.**

See Fraud.

**DEGREES.**

Of crime, see Homicide, §§ 250, 252, 252.

**DELAY.**

Hindering and delaying creditors by fraudulent transfers, see Fraudulent Conveyances.  
In delivery of goods sold, see Sales, § 176.  
In transmission or delivery of telegraph or telephone messages, see Telegraphs and Telephones, §§ 27-74.  
In transportation or delivery of goods, see Carriers, § 103.

**DELIVERY.**

Of deed, see Deeds, §§ 62, 200.  
Of goods by carrier, see Carriers, § 103.  
Of goods sold, see Sales, §§ 163, 176.  
Of goods to carrier, see Carriers, § 40.  
Of insurance policy, see Insurance, § 136.  
Of telegraph or telephone messages, see Telegraphs and Telephones, §§ 27-74.

**DEMAND.**

Element of conversion, see Trover and Conversion, § 9.  
On railroad company to erect or repair cattle guards, see Railroads, § 103.

**DEMISE.**

See Landlord and Tenant.

**DEMURRAGE.**

Ancillary jurisdiction of equity to enforce reciprocal demurrage charges, see Equity, § 30.

**DEMURRER.**

See Equity, §§ 214-245; Pleading, §§ 103-216, 254.  
Presumption on appeal or writ of error, see Appeal and Error, § 917.  
Review of decisions, see Appeal and Error, §§ 254, 1040.

**DENIALS.**

In pleading, see Pleading, § 129.

**DEPARTMENTS.**

Municipal departments and officers thereof, see Municipal Corporations, § 183.

**DEPOSIT.**

Of proceeds of sale of levee bonds, see Levees, § 32.

**DEPOSITARIES.**

Bailment in general, see Bailment.  
Deposits incident to particular occupations, see Banks and Banking.

**DEPOSITIONS.**

See Affidavits; Discovery; Witnesses.

§ 94. An answer not responsive to an interrogatory, to which no objection was made.

should be excluded.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

**DEPOSITS.**

See Bailment.

In bank, see Banks and Banking, § 148.

**DEPOSITS IN COURT.**

Of proceeds of sale of levee bonds, see Levees, § 32.

**DESCENT AND DISTRIBUTION.**

See Dower; Executors and Administrators; Homestead, §§ 141-147; Wills.

**II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.**

(B) Surviving Husband or Wife.

Rights as to homestead, see Homestead, §§ 141-147.

**III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.**

Partition among coheirs, see Partition.

(A) Nature and Establishment of Rights in General.

Agreement to divide estate according to settlement to be worked out through corporation, grounds for appointment of receivers, see Corporations, § 553.

Community and separate property of husband and wife, see Husband and Wife, § 274.

§ 78. Collateral heirs will not be put in possession of succession until validity of will alleged to be forged is determined.—Succession of Drysdale (La.) 35.

§ 90. Acts 1884, p. 12, No. 5, amending Rev. Civ. Code, art. 2239, held not to affect Rev. Civ. Code, art. 2444.—Byrd v. Pierce (La.) 452.

(B) Advancements.

§ 102. Acts of sale to certain of seller's heirs held, under the evidence, not to be simulations.—Byrd v. Pierce (La.) 452.

§ 109. An heir who comes to a succession under the terms of the Civil Code, and as authorized thereby, must return to his coheirs all that he has received from the common ancestor.—Blank v. Blank (La.) 745.

**DESCRIPTION.**

Of person in assessment rolls, see Taxation, § 415.

Of property conveyed, see Boundaries, § 3.

Of property in indictment for larceny, see Larceny, § 30.

Of property obtained by false pretenses, allegations in indictment, see False Pretenses, § 32.

**DESERTION.**

Of husband or wife, ground for divorce, see Divorce, § 37.

Of wife by husband, criminal responsibility, see Husband and Wife, §§ 305-313.

**DESTRUCTION.**

Of writing as ground for admission of secondary evidence, see Evidence, §§ 178, 183.

**DETAINDER.**

See Forcible Entry and Detainer.

Wrongful detention of property ground for civil action, see Trover and Conversion, § 9.

## DETINUE.

Actions for damages only, for injuring, taking, converting, or detaining personalty, see Trespass; Trover and Conversion.

Premature delivery of property to plaintiff as a breach of sheriff's bond, see Sheriffs and Constables, § 157.

Recovery of possession of mortgaged property, see Chattel Mortgages, § 172.

§ 5. In detinue, plaintiff must show that he has a property right, general or special, in the chattel, and that he is entitled to his immediate possession.—*Johnson v. New Enterprise Co. (Ala.)* 911.

§ 16. Under Code 1907, §§ 3792, 6039, a landlord, claiming a landlord's lien on crops, held not entitled to interpose his claim in an action in detinue brought by the holder of the legal title conveyed by the tenant's mortgage on the crops.—*Johnson v. New Enterprise Co. (Ala.)* 911.

§ 19. Plaintiff, obtaining a judgment in detinue, who elects to take the assessed value, held not entitled to recover for the use of the property pending the affirmance of the judgment on appeal.—*Fidelity & Deposit Co. of Maryland v. Art Metal Const. Co. (Ala.)* 186.

§ 25. A judgment in detinue held in the alternative, either for the property and value of detention or for the value of the property and the value of the detention.—*Fidelity & Deposit Co. of Maryland v. Art Metal Const. Co. (Ala.)* 186.

## DEVISES.

See Wills.

## DEVOLUTIVE APPEAL.

See Appeal and Error, § 1206.

## DIES NON JURIDICUS.

See Sunday.

## DIKES.

See Drains.

## DILIGENCE.

Affecting right to new trial, see Criminal Law, § 939; New Trial, § 95.

Of carrier in transportation and delivery of goods, see Carriers, § 103.

## DIRECTING VERDICT.

See Criminal Law, § 753.

## DISABILITIES.

Contributory negligence of persons under disability, see Negligence, § 85.

*Particular classes of persons.*

See Convicts; Infants.

Married women, see Husband and Wife, §§ 85-97.

## DISBURSEMENTS.

Costs in general, see Costs.

Of injunction, see Injunction, §§ 178, 184.

*From indebtedness, obligation, or liability.*  
See Bills and Notes, § 511; Judgment, § 800; Mortgages, §§ 298, 311; Release.

Bankrupts, see Bankruptcy, § 432.

Sureties on bonds, and undertakings in judicial proceedings, see Bail, §§ 79, 80.

## DISCONTINUANCE.

Of action, see Dismissal and Nonsuit, §§ 25, 26.

## DISCOVERED PERIL.

Injury avoidable notwithstanding contributory negligence, see Negligence, § 83.

Injury avoidable notwithstanding contributory negligence, application of doctrine to injuries caused by automobile on street, see Municipal Corporations, § 705.

## DISCOVERY.

See Depositions.

### I. IN EQUITY.

§ 3. The chancery court has jurisdiction of a bill for discovery, though plaintiff may have legal means of obtaining proof.—*Keystone Lumber Yard v. Yazoo & M. V. R. Co. (Miss.)* 445.

### II. UNDER STATUTORY PROVISIONS.

(A) *Interrogatories and Examination of Parties and of Other Persons.*

§ 67. Answers to interrogatories under the statute cannot be stricken solely because not responsive.—*Prestwood v. Carlton (Ala.)* 254.

§ 69. That answers to interrogatories propounded under Code 1890, § 1850 et seq., are merely irresponsible, is not ground for striking them out.—*Sullivan Timber Co. v. Louisville & N. R. Co. (Ala.)* 941.

§ 79. Plaintiff on defendant offering answers to interrogatories held entitled to the exclusion of so much thereof as was nonresponsive and illegal.—*Birmingham Ry., Light & Power Co. v. Morris (Ala.)* 198.

## DISCRETION OF COURT.

Admission in rebuttal of evidence proper in chief, see Trial, § 63.

Continuance, see Continuance, § 7.

Cross-examination of witnesses, see Witnesses, § 267.

Dissolution of temporary injunction, see Injunction, § 178.

Order of proof, see Criminal Law, §§ 690, 693. Reception of evidence in criminal prosecution, see Criminal Law, § 683.

Redirect examination of witnesses, see Witnesses, § 236.

Reopening case for further evidence, see Trial, § 68.

Review of discretion in civil actions, see Appeal and Error, §§ 969-974, 1092.

Review of discretion in criminal prosecutions, see Criminal Law, §§ 1150-1156.

## DISCRIMINATION.

Denial of equal protection of laws, see Constitutional Law, §§ 200-245.

Special privileges or immunities and class legislation, see Constitutional Law, § 200.

**DISMISSAL AND NONSUIT.**

Dismissal of action as to coparty as affecting competency as witness against estate of decedent, see *Witnesses*, § 139.  
 Dismissal of appeal or writ of error, see *Appeal and Error*, § 801; *Criminal Law*, § 1131.  
 Practice in equity, see *Equity*, § 303.  
 Review of decisions, see *Appeal and Error*, § 105.

**I. VOLUNTARY.**

§ 25. Where it appeared that one defendant was acting in the premises only as the agent of the other defendant, plaintiff could dismiss as to the agent without effecting a discontinuance as to the other defendant.—*Atlas Coal Co. v. O'Rear* (Ala.) 63.

§ 26. In actions *ex delicto*, plaintiff may discontinue as to one or more defendants and maintain the action against the remaining defendants.—*Wright v. Sample* (Ala.) 268.

**II. INVOLUNTARY.**

§ 56. Where persons were improperly joined as complainants, but the question whether they had an interest, and how they should assert it, was one to be litigated in the case, *held*, that the judgment would not be affirmed because of the misjoinder.—*Bacot v. Phenix Ins. Co. of Brooklyn* (Miss.) 729.

**DISORDERLY CONDUCT.**

Blasphemy or profanity, see *Blasphemy*.  
 Disorderly mode or course of life, see *Vagrancy*.  
 Keeping disorderly house, see *Disorderly House*.  
 Offenses against the public peace in general, see *Breach of the Peace*.

**DISORDERLY HOUSE.**

§ 5. Code 1906, § 5065, providing that every keeper of a house of prostitution shall be punished as a vagrant, *held* not to exclude the right to prosecute such person for keeping a bawdy house.—*Gavin v. State* (Miss.) 498.

**DISPARAGEMENT.**

Of title or interest by grantors, former owners, or privies as admission, see *Evidence*, § 230.

**DISPATCH.**

See *Telegraphs and Telephones*.

**DISPOSSESSION.**

See *Forcible Entry and Detainer*.

**DISPUTE.**

Amount in dispute as affecting jurisdiction of courts, see *Courts*, § 121; *Justices of the Peace*, § 44.  
 Want of actual controversy ground for denying mandamus, see *Mandamus*, § 16.

**DISQUALIFICATION.**

Of judge, see *Judges*, §§ 47-56.  
 Of jurors, ground for new trial, see *Criminal Law*, § 923.  
 Of prosecuting attorney as affecting right of judge to appoint counsel for prosecution, see *Criminal Law*, § 639.

**DISSEISIN.**

See *Forcible Entry and Detainer*.

**DISSENT.**

Of judges to opinion of court, see *Appeal and Error*, § 1123.

**DISSOLUTION.**

Of injunction, see *Injunction*, §§ 178, 184.  
 Of partnership, see *Partnership*, § 289.

**DISTRESS.**

For rent, see *Landlord and Tenant*, § 265.

**DISTRIBUTION.**

Of estate of decedent, see *Descent and Distribution*; *Executors and Administrators*, § 402.  
 Of governmental powers and functions, see *Constitutional Law*, § 50.

**DISTRICT AND PROSECUTING ATTORNEYS.**

Disqualification of prosecuting attorney as affecting right of judge to appoint counsel for prosecution, see *Criminal Law*, § 639.  
 Validity of information filed by attorney appointed to act instead of district attorney, see *Indictment and Information*, § 39.

§ 3. Private counsel, who aid in prosecution of a case as the solicitor may permit, are not "assistant solicitors," within *Gen. St. 1906*, § 3880.—*Clinton v. State* (Fla.) 580.

**DISTRICTS.**

Drainage or reclamation districts, see *Drains*, § 18.  
 School districts, see *Schools and School Districts*, § 53.  
 Taxing and assessment districts, see *Taxation*, § 253.

**DISTURBANCE OF PUBLIC ASSEMBLAGE.**

Breach of the public peace, see *Breach of the Peace*.

**DITCHES.**

See *Drains*.

**DIVERSE CITIZENSHIP.**

Ground of jurisdiction of United States courts, see *Removal of Causes*, § 61.

**DIVIDED COURT.**

Decisions on appeal or writ of error, see *Appeal and Error*, § 1123.

**DIVISION FENCES.**

See *Fences*.

**DIVORCE.****II. GROUNDS.**

§ 12. Divorces will not be granted for post-nuptial, except adultery, causes not rendering one of the parties incapable of performing his marital duties.—*Prall v. Prall* (Fla.) 867.

§ 27. "Extreme cruelty justifying divorce" defined.—*Prall v. Prall* (Fla.) 867.

§ 37. Refusal of wife to cohabit is not such a desertion as authorizes a divorce for willful, ob-

stinate, and continued desertion for one year.—*Prall v. Prall* (Fla.) 867.

#### IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

##### (C) Pleading.

§ 90. The bill of complaint should contain allegations of all facts necessary to the cause of action.—*Prall v. Prall* (Fla.) 867.

§ 91. A bill of divorce, except for adultery, under Gen. St. 1906, § 1926, must allege that plaintiff has resided two years in the state before filing the bill, which fact must be proven.—*Prall v. Prall* (Fla.) 867.

##### (D) Evidence.

§ 117. That evidence is not complete within itself, but must be supplemented by other evidence, *held* not to render it incompetent or inadmissible.—*Atlantic Coast Line R. Co. v. Partridge* (Fla.) 634.

§ 129. In a suit by a wife for divorce for adultery, evidence *held* to sustain judgment for plaintiff.—*Milner v. Tutwiler* (La.) 654.

##### (E) Dismissal, Trial or Hearing, and New Trial.

§ 146. Under Code 1907, § 3164, authorizing uncontested divorce cases to be decided in vacation, that a complaint in such a case asked for the custody of children *held* not to deprive the proceeding of its character as a divorce case, in view of Code 1907, § 3808.—*Falley v. Falley* (Ala.) 894.

##### (F) Judgment or Decree.

§ 160. Under Code 1907, § 3164 (Gen. Acts 1898-99, p. 118), after a decree pro confesso, a written request for submission in vacation in a letter written by solicitors, *held* to constitute a request filed, within the terms of the statute.—*Falley v. Falley* (Ala.) 894.

§ 171. A decree in a suit for divorce for violent temper *held* not a bar to a second suit for divorce for extreme cruelty and willful desertion where different facts are alleged.—*Prall v. Prall* (Fla.) 867.

§ 171. The principles of *res judicata* should not be so applied as to prevent one determination of every distinct cause of action under the statutes authorizing divorces for specific misconduct.—*Prall v. Prall* (Fla.) 867.

#### VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 308. Divorce decree *held* to relieve father of liability to the mother for the support of a son electing to live with her.—*Dickinson v. Dickinson* (Fla.) 572.

#### DOCUMENTS.

As evidence, see Criminal Law, § 432; Evidence, §§ 343-372.

Best and secondary evidence, see Criminal Law, § 398; Evidence, §§ 171-185.

#### DOING BUSINESS.

In state, by foreign corporation, see Corporations, § 642.

#### DOMESTIC ANIMALS.

See Animals.

#### DOMICILE.

Of parties to action as determining jurisdiction of courts, see Removal of Causes, § 61.

#### DONATIONS.

See Gifts.

#### DOWER.

##### II. INCHOATE INTEREST.

###### (A) Rights and Remedies of Wife.

§ 34. Where the owner of land died, leaving a widow and three children, the land descended to his children, subject only to a dower interest, and on the widow's death the property descended to a surviving child.—*Barrier v. Young* (Miss.) 559; *Same v. Holland* (Miss.) 560; *Same v. Daley*, *Id.*

##### III. RIGHTS AND REMEDIES OF WIDOW.

§ 55. Before dower is assigned, it is in the nature of a right of action, and not an interest or estate in land.—*Martin v. Evans* (Ala.) 997.

#### DRAFTS.

See Bills and Notes.

#### DRAINS.

In cities, use and regulation, see Municipal Corporations, § 712.

##### I. ESTABLISHMENT AND MAINTENANCE.

§ 18. Any suggestion of informality in a drainage district bond issue election *held* cured by a second election.—*Board of Com'rs of Bayou Terre-aux-Bœufs Drainage Dist. v. Baker* (La.) 16.

§ 18. The opening, maintenance, and control of natural drains *held* within the police power of the state conferred by Act No. 159, p. 233, of 1902, and Act No. 61, p. 142, of 1904, and other legislation, on the boards of commissioners of the drainage districts.—*Petit Anse Co. v. Iberia & V. R. Co.* (La.) 512.

#### DRAMSHOPS.

See Intoxicating Liquors.

#### DRUNKARDS.

Intoxication as defense in criminal prosecutions, see Criminal Law, § 53.

#### DUE COURSE OF TRADE.

Transfer of negotiable instruments, see Bills and Notes, § 332.

#### DUE PROCESS OF LAW.

See Constitutional Law, §§ 284-301.

#### DUES.

Of members of mutual benefit insurance associations, see Insurance, § 750.

#### DURESS.

Affecting validity of deed, see Deeds, § 71. Persons against whom deed may be canceled for duress, see Cancellation of Instruments, § 30.

#### DYING DECLARATIONS.

See Homicide, §§ 203-218.

#### EARNING CAPACITY.

Impairment of, evidence, see Damages, § 173.

## EASEMENTS.

### Public easements.

See Dedication; Highways; Navigable Waters. Streets, see Municipal Corporations, §§ 648-706.

## I. CREATION, EXISTENCE, AND TERMINATION.

§ 3. A provision in an executor's deed reserving a right of way over the land conveyed *held* not an easement in gross, but one appurtenant to the land reserved under Code, § 3396.—Webb v. Jones (Ala.) 887.

§ 14. A provision in the habendum of a deed *held* to create a servitude of a right of passage over the lands conveyed, whether it was a reservation or an exception.—Webb v. Jones (Ala.) 887.

§ 17. An implied right of passage cannot exist, where a special passage has been fixed by contract.—Baldwin Lumber Co. v. Todd (La.) 526; In re Baldwin Lumber Co., Id.

## II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 61. The complaint, in an action for interference with an easement must allege plaintiff's ownership of the easement.—Beard v. Hicks (Ala.) 232.

§ 61. Landlords *held* entitled to sue to enforce an easement of a right of way, though they had let the dominant estate to tenants for agricultural purposes.—Webb v. Jones (Ala.) 887.

§ 61. Demand on defendants that they open a way to which plaintiffs were entitled *held* not essential to the maintenance of a suit by complainants for the enforcement of their easement.—Webb v. Jones (Ala.) 887.

§ 61. Injunction, based upon implied right of passage, *held* properly refused.—Baldwin Lumber Co. v. Todd (La.) 526; In re Baldwin Lumber Co., Id.

## ECCLESIASTICAL CORPORATIONS.

See Religious Societies.

## EDUCATION.

See Schools and School Districts.

## EJECTMENT.

See Forcible Entry and Detainer, §§ 9-34; Real Actions.

## I. RIGHT OF ACTION AND DEFENSES.

§ 10. In ejectment to recover certain land under a navigable bay, plaintiff's evidence of possession *held* insufficient to show prior possession.—Bass v. Ramos (Fla.) 945.

§ 13. An equitable title will not support ejectment.—Neville v. Cheshire (Ala.) 1005.

§ 16. Where land was such that actual possession was apparently not allowed by law, or if the prior possession was not actual, or was unlawful, or was a mere pretense, or that of an intruder or trespasser, plaintiff must show title and right of possession.—Bass v. Ramos (Fla.) 945.

§ 16. Plaintiff in ejectment, though without title, if he has had prior actual and proper possession, though not for the period necessary to constitute adverse possession, may recover against a person without title.—Bass v. Ramos (Fla.) 945.

§ 16. Plaintiff in ejectment without title cannot recover as against a mere intruder without

title, if plaintiff has not himself had prior actual possession.—Bass v. Ramos (Fla.) 945.

§ 16. The rule that plaintiff must recover on his own title does not prevent the acquisition of possessory rights as between persons other than the true owner.—Bass v. Ramos (Fla.) 945.

§ 17. Plaintiff must either have title and present right to continued possession, or actual bona fide possession with a right to continued possession, when ousted by defendant, and a right to possession when suit is brought.—Bass v. Ramos (Fla.) 945.

§ 26. Pleas on equitable grounds in an action in ejectment *held* properly stricken.—Norman v. Beekman (Fla.) 876.

## III. PLEADING AND EVIDENCE.

Admissibility of evidence of similar transaction, see Evidence, § 129.

§ 84. In ejectment, a deed under which defendant claimed *held* admissible, though dated after commencement of suit.—Hughes v. Rose (Ala.) 899.

§ 85. Proof that lands in controversy are separate property of a married woman *held* not a variance in ejectment by A. joined by her husband, B.—Norman v. Beekman (Fla.) 876.

§ 86. Presumption that possession of land was lawful may be rebutted by proof of the character of the land, the time and manner of possession, and other circumstances.—Bass v. Ramos (Fla.) 945.

## IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 109. Affirmative charge for defendants in ejectment *held* properly refused.—Norman v. Beekman (Fla.) 876.

§ 114. In ejectment, in which plaintiffs claimed as heirs, and defendants claimed under a sale by the administrator of plaintiffs' ancestor, *held* error not to adjudge plaintiffs entitled to the homestead.—Shannon v. Summers (Miss.) 693.

## V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.

§ 127. In ejectment plaintiff may recover the land, together with mesne profits, including damages for waste and dilapidation.—Norman v. Beekman (Fla.) 876.

§ 132. In ejectment the damages allowed are those in actions of trespass, not of trover and conversion.—Norman v. Beekman (Fla.) 876.

§ 132. In ejectment the injury is to the freehold, and the true measure of damages is the injury done to it.—Norman v. Beekman (Fla.) 876.

§ 135. Amount of damages for cutting and removing wood, defined.—Norman v. Beekman (Fla.) 876.

## ELECTION.

Between causes of action, counts, or defenses, see Pleading, § 369.

## ELECTION OF REMEDIES.

§ 3. A bill to reform a policy *held* not inconsistent with an action at law on the policy as it would be if reformed.—Florida Home Ins. Co. v. Bozeman (Fla.) 413.

§ 14. The adoption of one of two or more inconsistent remedies by one cognizant of the facts is a bar to a resort to the alternative remedy.—Fidelity & Deposit Co. of Maryland v. Art Metal Const. Co. (Ala.) 186.

## ELECTIONS.

*Of particular officers.*

Chairman of county board, see Counties, § 51.

*To determine particular questions.*

Amendment or revision of Constitution, see Constitutional Law, § 9.

Issuance of drainage district bonds, see Drains, § 18.

To determine county aid to railroads, see Counties, § 154.

## V. REGISTRATION OF VOTERS.

§ 95. Acts 1897, p. 465, No. 199, § 35, relating to registration of voters, *held* in violation of Const. art. 167.—State ex rel. Woods v. Theriot (La.) 770.

§ 98. No one is entitled to be registered who does not possess the qualifications required of a voter.—State ex rel. Woods v. Theriot (La.) 770.

§ 98. An elector leaving a parish and precinct of his residence and removing to another parish *held* not entitled to be registered in the parish and precinct from which he removes after an absence of 10 months under Const. art. 197.—State ex rel. Woods v. Theriot (La.) 770.

## X. CONTESTS.

Appeal from part of judgment relating to costs, see Appeal and Error, § 122.

Review of part of judgment, see Appeal and Error, § 122.

§ 307. Under Act No. 59, p. 57, of 1880, a city is not liable for the costs of a contest of an election for membership in the city council.—Deal v. Hodge (La.) 823.

## ELECTRICITY.

Effect of partial invalidity of statute relating to licensing of electricians, see Statutes, § 64. Electric railroads, see Street Railroads.

Laws providing for licensing of electricians as denial of equal protection of law, see Constitutional Law, § 230; as denying protection of property right, see Constitutional Law, § 87. Telegraph and telephone lines, see Telegraphs and Telephones.

§ 16. Where electric light fixtures had been used for years and accepted by defendant electric light company, *held*, that it could not insist, in an action against it for setting fire to the dwelling that the fixtures were defective.—Hanton v. New Orleans & C. R., Light & Power Co. (La.) 544.

§ 19. Evidence in an action against an electric light company for the destruction of plaintiff's house by fire *held* to justify a finding that the fire was due to the passage of a greater current through the wires than the fixtures in the house were prepared to meet.—Hanton v. New Orleans & C. R., Light & Power Co. (La.) 544.

## • ELIGIBILITY.

Of witnesses, see Witnesses, §§ 37-204.

## EMBANKMENTS.

See Levees

## EMBEZZLEMENT.

See False Pretenses; Larceny.

Civil liability for conversion, see Trover and Conversion.

Former jeopardy, see Criminal Law, § 197.

## EMBRACERY.

Bribery of jurors, see Bribery.

## EMINENT DOMAIN.

Dedication of property to public use, see Dedication.

Public improvements by municipalities, see Municipal Corporations, §§ 266-446.

## I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 36. A telegraph is such a public use as to justify the exercise of eminent domain.—Western Union Telegraph Co. v. Hill (Ala.) 245.

## II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

§ 84. The special rights of owners of land extending to ordinary high-water mark of navigable waters in the waters opposite their holdings are rights of property which may not be taken without compensation and due process of law.—Broward v. Mabry (Fla.) 826.

## IV. REMEDIES OF OWNERS OF PROPERTY.

§ 274. The relief prayed by a bill to enjoin the construction by a city of a street over complainant's land granted.—City of Ocala v. Anderson (Fla.) 572.

§ 281. A railroad company, entering on land under eminent domain proceedings, *held* entitled to an injunction restraining a suit in ejectment to recover the land.—Jones v. Southern Ry. Co. (Ala.) 380.

## EMPLOYÉS.

See Master and Servant.

## EMPLOYMENT.

Of broker, see Brokers, § 40.

## ENACTMENT.

Of statutes, see Statutes, §§ 8½-64.

## ENCROACHMENT.

On highway, see Highways, § 158.

On street, see Municipal Corporations, §§ 697, 698.

## ENDOWMENT.

See Dower.

## ENROLLMENT.

See Records.

Of judgment, see Judgment, § 296.

Of voters, see Elections, §§ 95, 98.

## ENTRY.

Of judgment, see Judgment, § 286.

On land, by force, see Forcible Entry and Detainer.

## ENTRY, WRIT OF.

Actions for damages for wrongful entry upon or injury to real property, see Trespass.

Actions for forcible entry and detainer, see Forcible Entry and Detainer, §§ 9-34.

Actions for recovery of possession of real property, and damages for detention thereof, see Ejectment.

Real actions founded on right of property, see Real Actions.

## EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, §§ 209-245.



## EQUITABLE DEFENSES.

In actions at law, see Ejectment, § 26.

## EQUITABLE ESTATES.

See Mortgages; Trusts.

## EQUITABLE LIENS.

Vendors' liens, see Vendor and Purchaser, § 254.

## EQUITY.

Equitable defenses in action at law, see Ejectment, § 26.

Equitable estates, see Mortgages; Trusts.

Equitable liens, see Vendor and Purchaser, § 254.

*Particular subjects of equitable jurisdiction and equitable remedies.*

See Account; Cancellation of Instruments; Discovery, § 3; Fraudulent Conveyances, §§ 206-209; Injunction; Quietening Title; Receivers; Reformation of Instruments; Specific Performance; Trusts.

Relief from judgment, see Judgment, §§ 419-461.

### *Review on appeal.*

Necessity of exceptions for purpose of review in equitable actions, see Appeal and Error, § 250.

Scope and extent of review in equitable actions, see Appeal and Error, § 1009.

## I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

Grounds for injunction, see Injunction, § 23.

§ 17. A bill showing that the right of complainant to an office which has a pecuniary interest is involved should not be dismissed for want of equity.—Houston v. Howze (Ala.) 266.

§ 17. Equity held authorized to grant relief on a bill quia timet for the protection of a future right of enjoyment of personality.—Underwood v. Underwood (Ala.) 305.

§ 39. Where the chancery court has taken jurisdiction for the auxiliary purpose of discovery, it may grant full relief in the case, under the power conferred by Const. 1890, § 160.—Keystone Lumber Yard v. Yazoo & M. V. R. Co. (Miss.) 445.

§ 39. The chancery court having taken jurisdiction for the auxiliary purpose of discovery sought in a bill to compel a carrier to pay reciprocal demurrage charges, it may grant full relief by a decree for the amount proved.—Keystone Lumber Yard v. Yazoo & M. V. R. Co. (Miss.) 445.

## II. LACHES AND STALE DEMANDS.

In suit to confirm or try tax title, see Taxation, § 805.

## III. PARTIES AND PROCESS.

In suit to enforce specific performance, see Specific Performance, § 106.

## IV. PLEADING.

*In particular proceedings.*

See Quietening Title, §§ 35, 42.

For accounting, see Account, § 17.

For divorce, see Divorce, §§ 90, 91.

To enforce specific performance, see Specific Performance, § 114.

To reform written instrument, see Reformation of Instruments, § 36.

To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 263.

### (A) Original Bill.

In suits for reformation of instruments, see Reformation of Instruments, § 36.

In suits for specific performance, see Specific Performance, § 114.

In suits to quiet title, see Quietening Title, § 35.

In suits to set aside transfers in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 263.

§ 145. A bill in equity may be filed in different aspects, provided each aspect makes a good bill.—Henry v. Tennessee Live Stock Co. (Ala.) 1029.

§ 148. Remedies to enforce mechanics' and equitable liens held not so different that two liens could not be set up in the same bill.—Kelly v. Smith (Ala.) 145.

§ 148. A bill for partition and to remove a cloud from the title is not multifarious.—Fies v. Rosser (Ala.) 287.

§ 150. Under Code 1907, § 3005, as amended, a bill held multifarious.—Henry v. Tennessee Live Stock Co. (Ala.) 1029.

§ 153. Ambiguous allegations in a bill of complaint will be construed most strongly against the pleader.—Hull v. Burr (Fla.) 754.

### (C) Cross-Bill and Plea and Answer Thereto.

§ 195. A cross-bill held to introduce new matter not germane to the bill.—Stansel v. Hahn (Miss.) 696.

### (E) Demurrer, Exceptions, and Motions.

§ 214. The sufficiency of an answer to a bill can be tested only by exceptions thereto.—City of Woodlawn v. Durham (Ala.) 356.

§ 232. A demurrer addressed to a bill as a whole held properly overruled.—Jones v. Barker (Ala.) 890.

§ 232. Where a demurrer is interposed to the whole bill, it should be overruled as an entirety, if the bill states any case for relief in equity.—Roberts v. Cypress Lake Naval Stores Co. (Fla.) 678.

§ 245. On the failure of complainant to amend his bill on the sustaining of a demurrer thereto with leave to amend, the court must dismiss it.—Underwood v. Underwood (Ala.) 305.

### (F) Amended and Supplemental Pleadings and Revivor.

§ 273. Complainant may, after the sustaining of a demurrer to his bill for multifariousness, select which of the purposes of the bill he will insist on.—Bentley v. Barnes (Ala.) 361.

§ 273. An amendment to a bill in equity held to make a new cause of action, so that the repugnancy between the original bill and the amendment rendered the amended bill bad on demurrer.—Henry v. Tennessee Live Stock Co. (Ala.) 1029.

§ 273. An amendment to a bill in equity must not present a new cause from that originally presented.—Henry v. Tennessee Live Stock Co. (Ala.) 1029.

### (G) Signature, Verification, Filing, and Service.

§ 310. An answer, without signature, seal, or verification by or for defendant, may be treated as a nullity.—City of Ocala v. Anderson (Fla.) 572.

**V. EVIDENCE.***In particular proceedings.*

For divorce, see Divorce, §§ 117, 129.  
 For relief from judgment, see Judgment, § 461.  
 To reform written instrument, see Reformation of Instruments, § 45.  
 To set aside transfers in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 282-299.

**VII. DISMISSAL BEFORE HEARING.**

§ 363. In considering the question of the dismissal of a bill for want of equity, only the bill can be looked to.—*Houston v. Howze* (Ala.) 266.

**VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.**

In suits for injunction, see Injunction, § 130.

§ 373. Under Chancery Rules 35-37 (2 Code 1907, pp. 1538, 1539), a cause in chancery can be set down for hearing on the bill and answer without taking proof.—*City of Woodlawn v. Durham* (Ala.) 356.

**IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.**

Review of questions of fact, see Appeal and Error, §§ 1017-1022.

**X. DECREE AND ENFORCEMENT THEREOF.**

In suit for divorce, see Divorce, §§ 160, 171.

§ 420. A decree pro confesso entitles complainant to the relief for which a proper predicate has been laid in the bill.—*City of Ocala v. Anderson* (Fla.) 572.

§ 422. An assignment of error that the court erred in adopting and making part of its decree the master's unauthorized findings and conclusions of fact and law held without force.—*Sarasota Ice, Fish & Power Co. v. Lyle & Co.* (Fla.) 993.

**ERROR, WRIT OF.**

See Appeal and Error.

**ESCAPE.**

Ground for dismissal of appeal, see Criminal Law, § 1131.

**ESTABLISHMENT.**

Of counties, see Counties, § 16.  
 Of right of exemption, see Exemptions, § 123; Homestead, § 183.  
 Of street railroads, see Street Railroads, § 36.  
 Of streets, see Municipal Corporations, § 648.  
 Of telegraphs or telephones, see Telegraphs and Telephones, §§ 15, 20.

**ESTATES.**

Bankrupts' estates, see Bankruptcy.  
 Created by will, see Wills, § 614.  
 Decedents' estates, see Descent and Distribution; Executors and Administrators; Wills.  
 Insolvents' estates, see Insolvency.  
 Title acquired by purchaser from life tenant with power to sell, see Powers, § 43.

*Particular estates.*

See Dower; Homestead; Life Estates.  
 Estates for years, see Landlord and Tenant.  
 Tenancy in common, see Tenancy in Common.

**ESTOPPEL.**

See Election of Remedies.

**I. BY RECORD.**

By judgment, see Judgment, §§ 540-584; 608-715.

**II. BY DEED.**

Estoppel of tenant to dispute title of landlord, see Landlord and Tenant, § 63.

(B) Estates and Rights Subsequently Acquired.

§ 38. A subsequently acquired title by a grantor under warranty deed inures to the benefit of the grantee.—*Swift v. Doe ex dem. Williams* (Ala.) 123.

§§ 38, 39. Where land is conveyed with a warranty an after-acquired title of the grantor inures to the benefit of the grantee; but where land is conveyed by quitclaim, conveying only the interest then owned by the grantor, an after-acquired title does not pass.—*Vary v. Smith* (Ala.) 187.

§ 39. A mortgage held to convey only the title the mortgagor had at the time of the execution thereof, notwithstanding Code 1907, § 3421.—*Vary v. Smith* (Ala.) 187.

**III. EQUITABLE ESTOPPEL.**

*Of particular classes of persons, or persons in particular relations.*

Co-tenant, see Tenancy in Common, § 34.  
 Mortgagor to deny title of mortgagee, see Mortgages, § 142.  
 Partner, see Partnership, § 156.  
 Tenant, to dispute title of landlord, see Landlord and Tenant, § 63.

*To assert or deny particular facts, rights, claims, or liabilities.*

Grounds for avoidance or forfeiture of insurance policy, see Insurance, § 375.  
 Invalidity of contract for public improvement, see Municipal Corporations, § 319.  
 Title of landlord, see Landlord and Tenant, § 63.  
 Validity of insurance policy, see Insurance, § 375.

*To maintain or oppose particular remedies or defenses.*

Appeal or other proceeding for review, see Appeal and Error, § 882; Criminal Law, § 1137.  
 By election of remedy, see Election of Remedies, § 14.  
 Objections to evidence, see Trial, § 75.

**EVICITION.**

Of tenant as affecting liability for rent, see Landlord and Tenant, § 190.

**EVIDENCE.**

See Affidavits; Depositions; Discovery; Witnesses.

Absence of evidence, ground for continuance, see Criminal Law, §§ 594-596.

Admissibility under pleadings, see Pleading, §§ 380, 385.

Applicability of instructions to evidence, see Criminal Law, § 814; Trial, § 252.

Comments of counsel on evidence, see Criminal Law, § 720.

Comments of counsel on matters not sustained by evidence, see Criminal Law, § 719.

Instructions as to rules of evidence, see Criminal Law, §§ 778-789; Trial, §§ 206, 231, 237.

Instructions ignoring, see Trial, § 253.

**Instructions on evidence or witnesses as invasion of province of jury**, see Trial, §§ 191, 194.  
**Motion to strike out evidence**, see Criminal Law, § 696.  
**Newly discovered evidence. ground for new trial**, see Criminal Law, §§ 938, 939; New Trial, § 104.  
**Objections to evidence**, see Criminal Law, §§ 693-696; Trial, §§ 75-85.  
**Objections to evidence on ground of insufficiency of pleadings**, see Pleading, § 423.  
**Objections to evidence on ground of variance**, see Pleading, § 430.  
**Offer of proof**, see Criminal Law, § 670; Trial, § 46.  
**Presentation of evidence by counsel in criminal prosecution**, see Criminal Law, § 706.  
**Questions of fact for jury**, see Trial, §§ 136-145.  
**Reception at trial**, see Criminal Law, §§ 666-693; Trial, §§ 40-85.  
**Rulings on evidence. ground for new trial**, see Criminal Law, § 921.

*As to particular facts or issues.*

**See Adverse Possession**, §§ 27, 113; Statutes, § 286.  
**Adultery as ground for divorce**, see Divorce, § 129.  
**Agency**, see Principal and Agent, § 22.  
**Authority of agent**, see Principal and Agent, § 122.  
**Authority of corporate officer or agent**, see Corporations, § 432.  
**Bar of statute of limitations**, see Limitation of Actions, § 195.  
**Contributory negligence of servant injured**, see Master and Servant, § 274.  
**Damages**, see Damages, §§ 163-173.  
**Delivery of deed**, see Deeds, § 200.  
**Fraud in conveyance by ancestor**, see Descent and Distribution, § 90.  
**Fraudulent conveyance**, see Fraudulent Conveyances, §§ 282-299.  
**Good faith of purchaser of land**, see Vendor and Purchaser, § 244.  
**Health and physical condition of person injured**, see Damages, § 168.  
**Impairment of earning capacity**, see Damages, § 173.  
**Interest and bias of witnesses, for purpose of impeachment**, see Witnesses, § 374.  
**Negligence of master causing injury to servant**, see Master and Servant, §§ 270, 278.  
**Performance or breach of contract**, see Contracts, § 322.  
**Statute of frauds**, see Frauds, Statute of, § 158.  
**Transfer and ownership of bill or note**, see Bills and Notes, § 524.  
**Validity of contract**, see Contracts, § 99.  
**Validity of contract of sale**, see Sales, § 52; Vendor and Purchaser, § 44.  
**Validity of deed**, see Deeds, § 196.

*In actions by or against particular classes of persons.*

**See Brokers**, § 85; **Carriers**; **Landlord and Tenant**, § 231; **Master and Servant**, §§ 265-278, 341; **Municipal Corporations**, § 742; **Railroads**, §§ 347, 396, 441, 480-482; **Street Railroads**.  
**Insurance companies**, see Insurance, § 818.  
**Telegraph or telephone companies**, see Telegraphs and Telephones, § 66.

*In particular civil actions or proceedings.*

**See Forcible Entry and Detainer**, § 29; **Garnishment**, §§ 162, 164; **Mandamus**, § 168; **Money Lent**, § 7; **Trespass**, § 45.  
**Between parties to bailment**, see Bailment, § 31.  
**For assault**, see Assault and Battery, § 34.  
**For breach of contract of sale**, see Sales, § 417.  
**For compensation of broker**, see Brokers, § 85.

**For conspiracy**, see Conspiracy, § 19.  
**For divorce**, see Divorce, §§ 117, 129.  
**For equitable relief against judgment, sentence**, § 461.  
**For false imprisonment**, see False Imprisonment, §§ 27, 30.  
**For injuries at railroad crossings, at roads**, § 347.  
**For injuries from destruction of building**, see Municipal Corporations, § 74.  
**For injuries from fires caused by operation of railroads**, see Railroads, §§ 480-482.  
**For injuries from negligence or default in mission or delivery of telegraph or telegram**, see Telegraphs and Telephones.  
**For injuries to animals on or near tracks**, see Railroads, § 441.  
**For injuries to passengers**, see Carriers, § 318.  
**For injuries to persons on or near tracks**, see Railroads, § 396.  
**For injuries to persons on or near street road tracks**, see Street Railroads, § 1.  
**For injuries to servants**, see Master and Servant, §§ 265-278.  
**For price or value of goods sold**, see § 358.  
**For procuring discharge of servant**, see Master and Servant, § 341.  
**For rent**, see Landlord and Tenant, § 2.  
**On account**, see Account, Action on, § 7.  
**On bills or notes**, see Bills and Notes, § 524.  
**On insurance policies**, see Insurance.  
**Probate proceedings and actions relating to wills or probate**, see Wills, § 289.  
**To reform written instrument**, see Reformation of Instruments, § 45.  
**To restrain nuisance**, see Nuisance, § 7.  
**To set aside transfer in fraud of creditors**, see Fraudulent Conveyances, §§ 282-299.  
**To supply lost records**, see Records, § 1.

*In criminal prosecutions.*

**See Arson**, § 31; **Burglary**, §§ 31, 35; **Criminal Law**, §§ 309-561; **Forgery**, § 44; **Larceny**, § 97; **Homicide**, §§ 156-252; **Libel and Slander**, § 155; **Statute of Frauds**, § 46.  
**Application for change of venue**, see Trial, § 134.  
**Application for new trial**, see Criminal Law, §§ 956, 957.  
**Violations of liquor laws**, see Intoxicating Liquors, §§ 224, 231.

*Review and procedure thereon in appellate courts.*

**Harmless error in rulings on**, see Criminal Law, §§ 1169, 1170.  
**Review of rulings as dependent on presence or absence of error**, see Appeal and Error, §§ 1048-1058.  
**Review of rulings as dependent on presence or absence of evidence in record**, see Appeal and Error, § 690; Criminal Law, § 1121.  
**Review of rulings as dependent on presence or absence of objection in lower court**, see Appeal and Error, §§ 204, 205.  
**Review of rulings involving discretion**, see Appeal and Error, § 970.  
**Review of sufficiency of evidence**, see Appeal and Error, §§ 1002-1022; Criminal Law, §§ 1158-1160.

**I. JUDICIAL NOTICE.**

§ 14. That a nervous condition is a characteristic of syphilis may not be judicially noticed.—St. Louis & S. F. R. Co. v. *et al.* (Ala.) 113.  
 § 32. The Supreme Court will not take judicial notice of a city ordinance.—Burke v. *et al.* (La.) 710.

**II. PRESUMPTIONS.**

In criminal prosecutions, see Criminal Law, § 309.

*As to particular facts or issues.*

Execution, existence, and genuineness of will, see Wills, § 289.

Fraudulent conveyance, see Fraudulent Conveyances, §§ 282-290.

Jurisdiction of courts, see Judgment, § 493.

*In particular civil actions or proceedings.*

See Ejectment, § 86; Money Lent, § 7.

For injuries from fires caused by operation of railroads, see Railroads, § 480.

§ 56. It must be presumed that a party to a cause was an adult, within the recital of the decree that all adult parties interested in the cause consented to its rendition.—Gunter v. Hinson (Ala.) 86.

§ 75. The rule that there may be an unfavorable inference where evidence is withheld does not obtain where the evidence is equally accessible to both parties.—Jordan v. Austin (Ala.) 70.

§ 77. There can be no unfavorable inference against a party failing to produce his wife as a witness to a fact, where he and his daughter had both testified thereto, as the wife's testimony would be merely cumulative.—Jordan v. Austin (Ala.) 70.

**III. BURDEN OF PROOF.**

As affecting right to open and close in introducing evidence or arguing to jury, see Trial, § 23.

*As to particular facts or issues.*

See Damages, § 163.

Bar of statute of limitations, see Limitation of Actions, § 193.

Error in trial court, see Appeal and Error, § 901.

Fraud in conveyance by ancestor, see Descent and Distribution, § 90.

Fraudulent conveyance, see Fraudulent Conveyances, §§ 282-290.

Right to bail, see Bail, § 49.

Validity of deed, see Deeds, § 196.

*In particular civil actions or proceedings.*

See Garnishment, § 162; Mandamus, § 168.

For injuries from fires caused by operation of railroads, see Railroads, § 480.

For injuries to animals on or near railroad tracks, see Railroads, § 441.

For injuries to passengers, see Carriers, § 316.

For injuries to persons on or near railroad tracks, see Railroads, § 396.

For injuries to persons on or near street railroad tracks, see Street Railroads, § 112.

For injuries to servants, see Master and Servant, § 265.

On insurance policies, see Insurance, § 646.

To set aside transfers in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 282-290.

§ 96. Burden of proof as to plea of recoupment held on defendant, though general issue is also pleaded.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

**IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.**

(A) *Facts in Issue and Relevant to Issues.*

In criminal prosecutions, see Criminal Law, §§ 338-368.

§ 106. In an action on an account, evidence of immoral relations between the defendants held inadmissible.—Lord v. Calhoun (Ala.) 402.

§ 113. In an action against a carrier for injury to or destruction of goods received for carriage to J., evidence of the value of the goods at B., to determine their value at J., is admissible.—St. Louis & S. F. R. Co. v. Cash Grain Co. (Ala.) 81.

§ 117. Evidence offered in an action for injuries to a servant held inadmissible.—Fletcher v. Tennessee Coal, Iron & R. Co. (Ala.) 996.

**(B) Res Gestæ.**

In criminal prosecutions, see Criminal Law, §§ 364-368.

§ 121. On a trial of the right of property levied on by plaintiff under a writ of attachment and claimed by a third person, the former may prove all that was said and done at the time of the levy as a part of the res gestæ.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 127. Expressions of pain made by a person injured, forming a part of the res gestæ of the accident, are admissible.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 127. In a personal injury action, held no error to permit evidence that plaintiff complained the next day of his injuries.—Louisville & N. R. Co. v. Davaner (Ala.) 276.

§ 127. Rule stated as to admissibility in action for injuries of the declarations of injured party as to suffering occasioned by the injury.—Western Steel Car & Foundry Co. v. Bean (Ala.) 1012.

§ 127. In an action for injuries, declarations of plaintiff as to his suffering could be proven by his father, to whom they were made.—Western Steel Car & Foundry Co. v. Bean (Ala.) 1012.

**(C) Similar Facts and Transactions.**

Other offenses, see Criminal Law, §§ 369-372.

§ 129. One vice held not provable by other vices not necessarily connected with it.—Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.) 958.

§ 129. In statutory ejectment by one claiming under a senior mortgage against one claiming under a junior mortgage, a crop lien mortgage executed by the mortgagor to the senior mortgagee, which has no relation to the mortgage on the land, is properly excluded.—Davis v. Anderson (Ala.) 1002.

**(D) Materiality.**

In criminal prosecutions, see Criminal Law, § 384.

**(E) Competency.**

In criminal prosecutions, see Criminal Law, §§ 394, 390.

Of contradictory testimony of witness, see Witnesses, § 406.

Of impeaching evidence, see Witnesses, § 374.

§ 155. The exclusion of certain testimony on behalf of defendant held erroneous, in view of evidence admitted for plaintiff.—Pollak v. Gunter & Gunter (Ala.) 155.

**V. BEST AND SECONDARY EVIDENCE.**

In criminal prosecutions, see Criminal Law, § 398.

§ 171. Where the inquiry as to facts of a former suit between the parties was merely collateral to the issues, parol evidence showing the nature of such suit was admissible, even if the record therein was the best evidence of the facts sought to be shown.—Garden v. Houston Bros. (Ala.) 1030.

§ 177. Where a fact is ascertainable only by the inspection of a large number of docu-

ments made up of numerous detailed statements, a competent witness who has perused all the documents may state summarily the net results thereof.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 178. Contents of a justice's lost summons and complaint *held* provable by parol.—Southern Ry. Co. v. Dickens (Ala.) 109.

§ 183. Certain testimony as to the loss of an instrument *held* not a sufficient predicate for the admission of secondary evidence.—C. W. Zimmerman Mfg. Co. v. Dunn (Ala.) 906.

§ 183. A copy of an instrument is inadmissible, without a proper predicate accounting for the absence of the original.—C. W. Zimmerman Mfg. Co. v. Dunn (Ala.) 906.

§ 183. Exclusion of secondary evidence of certain orders *held* error.—Dewees v. Bostick Lumber & Mfg. Co. (Miss.) 865.

§ 185. Where plaintiff testified to addressing and mailing letters to defendant, a sufficient predicate was laid for testimony of their contents, without proving notice to defendant to produce them, where he denied having received them.—Jordan v. Austin (Ala.) 70.

## VII. ADMISSIONS.

### (A) Nature, Form, and Incidents in General.

§ 213. That a shipper, suing a carrier for injury to a destruction of goods received for transportation, had presented a claim direct to the carrier in settlement of the controversy, with a view of reaching an amicable adjustment of the dispute, could not be shown as an admission.—St. Louis & S. F. R. Co. v. Cash Grain Co. (Ala.) 81.

§ 213. A statement, made and delivered by a party to the adverse party in an attempted compromise of the matter in dispute between them, is inadmissible.—C. W. Zimmerman Mfg. Co. v. Dunn (Ala.) 906.

### (C) By Grantors, Former Owners, or Privies.

§ 230. Grantor's declarations after the making of the deed *held* not competent to show his intention as to delivery.—Napier v. Elliott (Ala.) 148.

### (D) By Agents or Other Representatives.

§ 242. Declarations of an agent *held* competent.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 242. Statements of the owner's architect, made while he was inspecting the building, in order to advise the owner whether it had been constructed according to agreement, were binding upon the owner, and admissible in evidence in an action by the contractors for the contract price.—Fleming v. Lunsford (Ala.) 921.

§ 244. In an action by a bank on a note, evidence of the cashier's admission of payment *held* admissible.—First Nat. Bank v. Alexander (Ala.) 45.

§ 244. Admission by a bank cashier to defendant that defendant had paid a note held by the bank *held* admissible against it.—First Nat. Bank v. Alexander (Ala.) 45.

§ 246. In a suit for breach of a sheriff's bond in failing to require and take a forthcoming bond of the plaintiff in detinue, certain evidence as to whether the bond was given or not *held* properly excluded.—Carmichael v. United States Fidelity & Guaranty Co. (Ala.) 1003.

### (E) Proof and Effect.

§ 258. It was proper to disallow an effort to show a declaration by an agent as to the location of the boundary line, where the character and scope of the agency was not indicated.—Clark v. Dunn (Ala.) 93.

§ 258. Certain proof *held* to establish, so as to render admissible proof of the agent.—Davis v. Andersen 1002.

## VIII. DECLARATIONS.

By agent as to his authority, see Principle Agent, § 22.

## IX. HEARSAY.

§ 315. In an action for injuries, proper not to permit plaintiff to be asked a physician had told him that drinker render him insane.—St. Louis & S. F. R. Co. v. Savage (Ala.) 113.

§ 317. In an action for rent of a defendant could not testify as to what an told him as to the number of days worked.—Dickens v. Murray & Peppe 1019.

§ 322. Question *held* objectionable for hearsay.—Supreme Lodge Knights of Honor v. Baker (Ala.) 958.

## X. DOCUMENTARY EVIDENCE.

Depositions, see Depositions, § 94.

In criminal prosecutions, see Criminal 432.

### (B) Exemplifications, Transcript Certified Copies.

§ 343. A certified copy of a deed executed by a Florida corporation in 1885, under corporate seal, signed by its president, and attested by him, is admissible under La. C. 125, c. 1639, § 30, even though attested by one witness.—Norman v. Beekun 876.

### (C) Private Writings and Public.

In criminal prosecutions, see Criminal 432.

§ 354. Original entries in plaintiff's account *held* admissible in an action for goods sold through defendant's alleged childress v. Smith-Echols-Burnett & Co. (Ala.) 322.

§ 354. The rule that a litigant's testimony is not admissible in evidence in his favor is subject to exceptions.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 355. Account shown to be a correct copy from plaintiff's books, coupled with evidence that it had been admitted to be correct by defendant, *held* entitled to be received in evidence.—Byrd v. Beall (Ala.) 53.

§ 355. A physician's visiting list is admissible to show the dates of his visits to the number of them.—Hardenstein (Miss.) 979.

### (D) Production, Authentication, and Effect.

§ 370. Before a letter relevant and its genuineness is competent evidence, its genuineness must be shown.—C. W. Zimmerman Mfg. Co. (Ala.) 906.

§ 372. Ancient surveys of a city, as shown on the county records, are presumed to be correct by authority, though not certified.—City of Lexington v. Hoskins 561.

## XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITING.

### (A) Contradicting, Varying, or Adding to the Terms of Written Instruments.

§ 408. A receipt in full is open to question by parol evidence.—Dewees v. Bostick & Mfg. Co. (Miss.) 865.

to, and what in fact the consideration was may be shown by parol.—Pollak v. Gunter & Gunter (Ala.) 155.

**(B) Invalidating Written Instrument.**

§ 434. That a conveyance was obtained by fraud is open to proof.—Martin v. Evans (Ala.) 997.

§ 436. That a conveyance was obtained by undue influence is open to proof.—Martin v. Evans (Ala.) 997.

**(C) Separate or Subsequent Oral Agreement.**

§ 441. Parol evidence of antecedent or contemporaneous agreements cannot be proved to contradict a written contract.—Red Snapper Sauce Co. v. Bolling (Miss.) 401.

§ 442. A contract for the sale of merchandise held to show that former conversations are merged in it, so that the buyer may not avoid paying the price by setting up matters not provided for in the contract.—Roll v. Puritan Mfg. Co. (Ala.) 354.

§ 445. A subsequent oral modification of a written contract, not required by law to be in writing, may be proved.—Red Snapper Sauce Co. v. Bolling (Miss.) 401.

**(D) Construction or Application of Language of Written Instrument.**

§ 450. Where a railroad rule was admissible in evidence, parol evidence was admissible to explain a typographical error therein.—Birmingham Ry., Light & Power Co. v. Morris (Ala.) 198.

**XII. OPINION EVIDENCE.**

In criminal prosecutions, see Criminal Law, §§ 448-491.

**(A) Conclusions and Opinions of Witnesses in General.**

§ 471. It is not error to refuse to compel a witness to state whether a third person had discharged his duties to his own employees.—Travis v. Sloss-Sheffield Steel & Iron Co. (Ala.) 108.

§ 471. In an action for injuries to a servant while standing on a pipe working on a casting placed thereon, by reason of the casting, slipping and injuring his foot, a question to plaintiff whether he could have stood on the ground and done the work was proper, as calling for a statement of fact.—United States Cast Iron, Pipe & Foundry Co. v. Driver (Ala.) 118.

§ 471. Question held not to call for witness' conclusion.—Birmingham Ry., Light & Power Co. v. McLain (Ala.) 149.

§ 471. Error held not committed in overruling objection to question whether plaintiff showed any evidence of being injured, as there are many injuries patent to any one.—Birmingham Ry., Light & Power Co. v. McLain (Ala.) 149.

§ 471. The court properly sustained an objection to testimony as to what witness would do with reference to certain appliances by which work was done.—United States Cast Iron, Pipe & Foundry Co. v. Granger (Ala.) 159.

§ 471. A witness not shown qualified may not give his opinion or conclusions.—Tennessee Coal, Iron & R. Co. v. Kelly (Ala.) 1008.

§ 471. Where a witness, referring to certain graphite, testified that an iron building had been painted with it several years ago, and on that stated that it was good, his stating that he "knew it was good" was not objectionable as an opinion.—Birmingham Paint & Roofing Co. v. Gillespie (Ala.) 1032.

Birmingham Paint & Roofing Co. v. Gillespie (Ala.) 1032.

§ 472. The rule that a witness cannot testify as to his opinion of the amount of damages suffered in consequence of a breach of contract or of a wrong held subject to a certain exception.—St. Louis & S. F. R. Co. v. Cash Grain Co. (Ala.) 81.

§ 472. In an action for false imprisonment, defendant was not entitled to testify as to his purpose in having plaintiff arrested.—Gray v. Strickland (Ala.) 152.

§ 472. It was proper to exclude testimony of a witness as to whether plaintiff knew all about a certain business; such matter being a question for the jury from the facts shown.—United States Cast Iron, Pipe & Foundry Co. v. Granger (Ala.) 159.

§ 472. In an action for failure to deliver a telegram, plaintiff could not testify that she suffered pain and mental anguish on account of "the dispatch."—Western Union Telegraph Co. v. Peagler (Ala.) 913.

§ 473. Conclusion called for by a question to a witness held not a permissible shorthand rendering of collective facts.—St. Louis & S. F. R. Co. v. Savage (Ala.) 113.

§ 474. Certain testimony of a shipper, suing a carrier for injury to goods delivered for transportation, held competent on the measure of damages.—St. Louis & S. F. R. Co. v. Cash Grain Co. (Ala.) 81.

§ 474½. Certain matters held to relate to matters of common observation, rendering it proper to exclude the opinion of a witness thereon.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 483. It was proper to permit a witness to testify as to whether a hook like the one in issue could get out of fix.—United States Cast Iron, Pipe & Foundry Co. v. Granger (Ala.) 159.

§ 489. A witness having no expert knowledge may testify as to the value of cattle.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 501. The evidence of an experienced engineer as to how far a locomotive engineer could see a person on the track under given circumstances held admissible.—Louisville & N. R. Co. v. Johnson (Ala.) 300.

**(B) Subjects of Expert Testimony.**

§ 527. Evidence, in an action for causing the death of plaintiff's intestate, of the fact of his death, held admissible.—Lovelady v. Birmingham Ry., Light & Power Co. (Ala.) 96.

§ 528. In an action for injuries, expert professional witnesses may testify as to the cause of plaintiff's impaired physical condition subsequent to the accident.—St. Louis & S. F. R. Co. v. Savage (Ala.) 113.

**(C) Competency of Experts.**

In criminal prosecutions, see Criminal Law, § 479.

§ 539. A witness, who qualified as an expert machinist, held properly permitted to state that in his opinion an engine and boiler were properly set up.—W. T. Adams Mach. Co. v. Turner (Ala.) 308.

**(E) Comparison of Handwriting.**

In criminal prosecutions, see Criminal Law, § 491.

### **XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.**

In criminal prosecutions, see Criminal Law, § 543.

### **XIV. WEIGHT AND SUFFICIENCY.**

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, §§ 318-406.

In criminal prosecutions, see Criminal Law, § 561.

Instructions as to weight and sufficiency, see Trial, §§ 206, 237.

Questions for jury, see Trial, §§ 139-143.

Scope and extent of review, see Appeal and Error, §§ 1002-1022.

#### *As to particular facts or issues.*

See Adverse Possession, § 27.

Adultery as ground for divorce, see Divorce, § 129.

Authority of corporate officers, see Corporations, § 432.

Fraudulent conveyance, see Fraudulent Conveyances, §§ 295, 299.

Good faith of purchaser of land, see Vendor and Purchaser, § 244.

Negligence of master causing injury to servants, see Master and Servant, § 278.

Transfer and ownership of bill or note, see Bills and Notes, § 524.

#### *In particular civil actions or proceedings.*

See Forcible Entry and Detainer, § 29; Garnishment, § 164; Money Lent, § 7.

Against administrator for medical services rendered intestate, see Executors and Administrators, § 221.

For breach of contract of sale, see Sales, § 417.

For divorce, see Divorce, § 129.

For injuries from destruction of building by city, see Municipal Corporations, § 742.

For injuries from fires caused by operation of railroad, see Railroads, § 482.

For injuries to passengers, see Carriers, § 318.

For injuries to persons on or near street railroad tracks, see Street Railroads, § 114.

For injuries to servants, see Master and Servant, § 278.

On bills or notes, see Bills and Notes, § 524.

On insurance policies, see Insurance, § 605.

To reform written instrument, see Reformation of Instruments, § 45.

To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 295, 299.

To supply lost records, see Records, § 17.

§ 586. Certain evidence on a slander trial held noncorroborative of defendant's denial that he used the words alleged.—*Von Eye v. Byrnes* (La.) 708.

§ 587. Wrongdoing cannot be proved merely by suspicious circumstances.—*Succession of Drysdale* (La.) 30.

§ 588. The testimony of a witness as to admissions made by an employé immediately after an accident is not entitled to much weight, especially where the witness at the time labored under great excitement.—*Litloff v. New Orleans Ry. & Light Co.* (La.) 105.

§ 588. Courts are unwilling to rest their judgment on the testimony of witnesses who cannot distinguish between the facts within their knowledge and those whose existence they are willing to take for granted and swear to.—*Succession of King* (La.) 735.

### **EXAMINATION.**

Of adverse party before trial, see Discovery, §§ 67-79.

Of expert witnesses, see Criminal Law, § 491.

Of impeaching witnesses, see Witnesses, § 358. Of nonexpert witnesses giving opinions, see Evidence, § 501.

Of witnesses in general, see Witnesses, §§ 230-287.

### **EXCEPTIONS.**

#### *In contracts and conveyances.*

Creation of easement by exception in grant, see Easements, § 14.

Risks and causes of loss excepted in insurance policy, see Insurance, § 402.

#### *In judicial proceedings.*

Bill of exceptions in general, see Exceptions, Bill of.

Necessity and sufficiency for purpose of review in civil cases, see Appeal and Error, §§ 250, 254.

Necessity and sufficiency for purpose of review in criminal cases, see Criminal Law, §§ 1055, 1056.

Requisites of record for purpose of review, see Appeal and Error, § 501.

To instructions, see Criminal Law, § 844.

To pleadings, see Pleading, § 228.

To pleadings, review of decisions, see Appeal and Error, § 1040.

### **EXCEPTIONS, BILL OF.**

In criminal cases, see Criminal Law, §§ 1090-1092.

Necessity for purpose of review, see Appeal and Error, §§ 544, 545.

### **II. SETTLEMENT, SIGNING, AND FILING.**

In criminal cases, see Criminal Law, § 1092.

§ 38. A paper in the record on appeal purporting to be a bill of exceptions held to be considered only for the purpose of reviewing a ruling on a motion to retax costs.—*McCrary v. Brown* (Ala.) 402.

§ 39. A special term of court was called for the 28th of October, 1907, for two weeks. A case was tried November 2d, and judgment entry stated that defendant had 60 days from adjournment of the term to sign the bill of exceptions. The order calling the term shows the criminal business was to be disposed of during the week commencing November 4th. Held, that a bill of exceptions signed on January 2, 1908, was in time.—*Louisville & N. R. Co. v. Huffstutler* (Ala.) 146.

§ 56. Under Code 1907, § 10, held, the old Code governs the signing of a bill of exceptions on appeal from a judgment entered before the new Code became operative.—*Jones v. Jones* (Ala.) 310.

§ 56. A paper in the record, which is not signed or otherwise authenticated, will not be considered as a bill of exceptions.—*Cook v. Phonoharp Co.* (Ala.) 1021.

### **EXCESSIVE DAMAGES.**

See Damages, § 130.

Ground for new trial, see New Trial, § 76.

### **EXCISE.**

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

### **EXCLAMATIONS.**

As part of *res gestæ*, see Evidence, § 127.

### **EXCUSABLE HOMICIDE.**

See Homicide, §§ 105, 116, 298, 300.

## EXCUSE.

For nonperformance or defects in performance of contracts in general, see Contracts, § 303.

## EXECUTION.

See Attachment; Garnishment.

Exemptions, see Exemptions; Homestead.

Of tax deeds, see Taxation, § 765.

Of will, see Wills, § 111.

## II. PROPERTY SUBJECT TO EXECUTION.

§ 41. A testamentary trust *held* an active trust, so that Code 1906, § 2779, would not authorize a sale of the beneficiaries' interest under execution.—*Stansel v. Hahn* (Miss.) 696.

## III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

§ 78. An execution, embracing two sheets of paper, the second containing only the bill of costs and the constable's indorsement, and pinned together, *held* valid.—*Glover v. Bass* (Ala.) 125.

## VII. SALE.

### (B) Title and Rights of Purchaser.

§ 272. A purchaser at execution sale *held* charged with notice of an unrecorded transfer of the land to the wife prior to the levy of an execution on the land as the property of the husband.—*McCullars v. Reaves* (Ala.) 313.

§ 272. Open possession by a vendee, either personally or by a tenant, is constructive notice of a change of ownership, though the deed is not recorded.—*McCullars v. Reaves* (Ala.) 313.

## EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

Courts of probate, see Courts, § 202.

Testamentary trustees, see Trusts.

Testimony as to transactions with persons subsequently deceased, see Witnesses, §§ 139, 140.

## II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 22. Act 109, p. 173, of 1906, *held* to empower a court to conserve an estate by the appointment of a temporary keeper.—*Succession of Pavey* (La.) 518; *In re Coco*, Id.

## IV. COLLECTION AND MANAGEMENT OF ESTATE.

### (A) In General.

§ 119. An administrator may be held liable individually for trespass, but not in his representative capacity.—*Brown v. Floyd* (Ala.) 995.

### (B) Real Property and Interests Therein.

§ 129. An administrator has no estate in or title to the lands of his intestate, but only the right and power, given exclusively by statute, to intercept the rents in certain cases for certain purposes, and to recover the land for this purpose, and to sell it if necessary to pay the decedent's debts, or he may in certain cases sell for distribution among the heirs.—*Mayer v. Kornegay* (Ala.) 880.

§ 129. Where an administrator attempts to assume the control of the lands of his intestate, without the necessity or contingency provided by statute arising, he is a trespasser as against the heirs.—*Mayer v. Kornegay* (Ala.) 880.

§ 130. An administrator may, in certain cases, as provided by statute, maintain ejectment against the heirs or strangers to recover the lands of his intestate, but only when it is

necessary for the purpose of administration.—*Mayer v. Kornegay* (Ala.) 880.

§ 130. An administrator cannot recover the lands of intestate from the heirs, without showing the necessity, or the contingency, or the happening of the event, for which the statute authorizes him to maintain such action.—*Mayer v. Kornegay* (Ala.) 880.

### (C) Personal Property.

Rights of distributees as against administrators, see Descent and Distribution, § 75.

## VI. ALLOWANCE AND PAYMENT OF CLAIMS.

### (A) Liabilities of Estate.

§ 221. In an action by a physician for services, evidence *held* to show a contract fixing the amount of compensation.—*Hardenstein v. Brien* (Miss.) 979.

### (D) Priorities and Payment.

§ 272. Debts, to be a charge upon the lands of an intestate, must have been incurred by the decedent, and be in excess of the value of his personal property.—*Mayer v. Kornegay* (Ala.) 880.

§ 272. Lands cannot be applied to the debts of a decedent, if the personal property is sufficient to pay the debts.—*Mayer v. Kornegay* (Ala.) 880.

§ 272. Debts of a decedent are not necessarily a charge upon his land, since they may be barred by limitations or the land be exempt from debt.—*Mayer v. Kornegay* (Ala.) 880.

§ 272. Debts contracted by an administrator are never a charge upon the lands of his intestate.—*Mayer v. Kornegay* (Ala.) 880.

## VII. DISTRIBUTION OF ESTATE.

Partition of property of estate, see Partition.

## VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

### (B) Application and Order.

§ 343. The burden of proof is upon the administrator to show the necessity for applying the lands of his intestate to the payment of the debts, or to bring him within the conditions or provisions of the statute, which provides the cases where a decedent's lands may be applied to the payment of his debt.—*Mayer v. Kornegay* (Ala.) 880.

§ 349. Where the probate court has decided that certain debts were not a charge upon the lands of a decedent, it being for this purpose a court of competent jurisdiction, its decree on this subject, if not appealed from, is final and conclusive.—*Mayer v. Kornegay* (Ala.) 880.

### (E) Proceeds.

§ 402. Chattel mortgagee *held* not entitled to maintain bill against administrator of mortgagor to reach proceeds of sale of property.—*Dothan Nat. Bank v. Crawford* (Ala.) 936.

## X. ACTIONS.

Effect of death and administration in general, see Limitation of Actions, § 80.

Survival of actions by or against decedents, see Abatement and Revival, § 52.

§ 423. Judgment creditors of a deceased debtor have a right of action to annul any contract made by him in fraud of their rights.—*Bank of Berwick v. George Vinson Shingle & Mfg. Co., Limited* (La.) 823.

§ 437. Under Code 1906, §§ 2096a, 2110, 3105, a claim by a physician for medical services rendered intestate during his last illness



*held* not barred until after four years and six months.—Hardenstein v. Brien (Miss.) 979.

§ 438. Heirs *held* not alone to have the quality to stand in judgment in a suit as abutting owner and taxpayer to restrain the city from entering into a paving contract, but the testamentary executor is the proper person to represent the succession.—Gurley v. City of New Orleans (La.) 411.

§ 454. An execution against the personal representative of a decedent in his personal or representative capacity cannot run against the lands of the decedent's estate.—Taylor v. Taylor (Ala.) 375.

## EXECUTORY CONTRACTS.

In general, see Contracts.

## EXEMPLARY DAMAGES.

See Damages, § 87.

For conversion, see Trover and Conversion, § 60  
For trespass, see Trespass, § 56.

## EXEMPTIONS.

See Homestead.

Construction of term "current year" in exemption law, see Time, § 4.

From liability for loss of or injury to goods, see Carriers, § 159.

From liability for negligence or default in transmission or delivery of messages, see Telegraphs and Telephones, § 54.

From taxation, see Taxation, §§ 196, 206.

Of bankrupt, see Bankruptcy, § 399.

### I. NATURE AND EXTENT.

#### (C) Property and Rights Exempt.

§ 37. Code Prac. art. 645, *held* to exempt crops from seizure upon execution while still in the ground.—Hinton v. Roané (La.) 798.

§ 37. Corn, hay, and cane *held* to belong to a judgment debtor and to be "on the farm" within the law, so as to be exempt from seizure upon execution.—Hinton v. Roane (La.) 798.

§ 37. Sugar cane raised to be made into syrup for family use *held* subject to seizure upon execution, and not exempted by Code Prac. art. 645.—Hinton v. Roane (La.) 798.

§ 39. The necessary corn for the current year is exempt from seizure, whether cultivated by the farmer on his own land or that of another.—W. C. Dejean & Bro. v. Lee (La.) 25.

§ 44. Two horses not used as work horses are not exempt from seizure under Const. art. 244.—W. C. Dejean & Bro. v. Lee (La.) 25.

#### (D) Liabilities Enforceable Against Exempt Property.

§ 76. That the judgment creditor had a privilege on property sought to be seized under execution, because the judgment was for necessary supplies, would not entitle the creditor to fees upon execution property of the debtor which was exempt therefrom.—Hinton v. Roane (La.) 798.

## III. WAIVER OR FORFEITURE.

By bankrupt, see Bankruptcy, § 399.

## IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 123. The purpose of allowing plaintiff to demand an inventory of defendant upon contest of a claim of exemptions declared.—Weinstein v. Yielding Bros. & Co. (Ala.) 126.

§ 123. Code 1907, § 4178. allowing plaintiff to demand an inventory of defendant upon the

contest of a claim of exemptions, *he* require an inventory of the property *l* on, where defendant denies that he other.—Weinstein v. Yielding Bros. & Co. 126.

§ 123. Defendant's sworn response has nothing to inventory *held* good (failure to file an inventory, within Co § 4178.—Weinstein v. Yielding Bros (Ala.) 126.

## EX PARTE PROCEEDING

Habeas corpus, see Habeas Corpus.  
In bankruptcy, see Bankruptcy, §§ 42,

## EXPERT TESTIMONY.

See Criminal Law, §§ 479, 491; Evidence, 527, 528, 539.

## EXPROPRIATION.

See Eminent Domain.

## EXPULSION.

Of municipal officer, see Municipal Officers, § 159.

## EXTENSION.

Of lease, see Landlord and Tenant, § 9  
Of time for presentation, allowance, a of bills of exceptions, see Criminal 1092.

## EXTINGUISHMENT.

Of judgment lien, see Judgment, § 800.

## EXTRINSIC EVIDENCE.

In general, see Evidence, §§ 408-450.

## FACT.

Evidence of matters of fact or conclusions, Evidence, § 471.

Findings of fact, see Trial, § 349.

Judicial notice of facts, see Evidence, § Questions of law or fact, province of jury, see Trial, §§ 136-145.

## FACTORIZING PROCESS

See Garnishment.

## FACTORS.

See Brokers.

## FAILURE.

See Insolvency.

## FALSE IMPRISONMENT.

### I. CIVIL LIABILITY.

#### (B) Actions.

Opinion evidence, see Evidence, § 472.  
Statutory regulations as to right to appeal and Error, § 2.

§ 27. In an action for false imprisonment evidence that the person making the arrest *held* admissible.—Gray v. St (Ala.) 152.

§ 30. In an action for false imprisonment a principal by bail, the *caus* and *bo* admissible only in mitigation of damage v. Strickland (Ala.) 152.

## FALSE PRETENSES.

Abstract instructions, see Criminal Law, § 813.  
Forgery, see Forgery.

§ 28. An indictment for defrauding a firm by false pretenses must allege the Christian and surnames of the partners, or sufficient excuse for the omission.—State v. Tatum (Miss.) 490.

§ 32. An indictment for false pretenses *held* to sufficiently allege the value of the money obtained.—State v. Tatum (Miss.) 490.

§ 33. Where false pretenses consist wholly or in part of the use of a written instrument, the writing need not be set out in the indictment in *hæc verba*.—State v. Tatum (Miss.) 490.

§ 38. In a prosecution for false pretenses, evidence *held* to constitute a fatal variance.—Cook v. State (Ala.) 319.

## FALSE REPRESENTATIONS.

See False Pretenses; Fraud.

Affecting validity of deed, see Deeds, § 70.

Affecting validity of insurance policy, see Insurance, §§ 282, 723.

Affecting validity of release, see Release, § 17.

Affecting validity of sale, see Sales, §§ 38, 40.

## FAMILY.

See Husband and Wife.

## FARES.

For carriage of passengers, see Carriers, § 249.

## FARM CROSSINGS.

See Railroads, § 103.

## FAULT.

See Negligence.

## FEDERAL COURTS.

See Courts, § 489.

Removal of causes to federal courts from state courts, see Removal of Causes.

## FEES.

Of attorneys, see Attorney and Client, §§ 133, 167.

Of municipal officers, see Municipal Corporations, § 164.

## FELLOW SERVANTS.

See Master and Servant, §§ 177–196, 216, 259, 287.

## FEME COVERT.

See Husband and Wife.

## FENCES.

§ 6. Certain lands *held* improved lands, within Code 1907, § 4247, relative to partition fence between improved lands.—Johnson v. Frederick (Ala.) 910.

§ 15. Moving party in proceedings for apportionment of expenses of partition fence *held* not required to consult other party as to the kind of fence to be built, etc. (Code 1907, §§ 4247, 4248).—Johnson v. Frederick (Ala.) 910.

## FERRIES.

Conflicting stipulations in agreement with lessee, see Contracts, § 162.

## FIDEI COMMISSUM.

See Trusts.

## FIDUCIARY RELATIONS.

See Brokers; Partnership; Principal and Agent; Trusts.

Between corporations and their officers or agents, see Corporations, §§ 310, 320.

Disclosure of communications, see Witnesses, § 204.

## FIERI FACIAS.

See Execution.

## FILING.

Criminal information or complaint, see Indictment and Information, § 43.

Pleading, see Pleading, § 339.

Written instruments or copies thereof with pleading, see Pleading, § 308.

## FINAL JUDGMENT.

Decisions reviewable, see Appeal and Error, § 78.

## FINDINGS.

By jury in general, see Trial, § 349.

Contrary to law or evidence, ground for new trial, see New Trial, § 76.

Review in appellate court, see Appeal and Error, §§ 931, 1009–1015, 1017–1022; Criminal Law, §§ 1158–1160.

## FINES.

See Penalties.

For contempt, see Contempt, §§ 72, 79.

§ 1. The amendment to Const. art. 16, § 9, requiring all fines collected to be applied to criminal prosecutions, *held* to repeal by implication art. 12, § 9, providing that “the net proceeds of all fines” shall be used solely for school purposes.—Board of Public Instruction of Polk County v. Board of Com’rs of Polk County (Fla.) 574.

## FIRE INSURANCE.

See Insurance.

## FIRES.

Civil liability for injuries from fires caused by operation of railroad, see Railroads, §§ 459–484.

Criminal responsibility for burning or setting fire to buildings or other structures and their contents, see Arson.

## FISCAL MANAGEMENT.

Of counties, see Counties, § 154.

Of municipal corporations, see Municipal Corporations, §§ 873, 993.

## FISH.

Partial invalidity of statute relating to measurement of oysters, see Statutes, § 64.

Statutory regulations as to measurement of oysters, see Weights and Measures, § 2.

## FLATS.

Ownership and control, see Navigable Waters, §§ 36, 37.

## FORCIBLE DEFILEMENT.

See Rape.

## FORCIBLE ENTRY AND DETAINER.

Trespass, see Trespass.

### I. CIVIL LIABILITY.

Jurisdiction on removal from justice's court to court of record, see Justices of the Peace, § 75.

§ 9. Plaintiff in an action of forcible entry and unlawful detainer must show prior actual possession.—*Bush v. Thomas* (Ala.) 133.

§ 29. In an action of forcible entry and unlawful detainer, a deed *held* inadmissible in evidence.—*Bush v. Thomas* (Ala.) 133.

§ 29. Evidence in an action of forcible entry and unlawful detainer *held* not sufficient to show actual possession in the plaintiff.—*Bush v. Thomas* (Ala.) 133.

§ 34. In unlawful detainer proceedings, *held*, that the question to whom the land involved was allotted in partition proceedings was one for the jury.—*Clark v. Dunn* (Ala.) 93.

## FORECLOSURE.

Of mortgage, see Chattel Mortgages, § 250; Mortgages, § 390.

## FOREIGN ATTACHMENT.

See Garnishment.

## FOREIGN CORPORATIONS.

See Corporations, §§ 642-672.

## FORFEITURES.

Of bail bonds, see Bail, §§ 79, 80.

Of exemptions, by bankrupt, see Bankruptcy, § 399.

Of insurance, see Insurance, §§ 328-335, 750.

Of insurance, estoppel or waiver affecting right, see Insurance, § 375.

Of liquor license, see Intoxicating Liquors, § 106.

Pecuniary punishment, see Fines; Penalties.

Seizures for enforcement of forfeitures, see Searches and Seizures.

## FORGERY.

Application of instructions to case, see Criminal Law, § 814.

Payment of forged paper by bank, see Banks and Banking, § 148.

§ 44. Production of the instrument alleged to be forged *held* essential to a conviction.—*Deal v. State* (Miss.) 495.

## FORMER ADJUDICATION.

Operation and effect in general, see Judgment, §§ 540-584, 668-715.

## FORMER JEOPARDY.

Bar to prosecution, see Criminal Law, §§ 178-197.

Plea of former jeopardy, see Criminal Law, §§ 291, 292.

## FORMS OF ACTION.

See Action, § 27; Assumpsit, Action of; Detinue; Ejectment; Forcible Entry and Detainer, §§ 9-34; Trespass, §§ 27-68; Trover and Conversion.

## FORNICATION.

See Seduction.

## FOURTEENTH AMENDMENT

See Constitutional Law, §§ 206, 209-230, 301.

## FRANCHISES.

Corporate franchises in general, see Franchises, § 38.

Grants by municipal corporations, right of street for purposes other than highways.—Municipal Corporations, §§ 680, 681.

## FRATERNAL ASSOCIATIONS

See Insurance, §§ 723-826.

## FRAUD.

Conveyances and transactions fraudulent as to creditors or subsequent purchasers, see Unlawful Conveyances.

Offenses involving fraud, see False Pretenses; Parol or extrinsic evidence to show fraud, Evidence, § 434.

*By particular classes of persons, or particular relations.*

See Brokers, § 65.

Applicants for insurance, see Insurance, § 723.

Purchaser of public lands, see Public Lands, § 152.

Sellers of goods, see Sales, §§ 38, 40.

*In particular classes of conveyances, contracts, transactions, or proceedings.*

See Contracts, § 94; Deeds, § 70; Insurance, §§ 282, 723; Release, § 17.

Conveyance by ancestor, see Descent and Distribution, § 90.

Lease, see Landlord and Tenant, § 28.

Payment of forged or altered paper by banks and Banking, § 148.

Sale of public lands, see Public Lands, § 152.

Sales, see Sales, §§ 38, 40.

## II. ACTIONS.

(B) Parties and Pleading.

§ 49. Fraud, when alleged, must be proved and satisfactorily proved.—*Southern Ry. v. Arnold* (Ala.) 293.

## III. CRIMINAL RESPONSIBILITY

See False Pretenses.

## FRAUDS, STATUTE OF.

### III. PROMISES TO ANSWER DEBT, DEFAULT OR MISCONDUCT OF ANOTHER.

§ 26. Where lands are rented to one who sells goods and delivered to her exclusively the credit of another, the latter's liability not within the statute of frauds.—*Lord v. Houn* (Ala.) 402.

## VI. REAL PROPERTY AND ESTATE AND INTERESTS THEREIN

§ 56. Title to realty cannot be established by parol.—*Tabernacle Baptist Church v. (La.)* 1.

§ 75. A verbal agreement between a husband and wife to execute similar wills disposing of real estate was void under the statute of (Code 1907, § 4289, subd. 5), and she had no right, after his death, to revoke a will pursuant thereto, and make another.—*A. Bromberg* (Ala.) 884.

### VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 103. That parties make mutual wills does not show an agreement to do so, and the wills themselves cannot furnish any memoranda of the contract.—Allen v. Bromberg (Ala.) 884.

§ 106. The memorandum of a contract for the sale of real estate, required by the statute, must show the contract, either on its face or by reference to some other writing, so that it can be understood without recourse to parol proof.—Allen v. Bromberg (Ala.) 884.

### IX. OPERATION AND EFFECT OF STATUTE.

Specific performance of oral contracts partly performed, see Specific Performance, § 43.

### X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 158. A parol agreement authorizing the lease of land, being void under the statute of frauds, *held* inadmissible in support of the lease.—Prestwood v. Carlton (Ala.) 234.

§ 158. Where issue is taken on a plea of the statute of frauds, plaintiff must prove either a contract in writing or one not required to be in writing.—Lord v. Calhoun (Ala.) 402.

### FRAUDULENT CONVEYANCES.

Conveyances in fraud of rights of heirs, see Decent and Distribution, § 90.

### I. TRANSFERS AND TRANSACTIONS INVALID.

#### (B) Nature and Form of Transfer.

§ 27. A mortgage given to secure an actual loan may be fraudulent as to creditors, if made with intent to screen the property of the insolvent debtor from the creditors.—Bank of Perwick v. George Vinson Shingle & Mfg. Co., Limited (La.) 823.

#### (D) Indebtedness, Insolvency, and Intent of Grantor.

§ 57. An instruction, which predicates the invalidity of a sale as against creditors on the necessity of the insolvency of the seller and knowledge thereof, is erroneous.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

#### (J) Knowledge and Intent of Grantee.

§ 158. Facts *held* sufficient to put a buyer on inquiry as to whether a sale would not be fraudulent as against creditors.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 159. An instruction, which makes the validity of a sale as against creditors to depend on the fact that the buyer had no notice of the insolvency of the seller, though he had notice of his fraudulent intent, is erroneous.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 169. A voluntary conveyance by a debtor may be set aside without showing fraudulent intent as to the grantee.—Allen v. Pierce (Ala.) 924.

### III. REMEDIES OF CREDITORS AND PURCHASERS.

#### (A) Persons Entitled to Assert Invalidity.

§ 206. If a debtor conveys his property to defraud future creditors, the conveyance is void as to both future and existing creditors.—Allen v. Pierce (Ala.) 924.

§ 211. It is immaterial, in an action to set aside a conveyance by a debtor of his property to his wife, what consideration was paid by the

complainant for the debt which he holds, as he stands in the place of the assignor.—Allen v. Pierce (Ala.) 924.

§ 220. Where a creditor whose indebtedness is secured by mortgage, in attempting to enforce his indebtedness, sues to set aside a conveyance of the debtor's property as fraudulent, a grantee in such conveyance has no right to complain as to the mortgagee's choice of remedies.—Allen v. Pierce (Ala.) 924.

#### (F) Pleading.

§ 203. A bill in a creditors' suit *held* not demurrable.—Allen v. Pierce (Ala.) 924.

#### (G) Evidence.

§ 282. A creditor of a seller attacking a sale made on a valuable consideration as fraudulent must show notice to the buyer.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 286. On the issue whether a sale of merchandise was in fraud of creditors of the seller, the question as to how much goods the buyer was carrying at the time was relevant on the good faith of the transaction.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 291. On the issue whether a sale of merchandise was in fraud of creditors, evidence as to how much the goods were reduced in value by the manner in which they were moved to the store of the buyer *held* competent.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 291. On the issue whether a sale of merchandise was in fraud of creditors of the seller, evidence of the value of a remnant stock *held* inadmissible.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 291. On the issue whether a sale of merchandise was in fraud of creditors, certain testimony of the buyer *held* admissible.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 295. An instruction *held* erroneous as requiring too high a degree of proof of fraud sufficient to set aside a sale as fraudulent against creditors.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 295. In an action to cancel a mortgage of partnership property placed thereon by one of the firm, evidence *held* to show that the mortgage was simulated and fraudulent.—Union Garment Co., Limited, v. Newburger (La.) 740.

§ 299. A sale of personal property by a debtor to his father-in-law and son-in-law *held* not prima facie fraudulent.—Grigsby Const. Co. v. Colly (La.) 855.

### FREIGHT.

Carriage of goods, see Carriers, §§ 40-159.

### FRUIT TREES.

Nature of action for penalty for destruction of or injury to, whether in contract or tort, see Action, § 27.

### FUNDS.

Of religious societies, see Religious Societies, § 20.  
Public funds, see Counties, § 154; Municipal Corporations, §§ 873, 993.

### FUTURITIES.

Protection of future rights in personal property in equity, see Equity, § 17.

### GAMBLING.

See Gaming.

## GAMING.

See Lotteries.

### III. CRIMINAL RESPONSIBILITY.

#### (A) Offenses.

Laws for protection of infants, see Infants, § 13.

#### (B) Prosecution and Punishment.

§ 97. Certain evidence *held* admissible against defendant, charged with conducting a gambling house.—Camp v. State (Fla.) 537.

## GARNISHMENT.

See Attachment.

Of stockholder for debts of corporation, see Corporations, § 255.

### IV. WRIT OR SUMMONS AND NOTICE, SERVICE, AND RETURN.

In proceedings against corporation, see Corporations, § 509.

§ 93. Notice of seizure in garnishment *held* fatally defective.—Bank of Monroe v. Ouachita Valley Bank (La.) 718.

### VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

Right of garnishee to appeal on failure to answer, see Appeal and Error, § 124.

§ 120. Where, in garnishment proceedings, an injunction is issued, and plaintiff takes nothing by the garnishment, the injunction is properly dismissed.—Bank of Monroe v. Ouachita Valley Bank (La.) 718.

§ 158. An issue on the denial of garnishee's answer includes the garnishee's indebtedness at the time of service as well as at the time of answer.—Jenkins v. McGeever (Ala.) 142.

§ 162. Where the garnishee answered that funds in his hands were those of defendant as president of a corporation, the judgment creditor must prove that the judgment debtor was the owner thereof.—Edward Thompson Co. v. Durand (La.) 407; In re Edward Thompson Co., Id.

§ 164. An order discharging a garnishee *held* unsupported by the evidence.—Jenkins v. McGeever (Ala.) 142.

## GENERAL DEMURRER.

See Pleading, § 205.

## GIFTS.

Charitable gifts, see Charities.

### INTER VIVOS.

Advancements, see Descent and Distribution, §§ 102, 109.

§ 41. Donation of lot to town for establishment of public market *held* properly revoked for nonperformance of obligations imposed on donee.—Voinche v. Town of Marksville (La.) 662.

## GOOD FAITH.

Of grantee in fraudulent conveyance, see Fraudulent Conveyances, § 169.

Of purchaser of bill or note, see Bills and Notes, § 332.

Of purchaser of land, see Vendor and Purchaser, §§ 227-244.

Of purchaser of mortgaged property, see Chattel Mortgages, § 153.

Of purchaser of property sold on execution, see Execution, § 272.

Of purchaser of public lands, see Public Lands, § 152.

## GOODS.

Mortgage, see Chattel Mortgages.

Sale, see Sales.

## GOVERNMENT.

See States.

Distribution of governmental powers, see Constitutional Law, § 50.

## GRAND JURY.

See Indictment and Information.

Discrimination as to service on juries by reason of race, color, or condition, see Constitutional Law, § 221.

Special or local law, see Statutes, § 87.

§ 10. Code 1907, §§ 3249, 7261, *held* not in conflict, as there is a field of operation for both, and, where the judge in ordering an adjourned term made no order at the time for a grand jury and did not order the same until after the term had convened, the grand jury was properly drawn under section 3249.—Holland v. State (Ala.) 215.

§ 12. Under Code 1907, § 3249, a grand jury was properly completed under section 7263, providing that, if 15 persons qualified as grand jurors do not appear, the court may cause others to be summoned, etc.—Holland v. State (Ala.) 215.

§ 20. An indictment attempted to be preferred by a grand jury organized by a court adjourned by operation of law is void.—Stephens v. State (Ala.) 42.

§ 20. Under the express terms of Code 1907, § 7572, no objection can be taken to an indictment by a plea in abatement or otherwise directed to the organization, formation, etc., of a special grand jury.—Holland v. State (Ala.) 215.

## GRANTS.

See Deeds.

Of easements, see Easements, § 14.

Of right to use streets for purposes other than highway, see Municipal Corporations, §§ 680, 681.

## GROUND RENTS.

Rents reserved in leases, see Landlord and Tenant, §§ 190-265.

## GUARANTY.

Application of statute of frauds, see Frauds, Statute of, § 26.

Authority of corporate officers to make, see Corporations, § 416.

## GUARDIAN AND WARD.

Matters relating to infants and their property irrespective of guardianship, see Infants.

## GUNS.

Liability for negligence in maintaining spring guns, see Negligence, § 47.

Liability of owner of store for injuries to burglar caused by spring guns, see Trespass, § 4.

# HABEAS CORPUS.

## I. NATURE AND GROUNDS OF REMEDY.

§ 1. While habeas corpus is a summary proceeding, it cannot be expected that it should obviate all delay incident to legal proceedings.—Ex parte Ryan (La.) 385.

§ 4. The Supreme Court may refer application for habeas corpus to the court of original jurisdiction, particularly where the judgment is reviewable.—Ex parte Ryan (La.) 161.

§ 22. A commitment for contempt is reviewable on certiorari or, in proper cases by habeas corpus, and not by appeal.—Ex parte Dickens (Ala.) 218.

## II. JURISDICTION, PROCEEDINGS, AND RELIEF.

Constitutional right to prompt hearing and determination, see Constitutional Law, § 327. Mandamus to compel hearing, see Mandamus, § 60.

§ 44. That the trial court improperly failed to bring the issues raised in habeas corpus proceedings to trial would not justify the Supreme Court in granting the writ under its original jurisdiction.—Ex parte Ryan (La.) 385.

§ 47. In the issuance of a habeas corpus, a justice of the Supreme Court *held* to act as a court, and to have inherent authority to make the power effective by necessary procedure.—Ex parte Nathan (Fla.) 38.

§ 90. At a hearing on habeas corpus to procure bail, the usual right to cross-examine and to impeach witnesses exists.—Ex parte Nathan (Fla.) 38.

§ 107. A person charged with being an accessory before the fact to murder *held* entitled on habeas corpus to show that the proof is not evident nor the presumption great that he is guilty.—Ex parte Nathan (Fla.) 38.

§ 113. An appeal from an order of the judge of a city court discharging on habeas corpus a person convicted of violating an ordinance *held* to lie, under Code 1907. § 6245.—City of Bessemer v. Eidge (Ala.) 270.

## HANDWRITING.

Comparison by witnesses, see Criminal Law, § 491.

## HARMLESS ERROR.

In civil actions, see Appeal and Error, §§ 1029-1068.

In criminal prosecutions, see Criminal Law, §§ 1166-1173.

## HAZARD.

See Lotteries.

## HEALTH.

Implied repeal of statute by act relating to same subject, see Statutes, § 161.

## HEARING.

In action for injunction, see Injunction, § 130. In equity, see Equity, §§ 373, 388.

On appeal or writ of error, see Appeal and Error, § 832.

On motion or application to quash or set aside indictment or information, see Indictment and Information, § 140.

## HEARSAY EVIDENCE.

See Criminal Law, §§ 419-421; Evidence, §§ 315-322.

# HEAT OF PASSION.

Element of manslaughter, see Homicide, § 39.

## HEIRS.

See Descent and Distribution.

Rights as to community and separate property, see Husband and Wife, § 274.

Rights as to homestead, see Homestead, §§ 141-147.

## HIGH SCHOOLS.

Laws providing for taxation of property of colored persons for support of high schools for white persons only as abridgment of privileges and immunities of citizenship, see Constitutional Law, § 206; as denial of equal protection of law, see Constitutional Law, § 220.

## HIGHWAYS.

See Navigable Waters, § 1.

Crossing by railroads, see Railroads, §§ 310-351.

Dedication of land for highway, see Dedication. Streets in cities, see Municipal Corporations, §§ 648-706.

## I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

Dedication, see Dedication.

## V. REGULATION AND USE FOR TRAVEL.

(A) Obstructions and Encroachments.

On streets, see Municipal Corporations, §§ 607-608.

§ 158. A bill to remove obstructions on a highway *held* sufficient as against a demurrer.—Jones v. Barker (Ala.) 890.

(B) Use of Highway and Law of the Road.

Collisions of street cars with animals or vehicles, see Street Railroads, § 90.

Right of way over street railroad tracks, see Street Railroads, § 85.

Use of street as highway, see Municipal Corporations, §§ 705, 706.

(C) Injuries from Defects or Obstructions.

Accidents at railroad crossings, see Railroads, §§ 310-351.

In streets, see Municipal Corporations, §§ 755-816.

## HIRING.

See Bailment.

## HOLDING OVER.

By tenant as extension or renewal of tenancy, for years, see Landlord and Tenant, § 90.

## HOLIDAYS.

See Sunday.

## HOMESTEAD.

Dower or rights of widow in real property of deceased husband, see Dower.

Exemption of personal property, see Exemptions.

## I. NATURE, ACQUISITION, AND EXTENT.

(D) Property Constituting Homestead.

§§ 81, 87. A husband *held* entitled to a homestead in lands belonging to him and used in con-

nection with adjoining lands, which he occupied as a homestead, though he had conveyed a one-third interest in the adjoining lands to his wife.—*Glover v. Bass* (Ala.) 125.

### III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 141. After the death of the husband, the mother is the head of the family, and, if the husband had a homestead, it passes to his wife.—*Harrelson v. Webb* (La.) 833.

§ 143. The homestead right *held* not affected by the fact that the property is held in indivision, and the widow may be the homesteader of the fractional part belonging to her husband.—*Harrelson v. Webb* (La.) 833.

§ 147. Widow does not lose her homestead by marrying an impecunious man, nor does this second marriage destroy the rights of the family therein.—*Harrelson v. Webb* (La.) 833.

### V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 183. The condition of a debtor on which the claim is based is considered as of the date when the claim is made.—*Harrelson v. Webb* (La.) 833.

## HOMICIDE.

Breaking and entering with intent to kill, see Burglary, §§ 35, 45.

Right of accused to bail, see Bail, §§ 43, 49.

### III. MANSLAUGHTER.

§ 39. Passion suddenly aroused, without more, cannot reduce a homicide from murder to manslaughter.—*Williams v. State* (Ala.) 59.

§ 45. Remark of employé *held* not a sudden and sufficient provocation within Gen. St. 1906, § 3204, defining excusable homicide.—*Pelt v. State* (Fla.) 832.

### V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 105. The rule that an officer having a warrant of arrest is justified in killing a person charged with a felony, if he resists or flees, *held* not to prevail as to an arrest for a misdemeanor.—*Holland v. State* (Ala.) 215.

§ 105. An officer armed with a legal warrant may enter the premises of the person to be arrested, is under no duty to retreat, and can repel any force used.—*Holland v. State* (Ala.) 215.

§ 105. Where the circumstances show a willful murder, rather than an attempt to arrest decedent, the warrant of arrest is of no benefit to defendant.—*Holland v. State* (Ala.) 215.

§ 116. A belief of imminent peril and of an urgent necessity to slay an assailant in self-defense must be both well-founded and honestly entertained.—*Williams v. State* (Ala.) 59.

### VI. INDICTMENT AND INFORMATION.

Defects in indictment as ground for arrest of judgment, see Criminal Law, § 970.

### VII. EVIDENCE.

#### (B) Admissibility in General.

Evidence of act of conspirators or codefendants, see Criminal Law, § 424.

In prosecution for breaking and entering and making assault with intent to kill, see Burglary, § 35.

Opinion evidence in general, see Criminal Law, § 452.

Res gestæ, see Criminal Law, §§ 364-368.

§ 156. In a homicide case, evidence admissible that accused and another shooting the morning before the homicide tending to show preparation and premeditation.—*Lowman v. State* (Ala.) 43.

§ 156. In a prosecution for murder, evidence that defendant had a pistol, in connection with evidence of a threat against the deceased admissible.—*Williams v. State* (Ala.) 59.

§ 156. A letter written by defendant tending to show a motive to kill defendant properly received in evidence, though of slight weight.—*Phillips v. State* (Ala.) 194.

§ 157. Certain evidence *held* to tend to throw into the details of a former difficulty between decedent and defendant and show what had been received.—*Holland v. State* (Ala.) 215.

§ 158. On a trial for murder, the state is entitled to show what defendant said just before the killing.—*Holland v. State* (Ala.) 215.

§ 166. On a murder trial, evidence *held* properly admitted to show motive.—*Copeland v. State* (Fla.) 621.

§ 166. On a murder trial, evidence *held* admissible to prove a difference between decedent and defendant and establish motive for the crime.—*Copeland v. State* (Fla.) 621.

§ 166. Evidence that deceased went to a place where the homicide occurred on an errand *held* admissible.—*State v. Holland* (Ala.) 700.

§ 168. On a murder trial, evidence *held* admissible to establish a desire by defendant to create an opportunity for the crime.—*Holland v. State* (Fla.) 621.

§ 169. On a trial for murder, certain evidence *held* erroneously admitted.—*Holland v. State* (Ala.) 215.

§ 169. On a trial for murder, a confession between decedent and another before the killing, and while defendant was absent, and not have been admitted.—*Holland v. State* (Ala.) 215.

§ 169. On a trial for murder, the state is entitled to show what defendant said just before the killing.—*Holland v. State* (Ala.) 215.

§ 169. *Held*, that certain evidence should be received on a trial for murder.—*Gilt v. State* (Fla.) 535.

§ 170. A witness having testified that he found tracks at the place of the homicide, that he had seen defendant make tracks at another place, *held* properly permitted to describe the tracks made by defendant at the latter place.—*Phillips v. State* (Ala.) 194.

§ 171. On a trial for murder, the state is not permitted to show that defendant struck a third person, where it did not appear that it was in an effort to escape.—*Holland v. State* (Ala.) 215.

§ 171. On a trial for murder, defendant is entitled to show everything that was said done from the time defendant came to where decedent was until the killing.—*Holland v. State* (Ala.) 215.

§ 174. Objection *held* properly sustained to certain evidence on a trial for murder, offered to explain evidence tending to show flight.—*Phillips v. State* (Ala.) 194.

§ 174. On a trial for murder, certain evidence *held* properly admitted as an inculpatory confession.—*Holland v. State* (Ala.) 215.

§ 184. Where defendant's theory was that the killing was justifiable, in that he was attempting to arrest decedent, *held*, that he should be permitted to show that he requested decedent to go with him.—*Holland v. State* (Ala.) 215.

§ 187. The evidence of authorship of a letter put in evidence under defendant's plea of self-defense *held* admissible.—Griffin v. State (Ala.) 962.

§ 188. A witness, testifying to the general character of decedent in the community in which the latter lived, *held* competent to testify to such character in the community in which the witness lived, eight miles distant.—Pate v. State (Ala.) 357.

§ 188. Evidence that decedent was, according to general reputation, a dangerous man, *held* competent on the issue whether accused had a right to think that his life was in danger.—Pate v. State (Ala.) 357.

§ 189. In a prosecution for assault with intent to kill, evidence as to the merits of a previous quarrel is inadmissible.—Cox v. State (Fla.) 873.

§ 190. Evidence of threats by deceased *held* inadmissible in the absence of proof of an overt act.—State v. Bouvy (La.) 849.

§ 191. In a prosecution of a wife for the murder of her husband, where she claimed self-defense, evidence that deceased had on other occasions beat her was properly excluded.—Hutcherson v. State (Ala.) 1027.

§ 192. In a prosecution for assault to kill, evidence of a physician as to the condition of defendant's shoulder and the likelihood of his claim that he sought to retreat, etc., *held* admissible.—Cox v. State (Fla.) 875.

§ 194. Defendant's belief that deceased had formed an intent to take his life was inadmissible, in the absence of proof of an overt act on deceased's part.—State v. Bouvy (La.) 849.

#### (C) Dying Declarations.

*Res gestæ*, see Criminal Law, § 366.

§ 203. Circumstances *held* to justify the conclusion that decedent knew her death was imminent, rendering her statement admissible as a dying declaration.—Copeland v. State (Fla.) 621.

§ 213. As an ex-convict is a competent witness, his dying declaration is admissible.—State v. Blount (La.) 12.

§ 214. Dying declarations must go in as a whole, though some of the statements, if standing alone, would be inadmissible.—State v. Blount (La.) 12.

§ 216. Foundation required to render a statement by decedent admissible as a dying declaration declared.—Copeland v. State (Fla.) 621.

§ 216. It is not necessary that the preliminary foundation for a dying declaration should be proved by express utterances of decedent, but it may be gathered from all the circumstances.—Copeland v. State (Fla.) 621.

§ 216. Where there was evidence that deceased said that he knew he was going to die, it was sufficient predicate for the admission of his dying declaration.—State v. Brady (La.) 806.

§ 218. Question of admissibility of dying declaration *held* a preliminary question for the judge.—Copeland v. State (Fla.) 621.

#### (E) Weight and Sufficiency.

§ 250. Evidence *held* to warrant a conviction of manslaughter.—Pelt v. State (Fla.) 832.

§ 250. Evidence *held* insufficient to support a conviction for murder.—Matthews v. State (Miss.) 561.

§ 252. The evidence of one witness is sufficient to support a conviction of murder, if it satisfies the jury beyond a reasonable doubt.—State v. Blount (La.) 12.

### VIII. TRIAL.

#### (A) Conduct in General.

Absence of accused during impaneling of jury, see Criminal Law, § 636.

Effect of insanity of juror pending prosecution, see Jury, § 149.

Presence of accused, see Criminal Law, § 636.

#### (B) Questions for Jury.

In prosecution for breaking and entering and making assault with intent to kill, see Burglary, § 45.

§ 269. In a prosecution for homicide, the degree of the homicide and the question of malice *held* for the jury.—Roberson v. State (Ala.) 345.

§ 271. What is sufficient provocation of passion to reduce a homicide from murder to manslaughter should be defined by the court, and not left to the jury.—Williams v. State (Ala.) 59.

§ 282. In a prosecution for homicide, the degree of the homicide and the question of malice *held* for the jury.—Roberson v. State (Ala.) 345.

#### (C) Instructions.

§ 286. *Held* that, though an instruction on a trial for murder may have been correct in the abstract, yet it might have a misleading tendency.—Holland v. State (Ala.) 215.

§ 290. Refusal to submit to jury the question whether a chair was a dangerous weapon *held* not error.—Pelt v. State (Fla.) 832.

§ 298. *Held*, that a charge requested by defendant on a trial for murder should have been given.—Holland v. State (Ala.) 215.

§ 300. An instruction that defendant "had a right to protect himself by taking the life of deceased, if such protection could not otherwise be secured," *held* properly refused.—Griffin v. State (Ala.) 962.

§ 300. An instruction as to the effect of deceased's general bad character *held* properly refused.—Griffin v. State (Ala.) 962.

§ 300. Propriety of refusing an instruction on self-defense determined.—Griffin v. State (Ala.) 962.

§ 300. An instruction on the question of self-defense *held* properly refused.—Griffin v. State (Ala.) 962.

§ 300. An oral charge as to self-defense *held* erroneous, and a charge as to the duty of a wife to retreat to avoid a difficulty *held* correct.—Hutcherson v. State (Ala.) 1027.

#### (D) Verdict.

§ 312. Verdict of guilty of assault with "attempt" to murder in the second degree *held* not fatally defective.—Bunch v. State (Fla.) 534.

§ 314. That the jury found the accused guilty of murder "without capital punishment" was not evidence of such uncertainty in the minds of the jury as to justify a reversal.—State v. Brady (La.) 806.

### HOPJACK.

See Intoxicating Liquors, § 17.

### HORSES.

Injuries to horses on railroad tracks, see Railroads, §§ 439-446.

### HOSTILE POSSESSION.

Of occupant of real estate holding adversely, see Adverse Possession, §§ 70-79.



Impeachment for interest or bias, see Witnesses, §§ 363-374.

## HOUSEBREAKING.

See Burglary.

## HOUSE OF ILL FAME.

See Disorderly House.

## HUMANITARIAN DOCTRINE.

Application of doctrine to injuries caused by automobile on street, see Municipal Corporations, § 705.

Injury avoidable notwithstanding contributory negligence, see Negligence, § 83.

## HUSBAND AND WIFE.

See Divorce; Dower.

Competency as witnesses for or against each other, see Witnesses, §§ 52-61.

Privileged communications, see Witnesses, § 188.

Right of survivor to exemptions, see Homestead, §§ 141-147.

## III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Validity of unrecorded conveyance to wife as against bona fide purchaser from husband, see Vendor and Purchaser, § 232.

## IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

### (C) Contracts.

§ 85. A married woman's note, under the Constitution and statutes *held* void.—Virginia-Carolina Chemical Co. v. Fisher (Fla.) 504.

§ 87. Under Rev. Civ. Code, arts. 1790, 2398, a wife is not liable as surety for her husband on an appeal bond.—In re Succession of Maloney (La.) 647.

§ 89. Married woman's contract *held* incapable of ratification after her husband's death.—Virginia-Carolina Chemical Co. v. Fisher (Fla.) 504.

### (D) Trade or Business.

§ 97. A married woman, under the Constitution and statutes, cannot be a member of a partnership.—Virginia-Carolina Chemical Co. v. Fisher (Fla.) 504.

## V. WIFE'S SEPARATE ESTATE.

### (A) What Constitutes.

§ 114. The married woman's act of February 28, 1887 (Acts 1886-87, p. 80), *held* not to apply to a conveyance to the wife by the husband, who died before the passage of the act.—Neville v. Cheshire (Ala.) 1005.

§ 114. A husband's deed to his wife, followed by his death prior to passage of married woman's act of February 28, 1887 (Acts 1886-87, p. 80), *held* to leave the legal title in the husband's heirs.—Neville v. Cheshire (Ala.) 1005.

§ 119. A deed of land by the husband to the wife, executed prior to the married woman's act of February 28, 1887 (Acts 1886-87, p. 80), *held* void in law, but valid in equity, as creating an equitable separate estate in the wife.—Neville v. Cheshire (Ala.) 1005.

### (B) Rights and Liabilities of Husband.

Homestead rights, see Homestead, § 87.

§ 171. Under Code 1907, § 4497, a mortgage on a wife's separate estate to secure the debt of her husband *held* void.—Allen v. Pierce (Ala.) 924.

### (D) Conveyances and Contracts to Convey.

§ 193. An objection to a deed on the ground that the grantor's husband had not joined therein *held* without merit (Code 1907, § 4494).—Hughes v. Rose (Ala.) 899.

## VII. COMMUNITY PROPERTY.

§ 274. In a proceeding via executiva to enforce payment of a note representing a community debt and secured by mortgage after the wife's death, there is no law which precludes the wife's heirs or surviving husband from purchasing the property sold.—Schlieder v. Boulet (La.) 617.

§ 274. The payment of a note representing a community debt may be enforced after the wife's death in a proceeding via executiva against the surviving husband, without making the wife's heirs parties.—Schlieder v. Boulet (La.) 617.

§ 274. Where, in a proceeding via executiva to enforce payment of a note representing a community debt after the wife's death, there is a surplus which the surviving husband retains, a subsequent transferee *held* to acquire the property free of any incumbrance in favor of the major heirs of the deceased wife.—Schlieder v. Boulet (La.) 617.

## IX. ABANDONMENT.

Appealability of order for payment of money for support as dependent on finality of judgment, see Criminal Law, § 1023.

Competency of wife as witness on question of paternity in prosecution for abandonment of wife and child, see Witnesses, § 61.

Hearsay evidence, see Criminal Law, § 420.

§ 305. Code 1907, § 7843, prohibiting abandonment of wife or child, does not prohibit a husband from abandoning a wife whom he was induced to marry by false assertions that he was the father of a child born out of wedlock.—Carnley v. State (Ala.) 362.

§ 312. Where a husband was charged with abandoning his wife and child under Code 1907, § 7843, the evidence must establish an abandonment of both.—Carnley v. State (Ala.) 362.

§ 312. Where accused was charged with abandoning his wife and child, both the marriage and the paternity of the child must be proved.—Carnley v. State (Ala.) 362.

§ 313. In a prosecution for abandonment, on an issue as to the paternity of a child born out of wedlock, defendant *held* entitled to testify that he was not the father, and to prove that another had intercourse with the complainant during the period of gestation.—Carnley v. State (Ala.) 362.

## HYPOTHECATION.

See Chattel Mortgages; Pledges.

## IDENTIFICATION.

Of act amended in amending act, see Statutes, § 138.

## IDENTITY.

Of accused, evidence of in criminal prosecutions, see Homicide, § 170.

Of causes of action or defenses as affecting operation of former judgment as bar, see Judgment, § 584.

ing conclusiveness of judgment, see Judgment, §§ 713, 715.  
Of offense under plea of former jeopardy, see Criminal Law, § 197.  
Of persons as affecting conclusiveness of former judgment, see Judgment, §§ 668, 682.

## **IDLE PERSONS.**

See Vagrancy.

## **ILLEGAL IMPRISONMENT.**

See False Imprisonment.

## **ILLEGALITY.**

Of contracts, see Contracts, §§ 101, 136.

## **ILL FAME.**

Houses of ill fame, see Disorderly House.

## **IMMOVABLES.**

Conveyances, see Deeds.

Mortgages, see Mortgages.

Sales, see Vendor and Purchaser.

## **IMMUNITY.**

See Exemptions.

Constitutional guaranties of privileges or immunities of citizens, see Constitutional Law, § 206.

From liability for negligence or default in transmission or delivery of messages, see Telegraphs and Telephones, § 54.

From taxation, see Taxation, §§ 196, 206.

## **IMPANELING JURY.**

See Jury, § 149.

## **IMPEACHMENT.**

Of sheriff for neglect of duty, see Sheriffs and Constables, § 6.

Of verdict by affidavits and testimony of jurors on motion for new trial, see Criminal Law, § 957.

Of witness, see Witnesses, §§ 318-406.

## **IMPLICATION.**

Creation of easement, see Easements, § 17.

## **IMPLIED AUTHORITY.**

Of agent, see Principal and Agent, §§ 101, 103.

## **IMPLIED CONTRACTS.**

See Account Stated; Assumpsit, Action of; Money Lent; Work and Labor.

## **IMPLIED REPEAL.**

Of statute, see Statutes, §§ 159, 161.

## **IMPRISONMENT.**

See Bail; False Imprisonment.

Release on habeas corpus, see Habeas Corpus.

## **IMPROVEMENTS.**

Allowance for improvements in petitory actions, see Real Actions, § 8.

Public improvements, see Drains; Highways; Levees; Municipal Corporations, §§ 266-446.

Admission of by failure to deny, see Pleading, § 129.

## **INCAPACITY.**

In general, see Infants.

Of married women, see Husband and Wife, §§ 85-97.

To commit crime, see Infants, § 66.

## **INCENDIARISM.**

See Arson.

## **INCHOATE DOWER.**

See Dower, § 34.

## **INCLOSURE.**

In general, see Fences.

## **INCOME.**

Rights and liabilities of life tenants as to income of property, see Life Estates, § 15.

## **INCONSISTENCY.**

Implied repeal of statute by inconsistent statute, see Statutes, § 159.

In allegations of pleading in general, see Pleading, § 21.

In description of boundaries, see Boundaries, § 3.

In instructions to jury, see Trial, § 243.

Of alternative remedies, see Election of Remedies, § 3.

Statements by witnesses inconsistent with testimony as ground for impeachment, see Witnesses, § 380.

## **INCORPORATION.**

In general, see Corporations, § 29.

## **INCUMBRANCES.**

See Mortgages.

On property of married woman's separate estate, see Husband and Wife, § 171.

## **INDEBITATUS ASSUMPSIT.**

See Assumpsit, Action of.

## **INDEBTEDNESS.**

Charge on married woman's separate property, see Husband and Wife, § 171.

Of corporations in general, see Corporations, § 487.

Of counties, see Counties, § 154.

## **INDEPENDENT CONTRACTORS.**

Liability for acts and omissions, see Master and Servant, § 316.

## **INDICTMENT AND INFORMATION.**

See Grand Jury.

Defects as ground for arrest of judgment, see Criminal Law, § 970.

Preliminary complaint, see Criminal Law, § 211.

Review of questions as dependent on presentation by record, see Criminal Law, § 1116.

Service of copy of indictment or information before trial, see Criminal Law, § 627.

*For particular offenses.*

See Assault and Battery, § 77; Blasphemy, § 3; Bribery, § 6; False Pretenses, §§ 28-38; Larceny, §§ 30-40; Libel and Slander, § 152.

## I. NECESSITY OF INDICTMENT OR PRESENTMENT.

Subject and title of statute, see Statutes, § 118.

§ 2. Sp. Acts 1907, p. 189, *held* a valid exercise of the power conferred on the Legislature by Const. 1901, § 8, authorizing the Legislature to dispense with indictments in misdemeanor cases.—State v. Semmes (Ala.) 120.

§ 2. Provision of the Bill of Rights that prosecutions shall be by indictment or information construed.—State v. Boasberg (La.) 162.

§ 3. Gen. Acts 1907, Sp. Sess. p. 189, *held* not to dispense with indictments in prosecutions for giving away to induce trade, furnishing at public places, or otherwise disposing of intoxicating liquors.—State v. Semmes (Ala.) 351.

## IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

§ 39. An information filed by an attorney appointed by the district judge to represent the state in a criminal case is null and void, when the district attorney was improperly recused by the judge.—State v. Boasberg (La.) 162.

§ 43. Gen. St. 1906, § 3882, authorizes informations to be filed in vacation, and an omitted file mark may by order of court be placed upon an information nunc pro tunc, when the facts warrant it.—Johnson v. State (Fla.) 529.

## V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

Allegations as to place in affidavit charging use of profane language, see Blasphemy, § 3.  
Description of property stolen, see Larceny, § 30.

Mandamus to compel filing of bill of particulars, see Mandamus, § 61.

§ 55. It is the declared policy of the Legislature, as well as of the court, to uphold indictments and informations whenever there has been a substantial compliance with the statutory requirements.—Tillman v. State (Fla.) 675.

§ 86. Information *held* sufficient as to place of larceny.—Enson v. State (Fla.) 948.

§ 87. Information *held* sufficient as to time of larceny.—Enson v. State (Fla.) 948.

§ 110. Indictment for resisting an officer attempting an arrest, under Gen. St. 1906, § 3500, *held* sufficient.—Johnson v. State (Fla.) 529.

§ 110. Information for statutory offense *held* good on motion to quash.—Johnson v. State (Fla.) 529.

§ 121. Where description of money stolen is alleged in the information to be unknown, accused can compel solicitor to file a more particular description, learned since the filing of the information.—Enson v. State (Fla.) 948.

§ 121. In a prosecution for maintaining a tippling shop, defendant *held* entitled to a bill of particulars alleging the name of the particular drink sold by him claimed by the state to be intoxicating.—State v. Clark (La.) 811.

## VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 140. Issue having been joined on a motion to quash an indictment, *held*, that defendant was entitled to prove by the grand jurors that there was no corroborative evidence.—Allen v. State (Ala.) 279.

§ 140. The mere fact that other witnesses than prosecutrix were examined did not prove that the testimony given by them was corroborative.—Allen v. State (Ala.) 279.

## VIII. AMENDMENT.

§ 161. Amendment of information, trial, without objection, *held* not ground for new trial.—State v. Behler (La.) 483.

## IX. ISSUES, PROOF, AND VERDICT.

*In prosecutions for particular offenses*  
See False Pretenses, § 38; Larceny, § 312.  
Abandonment of wife, see Husband and Wife, § 312.

§ 176. In a prosecution for assault with intent to rape, *held*, that the exact date of commission of the offense need not be proved.—State v. Riggio (La.) 600.

## INDIGENT PERSONS.

See Paupers.

## INFANTS.

Care required of master as to infant servant, see Master and Servant, §§ 91, 153.  
Contributory negligence of children in case of negligence, § 85.  
Presumption against infancy, see Evidence, § 56.

## II. CUSTODY AND PROTECTION.

Custody and support on divorce of parent, see Divorce, § 308.  
Prohibition to review prosecution for violation of child labor law, see Prohibition, § 308.

§ 13. Where defendant, with his minor, engaged in betting with others, and was guilty of violating Code 1907, § 353, Lang v. State (Ala.) 353.

## VI. CRIMES.

§ 66. A criminal intent cannot be inferred from an infant, until he has developed sufficient intelligence and moral perception to distinguish between right and wrong and to comprehend the consequences of his acts.—Beason v. State (Miss.) 488.

§ 66. In a trial of an infant under the age of 14 for rape, where there was no evidence of his mental capacity to entertain a criminal intent or of his physical ability to commit the crime, a peremptory instruction to acquit may be given.—Beason v. State (Miss.) 488.

§ 66. The presumption that an infant under the age of 14 has not reached the age of majority, and hence is incapable of committing a crime, is prima facie only.—Beason v. State (Miss.) 488.

§ 66. While an infant under the age of 14 years is conclusively presumed to be incapable of committing a crime, the presumption of a criminal intent, the presumption of the ages of 7 and 14 is only prima facie only.—Beason v. State (Miss.) 488.

## VII. ACTIONS.

§ 93. The avoidance of a contract by an infant must be specially pleaded, under Code 1907, § 5331.—Sanders v. Williams (Ala.) 893.

§ 94. In an action for breach of contract by an infant, based on an outstanding bill of exchange which plaintiff paid, the defense that the contract was avoided by an infant mortgagee being specially pleaded, is not available.—Sanders v. Williams (Ala.) 893.

## INFLUENCE.

Undue influence affecting validity of deeds, § 72.

Criminal accusation, see Indictment and Information.

## INHERITANCE.

See Descent and Distribution.

## INJUNCTION.

Mandamus to compel granting of injunction, see Mandamus, § 37.

### *Incidental to particular remedies or proceedings.*

See Garnishment, § 120.

Condemnation proceedings, see Eminent Domain, § 274.

To protect easement, see Easements, § 61.

### *Relief against particular acts or proceedings.*

Enforcement of judgment, see Judgment, §§ 419-461.

Interference with timber rights, see Logs and Logging, § 3.

Obstruction of street, see Municipal Corporations, § 697.

Public nuisance, see Nuisance, § 75.

Unauthorized or illegal acts by municipality or officers in general, see Municipal Corporations, § 993.

### *Review of proceedings for injunction.*

Finality for purpose of review, of order dissolving injunction, see Appeal and Error, § 73.

## I. NATURE AND GROUNDS IN GENERAL.

### (A) Nature and Form of Remedy.

§ 5. A mandatory order may be made restoring property trespassed upon.—City of Ocala v. Anderson (Fla.) 572.

### (B) Grounds of Relief.

§ 23. Where complainants and defendants had large equities, an injunction may be refused, unless there be an offer to protect defendants.—Wefel v. Williams & Pritchett (Fla.) 679.

## II. SUBJECTS OF PROTECTION AND RELIEF.

### (B) Property, Conveyances, and Incumbrances.

§ 35. Exclusive occupancy of land under claim of title held sufficient possession to sustain an injunction against irreparable injury by another who enters without title.—Bay Point Mill Co. v. Saunders (Fla.) 984.

§ 38. A decree enjoining defendant from trespassing on land claimed by defendant, as to which neither plaintiff nor defendant had valid title, held not error.—Bay Point Mill Co. v. Saunders (Fla.) 984.

## III. ACTIONS FOR INJUNCTIONS.

Parties to suit to restrain obstruction in street, see Municipal Corporations, § 671.

§ 130. Where a bill for injunction was brought against two defendants, and as to one the proof failed, the bill should be dismissed without prejudice.—Tedescki v. Burger (Ala.) 150.

## IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

### (A) Grounds and Proceedings to Procure.

§ 133. A mandatory decree restoring property trespassed upon should, except in a rare case, be made only on final hearing.—City of Ocala v. Anderson (Fla.) 572.

Dismissal of injunction incidental to garnishment proceedings, see Garnishment, § 120.

Effect of supersedeas or stay, see Appeal and Error, § 488.

Finality of order of dissolution for purpose of review, see Appeal and Error, § 73.

§ 178. Dissolution of a temporary injunction on bond is largely within the discretion of the court granting the injunction.—Jeanerette Lumber & Shingle Co. v. Police Jury of Parish of St. Martin (La.) 404; In re Jeanerette Lumber & Shingle Co., Id.

§ 184. Petitioners' right to injunctive relief is not waived by the dissolution of a temporary injunction on bond.—Jeanerette Lumber & Shingle Co. v. Police Jury of Parish of St. Martin (La.) 404; In re Jeanerette Lumber & Shingle Co., Id.

## VII. VIOLATION AND PUNISHMENT.

§ 216. Violation vel non of an injunction is not decidable alone by the letter of the writ, but in many cases its spirit is within the binding quality thereof.—Ex parte State (Ala.) 143.

§ 228. Where an injunction forbade certain persons to move, molest, damage, or destroy certain property described, and did not purport to protect the property otherwise than by restraining the persons named, its breach could only be committed by such persons, or by persons conspiring with them.—Ex parte State (Ala.) 143.

## VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 235. An action on an injunction bond held properly brought before the final disposition of the suit in which the injunction issued.—Gray v. South & North Alabama R. Co. (Ala.) 352.

## INJURIES.

In general, see Damages; Negligence; Torts.

## INNOCENT PURCHASERS.

Of bills or notes, see Bills and Notes, § 332.

Of public lands, see Public Lands, § 152.

## INSANE PERSONS.

Effect of insanity of juror pending prosecution, see Jury, § 149.

Opinion evidence as to insanity, see Criminal Law, § 452.

Separate trial of plea of insanity in criminal prosecution, see Criminal Law, § 625.

## I. DISABILITIES IN GENERAL.

Opinion evidence as to insanity, see Criminal Law, § 452.

## INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy.

Of corporations in general, see Corporations, § 553.

Of grantor, element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 57.

## III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF INSOLVENT'S ESTATE.

### (D) Administration of Estate.

§ 73. The court in which insolvency proceedings are pending has original jurisdiction of an action on the bond given by the debtor for

the release of the property.—*Interstate Trust & Banking Co. v. United States Fidelity & Guaranty Co. (La.)* 612.

#### IV. COMPOSITION, RESPITE, OR RAISING ASSIGNMENT.

§ 142. Where bond given by insolvent, conditioned for discharge of his debts, was insufficient to pay all the debts, a pro rata distribution will be made.—*Interstate Trust & Banking Co. v. United States Fidelity & Guaranty Co. (La.)* 612.

#### INSTRUCTIONS.

By court to jury, see *Criminal Law*, §§ 755½-764, 778-823, 825-830, 844; *Trial*, §§ 181-295.

By court to jury, right to take to consultation room, see *Criminal Law*, § 858.

By master to servant, see *Master and Servant*, § 153.

#### INSTRUMENTS.

Acknowledgment of, see *Acknowledgment*.

Alteration, see *Alteration of Instruments*.

Best and secondary evidence, see *Criminal Law*, § 398; *Evidence*, §§ 171-185.

Cancellation, see *Cancellation of Instruments*.

Cross-examination of witnesses as to writings, see *Witnesses*, § 271.

Documentary evidence, see *Criminal Law*, § 432; *Evidence*, §§ 343-372.

Estoppel by deeds and other instruments, see *Estoppel*, §§ 38, 39.

Filing with pleading, see *Pleading*, § 308.

Forgery, see *Forgery*.

Oyer, see *Pleading*, § 306.

Parol or other extrinsic evidence, see *Evidence*, §§ 408-450.

Recording, see *Records*.

Reformation, see *Reformation of Instruments*.

Requisites and sufficiency of writing to satisfy statute of frauds, see *Frauds*, *Statute of*, §§ 103, 106.

Verification of pleadings in actions on written instruments in general, see *Pleading*, § 291.

##### *Particular classes of written instruments.*

See *Assignments for Benefit of Creditors*; *Bills and Notes*; *Bonds*; *Chattel Mortgages*; *Indictment and Information*; *Insurance*; *Mortgages*; *Release*; *Stipulations*; *Wills*.

Contracts in general, construction and operation, see *Contracts*, §§ 147, 162.

Deeds, see *Deeds*.

#### INSULTING LANGUAGE.

As provocation for homicide, see *Homicide*, § 45.

To passenger, liability of carrier for acts of employees, see *Carriers*, § 283.

#### INSURABLE INTEREST.

See *Insurance*, § 115.

#### INSURANCE.

##### I. CONTROL AND REGULATION IN GENERAL.

§ 4. Code 1907, § 4594, relating to fire insurance corporations, held constitutional.—*Ætna Ins. Co. v. Kennedy (Ala.)* 73.

§ 4. Section 2, Act No. 105, p. 134, of 1898, prescribing provisions for charters of insurance companies, held not repealed by subsequent legislation.—*State ex rel. Lumberman's Accident Co. v. Michel (La.)* 543.

§ 5. Certificate held properly refused to industrial life insurance company whose charter

failed to conform to section 2, Act No. 105, p. 134, of 1898.—*State ex rel. Lumberman's Accident Co. v. Michel (La.)* 543.

##### III. INSURANCE AGENTS AND BROKERS.

###### (A) Agency for Insurer.

§ 95. Notice to a soliciting agent after a fire insurance policy is issued is not notice to the company.—*Ætna Ins. Co. v. Kennedy (Ala.)* 73.

##### IV. INSURABLE INTEREST.

§ 115. The interest of a stockholder, to whom a fire insurance policy is issued on corporate property, is not necessarily measured by the value thereof.—*Ætna Ins. Co. v. Kennedy (Ala.)* 73.

§ 115. A stockholder in a corporation has an insurable interest in its property, which will sustain recovery on a policy issued to him thereon.—*Ætna Ins. Co. v. Kennedy (Ala.)* 73.

##### V. THE CONTRACT IN GENERAL.

###### (A) Nature, Requisites, and Validity.

Election of remedies, see *Election of Remedies*, § 3.

§ 136. That canceled policy of insurance remains in hands of insured, and that new policy sent to a subagent for delivery is not actually delivered until after the fire, did not affect liability on the last policy.—*Ætna Ins. Co. v. Renno (Miss.)* 563.

##### VI. PREMIUMS, DUES, AND ASSESSMENTS.

Pleading conclusions in action on note for premium, see *Pleading*, § 8.

§ 188. The burden of proof was on the maker of a note given for a premium on a policy to be delivered within a reasonable time to show that the time consumed was unreasonable.—*Deleon v. Walter (Ala.)* 934.

##### VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§ 229. Agent of insured held to have authority to waive, for the assured, the five days' notice of cancellation.—*Ætna Ins. Co. v. Renno (Miss.)* 563.

##### IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

###### (B) Matters Relating to Property or Interest Insured.

§ 282. The clause in a fire policy making its validity depend upon the sole and unconditional ownership by insured is reasonable and valid, and a breach of such stipulation, unless waived by the company, will excuse it from liability.—*Bacot v. Phenix Ins. Co. of Brooklyn (Miss.)* 729.

§ 282. Nature of provision in fire policy as to sole and unconditional ownership, stated.—*Bacot v. Phenix Ins. Co. of Brooklyn (Miss.)* 729.

§ 282. Right of husband insuring a home- stead belonging to the wife, representing that he was the sole and unconditional owner, stated.—*Bacot v. Phenix Ins. Co. of Brooklyn (Miss.)* 729.

§ 282. Nature of contract between an insurer and mortgagee of insured premises, made by attaching a mortgage clause to the mortgagor's

fire policy, stated under Code 1906, § 2596.—*Bacot v. Phenix Ins. Co. of Brooklyn (Miss.)* 729.

## **X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.**

### **(B) Matters Relating to Property or Interest Insured.**

§ 328. A clause in a fire policy as to forfeiture for foreclosure proceedings or notice of sale *held* proper to safeguard the insurer against increased risks.—*Hartford Fire Ins. Co. v. Hollis (Fla.)* 985.

§ 333. A clause in a fire policy as to forfeiture for increasing hazard *held* proper to safeguard the insurer against increased risks.—*Hartford Fire Ins. Co. v. Hollis (Fla.)* 985.

§ 335. Iron-safe clause in a fire policy is a valid provision.—*Hartford Fire Ins. Co. v. Hollis (Fla.)* 985.

## **XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.**

§ 375. An agent, authorized to write fire insurance, may waive a condition in a policy.—*Ettna Ins. Co. v. Kennedy (Ala.)* 73.

## **XII. RISKS AND CAUSES OF LOSS.**

### **(A) Marine Insurance.**

§ 402. The external violence, exempting a marine insurer from liability for loss occasioned by the bursting of the boilers, unless occasioned by external violence, is violence external to the vessel.—*Quackenboss v. Insurance Co. of North America, of Philadelphia (Miss.)* 444.

## **XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.**

§ 606. An insurance company, on paying insured for property tortiously destroyed by a third person, is subrogated to the rights of insured against the third person.—*Southern Ry. Co. v. Stonewall Ins. Co. (Ala.)* 940.

§ 606. Where the owner of property burned has been paid part of his loss by an insurer, an action against the wrongdoer for the value of the property *held* properly brought in the name of insured, and insurer not a necessary party.—*Hanton v. New Orleans & C. R., Light & Power Co. (La.)* 544.

## **XVIII. ACTIONS ON POLICIES.**

Election of remedies, see Election of Remedies, § 3.

§ 624. Where the interest of a mortgagee is the only valid liability under a fire policy, all that is due thereunder being due to him, "as his interest may appear," he can sue thereon, though his interest is less than the face of the policy.—*Bacot v. Phenix Ins. Co. of Brooklyn (Miss.)* 729.

§ 629. A complaint on a life insurance policy intended to be in the form prescribed by Code 1907, vol. 2, p. 1196, § 5382, form 12, *held* insufficient for failure to comply therewith.—*United States Health & Accident Co. v. Veitch (Ala.)* 95.

§ 642. In an action on a combination mercantile and building fire policy issued upon a single consideration, certain demurrers to pleas *held* insufficient to raise the question whether the policy was divisible.—*Hartford Fire Ins. Co. v. Hollis (Fla.)* 985.

§ 645. Where a complaint declares on a life insurance policy, a health and accident policy

is inadmissible in support of the complaint.—*United States Health & Accident Co. v. Veitch (Ala.)* 95.

§ 646. In a suit on a fire insurance policy, the burden is on plaintiff to show the value of his interest in the property destroyed.—*Ettna Ins. Co. v. Kennedy (Ala.)* 73.

§ 654½. In an action on life policy, evidence that on the day insured received the policy he had a certain sum of money in his pocket *held* inadmissible to show payment of premiums.—*Fidelity Mut. Life Ins. Co. v. Satterfield (Ala.)* 132.

§ 658. In an action on a marine policy, certain evidence *held* immaterial.—*Quackenboss v. Insurance Co. of North America, of Philadelphia (Miss.)* 444.

§ 665. In an action on a fire insurance policy, evidence *held* sufficient to raise an inference that plaintiff had some interest in the property.—*Ettna Ins. Co. v. Kennedy (Ala.)* 73.

## **XX. MUTUAL BENEFIT INSURANCE.**

### **(B) The Contract in General.**

§ 723. Statement as to what is one's occupation, within a warranty in an application for life insurance as to occupation of insured.—*Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.)* 958.

### **(D) Forfeiture or Suspension.**

§ 750. Membership in a fraternal order *held* forfeited on nonpayment of dues.—*Independent Order of Sons and Daughters of Jacob of America v. Moncrief (Miss.)* 558.

### **(F) Actions for Benefits.**

§ 815. A complaint in an action on a life policy *held* subject to demurrer.—*Patterson v. Grand Lodge K. P. (Ala.)* 377.

§ 815. A complaint in an action on a life policy *held* in code form (Code 1907, p. 1196, form 12), and not demurrable.—*Patterson v. Grand Lodge K. P. (Ala.)* 377.

§ 815. A complaint in an action on a policy issued by a benevolent association *held* to state a cause of action.—*Patterson v. Grand Lodge K. P. (Ala.)* 377.

§ 818. Evidence in an action on a life policy *held* properly excluded as irrelevant.—*Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.)* 958.

§ 818. Questions to witness *held* proper in an action on a life policy in which a defense was false statement of insured in his application as to use of stimulants.—*Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.)* 958.

§ 818. Evidence in an action on a life policy *held* irrelevant on defense of false statement in application as to occupation of insured.—*Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.)* 958.

§ 825. Under the evidence in an action on a life policy, *held*, the general affirmative charge for defendant was properly refused.—*Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.)* 958.

§ 826. Instructions on defense of false statement in application for life insurance as to occupation of insured *held* at least misleading.—*Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.)* 958.

§ 826. An instruction given *held* to conform, and one refused not to conform, to pleas, in an action on a life policy, on the defense of false statements in application as to use of stimulants.—*Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.)* 958.

§ 826. Occupation *held* properly defined by instruction in an action on a life policy, in which a defense was false statement in application as to occupation.—*Supreme Lodge Knights and Ladies of Honor v. Baker* (Ala.) 958.

## INTENT.

Affecting contract, see *Contracts*, § 147.  
Element of offense by infant, see *Infants*, § 66.  
Element of rape, see *Rape*, § 16.

## INTEREST.

See *Usury*.  
On attorney's fees as element of costs, see *Costs*, § 150.  
*Pecuniary interest in particular subject-matter*.  
Disqualification of witnesses, see *Witnesses*, § 111.  
Ground of impeachment of witness, see *Witnesses*, §§ 363-374.  
Ground of right to review of decision, see *Appeal and Error*, § 150.  
Insurable interest, see *Insurance*, § 115.

## INTERLOCUTORY DECISIONS.

Decisions reviewable, see *Appeal and Error*, § 73.  
Review, see *Appeal and Error*, §§ 872, 874.

## INTERLOCUTORY INJUNCTION.

See *Injunction*, § 133.

## INTERMEDIATE COURTS.

Review of decisions, see *Appeal and Error*, §§ 532, 1082-1094; *Criminal Law*, § 1179.

## INTERNAL IMPROVEMENT FUND.

Power of trustees to convey lands under navigable waters, see *Navigable Waters*, § 37.

## INTERPRETATION.

*Of contracts, instruments or judicial acts and proceedings*.  
See *Dedication*, § 64; *Mortgages*, § 142; *Statutes*, §§ 209-241; *Wills*, §§ 457, 614.  
Constitutional provisions, see *Constitutional Law*, §§ 12-24.  
Contracts in general, see *Contracts*, §§ 147, 162.  
Deeds, see *Boundaries*, § 3; *Deeds*, §§ 90-155.  
Instructions, see *Criminal Law*, §§ 822, 823; *Trial*, § 295.  
Judgment on trial of issues, see *Judgment*, § 525.  
Leases, see *Landlord and Tenant*, §§ 40-48.  
Parol or extrinsic evidence to aid interpretation of written instruments, see *Evidence*, § 450.  
Pleadings, see *Pleading*, § 34.  
Powers, see *Powers*, §§ 33, 43.  
Public contracts, see *Municipal Corporations*, § 352.  
Verdict or findings, see *Criminal Law*, § 893.  
Warranties, see *Sales*, § 280.

## INTERROGATORIES.

To jury, see *Trial*, § 349.

## INTERSTATE COMMERCE.

Power to regulate, see *Commerce*.  
Regulation of transportation by carriers in general, see *Carriers*, §§ 1-18.

## INTER VIVOS.

Gifts, see *Gifts*, § 41.

## INTESTACY.

See *Descent and Distribution*.

## INTOXICATING LIQUORS.

Effect of prohibition law as to termination of lease of building for saloon, see *Landlord and Tenant*, § 189½.

## II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

Manner of amending statute as affecting validity, see *Statutes*, § 138.  
Subject and title of statute, see *Statutes*, § 118.  
Unreasonable search and seizure, see *Searches and Seizures*, § 7.

§ 17. Act Aug. 13, 1907 (Gen. Acts 1907, p. 696), entitled "An act to prohibit the sale of hop-jack," etc., "or other beverages, the product of maltose or gencose, at any place where the sale of spirituous, vinous or malt liquors are prohibited by law," *held* unconstitutional.—*Elder v. State* (Ala.) 370.

## IV. LICENSES AND TAXES.

§ 45. Acts 1908, p. 237, No. 176, § 2, does not repeal Acts 1902, p. 93, No. 66, amending Rev. St. § 910, prohibiting the sale of intoxicating liquors without a license.—*State v. Le Blanc* (La.) 814.

§ 55. Under subdivision 52, § 4122, Code 1896, as amended by the revenue act (Gen. Acts 1903, p. 209), defendant, having paid for brewer license in M. county, *held* entitled to sell its own beer in B. county at wholesale without a wholesale license.—*State v. Capitol Brewing & Ice Co.* (Ala.) 312.

§ 106. A conviction of permitting gambling in a barroom, in violation of Act No. 176, p. 242, of 1908, § 10, had at the same time as a conviction of selling liquor to a minor in violation of section 6, *held* a second conviction of violation of the act, within section 8, warranting a revocation of defendant's license.—*State v. Apfel* (La.) 613.

## VI. OFFENSES.

§ 146. The purchase of liquor by accused without the state as agent for another *held* not an offense, within Code 1907, § 7363.—*Vernon v. State* (Ala.) 57.

§ 146. Accused *held* not liable, under Code 1907, § 7363, for unlawfully disposing of intoxicating liquor.—*Vernon v. State* (Ala.) 57.

§ 147. There may be a conviction of an illegal sale of liquors, though all the transaction but the delivery was out of the state.—*Anglin v. State* (Miss.) 492.

§ 147. A sale of intoxicating liquors *held* to have been made in the state, and so subject to its laws.—*Anglin v. State* (Miss.) 728.

§ 167. Under Acts 1886-87, p. 699, and Gen. Acts 1907, p. 366, one *held* properly convicted of selling intoxicating liquors, as charged by an indictment in the form prescribed by Code 1907, § 7353.—*Darrington v. State* (Ala.) 396.

## VIII. CRIMINAL PROSECUTIONS.

Appellate jurisdiction dependent on extent of penalty, see *Criminal Law*, § 1020.

Bill of particulars, see *Indictment and Information*, § 121.

Concurrence of separate branches of legislature in law relating to demand for jury trial, see *Statutes*, § 23.

Former jeopardy, plea of, see *Criminal Law*, § 292.

Necessity of indictment, see *Indictment and Information*, § 3.

Res gestæ, see Criminal Law, § 368.

Subject and title of statute, see Statutes, § 118.  
Validity of statute authorizing prosecution by affidavit, see Indictment and Information, § 2.

§ 198. An affidavit charging the illegal retailing of liquors held sufficient to allege that affiant had probable cause for believing the person guilty, as expressly required by Code 1907, § 6708.—*Malloy v. State* (Ala.) 1027.

§ 198. An affidavit, under Code 1906, § 1797, as amended by Laws 1908, p. 116, c. 114, § 1, charging defendant with selling intoxicants in violation of law, need not allege in what manner accused obtained the liquor.—*City of Gulfport v. Martin* (Miss.) 502.

§ 224. A beverage under a particular trade-name and manufactured by a particular firm would be presumed to be manufactured from a formula, and to be of a uniform quality.—*State v. Clark* (La.) 811.

§ 231. Evidence of the intoxicating effects of a beverage sold generally under a trade-name at other places than that of accused held admissible.—*State v. Clark* (La.) 811.

## IX. SEARCHES, SEIZURES, AND FORFEITURES.

Unreasonable search and seizure, see Searches and Seizures, § 7.

## INTOXICATION.

Defense in criminal prosecutions, see Criminal Law, § 53.

## INTRUDERS.

On land, see Forcible Entry and Detainer; Trespass.

## INVEIGLEMENT.

Of servant, see Master and Servant, § 341.

## INVENTORY.

Of goods insured, requirement of insurance policy, see Insurance, § 335.  
Of property exempt, see Exemptions, § 123.

## INVITED ERROR.

See Appeal and Error, § 882.

## INVOLUNTARY NONSUIT.

See Dismissal and Nonsuit, § 56.

## IRON-SAFE CLAUSE.

In insurance policy, see Insurance, § 335.

## ISSUES.

Applicability of instructions to issues, see Criminal Law, § 814; Trial, § 251.

Identity of issues as affecting conclusiveness of judgment, see Judgment, §§ 713, 715.

In civil actions, see Pleading, §§ 380-399.

In criminal prosecutions, see Indictment and Information, § 176.

Instructions ignoring, see Trial, § 253.

Judgment on trial of issues, see Judgment, § 251.

Presented for review on appeal, see Appeal and Error, §§ 171-173.

## JEOPARDY.

Former jeopardy as bar to prosecution, see Criminal Law, §§ 178-197, 291, 292.

## JOINDER.

Of parties in civil actions in general, see Parties, § 35.

## JOINT ADVENTURES.

See Partnership.

Conspirators, see Conspiracy.

## JOINT OWNERS.

Community property, see Husband and Wife, § 274.

## JOINT TENANCY.

See Tenancy in Common.

Partition of joint property, see Partition.

## JOURNALS.

Legislative journals, necessity of showing notice of publication of local bills, see Statutes, § 8½.

## JUDGES.

See Courts; Justices of the Peace.

Certiorari to review proceedings, see Certiorari, § 15.

Mandamus to judge, see Mandamus, §§ 26-61.

Remarks and conduct on trial, see Criminal Law, §§ 657, 658.

## I. APPOINTMENT, QUALIFICATION, AND TENURE.

Of justices of the peace, see Justices of the Peace, § 6.

## III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

Authority to issue writ of habeas corpus, see Habeas Corpus, § 47.

## IV. DISQUALIFICATION TO ACT.

§ 47. The presiding judge has been consulted "as an advocate in the cause," in the sense of Acts 1880, p. 38, No. 40, when he has been previously employed on the same matter in civil proceedings.—*State v. Perkins* (La.) 806.

§ 49. That a judge may have expressed his belief in the guilt of accused furnishes no ground for recusation.—*State v. Woods* (La.) 671.

§ 51. Where a motion to recuse the presiding judge assigns no legal ground for recusation, it may be overruled without reference to another judge.—*State v. Blount* (La.) 12.

§ 51. Where a motion to recuse the presiding judge assigns no legal grounds therefor, it may be by him overruled, without reference to another judge.—*State v. Woods* (La.) 671.

§ 56. A judge, recusing himself and appointing a judge ad hoc, retains jurisdiction to review the appointment, on suggestion that the judge ad hoc is disqualified.—*State v. Woods* (La.) 671.

## JUDGMENT.

Decisions of courts in general, see Courts, §§ 93, 106.

Disobedience to, as contempt of court, see Contempt, § 20.

Practice in equity, see Equity, §§ 420, 422.

In actions by or against particular classes of persons.

See Corporations, § 522.

In particular civil actions or proceedings.

See Ejectment, § 114; Mandamus, § 178; Real Actions, § 8.

For divorce, see Divorce, §§ 100, 171.



*In criminal prosecutions.*

See Criminal Law, §§ 977-996.

*Review.*

See Appeal and Error; Certiorari; Criminal Law, §§ 1019-1189; Justices of the Peace, § 174.

Finality for purpose of review, see Appeal and Error, § 78.

Judgment on appeal or writ of error, see Appeal and Error, §§ 1123-1206; Criminal Law, §§ 1182, 1189.

**II. BY CONFESSION.**

§ 46. Stipulations in a note as to confession of judgment construed.—*Jemison v. Freed* (Ala.) 52.

§ 53. A provision in a note for confession of judgment thereon *held* void, under Code 1907, § 4206.—*Jemison v. Freed* (Ala.) 52.

**III. ON CONSENT, OFFER, OR ADMISSION.**

§ 82. A consent that a decree be made waives any prior irregularity.—*Gunter v. Hinson* (Ala.) 86.

**IV. BY DEFAULT.**

Decree in equity pro confesso, see Equity, § 420.

In action for divorce, see Divorce, § 160.

**(A) Requisites and Validity.**

Right to jury trial, see Jury, § 28.

§ 106. Where defendant waits until the rule day to file a motion for a more definite bill of particulars, and plaintiff is justified in treating the motion as a nullity, he may cause the clerk to enter a default for failure to plead or demur.—*Register v. Pringle Bros.* (Fla.) 584.

§ 108. Plaintiff *held* justified in disregarding a motion by defendant for a more definite bill of particulars, and causing the clerk to enter a default for failure to plead or demur.—*Register v. Pringle Bros.* (Fla.) 584.

§ 123. Requested charges going to the entire cause of action are properly refused after judgment by default.—*Fidelity & Deposit Co. of Maryland v. Aultman* (Fla.) 901.

§ 128. Though Gen. St. 1906, § 1425, authorizing final judgment after default, must be strictly complied with, that affidavit of account was prematurely filed *held* not to render such a judgment voidable.—*Register v. Pringle Bros.* (Fla.) 584.

§ 130. A default judgment, entered without compliance with Code 1907, § 3971, *held* erroneous.—*Parsons Lumber Co. v. West-Stegall Grain & Milling Co.* (Ala.) 1034.

**VI. ON TRIAL OF ISSUES.****(A) Rendition, Form, and Requisites in General.**

Review of objections, see Appeal and Error, § 223.

**(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.**

§ 251. Judgment, so far as concerned the question of ownership and possession, beyond what was necessary for determining the question of trespass, *held* to be beyond the issues involved, and so unauthorized.—*Union Sawmill Co. v. Summit Lumber Co.* (La.) 35.

§ 251. A judgment for an item in an account which is not presented by the pleadings cannot be sustained.—*McLeod v. Womack* (Miss.) 66.

**VII. ENTRY, RECORD, AND DOCKETING.**

Judgment in criminal prosecution, see Criminal Law, § 996.

§ 286. The act of the clerk of court in entering judgment for costs pro forma against a husband and wife, when directed by the court to enter judgment against the husband alone, is a self-correcting misprison.—*Bothamly v. Queal* (Fla.) 415.

**VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.**

Judgment in criminal prosecution, see Criminal Law, § 996.

**X. EQUITABLE RELIEF.****(A) Nature of Remedy and Grounds.**

§ 419. Equity will cancel a judgment at law, when the complainant avers and proves that he had no notice of the suit and has a meritorious defense.—*Fields v. Henderson* (Ala.) 56.

§ 452. A purchaser at a sale under a judgment in attachment proceedings *held* to acquire the title that defendant in attachment had, and to have the same right as he to file a bill to annul a judgment in a senior attachment proceeding, on the ground that the affidavit, required by Ann. Code 1892, § 143, as the basis of a judgment on service by publication, had not been made.—*McKinney v. Adams* (Miss.) 474.

**(B) Jurisdiction and Proceedings.**

Appellate jurisdiction dependent on amount in controversy, see Courts, § 224.

§ 461. In a suit to set aside a judgment for want of notice, complainant's proof of the meritorious defense *held* insufficient to entitle him to relief.—*Fields v. Henderson* (Ala.) 56.

**XI. COLLATERAL ATTACK.****(A) Judgments Impeachable Collaterally.**

Conclusiveness of decree in proceedings for sale of decedent's property, see Executors and Administrators, § 349.

**(B) Grounds.**

§ 495. The judgment of a domestic court of general jurisdiction is not open to collateral impeachment because the record fails to show service of the process by which the court acquired jurisdiction.—*Roman v. Morgan* (Ala.) 273.

**(C) Proceedings.**

§ 518. "Collateral attack" defined.—*McKinney v. Adams* (Miss.) 474.

§ 518. A bill by an attachment creditor to annul a judgment in a senior attachment, on the ground that the affidavit, required by Ann. Code 1892, § 143, as the basis of a judgment on service by publication, had not been made, *held* a direct attack.—*McKinney v. Adams* (Miss.) 474.

**XII. CONSTRUCTION AND OPERATION IN GENERAL.**

§ 525. Judgment recital, that parties interested had consented to its rendition, *held*, in the absence of fraud, conclusive.—*Gunter v. Hinson* (Ala.) 86.

**XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.****(A) Judgments Operative as Bar.**

§ 540. To support a plea of res judicata, *held*, that there must be identity of cause of

action and of the parties to the action.—*Virginia-Carolina Chemical Co. v. Fisher* (Fla.) 504.

§ 572. Where judgment is rendered for defendant on demurrer, plaintiff is estopped from maintaining a similar action for the same cause on the same grounds.—*Prall v. Prall* (Fla.) 867.

§ 572. Demurrer to pleading because essential facts were omitted *held* to conclude parties only as to the sufficiency of the facts alleged to state a cause of action.—*Prall v. Prall* (Fla.) 867.

§ 572. A final judgment on demurrer *held* not a bar to a second suit for the same cause between the same parties where the pleadings in the second suit supply the essential allegations omitted in the first.—*Prall v. Prall* (Fla.) 867.

**(B) Causes of Action and Defenses Merged, Barred, or Concluded.**

§ 584. Final decree of a court having jurisdiction is a bar to another suit between the same parties as to the same subject-matter.—*Prall v. Prall* (Fla.) 867.

**XIV. CONCLUSIVENESS OF ADJUDICATION.**

**(B) Persons Concluded.**

§ 668. Those who were parties to a former litigation and have accepted the terms of the decision are not to be considered as third persons regarding views expressed contradictorily with them.—*Board of Com'rs of Bayou Terre-Aux-Bœufs Drainage Dist. v. Baker* (La.) 16.

§ 682. Where A. sold timber to B. and C., and a judgment decreed B. the owner of the timber, it was *res judicata* against A., repurchasing the timber from C.—*Roach v. Craig* (La.) 652.

**(C) Matters Concluded.**

§ 713. Judgment in a suit on the merits is conclusive in a second suit as to every question that might have been determined under the pleadings.—*Prall v. Prall* (Fla.) 867.

§ 713. A judgment is a bar to a second suit only as to every question actually litigated, and is not conclusive as to other matters that might have been, but were not litigated.—*Prall v. Prall* (Fla.) 867.

§ 715. The test of identity of causes of action is the identity of the facts necessary to maintain the actions.—*Prall v. Prall* (Fla.) 867.

**XV. LIEN.**

§ 780. One's interest as tenant in common in cotton *held* subject to the lien of a recorded judgment against him.—*Haynes Mercantile Co. v. Bell* (Ala.) 311.

§ 800. The court *held* authorized to infer that plaintiff lost opportunity to enforce his judgment lien by defendant shipping from the county the property on which the lien existed, after purchasing it from the judgment debtor.—*Haynes Mercantile Co. v. Bell* (Ala.) 311.

**XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.**

Pending appeal or other proceeding for review, see Appeal and Error, §§ 460-489.

**XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.**

Sufficiency of plea of set-off, see Pleading, § 142.

**XXI. ACTIONS ON JUDGMENTS.**

Departure of amended complaint from original, see Pleading, § 248.

**XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.**

§ 948. An estoppel by judgment must be specially pleaded.—*Hinton v. Roane* (La.) 798.

**JUDICIAL DISCRETION.**

Admission in rebuttal of evidence proper in chief, see Trial, § 63.

Continuance, see Continuance, § 7.

Cross-examination of witnesses, see Witnesses, § 267.

Dissolution of temporary injunction, see Injunction, § 178.

Order of proof, see Criminal Law, §§ 690, 693.

Redirect examination of witnesses, see Witnesses, § 286.

Reopening case for further evidence, see Trial, § 68.

Review of discretion in civil actions, see Appeal and Error, §§ 969-974, 1092.

Review of discretion in criminal prosecutions, see Criminal Law, §§ 1150-1156.

**JUDICIAL MORTGAGE.**

See Judgment, §§ 780, 800.

**JUDICIAL NOTICE.**

In civil actions, see Evidence, §§ 14, 32.

**JUDICIAL OFFICERS.**

See Judges; Justices of the Peace.

**JUDICIAL SALES.**

Exemption of personal property, see Exemptions.

Exemption of real property, see Homestead.

Of property in possession of receiver, see Receivers, § 135.

Of property of decedent, see Executors and Administrators, §§ 343-402.

On execution, see Execution, § 272.

On partition, see Partition, §§ 108, 109.

Tax sales, see Taxation, § 623.

**JURISDICTION.**

Amount or value in controversy, see Courts, § 122; Justices of the Peace, § 44.

Of courts in general, see Courts.

Removal of actions from state court to United States court, see Removal of Causes.

Transfer of jurisdiction on appeal or other proceeding for review, see Appeal and Error, §§ 454, 456.

Want of jurisdiction ground for collateral attack on judgment, see Judgment, § 495.

Want of jurisdiction ground for equitable relief against judgment, see Judgment, § 419.

*Jurisdiction of particular actions or proceedings.*

See Habeas Corpus, §§ 44-113.

Insolvency proceedings, see Insolvency, § 73.

*Special jurisdictions and jurisdictions of particular classes of courts.*

See Justices of the Peace, § 44.

Appellate jurisdiction, see Appeal and Error, § 21; Courts, §§ 210-224.

Equity jurisdiction, see Equity, §§ 17, 39.

**JURY.**

See Grand Jury.

Affidavits, statements, and testimony of jurors on motion for new trial, see Criminal Law, § 957.

Custody, conduct and deliberations, see Criminal Law, § 858.

Discrimination as to service on juries by reason of race, color, or condition, see Constitutional Law, § 221.  
 Instructions, see Criminal Law, §§ 755½-764, 778-823, 825-830, 844; Trial, §§ 191-235.  
 Questions for jury in civil actions, see Trial, §§ 130-145.  
 Questions for jury in criminal prosecutions, see Criminal Law, §§ 753-764.  
 Service of list of jurors in criminal prosecution, review of defects as dependent on prejudicial nature of error, see Criminal Law, § 1166.  
 Taking case or question from jury at trial, see Criminal Law, § 753; Trial, §§ 136-145.  
 Verdict in civil actions, see Trial, §§ 328-349.  
 Verdict in criminal prosecutions, see Criminal Law, §§ 881, 893.

## II. RIGHT TO TRIAL BY JURY.

Concurrence of separate branches of legislature in law relating to demand for jury trial, see Statutes, § 23.

§ 10. Const. 1901, § 11, guaranteeing a right of trial by jury, extends only to those cases in which the right existed at the time of the adoption of that provision.—Costello v. Feagin (Ala.) 134.

§ 10. Constitutional right of trial by jury does not extend to cases where it did not exist prior to the Constitution.—State v. Bley (Ala.) 263.

§ 17. Loc. Acts 1898-99, pp. 197, 198, §§ 4, 5, regulating procedure in the Clay county circuit court, *held* not to include a cause appealed there from a justice's court; but as to such a cause Code 1907, § 4722, controls, and, the amount sued for exceeding \$20, the cause was properly tried to a jury, and defendant had no right to a trial by the court.—Central of Georgia Ry. Co. v. Williams (Ala.) 328.

§ 19. The right to trial by jury does not extend to taxation proceedings.—State v. Bley (Ala.) 263.

§ 23. A municipality *held* not without power to pass an ordinance prohibiting the giving away or otherwise disposing of intoxicating liquor on the theory that it cannot convert an offense against the state into an offense against the city, with effect to deny a jury trial.—Costello v. Feagin (Ala.) 134.

§ 28. Under Acts 1907, pp. 567, 569, §§ 12, 16, where defendant defaulted in an action in the Mobile law and equity court, and did not object to plaintiff's withdrawal of his demand for a jury trial, the court could assess the damages.—Pace v. Hannan (Ala.) 908.

## III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.

Disqualification of or misconduct affecting as ground for new trial, see Criminal Law, § 923; New Trial, § 52.

## IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 66. Drawing of a jury at a meeting of jury commissioners attended by a quorum *held* not void because of the absence of one of their number.—State v. Bouvy (La.) 849.

§ 66. A jury commission cannot legally act when there is a vacancy in the board.—State v. Bouvy (La.) 849.

§ 66. Absence of a member of a jury commission is not equivalent to a vacancy in the board sufficient to prevent action.—State v. Bouvy (La.) 849.

§ 72. Where a judge directs the summoning of talesmen without instructions except as to

number, the sheriff may exercise his discretion as to the place from which they shall be summoned.—State v. Bouvy (La.) 849.

§ 72. A sheriff directed to summon talesmen from bystanders need not summon every man he meets.—State v. Bouvy (La.) 849.

§ 82. Where a sheriff acts in good faith in summoning talesmen, it was not material that some of them were summoned at some distance from the courthouse.—State v. Bouvy (La.) 849.

§ 82. A sheriff's mistake in summoning 11 more talesmen for jurors than he was ordered *held* not ground for setting aside a conviction.—State v. Bouvy (La.) 849.

## V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

Incompetency of or misconduct affecting as ground for new trial, see New Trial, § 52.

§ 90. That the wife of a juror was a first cousin of accused's mother-in-law did not make accused and the juror related by consanguinity or affinity, so that it was error to allow the state to challenge him on that ground.—Lowman v. State (Ala.) 43.

§ 103. It was not error to overrule a challenge to a juror who stated that, though he had a fixed opinion, he would be governed by the law and the evidence.—State v. Bouvy (La.) 849.

§ 116. Motion to quash jury venire upon certain grounds *held* without merit.—Phillips v. State (Ala.) 194.

§ 116. The mode of selecting jurors, in the absence of fraud, *held* not a ground for quashing the venire, in view of Code 1907, § 7256.—Griffin v. State (Ala.) 962.

## VI. IMPANELING FOR TRIAL AND OATH.

Absence of accused during impaneling of jury, see Criminal Law, § 636.

§ 149. Where, pending prosecution for homicide, a juror became insane, the court should begin the trial *de novo*, tendering to defendant the right to exercise all the peremptory challenges allowed him by law.—Dennis v. State (Miss.) 499.

## JUSTICES OF THE PEACE.

### I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 6. The acts of a *de facto* justice of the peace are valid and effective.—Southern Ry. Co. v. Dickens (Ala.) 109.

### III. CIVIL JURISDICTION AND AUTHORITY.

§ 44. Const. art. 126, excluding interest in determining jurisdiction of justice, does not apply where the demand is only for interest.—Turner v. Woods (La.) 649.

### IV. PROCEDURE IN CIVIL CASES.

Issuance of process as affecting limitations, see Limitation of Actions, § 119.

§ 64. Code 1896, § 2663, subd. 3, relating to appointment of constables by a justice of the peace, *held* not to repeal section 979, providing for the service of justice's process by other constables in the county.—Southern Ry. Co. v. Dickens (Ala.) 109.

§ 75. Under Code 1896, § 2147 et seq., where an action of unlawful detainer was removed to the circuit court, the title became the issue between the parties.—Clark v. Dunn (Ala.) 93.

**V. REVIEW OF PROCEEDINGS.****(A) Appeal and Error.**

Amendment on appeal as affecting limitations, see Limitation of Actions, § 127.  
 Right to jury trial on trial de novo on appeal from justice's court, see Jury, § 17.

§ 174. Jurisdiction of an appeal from a justice to the circuit court *held* not lost because of an amendment of the complaint, adding five counts, each claiming "the further and additional sum" of \$100, which collectively exceeded a justice's jurisdiction; but the circuit court could cure this by allowing another amendment striking out the words "further and additional."—Central of Georgia Ry. Co. v. Williams (Ala.) 328.

**JUSTIFIABLE HOMICIDE.**

See Homicide, §§ 105, 116, 298, 300.

**JUSTIFICATION.**

Defense to action for assault, see Assault and Battery, §§ 12, 13.

**JUVENILE COURTS.**

Prohibition against proceedings in, see Prohibition, § 17.

**KNOWLEDGE.**

Affecting competency of expert witness, see Evidence, § 539.  
 Affecting competency of witness in general, see Witnesses, § 37.  
 Of defect or danger as affecting assumption of risk by servant, see Master and Servant, § 217.  
 Opinion evidence founded on special knowledge as to subject-matter, see Criminal Law, § 452; Evidence, § 474.

*Affecting or element of particular acts or transactions.*

See Fraudulent Conveyances, §§ 158-169.

Purchase of land, see Vendor and Purchaser, §§ 227, 232.

Transfer of bill or note, see Bills and Notes, § 332.

*Element of offenses.*

See Criminal Law, § 370.

**LABOR.**

See Master and Servant; Work and Labor.

Liens on crops for labor, see Agriculture, § 12.

**LACHES.**

*Affecting particular rights, remedies, or proceedings.*

By or against executor or administrator, see Executors and Administrators, § 437.

For new trial, see Criminal Law, § 951.

To confirm or try tax title, see Taxation, § 805.

**LADING.**

Bill of, see Carriers, §§ 58, 62.

**LANDLORD AND TENANT.**

Lease of railroad franchise or property, see Railroads, § 131.

**II. LEASES AND AGREEMENTS IN GENERAL.****(A) Requisites and Validity.**

§ 28. Misrepresentation by a grantee or lessee in obtaining the grantor's signature *held* a fraud available at law.—Prestwood v. Carlton (Ala.) 254.

**(B) Construction and Operation.**

Necessity for verification of plea in action for breach of covenant, see Pleading, § 291.

§ 40. Where a lease contract sued on referred in terms to a lease of the premises from a third person to the lessor, evidence of that lease is admissible.—Davis v. Simpson Coal Co. (Ala.) 368.

§ 44. Where land not owned by the lessor was included in the lease through the mutual mistake of both parties thereto, there was no breach of covenant of title as to such lands, and this is especially true where the error was the result of the lessee's fraud.—Prestwood v. Carlton (Ala.) 254.

§ 44. Under Code 1906, §§ 1801, 3090, 3108, the statute of limitations will run in favor of a nonresident owner of land.—Beresford v. Marble (Miss.) 68.

§ 48. In an action for breach of covenant in a lease, alleging want of title, a plea alleging fraud and misrepresentation by the lessee *held* to state a good defense.—Prestwood v. Carlton (Ala.) 254.

§ 48. In an action for breach of covenant contained in a lease alleging want of title to part of the premises, a plea of misrepresentations by the lessee *held* sufficient.—Prestwood v. Carlton (Ala.) 254.

§ 48. In an action for breach of covenant in a lease, *held*, under the pleadings, that defendant could not show parol authority to make the lease for the owner of the premises.—Prestwood v. Carlton (Ala.) 254.

§ 48. On breach of covenant by the lessor, the lessee is entitled to recover the difference between the rent reserved and the value of the premises for the term, together with other direct damages.—Prestwood v. Carlton (Ala.) 254.

§ 48. The measure of damages to lessee, in that a storeroom, as constructed, was of less dimensions than contracted for, stated.—Bromberg v. Eugenotto Const. Co. (Ala.) 314.

§ 48. In estimating damages, in that a storeroom was of less dimensions than contracted for, lessee *held* as much entitled to damages for the period during which he had the option of extending the lease as for the original term.—Bromberg v. Eugenotto Const. Co. (Ala.) 314.

**III. LANDLORD'S TITLE AND REVERSION.****(B) Estoppel of Tenant.**

§ 63. A lessee procuring a lease by misrepresentations as to the description of the land *held* estopped to dispute the lessor's ownership by an action for breach of covenant.—Prestwood v. Carlton (Ala.) 254.

**IV. TERMS FOR YEARS.****(C) Extensions, Renewals, and Options to Purchase or Sell.**

§ 90. The presumption of the continuance of a tenancy, arising from a tenant remaining in possession, is rebuttable.—Long v. Grant (Ala.) 914.

§ 90. When a tenant holds over after expiration of his term, the landlord may either treat him as a trespasser or hold him to a continuance of the tenancy on the same terms.—Long v. Grant (Ala.) 914.

**VII. PREMISES AND ENJOYMENT AND USE THEREOF.****(D) Repairs, Insurance, and Improvements.**

§ 150. Tenant *held* entitled to recover cost of repairs to building caused by breaking of

plate glass window by burglars.—Well v. Bonart (La.) 655.

## VIII. RENT AND ADVANCES.

Recovery of rent in action of trespass, see Trespass, § 50.

### (A) Rights and Liabilities.

Rights of life tenant, see Life Estates, § 21.

§ 190. If one leased premises including part of a street, he could not, in absence of a covenant against interference by public authorities, when evicted by the city, hold the lessor guilty of a breach of lease.—Davis v. Simpson Coal Co. (Ala.) 368.

§ 192. Liability of tenant for rent in case of eviction by the landlord or in case of the act of a third person or public authority, impairing the usefulness of the premises, determined.—O'Byrne v. Henley (Ala.) 83.

§ 192. The common-law rule as to the liability of a tenant for rent in case of the destruction of premises held subject to the exception that the tenant is released from liability for rent in the event of the complete destruction of the premises.—O'Byrne v. Henley (Ala.) 83.

§ 194. Held incumbent on a tenant to deliver the property to the landlord to terminate liability for rent.—I. Trager Co. v. Cavaroc Co. (La.) 598.

§ 199½. A lease of premises for saloon purposes held not terminated by the prohibition law, so as to relieve the lessee from liability for future rent.—O'Byrne v. Henley (Ala.) 83.

§ 199½. The liability of a tenant to pay rent held to cease on the total destruction of the business or trade, which, by the lease, was to be carried on in the premises.—O'Byrne v. Henley (Ala.) 83.

### (B) Actions.

§ 231. Where a lease contract sued on referred in terms to a lease of the premises from a third person to the lessor, which provided that there should be no subletting without the consent of the lessor therein, the third person's testimony that he had consented to the transfer of the lease was admissible.—Davis v. Simpson Coal Co. (Ala.) 368.

### (C) Lien.

Against bankrupt lessee, see Bankruptcy, § 191.  
Effect of appointment of receiver for lessee, see Receivers, § 77.

Interposing claim in detinue by mortgagee, see Detinue, § 16.

§ 246. Lessor's right of pledge on effects of sublessee held not affected by the fact that he had given lessee notes for the rent.—Tulane Improvement Co. v. W. B. Green Photo Supply Co. (La.) 601.

§ 246. Measure of lessor's pledge on effects of sublessee held rent accrued at the time of seizure, though the same may not then be demandable under the sublease.—Tulane Improvement Co. v. W. B. Green Photo Supply Co. (La.) 601.

§ 246. A lessor's right of pledge, under Rev. Civ. Code, art. 2706, on the effects of a sublessee, held restricted to the amount owing by the sublessee at the time of seizure.—Tulane Improvement Co. v. W. B. Green Photo Supply Co. (La.) 601.

### (D) Distress.

Right of new trial, see New Trial, § 2.

§ 265. The cessation of the relation of landlord and tenant does not destroy the statutory

remedy by distress as to rent there accrued.—Owens v. Wilson (Fla.) 674.

## LANDS.

Conveyances, see Deeds; Vendor chaser.

Mortgage, see Mortgages.

Public lands, see Public Lands.

## LANGUAGE.

Of statute, following statutory language dictum or information, see Indictment, § 110.

## LARCENY.

See False Pretenses.

Larceny distinguished from offense animals, see Animals, § 45.

## I. OFFENSES AND RESPONSES THEREFOR.

§ 26. Paying for stolen property held a defense to a prosecution therefor.—J State (Fla.) 582.

## II. PROSECUTION AND PUNISHMENT.

### (A) Indictment and Information.

§ 30. An indictment for larceny is where it states that a better description of money stolen than that given is unknown to the prosecuting solicitor or the grand jury. State (Fla.) 948.

§ 32. A buyer in possession of property under a conditional sale held the owner an indictment for the larceny proper ownership in him.—May v. State (Ala.) 360.

§ 38. An indictment held to charge and not to support a conviction of Fournier v. State (Miss.) 502.

§ 40. One may be convicted of grand larceny under an indictment alleging the value of property stolen at \$100, on the statement that it was worth \$25 or over.—May v. State (Ala.) 360.

§ 40. Under plea of not guilty, the defendant's want of knowledge of better description of the stolen property is traversable.—State (Fla.) 948.

§ 40. Under a plea of not guilty, the defendant cannot be acquitted on proof that he could easily have known a better description of the property stolen than that in the indictment.—Enson v. State (Fla.) 948.

### (B) Evidence.

§ 45. Where money found on defendant responds with the stolen money, evidence of its identity is admissible.—Thompson v. State (Fla.) 507.

§ 50. Where larceny of money is proved, evidence that defendant had no money and considerable money after the larceny is admissible.—Thompson v. State (Fla.) 507.

§ 58. The identity of stolen money determined by the jury from circumstantial evidence.—Thompson v. State (Fla.) 507.

§ 65. Evidence held sufficient to support a verdict of guilty of grand larceny.—State (Fla.) 948.

### (C) Trial and Review.

Application of instructions to case, see Criminal Law, § 814.

## LAST CLEAR CHANCE.

Application of doctrine to injuries caused by automobile on street, see Municipal Corporations, § 705.

Injury avoidable notwithstanding contributory negligence, see Negligence, § 83.

## LAW.

See Common Law.

Due process of law, see Constitutional Law, §§ 284-301.

Judicial notice of laws, see Evidence, § 32.

Questions of law or fact, province of court and jury, see Trial, § 136-145.

Statutory law, see Statutes.

## LAWYERS.

See Attorney and Client.

## LEADING QUESTIONS.

On examination of witnesses, see Witnesses, § 240.

## LEASE.

See Landlord and Tenant.

Of railroads, see Railroads, § 131.

## LEAVE OF COURT.

To amend pleading, see Pleading, § 237.

## LEGACIES.

See Wills.

Charitable bequests, see Charities.

## LEGISLATION.

In general, see Statutes.

## LEGISLATIVE JOURNALS.

Necessity of showing notice of publication of local bills, see Statutes, § 8½.

## LEGISLATIVE POWER.

See Constitutional Law, § 50.

## LEVEES.

§ 32. Proceeds from sale of bonds under Act No. 25, p. 24, of 1908, by the Board of Levee Commissioners of the Orleans Levee District, *held* not required by Rev. St. § 2769, to be deposited in the state treasury; but the same may be deposited with a bank selected by the board as its fiscal agent under Act No. 23, p. 25, of 1907.—State ex rel. Guion v. Board of Levee Com'rs of Orleans Levee Dist. (La.) 458.

## LEVY.

Of assessment, or tax, see Municipal Corporations, §§ 407-446.

## LEWDNESS.

See Disorderly House.

## LEX LOCI.

As to requisites of will, see Wills, § 70.

Conflicting jurisdiction of courts, see Courts, § 489.

and Telephones, § 27.

## LIBEL AND SLANDER.

### I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 7. An article *held* not libelous per se.—Tennessee Coal, Iron & R. Co. v. Kelly (Ala.) 1008.

### IV. ACTIONS.

#### (B) Parties, Preliminary Proceedings, and Pleading.

§ 89. What the complaint for libel must state, where the article is not libelous per se, determined.—Tennessee Coal, Iron & R. Co. v. Kelly (Ala.) 1008.

#### (C) Evidence.

Negative testimony, see Evidence, § 586.

### VI. CRIMINAL RESPONSIBILITY.

#### (B) Prosecution and Punishment.

Comparison of handwriting, see Criminal Law, § 491.

§ 152. Under Code 1896, § 4896 (Code 1907, § 7134), an indictment for defamation of a female *held* sufficient.—Butler v. State (Ala.) 400.

§ 155. In a trial for publishing a defamatory letter, parts of other letters written by accused *held* admissible to show malice.—Cox v. State (Ala.) 398.

§ 155. In a trial for publishing a defamatory letter, the letter *held* admissible in connection with evidence to show that it was written by defendant.—Cox v. State (Ala.) 398.

§ 155. In a trial under Code 1896, § 5063, for defamation of a female, evidence of repetition after the commencement of the prosecution of the words charged to have been spoken *held* admissible to show the animus with which the words were spoken.—Butler v. State (Ala.) 400.

## LICENSES.

### I. FOR OCCUPATIONS AND PRIVILEGES.

See Brokers, § 42.

Effect of partial invalidity of statutes, see Statutes, § 64.

Laws providing for licensing of electricians as denial of equal protection of law, see Constitutional Law, § 230; as denying protection of property right, see Constitutional Law, § 87.

Laws relating to licenses as denial of equal protection of laws, see Constitutional Law, § 230. Sale of intoxicating liquors, see Intoxicating Liquors, §§ 45-106.

Subject and title of statutes, see Statutes, § 114.

### II. IN RESPECT OF REAL PROPERTY.

Grants by municipalities of rights to use street for purposes other than highway, see Municipal Corporations, §§ 680, 681.

## LIENS.

Effect of proceedings in bankruptcy, see Bankruptcy, § 191.

Multifariousness in pleading, in action to enforce, see Equity, § 148.

*Liens acquired by particular remedies or proceedings.*

Judgment, see Judgment, §§ 780, 800.

*Particular classes of liens.*

See Chattel Mortgages, § 153; Mortgages, § 151; Pledges.

Agricultural liens, see Agriculture, § 12.

Of landlord for rent, see Landlord and Tenant, § 246.

Of vendor for price of land, see Vendor and Purchaser, §§ 254, 299.

On property in hands of receiver, see Receivers, § 77.

**LIFE ESTATES.**

See Dower.

Conclusions in pleading in action against life tenant, see Pleading, § 8.

Construction of wills, see Wills, § 614.

Title acquired by purchaser from life tenant with power to sell, see Powers, § 43.

§ 4. Where a deed conveyed a life estate, with remainder to the grantor's heirs, no intermediate titles, taken in subseverancy to such deed, could be set up to defeat the claim of the heirs.—Baker v. Richardson (Miss.) 447.

§ 6. A will bequeathing personal property to testator's wife for life with remainder over *held* to give the wife the right to use the personalty for her own use for life, with remainder, if any, to the son.—Underwood v. Underwood (Ala.) 305.

§ 6. The intention of testator bequeathing personal property to one for life with remainder over controls in determining the rights of the respective legatees.—Underwood v. Underwood (Ala.) 305.

§ 8. Where a purchaser became the owner in fee of an interest in real estate and the owner of a life estate, no question of adverse possession could arise before the death of the life tenant.—Cramton v. Rutledge (Ala.) 900.

§ 15. A tenant for life of real estate is entitled to the rents thereof.—Underwood v. Underwood (Ala.) 305.

§ 21. A life estate in personalty *held* to give the donee the right to consume such articles as cannot be enjoyed without consuming them, and the right to wear out by use such as cannot be used without wearing out.—Underwood v. Underwood (Ala.) 305.

§ 23. Code 1907, § 3385, *held* to afford no protection to a purchaser from a life tenant in possession before the expiration of five years of such possession.—Touart v. Rickert (Ala.) 806.

§ 27. A will bequeathing personal property to testator's wife for life with remainder over *held* to give the wife the right to use the personalty for her own use for life, with remainder, if any, to the son.—Underwood v. Underwood (Ala.) 305.

§ 27. The intention of testator bequeathing personal property to one for life with remainder over controls in determining the rights of the respective legatees.—Underwood v. Underwood (Ala.) 305.

§ 28. A life tenant in possession of land abutting on an alley may sue for an interference with his easement right to the alley.—Beard v. Hicks (Ala.) 232.

**LIFE INSURANCE.**

See Insurance.

**LIGHTS.**

See Electricity.

**LIMITATION OF ACTIONS.**

See Adverse Possession.

*Particular actions or proceedings.*

Appeal or other proceedings for review, see Appeal and Error, §§ 338-344.

By or against executors or administrators, see Executors and Administrators, § 437.

For new trial, see Criminal Law, § 951.

To confirm or try tax title, see Taxation, § 805.

**II. COMPUTATION OF PERIOD OF LIMITATION.****(A) Accrual of Right of Action or Defense.**

§ 46. Time when limitations commence to run against an account determined.—Deweese v. Bostick Lumber & Mfg. Co. (Miss.) 803.

§ 55. Where defendants caused rock to fall into a stream where plaintiffs were to erect a pier, the statute limiting the time for suit for the injury ran from the time the rock fell.—McCalla v. Louisville & N. R. Co. (Ala.) 971.

§ 55. Where defendants caused rock to fall into a stream where plaintiffs were to erect a pier, the running of the statute of limitations as to suit for the injury was not postponed until plaintiffs could demonstrate their loss by completing the contract under conditions of increased difficulty and cost.—McCalla v. Louisville & N. R. Co. (Ala.) 971.

**(D) Death and Administration.**

§ 80. Where limitations had begun to run against plaintiff's ancestor, it was not interrupted at his death, though plaintiff was yet unborn.—Oliver v. Williams (Ala.) 937.

**(H) Commencement of Action or Other Proceeding.**

§ 119. Under Code 1896, §§ 2667, 2814, where a justice of the peace was also a deputy sheriff and there was no constable in his precinct, a summons signed by him while in his hands was not "issued" so as to stop the running of limitations.—Southern Ry. Co. v. Dickens (Ala.) 109.

§ 127. In an action against a railroad company for killing a hog, plaintiff's amended complaint, filed after limitations had run, *held* to state the same cause of action as alleged in the original complaint, and that the cause was therefore not barred.—St. Louis & S. F. R. Co. v. Hooker (Ala.) 56.

§ 127. Under Code 1907, § 5367, where the original complaint was not barred by limitations, a proper amendment thereof relates back to the commencement of the suit, and is not affected by the statute of limitations.—Dallas Mfg. Co. v. Townes (Ala.) 157.

§ 127. Where no one of the counts of an amended complaint filed in the circuit court on appeal from a justice attempted to set up a new cause of action, *held*, that each related back to the beginning of the original action before the justice, and, that having been brought within time, there was no bar of limitations.—Central of Georgia Ry. Co. v. Williams (Ala.) 328.

**III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.**

§ 146. Where a person assents to the correctness of amount alleged to be due on notes, *held* not such an acknowledgment that the creditor can sue thereon after recovery on the notes has been barred by limitations, under Code 1907, § 4850.—Jasper Trust Co. v. Lampkin (Ala.) 337.

## **V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.**

§ 195. When limitations are pleaded, the burden is on plaintiff to prove a cause of action within the period of the bar.—*Lord v. Calhoun* (Ala.) 402.

### **LIMITATION OF LIABILITY.**

Of carrier in respect to goods, see *Carriers*, § 159.

Of telegraph or telephone company for negligence or default in transmission or delivery of message, see *Telegraphs and Telephones*, § 54.

### **LIQUIDATION.**

In general, see *Assignments for Benefit of Creditors*; *Bankruptcy*; *Insolvency*.

Of corporations in general, see *Corporations*, § 553.

### **LIQUOR SELLING.**

See *Intoxicating Liquors*.

### **LITTORAL RIGHTS.**

See *Navigable Waters*, § 39.

### **LIVE STOCK.**

See *Animals*.

Fence laws in general, see *Fences*.

Injuries to, by operation of railroad, see *Railroads*, §§ 439-446.

### **LOAN AGENTS.**

Subject and title of statute imposing license tax, see *Statutes*, § 114.

### **LOANS.**

See *Pawnbrokers*.

Recovery of money lent, see *Money Lent*.

Usurious loans, see *Usury*.

### **LOCAL ASSESSMENTS.**

See *Municipal Corporations*, §§ 407-446.

### **LOCAL LAWS.**

See *Statutes*, § 87.

### **LOGS AND LOGGING.**

Denial of due process of law by regulations as to equipment of lumber cars, see *Constitutional Law*, § 297.

Denial of equal protection of laws by regulations as to equipment of lumber cars, see *Constitutional Law*, § 241.

§ 3. An owner of the timber on land is entitled to enter and remove the same, doing no more damage and committing no trespass beyond what is necessary to accomplish the removal.—*Wilmer Lumber Co. v. Eiseley* (Ala.) 225.

§ 3. A contract for the sale of standing timber construed.—*Stevenson & Herzfeld v. Davis* (Ala.) 1023.

§ 3. Injunction to restrain grantors of timber from turpentineing under the contract denied.—*Wefel v. Williams & Pritchett* (Fla.) 679.

§ 34. Mill owner agreeing to receive logs during floating season of 1906-07 held not obliged to accept logs tendered at beginning of floating season of 1907-08.—*Wall v. Ouachita Lumber Co., Limited* (La.) 769.

## **LORD'S DAY.**

See *Sunday*.

### **LOSS.**

Causes of loss within insurance policy, see *Insurance*, § 402.

Of goods by carrier, see *Carriers*, § 123.

Of writing as ground for admission of secondary evidence, see *Evidence*, § 183.

### **LOST INSTRUMENTS.**

Destruction or loss of primary evidence, as ground for admission of secondary evidence, see *Evidence*, § 178.

Supplying or restoring records lost or destroyed, see *Records*, § 17.

## **LOTTERIES.**

### **IV. CRIMINAL RESPONSIBILITY.**

#### **(A) Offenses.**

§ 20. Under Code 1906, § 1286, one held not guilty, unless property raffled be put up or offered in the state, though chances are sold in it.—*Jenkins v. State* (Miss.) 495.

### **LUMBER.**

See *Logs and Logging*.

Laws regulating equipment of lumber cars as interfering with interstate commerce, see *Commerce*, § 61.

Laws relating to equipment of lumber cars as denial of right of acquiring, possessing and protecting property, see *Constitutional Law*, § 87.

### **LYNCHING.**

Impeachment of sheriff for failure to prevent lynching of prisoner, see *Sheriffs and Constables*, § 6.

### **MACHINERY.**

Dangerous machinery, liability of master for injuries to servant, see *Master and Servant*, §§ 101-118.

### **MAGISTRATES.**

See *Justices of the Peace*.

### **MALICIOUS PROSECUTION.**

See *False Imprisonment*.

### **II. WANT OF PROBABLE CAUSE.**

§ 21. In an action for malicious prosecution, where defendant, after statement of the case, made his affidavit under instruction of the prosecuting attorney, there can be no recovery.—*Hammar v. J. B. & J. W. Atkins* (La.) 781.

### **MANDAMUS.**

Compelling correction of statement in bill of exceptions in criminal case, see *Criminal Law*, § 1092.

Mandatory injunction, see *Injunction*, § 5.

### **I. NATURE AND GROUNDS IN GENERAL.**

§ 4. Mandamus will not be issued to correct alleged errors in a judgment, where there is an adequate remedy by writ of error.—*State v. Wolfe* (Fla.) 511.

§ 16. Mandamus will not issue to a trial judge to send memoranda in a criminal case to



the Supreme Court, when in his return he sends all such memoranda.—State v. Miller (La.) 481; In re Arthur, Id.

§ 16. Mandamus will not issue to compel a trial judge to file his charge in a criminal case, when his return states that he has filed it.—State v. Miller (La.) 481; In re Arthur, Id.

## II. SUBJECTS AND PURPOSES OF RELIEF.

### (A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

§ 26. Office of "mandamus," defined.—Ex parte Dickens (Ala.) 218.

§ 37. Mandamus will not lie to compel the grant of an injunction, except on clear disclosure of one of the special grounds therefor, set forth in Code Prac. art. 298.—Baldwin Lumber Co. v. Todd (La.) 526; In re Baldwin Lumber Co., Id.

§ 57. Mandamus lies to compel reinstatement of an appeal improperly dismissed.—H. L. Bain & Co. v. Oliphant (La.) 588.

§ 60. That the trial court improperly failed to bring the issues raised in habeas corpus proceedings to trial would not justify the Supreme Court in granting the writ under its original jurisdiction.—Ex parte Ryan (La.) 385.

§ 61. Accused in a nonappealable criminal case held not entitled to test before judgment the correctness of the ruling of the trial judge upon interlocutory points.—State v. Sandoleski (La.) 433; In re Sandoleski, Id.

### (B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 73. Mandamus held the proper remedy to compel county revenue and road commissioners to fix salary, under Code 1907, § 703, subd. "G," of one elected by the county board of health as physician to attend the county poorhouse and jail inmates.—Revenue and Road Com'rs of Mobile County v. State (Ala.) 972.

§ 76. Mandamus held proper proceeding to test the validity of expulsion of city council member.—Etzler v. Brown (Fla.) 416.

§ 76. The court may interfere where a city council manifestly attempts, by abuse of its discretion to fix salary, to indirectly abolish an officer or remove an officer, which it has no power to do.—State ex rel. Thurmond v. City of Shreveport (La.) 3.

## III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 151. Where substantial interests of third persons, not before the court, are involved, mandamus will not issue.—State v. Wolfe (Fla.) 511.

§ 168. Upon application for mandamus and certiorari to compel a district court to proceed with habeas corpus proceedings, prior proceedings therein held not to show that the respondent purposely delayed the trial, so as to prevent relator from obtaining relief.—Ex parte Ryan (La.) 385.

§ 178. Where the trial court discontinued the hearing of habeas corpus proceedings on a misapprehension that relator's counsel intended to abandon them and apply to the Supreme Court for relief, but is willing to continue the proceedings, they should be prosecuted to completion.—Ex parte Ryan (La.) 385.

## MANDATE.

See Mandamus.

Disobedience of mandate as contempt of court, see Contempt, § 20.

To lower court on decision on appeal proceeding for review, see Appeal a §§ 1203-1206.

## MANDATORY INJUNCTION

See Injunction, § 5.

## MAPS.

Dedication of property to public use, cation, § 19.

## MARINE INSURANCE.

Risks and causes of loss within policy, § 402.

## MARITAL RIGHTS.

See Husband and Wife.

## MARKETS.

Dedication of property for establishment misuser or diversion, see Dedication,

## MARKET VALUE.

Of property, opinion evidence, see Evidence, § 489.

Of property, relevancy of evidence, dence, § 113.

## MARRIAGE.

See Divorce; Husband and Wife.

Of widow as affecting homestead, sstead, § 147.

## MARRIED WOMEN.

See Husband and Wife.

## MARSHALING ASSETS AND CURITIES.

Of firms and partners, see Partnership 186.

## MASTER AND SERVANT

Declarations by employé as evidence employer, see Evidence, §§ 242, 244. Implied liabilities for services render performance of duties of employ Work and Labor.

### I. THE RELATION.

#### (A) Creation and Existence

Employment of agents, see Principal a § 22.

#### (B) Statutory Regulation

Prohibition to review prosecution for of child labor law, see Prohibition,

#### (C) Termination and Discharge

Termination of agency, see Principal a § 34.

## II. SERVICES AND COMPENSATION

### (B) Wages and Other Remuneration

Agricultural liens, see Agriculture, §

## III. MASTER'S LIABILITY FOR INJURIES TO SERVANTS

### (A) Nature and Extent of Liability

§ 85. An employer held liable for his negligence or that of a vice president. Stearns & Culver Lumber Co. v. Fox 680.

§ 85. Employer *held* liable for injury to employé by the negligent performance or nonperformance of any duty devolving upon him by virtue of the express or implied requirements of the employment.—*Stearns & Culver Lumber Co. v. Fowler* (Fla.) 680.

§ 91. If from the appearance of a youthful employé the master is put upon notice of his immaturity, incapacity, or inexperience, and fails to institute an inquiry thereto, he is chargeable as with actual negligence.—*Louisville & N. R. Co. v. Wilson* (Ala.) 188.

**(B) Tools, Machinery, Appliances, and Places for Work.**

Duty of railroad company giving another company right to use its tracks to avoid injury to servants of latter company, see *Railroads*, § 260.

§§ 101, 102. The master's common-law duty *held* to furnish, not good and safe, but only reasonably safe and suitable, instrumentalities employed in the business.—*Huyck v. McNerney* (Ala.) 928.

§ 107. A ladder of a building contractor *held* part of his plant, within liability act (Code 1907, § 3910, subd. 1).—*Huyck v. McNerney* (Ala.) 926.

§ 118. A rope *held* a part of the ways, works, machinery, or plant in a coal mine.—*New Connellsville Coal & Coke Co. v. Kilgore* (Ala.) 205.

§ 118. A skidway, together with a hoisting bucket, *held* a part of the plant of a coal mine.—*New Connellsville Coal & Coke Co. v. Kilgore* (Ala.) 205.

§ 118. Code 1907, § 1028, *held* not to require safety catches upon a car operated upon an inclined track, though used for lowering and hoisting persons into and out of a mine; for, while there should not be too narrow a construction of section 1028, the fact that the duty imposed is enforced by penal provisions (section 7418) cannot be ignored.—*Green v. Bessemer Coal, Iron & Land Co.* (Ala.) 289.

**(C) Methods of Work, Rules, and Orders.**

§ 144. Where a minor was instructed not to ride on a tram car, any custom to the contrary could not estop the employer to impose his will on the employé in the particular instance.—*Green v. Bessemer Coal, Iron & Land Co.* (Ala.) 289.

**(D) Warning and Instructing Servant.**

§ 153. Mere minority alone does not fix upon the master the absolute duty of warning the servant as to danger.—*Louisville & N. R. Co. v. Wilson* (Ala.) 188.

**(E) Fellow Servants.**

Validity of statute as denying due process of law, see *Constitutional Law*, § 301.

Validity of statute as denying equal protection of law, see *Constitutional Law*, § 245.

§ 177. Master *held* not liable to one servant for injury through the negligence of another in the same employment, unless the master's representative.—*Stearns & Culver Lumber Co. v. Fowler* (Fla.) 680.

§ 177. Employer *held* not, in general, liable for injury by a fellow servant's negligence.—*Stearns & Culver Lumber Co. v. Fowler* (Fla.) 680.

§ 177. At common law, where master himself has performed his duty, he is not liable for a fellow servant's negligence.—*Stearns & Culver Lumber Co. v. Fowler* (Fla.) 680.

§ 185. Evidence that a servant, charged with repairing an appliance, was negligent, *held* not to sustain an allegation that the master was

negligent.—*Central Foundry Co. v. Bailey* (Ala.) 346.

§ 185. In determining whether an employé represents the employer, the duty required to be performed, rather than his title, is to be considered.—*Stearns & Culver Lumber Co. v. Fowler* (Fla.) 680.

§ 187. At common law, where master delegates to employé duty devolving upon him, such employé *held* a vice principal, for whose negligence the master is liable.—*Stearns & Culver Lumber Co. v. Fowler* (Fla.) 680.

§ 190. Conductor of log train *held* not in law necessarily a vice principal of the sawmill company discharging a duty peculiarly devolving upon it while signaling the movements of a machine used in loading the train.—*Stearns & Culver Lumber Co. v. Fowler* (Fla.) 680.

§ 196. To render employés fellow servants, *held* not necessary that they should be engaged in the same particular work, but sufficient if employed to perform duties tending to accomplish the same general purpose.—*Stearns & Culver Lumber Co. v. Fowler* (Fla.) 680.

§ 196. An employer *held* liable to an employé, injured by another servant in the performance of different work under their common employment.—*Taylor v. E. C. Palmer & Co.* (La.) 522.

**(F) Risks Assumed by Servant.**

§ 203. Risks resulting from the master's negligence are not assumed by the servant.—*Stearns & Culver Lumber Co. v. Fowler* (Fla.) 680.

§ 205. A servant has the right to presume that the premises of the master are safe for the work which he is engaged to perform.—*Western Steel Car & Foundry Co. v. Bean* (Ala.) 1012.

§ 216. An employé, engaged in making safe an unsafe condition in the plant or premises of his employer, assumes the risk of inherent dangers, but not those growing out of his employer's negligence.—*Tennessee Coal, Iron & R. Co. v. King* (Ala.) 75.

§ 216. An employé, engaged in making safe an unsafe condition in the plant or premises of his employer, assumed the risk of inherent dangers, but not those growing out of negligence of his superiors.—*Tennessee Coal, Iron & R. Co. v. King* (Ala.) 75.

§ 216. Risks assumed by servant at common law, stated.—*Stearns & Culver Lumber Co. v. Fowler* (Fla.) 680.

§ 217. Notice of such danger in riding on a car as necessarily inhered in its operation *held* not to put the employé in the attitude of assuming the risk from a defect not known to him, nor so obvious that he must be presumed to have known it.—*Green v. Bessemer Coal, Iron & Land Co.* (Ala.) 289.

§ 217. A servant does not assume the risk of dangers from an insecurely fastened furnace door about which he is to work, where he has no knowledge of the defective condition of the fastenings.—*Jones v. Tennessee Coal, Iron & R. Co.* (Ala.) 1017.

§ 222. An employé, who with appreciation of the danger enters on a perilous work, assumes the risk.—*Briggs v. Tennessee Coal, Iron & R. Co.* (Ala.) 1025.

**(G) Contributory Negligence of Servant.**

§ 243. Where an injury to a servant occurred as the proximate result of his own negligence in failing to obey the master's instructions, he cannot recover.—*New Connellsville Coal & Coke Co. v. Kilgore* (Ala.) 205.

**(H) Actions.**

Allegations of fact or conclusions, see *Pleading*, § 8.

Argumentative instructions, see Trial, § 240.  
Pleading matters of conclusion, see Pleading, § 8.

§ 256. A complaint in an action for injuries to a servant *held* to show that the servant was engaged in the duties of his employment at the time of the injury.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 256. Averment *held* not equivalent to an averment that plaintiff's intestate at the time of his death was engaged in the performance of some duty imposed by his employment.—Green v. Bessemer Coal, Iron & Land Co. (Ala.) 289.

§ 256. A general allegation that plaintiff's intestate was on a car "while in the performance of his duties" *held* sufficient.—Green v. Bessemer Coal, Iron & Land Co. (Ala.) 289.

§ 256. Count for injury to employé *held* demurrable, in the absence of certain allegation.—Green v. Bessemer Coal, Iron & Land Co. (Ala.) 289.

§ 256. Count of a complaint for injury to an employé *held* to be for a breach of the master's common-law duty in respect to furnishing instrumentalities employed in the business.—Huyck v. McNerney (Ala.) 926.

§ 258. A count for injury to a miner *held* not required to aver that the failure by the mine-owner to observe Code 1869, § 2914, was negligence.—Sloss-Sheffield Steel & Iron Co. v. Sharp (Ala.) 52.

§ 258. Notwithstanding certain defects in count for injury to a miner, *held*, that a demurrer thereto was not erroneously overruled, where not pointing out such defects.—Sloss-Sheffield Steel & Iron Co. v. Sharp (Ala.) 52.

§ 258. A complaint in an action for injuries to a servant *held* not subject to demurrer, as failing to show any duty by defendant to furnish lights to the contractor for work after dark.—Dallas Mfg. Co. v. Townes (Ala.) 157.

§ 258. The averment of youth in an injured employé in connection with the allegation that he is a minor may be consistent with the fact that he is fully matured for one of his age.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 258. An averment of the master's knowledge of the inexperience of a youthful employé is indispensable to a count charging negligence in failing to warn him of danger.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 258. The complaint for injury to a servant *held* not to show a defect in the master's plant.—Huyck v. McNerney (Ala.) 926.

§ 258. The complaint for injury to a servant from a defective instrumentality *held* not to show it was furnished by the master, so as to make him liable.—Huyck v. McNerney (Ala.) 926.

§ 258. The complaint for injury to a servant *held* required to connect the defect and the accident.—Huyck v. McNerney (Ala.) 926.

§ 258. A complaint for personal injuries under the liability act (Code 1907, § 3910, subd. 1) *held* not subject to the demurrer interposed.—Jones v. Tennessee Coal, Iron & R. Co. (Ala.) 1017.

§ 258. A complaint in an action for personal injuries *held* not subject to the demurrer interposed.—Jones v. Tennessee Coal, Iron & R. Co. (Ala.) 1017.

§ 258. The declaration in an action against a telephone company for the death of a lineman *held* to state a cause of action.—Berry v. Cumberland Telephone & Telegraph Co. (Miss.) 69.

§ 259. A count in a complaint in an injury action by a servant *held* insufficient, whether

based on Code 1896, § 1749, subd. 2, common law.—United States Cast Iron Foundry Co. v. Driver (Ala.) 118.

§ 259. Though the question whether negligence was in the performance of a duty upon the employer, as such, might largely of evidence, the declaration *held* wholly fail to state a cause of action.—Culver Lumber Co. v. Fowler (Fla.) 118.

§ 262. In an action by a servant for a plea *held* insufficient.—United States Iron, Pipe & Foundry Co. v. Driver (Ala.) 118.

§ 262. A plea of contributory negligence in an action against a railroad company for injuries *held* sufficient.—Turner v. Louisville & N. R. Co. (Ala.) 124.

§ 262. In an action for injury to while performing his duty, a plea *held* to demur, where it failed to allege it was a safer way in which plaintiff could have discharged his duty.—United States Iron, Pipe & Foundry Co. v. Granger (Ala.) 150.

§ 262. A plea of contributory negligence in an action by a servant for personal injuries while occupying a position of danger, when obviously a safer way for him to do was subject to demurrer in failing to allege plaintiff was aware of the danger of the position occupied by him.—United States Cast Iron & Foundry Co. v. Granger (Ala.) 150.

§ 262. A plea of assumption of duty by a servant, under Code 1896, § 1749, subd. 5, need not aver the master's knowledge of the defect, but must be available such knowledge must be shown forward by replication.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 262. An averment of the servant's knowledge of the danger arising from the defect is not indispensable to a plea of assumption of risk in the language of Code 1896, § 1749, subd. 5.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 262. In an action for injuries to a miner caused by defects in a signal, a plea *held* insufficient.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 262. In an action for injuries to a miner, a plea *held* to sufficiently plead assumption of risk.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 262. A plea of contributory negligence in an action by a servant for personal injuries does not allege that the negligence of the servant proximately to the injury is insufficient.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 262. A plea alleging assumption of duty by the servant suing for a personal injury does not allege facts relating to contributory negligence, is insufficient.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 262. In an action for injuries to a miner, a plea *held* to sufficiently plead negligence of a fellow servant.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 262. A plea in an action for injury to a servant *held* to sufficiently plead contributory negligence.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 262. In an action for injuries, a plaintiff, after discovering the danger in the service, was not defective for stating that he voluntarily remained.—Tennessee Coal, Iron & R. Co. (Ala.) 1017.

§ 264. Under the employer's liability act (Code 1896, § 1749, subd. 2) defendant's action for injuries to a servant *held* to a general charge as to a count alleging the name of defendant's superintendent known to plaintiff; the proof showing

was known.—Central Foundry Co. v. Bailey (Ala.) 346.

§ 265. In an action for injuries to a servant, a count of the complaint *held* to allege several acts of negligence, so as to place on plaintiff the burden of showing that the injury resulted from all of such acts operating together.—Central Foundry Co. v. Bailey (Ala.) 346.

§ 265. In an action for death of a railroad employé, evidence *held* insufficient to sustain judgment for plaintiff.—Louisville & N. R. Co. v. Caldwell (Fla.) 484.

§ 265. Burden *held* upon employé to show that the negligence of another employé causing the injury was in performing a duty cast upon the master as such.—Stearns & Culver Lumber Co. v. Fowler (Fla.) 680.

§ 265. An employé, to recover, must make it appear that the negligence causing the injury was in the performance of a duty imposed upon the master as such.—Stearns & Culver Lumber Co. v. Fowler (Fla.) 680.

§ 269. In an action for the death of a miner, any evidence that the accident resulted from an overheated blast fired by an independent contractor *held* admissible.—Travis v. Sloss-Sheffield Steel & Iron Co. (Ala.) 108.

§ 270. Testimony as to the condition of a machine three months after an injury to an employé is admissible.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 270. Evidence of the condition of the machine eight months before an injury to an employé is admissible when it is shown that the condition had not changed.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 274. In a servant's action for injuries through falling on a loose plank on a scaffold, certain evidence *held* admissible.—Western Steel Car & Foundry Co. v. Bean (Ala.) 1012.

§ 278. Evidence *held* insufficient to show the master's liability for the servant's injuries.—Dallas Mfg. Co. v. Townes (Ala.) 157.

§ 286. The question whether the master ought to have known of the necessity of warning a youthful employé as to danger is for the jury.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 286. In an action for injuries to a coal miner caused by defective rope attached to the hoisting bucket, the question whether the rope was defective *held* for the jury.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 286. In an action for injuries to a servant, evidence *held* not to show that the injury occurred as alleged.—Fletcher v. Tennessee Coal, Iron & R. Co. (Ala.) 996.

§ 286. Where the duty negligently performed does not appear, as a matter of law, to be a duty devolving upon the master, the question whether it did *held* for the jury.—Stearns & Culver Lumber Co. v. Fowler (Fla.) 680.

§ 286. Evidence, in an action for the death of a lineman resulting from contact with wires charged with electricity, *held* to raise for the jury the question of negligence by defendant.—Berry v. Cumberland Telephone & Telegraph Co. (Miss.) 69.

§ 287. Injuries to a timberman by the fall of material from a mine *held* attributable to the negligence of both the superintendent and foreman in failing to make proper tests before directing the cutting of hitches for timbers.—Tennessee Coal, Iron & R. Co. v. King (Ala.) 75.

§ 289. In an action for injuries to a coal miner caused by defect in a hoisting bucket, the question of reasonable time after knowledge of the defect *held* for the jury.—New Connellsville Coal & Coke Co. v. Kilgore (Ala.) 205.

§ 298. In an injury action by a servant, charges *held* erroneous.—United States Cast Iron, Pipe & Foundry Co. v. Driver (Ala.) 118.

§ 293. A charge *held* erroneous for failure to hypothesize knowledge or notice on the part of the superintendent of the employé's inexperience.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 295. A charge that in passing on the question of assumption of risk on the part of a youthful employé the jury may consider his inexperience is not objectionable.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

Liability of carrier for acts or omissions of employes resulting in personal injury to passenger, see Carriers, § 283.

##### (A) Acts or Omissions of Servant.

§ 302. A master *held* liable for act of his servant, causing an injury to a third person.—Weinacker Ice & Fuel Co. v. Ott (Ala.) 901.

##### (B) Work of Independent Contractor.

§ 316. Persons to whom parts of a railroad construction contract were let *held* not independent subcontractors.—Alabama Western R. Co. v. Talley-Bates Const. Co. (Ala.) 341.

§ 316. "Independent contractor" defined.—Alabama Western R. Co. v. Talley-Bates Const. Co. (Ala.) 341.

##### (C) Actions.

§ 328. In actions for damages caused by the negligence of a servant, it is permissible to join the master as a defendant.—Southern Ry. Co. v. Arnold (Ala.) 298.

§ 332. In an action against one engaged in the ice business for injuries to a child, who was pushed off an ice wagon by one attending the wagon, the question whether he was defendant's agent and acting within his authority *held* for the jury.—Weinacker Ice & Fuel Co. v. Ott (Ala.) 901.

#### V. INTERFERENCE WITH THE RELATION BY THIRD PERSONS.

##### (A) Civil Liability.

§ 341. Statement of when one is liable for procuring the discharge of a servant by his employers.—Tennessee Coal, Iron & R. Co. v. Kelly (Ala.) 1008.

§ 341. Evidence in an action for damages for defendant's procuring the discharge of plaintiff by his employers *held* inadmissible under the issues.—Tennessee Coal, Iron & R. Co. v. Kelly (Ala.) 1008.

§ 341. Evidence *held* immaterial on the question of liability for procuring discharge of a servant by his employers.—Tennessee Coal, Iron & R. Co. v. Kelly (Ala.) 1008.

#### MATERIALITY.

Of alteration of written instrument, see Alteration of Instruments, § 5.

Of evidence, see Criminal Law, § 384.

#### MEASURE OF DAMAGES.

See Damages, § 123.

#### MECHANICS' LIENS.

#### IV. OPERATION AND EFFECT.

##### (C) Priority.

Priority over mortgage, see Mortgages, § 151.

## VII. ENFORCEMENT.

Multifariousness in pleading, see Equity, § 148.

## MEDICAL EXPERTS.

Testimony, see Evidence, § 528.

## MEETINGS.

Of municipal councils, see Municipal Corporations, § 97.

## MEMBERS.

Of city council, see Municipal Corporations, § 97.

Of corporations in general, see Corporations, § 255.

Of firms, see Partnership.

Of religious societies, see Religious Societies.

Of school boards, see Schools and School Districts, § 53.

## MEMORANDA.

Competency as evidence, see Evidence, § 355.

Of judge at trial in criminal prosecution, mandamus to compel filing on appeal, see Mandamus, § 16.

Required by statute of frauds, see Frauds, Statute of, §§ 103, 106.

## MENTAL SUFFERING.

Element of damages, see Damages, § 49.

Element of damages for negligence or default in transmission or delivery of telegrams, see Telegraphs and Telephones, § 68.

Opinion evidence, see Evidence, § 472.

## MERGER.

Of cause of action in judgment, see Judgment, §§ 540-584.

## MESSAGES.

Transmission and delivery of telegraph or telephone messages, see Telegraphs and Telephones, §§ 27-74.

## METES AND BOUNDS.

See Boundaries.

## MINES AND MINERALS.

### III. OPERATION OF MINES, QUARRIES, AND WELLS.

(C) Rights and Liabilities Incident to Working.

Liability of master for injuries to servant from defective or dangerous condition of mines, quarries, and excavations, see Master and Servant, § 118.

## MINISTERS.

Fares chargeable by carriers, see Carriers, § 249.

## MINORS.

See Infants.

## MISCONDUCT.

See Contempt.

Of clerk of court, see Clerks of Courts, § 72.

Of counsel at trial, see Criminal Law, §§ 706-730.

Of trial judge, see Criminal Law, §§ 657, 658.

## MISDELIVERY.

Of telegraph message, see Telegraphs and phones, §§ 27-74.

## MISJOINDER.

Multifariousness in bill in equity, see Bill, § 148, 150.

## MISLEADING INSTRUCTION.

See Trial, § 242.

## MISREPRESENTATION.

See False Pretenses; Fraud.

Affecting validity of contract in general, Contracts, § 94.

Affecting validity of contract of sale, see §§ 38, 40.

Affecting validity of deed, see Deeds.

Affecting validity of insurance policy, Insurance, §§ 282, 723.

Affecting validity of release, see Release.

## MISTAKE.

In deed, see Deeds, § 69.

## MITIGATION.

Of damages, see Damages, § 62.

## MODIFICATION.

Of sentence in criminal prosecution, see Criminal Law, § 993.

## MONEY.

Deposits, see Banks and Banking, § 14.

Obtaining money under false pretenses, False Pretenses.

## MONEY LENT.

Bill or note given for loan of money, and Notes.

Usurious loans, see Usury.

§ 7. Where money is lent without agreement as to the time of payment, the time is that it is due on demand.—Southern Hardware & Supply Co. (Ala.)

§ 7. In an action to recover money, evidence held insufficient to show that in any agreement that the money was repaid until defendant was able to pay.—Southern Hardware & Supply Co. (Ala.)

## MONOPOLIES.

Validity of contract providing for use of patented articles or materials in construction of public improvement, see Municipalities, § 330.

## II. TRUSTS AND OTHER CONDITIONS IN RESTRAINT OF TRADE.

Validity of statute dispensing with notice to insurance companies becoming member of traffic association or making agreement with other companies as to rates of premium, Insurance, § 4.

## MORTGAGES.

Admissibility of other mortgages in evidence by person claiming under senior mortgage, against person claiming under junior mortgage, see Evidence, § 129.

By or to bank officer, see Banks and Banking, § 109.

Estoppel of mortgagor to set up after required title, see Estoppel, § 39.

Multifariousness in pleading in action to set aside mortgage, see Equity, § 150.

Of married woman's separate property, see Husband and Wife, § 171.

Of personal property in general, see Chattel Mortgages.

Right of mortgagee to sue on insurance policy, see Insurance, § 624.

### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials of Conveyances as Security.

§ 3. Gen. St. 1906, § 2494, providing that all deeds, etc., conveying real property to secure the payment of money shall be deemed mortgages, should be liberally construed to carry out the legislative intent.—Hull v. Burr (Fla.) 754.

§ 25. The assertion of a tax title based on a void assessment held to afford no consideration for a mortgage by the owner to the tax title holder.—State Land Co. v. Mitchell (Ala.) 117.

§ 32 In case of doubt whether a written instrument was intended to be an absolute deed, conditional sale, or a mortgage, equity will hold the transaction to be a mortgage.—Hull v. Burr (Fla.) 754.

§§ 32, 33. An instrument will be held a mortgage whatever its form, if, when taken alone or in connection with the surrounding circumstances, it appears to have been given to secure the payment of money, and the mere absence of terms of defeasance is not conclusive.—Hull v. Burr (Fla.) 754.

### III. CONSTRUCTION AND OPERATION.

#### (C) Property Mortgaged, and Estates of Parties Therein.

§ 142. As a general rule a mortgagor is estopped from denying his mortgagee's title; but, where there is no warranty in the mortgage, the mortgagor may set up a subsequently acquired title.—Vary v. Smith (Ala.) 187.

#### (D) Lien and Priority.

§ 151. Where the increased value of the property caused by the work done by complainant exceeded the amount due him, his lien was to that extent prior to a mortgage executed before the lien was created.—Climax Lumber Co. v. Bay City Mach. Works (Ala.) 935.

### IV. RIGHTS AND LIABILITIES OF PARTIES.

Right of mortgagee to sue on insurance policy, see Insurance, § 624.

### VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 298. In statutory ejectment by one claiming under a senior mortgage against one claiming under a junior mortgage, evidence that the senior mortgage had been paid before its foreclosure held admissible, in view of Code 1907, § 4800.—Davis v. Anderson (Ala.) 1002.

§ 311. Rights of mortgagor under an absolute deed, intended as a mortgage, stated.—Sewell v. Buyck (Ala.) 127.

### X. FORECLOSURE BY ACTION.

Commencement of foreclosure proceedings, as breach of condition against change of title of insured, see Insurance, § 328.

### (A) Nature and Form of Remedy.

§ 390. Remedies of a mortgagee stated.—Allen v. Pierce (Ala.) 924.

### MOTIONS.

Review of proceedings, see Appeal and Error, § 189.

#### For particular purposes or relief.

Change of venue, see Criminal Law, §§ 134, 135.

Continuance, see Criminal Law, § 603.

Dismissal of appeal or writ of error, see Appeal and Error, § 801; Criminal Law, § 1131.

Judgment by default, see Judgment, § 123.

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Presentation of objections, for purpose of review, see Appeal and Error, §§ 237, 242.

Quashing or setting aside indictment or information, see Indictment and Information, § 140.

Quashing venire, see Jury, § 116.

Relating to pleadings, see Pleading, §§ 341-369.

Striking out evidence, see Criminal Law, § 636.

### MOTIVE.

Evidence of, in criminal prosecutions, see Homicide, § 166.

### MOTOR VEHICLES.

On streets, liabilities for injuries, see Municipal Corporations, §§ 705, 706.

### MULTIFARIOUSNESS.

In bill in equity, see Equity, §§ 148, 150.

### MUNICIPAL CORPORATIONS.

See Counties; Schools and School Districts, § 53.

Drainage or reclamation districts, see Drains, § 18.

Liability for costs of election contest for membership in council, see Elections, § 307.

Mandamus to municipalities and municipal officers, see Mandamus, § 76.

Street railroads, see Street Railroads.

### I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

Of counties, see Counties, § 16.

### II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 62. A city charter confiding to the council the power to define duties of an officer held violated by the council attempting to delegate the power to the mayor.—State ex rel. Thurmond v. City of Shreveport (La.) 3.

### IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

#### (A) Meetings, Rules, and Proceedings in General.

Liability of city for costs of election contest, see Elections, § 307.

Mandamus to test validity of action of city council in expelling member from office, see Mandamus, § 76.

§ 97. Generally speaking, a permanent statute or ordinance is understood to continue in force till its repeal, and that was the obvious sense to be accorded to the word "permanent," as used in Municipal Code Act (Acts 1907, p. 831) § 81 (Code 1907, § 1252); and hence an ordinance determining officers pursuant to sections 17 and 33 (Acts 1907, pp. 799, 811; Code 1907, §§ 1067, 1171), providing that till repeal the offices provided for should exist, to be filled

by each succeeding administration, carries on its face an intent to form a permanent rule of government till repeal, and till such time it continued in force.—*Michael v. State* (Ala.) 929.

§ 97. An ordinance *held* to have been passed by a legal majority, pursuant to Municipal Code Act (Acts 1907, p. 831) § 81 (Code 1907, § 1252).—*Michael v. State* (Ala.) 929.

(B) **Ordinances and By-Laws in General.**  
Judicial notice of ordinances, see Evidence, § 32.

§ 111. Under Const. 1890, § 175, an ordinance pursuant to Code 1906, § 3332, providing for the removal of officers without an indictment and conviction, is void.—*Lizano v. City of Pass Christian* (Miss.) 981.

## V. OFFICERS, AGENTS, AND EMPLOYEES.

Mandamus to municipal officers, see Mandamus, § 76.

Of counties, see Counties, §§ 51, 65-98.

Of school districts, see Schools and School Districts, § 53.

Quo warranto to try title to office, see Quo Warranto, § 11.

### (A) Municipal Officers in General.

Mandamus to test validity of action of city council in expelling member from office, see Mandamus, § 76.

§ 126. Under Municipal Code Act (Acts 1907, pp. 791, 799, 811, 892) §§ 2, 17, 33, 199 (Code 1907, §§ 1047, 1048, 1067, 1171), *held* that, where a city of less than 6,000 organized by passing an ordinance under section 199, it might exercise all powers provided for in the act, unless expressly or plainly prohibited, and that the old council might anticipate the incoming council in passing an ordinance determining new officers under section 17 and 33, and so render valid appointment of a treasurer.—*Michael v. State* (Ala.) 929.

§ 155. A city auditor *held* necessary, and so not within the charter provision authorizing the council to remove an officer when his service is no longer necessary.—*State ex rel. Thurmond v. City of Shreveport* (La.) 3.

§ 159. An officer of a city should be given an opportunity to be heard in defense of any charge against him for which he may be expelled.—*Etzler v. Brown* (Fla.) 416.

§ 159. The action taken by the requisite vote of a city council expelling a member will not be disturbed by mandamus.—*Etzler v. Brown* (Fla.) 416.

§ 159. Where no injury appears to have been done an expelled member of the city council, *held* not necessarily illegal for the council while in executive session considering the action to be taken to receive reports of a detective, where the action taken was publicly done and so recorded.—*Etzler v. Brown* (Fla.) 416.

§ 159. City council member *held* guilty of disorderly behavior and malconduct in office within Gen. St. 1906, § 1012, authorizing an expulsion therefor.—*Etzler v. Brown* (Fla.) 416.

§ 164. The city council will be required to restore the salary of an officer to not less than the lowest reasonable amount shown by the evidence.—*State ex rel. Thurmond v. City of Shreveport* (La.) 3.

### (B) Municipal Departments and Officers Thereof.

§ 183. "Public officer," within Const. 1890, § 175, defined.—*Lizano v. City of Pass Christian* (Miss.) 981.

## VI. PROPERTY.

Adverse possession of street, see Adverse Possession, § 4.

## IX. PUBLIC IMPROVEMENTS.

### (A) Power to Make Improvements or Grant Aid Therefor.

§ 266. Act March 12, 1907 (Laws 1907, p. 398), authorizing a city to construct sewers and compel connections, *held* a valid exercise of police power, and not invalid as compelling improvement of property without the owner's consent.—*Allman v. City of Mobile* (Ala.) 238.

§ 277. Statutes *held* not to authorize a city to improve streets abutting on county property at the county's expense without a contract on its part to pay therefor.—*Edwards v. City of Ocala* (Fla.) 421.

§ 277. The authority to improve county property is by statute given to the county commissioners alone, and cannot be directly or indirectly exercised by a city.—*Edwards v. City of Ocala* (Fla.) 421.

### (B) Preliminary Proceedings and Ordinances or Resolutions.

Death of plaintiff as ground for abatement of action to restrain entering into contract, see Abatement and Revival, §§ 45, 52.

Right of action as between heirs and executor to continue action by decedent to restrain entering into contract, see Executors and Administrators, § 438.

§ 292. *Held*, that the charter of New Orleans (Acts 1896, p. 46, No. 45), as amended by Acts 1902, p. 430, No. 215, providing that street pavements can be ordered only on petition, must be strictly observed.—*Gurley v. City of New Orleans* (La.) 411.

§ 294. *Held*, that the charter of New Orleans (Acts 1896, p. 46, No. 45), as amended by Acts 1902, p. 430, No. 215, relative to notice of street pavement proceedings, must be strictly observed.—*Gurley v. City of New Orleans* (La.) 411.

§ 294. Publication of a street pavement petition under misleading caption *held* not a compliance with the law requiring the petition to be published.—*Gurley v. City of New Orleans* (La.) 411.

§ 319. An abutting owner *held* estopped to restrain a city from contracting for bitulithic pavement.—*Gurley v. City of New Orleans* (La.) 411.

### (C) Contracts.

Conclusiveness of admissions in pleadings, see Pleading, § 36.

§ 330. *Held*, that the charter of New Orleans (Acts 1896, p. 46, No. 45), as amended by Acts 1902, p. 430, No. 215, relative to awarding street pavement contracts to lowest bidder, must be strictly observed.—*Gurley v. City of New Orleans* (La.) 411.

§ 330. There can be no competition on a paving contract, where specifications require material to be that manufactured by a named company.—*Saxon v. City of New Orleans* (La.) 663.

§ 352. A contractor for city sewers *held* not entitled to measure the length of the foundation under the sewer in a particular manner.—*Shea v. Sewerage & Water Board of New Orleans* (La.) 166.

§ 352. A contractor for a city sewer *held* not entitled to charge extra for drop pipes in the manholes.—*Shea v. Sewerage & Water Board of New Orleans* (La.) 166.

§ 352. The cost of lumber used by a sewer contractor in making forms for the masonry work required by the contract *held* included in



§ 352. An agreement between a city and its sewer contractor, made during the progress of the work, *held* not to preclude the contractor from recovering certain expenses incurred in the progress of the work.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 356. An estimate of the depth of the cut in trench for a sewer, based on actual measurements made on the work, controls as against a measurement based on profiles previously made from merely approximate measurements.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 358. A stipulation in a contract for city sewers, relating to the right of the general superintendent of the city to decide matters of dispute, *held* valid.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 358. A stipulation in a contract for city sewers *held* to authorize the general superintendent of the city to judge of the manner in which the work shall be done.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 358. Under a contract to construct city sewers, the estimates of the work done, made by the general superintendent, *held* to control as against measurements by the contractor's engineer.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 360. A sewer contractor *held* entitled to recover for extra work without showing that the extra work was ordered in writing.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 360. The expense of top sheeting in a sewer trench to overcome a difficulty met with by the contractor in the course of his work falls on him and not on the city.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 360. A contractor for a city sewer *held* required to pay the cost of draining a street and of removing and repairing overhead wires.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 360. A sewer contractor, who repairs a road for his own convenience and not pursuant to the order of the city, cannot recover from the city the cost thereof.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 360. A contractor for a sewer, who makes repairs rendered necessary without his fault and under the order of the city, may recover the cost thereof.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 360. The amount expended by a sewer contractor in diverting water from his work, brought on the work as the result of other work let to other contractors, is recoverable from the city.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 360. A contractor for a sewer *held* entitled to recover a specified amount for driving piles deeper than originally required by the contract.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 362. A sewer contractor *held* not liable for liquidated damages for delay in completing the work.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 363. A contractor for a city sewer *held* required to pay the cost of painting and plastering the sewer made necessary because of his failure to comply with the contract.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 363. A contractor for sewers with a city is not responsible for failures in the work except so far as they result from his fault.—Shea

§ 374. A contractor for the construction of city sewers *held* entitled to sue for the balance remaining after completion of the work by the city.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 374. Evidence *held* to show that failures in sewers due to the pipes separating or cracking were due to the condition of the soil, etc., relieving the contractor from liability therefor.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 374. A contractor on a large and protracted work *held* only required to furnish an itemized bill of expenses incurred from the books kept by him.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 374. A contractor for city sewers cannot recover from the city the loss occasioned by the idleness of machines while waiting for permission to begin work, in the absence of evidence that the city was advised of the situation and put in default.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 374. A sewer contractor *held* entitled to recover the difference between the cost of cleaning the sewers with and without an appliance devised by him.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

§ 374. In an action by a contractor against a city for the balance due on the contract, the exclusion of certain evidence in support of the city's reconventional demand *held* erroneous.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

#### (D) Damages.

Compensation or damages for property taken under power of eminent domain, see Eminent Domain.

#### (E) Assessments for Benefits, and Special Taxes.

§ 407. The constitutional requirement of a uniform and equal rate of taxation does not relate to a municipal street improvement assessment.—Edwards v. City of Ocala (Fla.) 421.

§ 426. Authority given a city to impose a street improvement assessment will be held not to extend to a county courthouse square, unless the intent to include it clearly appears.—Edwards v. City of Ocala (Fla.) 421.

§ 426. Authority given a city to improve its streets *held* not to contemplate that it might acquire a lien on county property used for governmental purposes, or that an action might be brought against the county for the cost of street improvements.—Edwards v. City of Ocala (Fla.) 421.

§ 446. An owner of property abutting on a street improved by the city *held* not entitled to avoid the assessment by proving that the improvement was not done in accordance with the contract.—City of Woodlawn v. Durham (Ala.) 356.

### X. POLICE POWER AND REGULATIONS.

#### (A) Delegation, Extent, and Exercise of Power.

§ 591. Mobile City Ordinance No. 830, regulating sewers, *held* not invalid as a delegation of legislative power to the plumbing inspector.—Allman v. City of Mobile (Ala.) 238.

§ 591. Mobile City Ordinance No. 830, requiring sewer connections, *held* not invalid as leaving its enforcement to the discretion of the plumbing inspector.—Allman v. City of Mobile (Ala.) 238.



**(B) Violations and Enforcement of Regulations.**

Certification of record on appeal, see Criminal Law, § 1105.

Habeas corpus to obtain release of person convicted of violation, right of city to appeal, see Habeas Corpus, § 113.

Right to trial by jury, see Jury, § 23.

§ 642. An appeal to the city court of Gadsden from conviction in the mayor's court in Attalla for violation of an ordinance *held* a civil and not a criminal proceeding.—Feagin v. City of Attalla (Ala.) 72.

**XL USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.**

Dedication of property to public or to municipality, see Dedication.

**(A) Streets and Other Public Ways.**

Adverse possession of street, see Adverse Possession, § 4.

Dedication of, see Dedication.

Injuries to persons on street by collision with street cars, see Street Railroads, §§ 81-118.

Obstructions or encroachments on highways in general, see Highways, § 158.

Right of life tenant in possession to sue for interference with easement, see Life Estates, § 28.

Right of way over street railroad tracks, see Street Railroads, § 85.

Subjects and titles of acts relating to, see Statutes, § 123.

§ 648. The fact that one had previously bought a strip claimed by another for an alley was not inconsistent with the latter's theory of a dedication of the strip for an alley or prescriptive use of the same.—Beard v. Hicks (Ala.) 232.

§ 671. One *held* entitled to sue for the obstruction of an alley, though the obstruction was a public nuisance and could be abated by the city.—Beard v. Hicks (Ala.) 232.

§ 671. The complaint, in an action for obstructing an alley, *held* sufficient as against a demurrer.—Beard v. Hicks (Ala.) 232.

§ 671. One suing for the obstruction of an alley *held* entitled to show certain facts.—Beard v. Hicks (Ala.) 232.

§ 671. Code 1907, § 1241, requiring the board of public works to supervise all public works of the city, and giving it exclusive power over the streets, etc., does not deprive an abutting property owner of his right to injunctive relief against obstructions in streets, if he would otherwise be entitled to such relief.—Louisville & N. R. Co. v. Cowley (Ala.) 1015.

§ 671. Owners of property abutting on a public street, whose rights, damages, and injuries are alleged to be of the same kind, differing only in extent and amounts, may join as complainants in a bill to restrain the maintenance of an obstruction in the street.—Louisville & N. R. Co. v. Cowley (Ala.) 1015.

§ 671. Property owners adjacent to an obstruction to a sidewalk, who suffer special and peculiar damage therefrom different from that suffered by the general public, may enjoin its maintenance.—Caldwell v. George (Miss.) 631.

§§ 680, 681. A city board of aldermen *held* to have no power to permit the obstruction of a sidewalk, so that such permission would be void, and would not protect one receiving it in an action to enjoin the obstruction.—Caldwell v. George (Miss.) 631.

§ 697. At the suit of a city a court of equity will abate an obstruction in a city street as a

public nuisance.—Rudolph v. City of Elyton (Ala.) 80.

§ 697. In a suit by a city to abate an obstruction in a public highway, an allegation that plaintiff was a municipal corporation located in a certain county was sufficient, without alleging how or when such corporation was created.—Rudolph v. City of Elyton (Ala.) 80.

§ 697. In a suit by a city to abate as a public nuisance obstructions in a highway, a general allegation that the road named had been continuously used as a public highway for more than 20 years was sufficient, in absence of a demurrer thereto for not alleging that it was used adversely.—Rudolph v. City of Elyton (Ala.) 80.

§ 698. In an action for obstructing an alley, an instruction, predicating a finding for plaintiff only in case the alley was a public one throughout a certain distance, *held* erroneous.—Beard v. Hicks (Ala.) 232.

§ 698. Whether an obstruction of an alley intercepted the adverse user of the alley by the public, so as to break the continuity of the 20 years' prescription, *held* for the jury.—Beard v. Hicks (Ala.) 232.

§ 698. In an action for obstructing an alley, an instruction, predicating a recovery on the fact that the obstruction was willfully and maliciously built, and ignoring a count of the complaint which did not charge malicious conduct, was properly refused.—Beard v. Hicks (Ala.) 232.

§ 698. In an action for obstructing a public alley, an instruction confining plaintiff to actual damages was properly refused, where the evidence authorized punitive damages.—Beard v. Hicks (Ala.) 232.

§ 705. The cause of an accident to a pedestrian, struck by an automobile, *held* the inattention of the operator thereof, with his lack of skill.—Navailles v. Dielmann (La.) 449.

§ 705. The cause of an accident to a pedestrian, struck by an automobile, *held* the operator's act in venturing on the streets without knowing how to make an emergency stop.—Navailles v. Dielmann (La.) 449.

§ 705. The act of a pedestrian in running in front of an automobile as a result of terror *held* not negligence.—Navailles v. Dielmann (La.) 449.

§ 705. An operator of an automobile, striking a pedestrian, *held* liable under the last chance doctrine.—Navailles v. Dielmann (La.) 449.

§ 706. The petition in an action for injuries to a pedestrian, struck by an automobile, *held* sufficiently specific.—Navailles v. Dielmann (La.) 449.

**(B) Sewers, Drains, and Water Courses.**

§ 712. Mobile City Ordinance No. 830, requiring sewer connections, *held* reasonable.—Allman v. City of Mobile (Ala.) 238.

§ 712. Mobile City Ordinance No. 830, requiring sewer connections, in so far as it applied to residence property, equipped only with open pit vaults, was not in conflict with Ordinance No. 829 forbidding the connection of such vaults with the sewers.—Allman v. City of Mobile (Ala.) 238.

§ 712. Mobile City Ordinance No. 824 *held* applicable only where parties voluntarily request permission to make sewer connections; no permit being necessary under Ordinance No. 830 as amended.—Allman v. City of Mobile (Ala.) 238.

§ 712. A city authorized by Act March 12, 1907 (Laws 1907, p. 398), to construct sewers and compel connections, had authority to secure

**(C) Public Buildings, Parks, and Other Public Places and Property.**

Dedication of property for market, misuser or diversion, see Dedication, § 64.

**XII. TORTS.**

**(A) Exercise of Governmental and Corporate Powers in General.**

§ 742. In an action for the unlawful destruction of plaintiff's building situated between a city street and the river, on the ground that it was on land which owed its servitude to the public, evidence held insufficient to prove a right to such servitude.—*Faucheux v. Town of St. Martinville (La.)* 809.

**(B) Acts or Omissions of Officers or Agents.**

§ 747. Where mayor of a town clears banks of stream of trespassers under will of town council, the municipality is liable for any damages resulting from irregular method employed.—*Faucheux v. Town of St. Martinville (La.)* 809.

§ 747. Destruction of building of owner on the banks of Bayou Teche by the chief of police held unlawful and to render the municipality liable for resulting damages.—*Faucheux v. Town of St. Martinville (La.)* 809.

**(C) Defects or Obstructions in Streets and Other Public Ways.**

§ 755. Under the statute (Gen. St. 1906, § 1017), empowering municipal corporations to regulate the grading, construction, and repair of streets, a city is responsible for injuries from the negligent nonperformance of such duty.—*City of Pensacola v. Jones (Fla.)* 874.

§ 757. An abutting owner's statutory duty to repair sidewalks does not relieve the city from liability for its negligence in failing to keep them in repair.—*City of Pensacola v. Jones (Fla.)* 874.

§ 803. Duty of pedestrian to guard against drain across sidewalk stated.—*Burke v. Tricalli (La.)* 710.

§ 816. Where a declaration alleged a city's negligence in failing to keep its streets in repair, it was not necessary to charge additional negligence in failing to keep them lighted.—*City of Pensacola v. Jones (Fla.)* 874.

§ 816. A declaration against a city for injuries caused by an alleged defective sidewalk held to sufficiently charge that the sidewalk was not reasonably safe.—*City of Pensacola v. Jones (Fla.)* 874.

**XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.**

Of counties, see Counties, § 154.

**(A) Power to Incur Indebtedness and Expenditures.**

§ 873. Under Const. 1901, § 94 (Const. 1875, art. 4, § 55), a city cannot purchase land with public funds and have the same conveyed to a railroad company in consideration that the company maintain a depot thereon.—*Southern Ry. Co. v. Hartshorne (Ala.)* 139.

**(E) Rights and Remedies of Taxpayers.**

§ 993. A taxpayer has a right to enjoin a paving contract, adjudicated without opportunity for competition, unless the property holders fix the price for a patented pavement.—*Saxon v. City of New Orleans (La.)* 663.

Liability for costs of election contest for membership in council, see Elections, § 307.

**MURDER.**

See Homicide.

**MUTUAL BENEFIT INSURANCE.**

See Insurance, §§ 723-826.

**MUTUAL WILLS.**

Requirements of statute of frauds, see Frauds, Statute of, §§ 75, 103.

**NAMES.**

In assessment rolls, see Taxation, § 415. Necessity of setting out names of individual partners in indictment for defrauding partnership by false pretenses, see False Pretenses, § 28.

**NAVIGABLE WATERS.**

Nonnavigable waters, see Waters and Water Courses.

**I. RIGHTS OF PUBLIC.**

§ 1. Whether a stream or body of water is navigable for useful public purposes is to be determined by application of existing provisions and principles of law to particular facts of each case.—*Broward v. Mabry (Fla.)* 826.

§ 1. Capacity for navigation, not actual use thereof, determines the navigable character of waters in reference to the ownership and uses of the land covered thereby.—*Broward v. Mabry (Fla.)* 826.

**II. LANDS UNDER WATER.**

§ 36. Riparian rights arise by implication of law, but give no title to the land under navigable waters.—*Broward v. Mabry (Fla.)* 826.

§ 36. Where a stream or body of water is permanent in character, and in its ordinary natural state is navigable in fact for useful purposes, or is such that it may be used for purposes common to the public in its locality, such water is of a public character, and title to land thereunder, including the shore or space between ordinary high and low water marks, when not granted to private owners, is held by the state in its sovereign capacity in trust for all the people of the state.—*Broward v. Mabry (Fla.)* 826.

§ 36. Act Cong. March 3, 1845, c. 48, § 5 Stat. 742, admitting Florida into the Union on condition that it shall never interfere with the disposal of the public lands within the state, relates only to lands within the territorial limits of the state, title to which was in the United States for its own purposes.—*Broward v. Mabry (Fla.)* 826.

§ 36. New states admitted "into the Union on equal footing with the original states, in all respects whatsoever," have the same rights and duties as to navigable waters and lands thereunder within their borders as the original 13 states, among which are the right and duty to hold the land for the benefit of the people.—*Broward v. Mabry (Fla.)* 826.

§ 36. The rights of the people of the states to the navigable waters and lands thereunder, including the space between high and low water marks, being designed to promote the general welfare, are subject to lawful regulation by the states.—*Broward v. Mabry (Fla.)* 826.

§ 36. Under the Constitution of the United States, the several states continued to hold title to the beds of all waters within their respective borders that were navigable in fact, in trust for all the people of the states respectively.—*Broward v. Mabry* (Fla.) 826.

§ 36. After the accomplishment of the independence of the American colonies, title to the beds of all waters navigable in fact was held by the states in which they were located in trust for all the people of the states respectively.—*Broward v. Mabry* (Fla.) 826.

§ 36. Under the common law of England, which also applied to the English colonies in America, the crown in its sovereign capacity held title to the beds of navigable or tide waters, including the shore or space between high and low water marks, in trust for the people.—*Broward v. Mabry* (Fla.) 826.

§ 36. Where the title to land under navigable waters is in private persons, their recovery of possession is subject to the rights of the public in the waters.—*Bass v. Ramos* (Fla.) 945.

§ 36. Private persons held not entitled to recover possession of lands under navigable waters.—*Bass v. Ramos* (Fla.) 945.

§ 37. The trustees of the internal improvement fund, who have the disposal of the swamp and overflowed lands of the state, have no power to convey title to the lands under navigable waters which properly belong to the state in its sovereign capacity.—*Broward v. Mabry* (Fla.) 826.

§ 37. The trust under which the title to lands under navigable waters is held by the states cannot be wholly alienated; but to enhance the rights and interests of the people the states may grant to individuals title to limited portions of the lands under navigable waters, or may give limited privileges therein.—*Broward v. Mabry* (Fla.) 826.

§ 37. Where the waters of an inland lake are in fact navigable, the title to lands under such waters is held by the state in trust for all the people of the state, and the owners of the lands abutting on such lake may protect their riparian rights by enjoining a contemplated sale or conveyance of the land under the water by the trustees of the internal improvement fund, even though the state in its sovereign capacity is not specifically made a party.—*Broward v. Mabry* (Fla.) 826.

§ 37. Grants and conveyances of land bordering on navigable waters carry title in general to ordinary high-water mark, unless a contrary intent appears.—*Broward v. Mabry* (Fla.) 826.

### III. RIPARIAN AND LITTORAL RIGHTS.

As property subject of compensation when taken for public use, see Eminent Domain, § 84.

§ 39. The special rights of owners of land extending to ordinary high-water mark of navigable waters in the waters opposite their holdings are rights of property which may be regulated.—*Broward v. Mabry* (Fla.) 826.

### NAVIGATION.

See Navigable Waters, § 1.

Marine insurance, see Insurance, § 402.

### NEGATIVE EVIDENCE.

Weight and conclusiveness, see Evidence, § 586.

### NEGLIGENCE.

*By particular classes of persons*

See Carriers, §§ 103, 123, 159, 280-321 of Courts, § 72; Municipal Corporations, §§ 742-816; Railroads, §§ 113, 114, 310-351, 355-396, 439-446, 459-484 Railroads, §§ 81-118.

Bailees, see Bailment, § 14.

Electric light or power companies, and electricity, §§ 16, 19.

Employers, see Master and Servant, § 316; Employés, liability for injuries to third persons, see Master and Servant, §§ 302-332. Fellow servants, see Master and Servant, §§ 177-196.

Telegraph or telephone companies, and telegraphs and telephones, §§ 15, 27-74.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Railroads, §§ 113, 114, 260, 297, 355-396, 439-446, 459-484; Street Railroads, §§ 81-118; Telegraphs and Telephones, §§ 15, 27-74.

Automobiles, see Municipal Corporations, §§ 705, 706.

Carrier's premises, see Carriers, § 286.

Conveyances and other means for transportation of passengers, see Carriers, §§ 103, 123, 159, 280-321. Railroad lands and structures, see Railroads, §§ 113, 114.

Streets and highways, see Municipal Corporations, §§ 755-816.

Tools, machinery, appliances, and plant, work, see Master and Servant, §§ 316, 317. Use of street by traveler, see Municipal Corporations, §§ 705, 706.

*Injuries to particular species of property*

Animals in operation of railroads, see Railroads, §§ 439-446.

Goods shipped, see Carriers, § 123.

### I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General

§ 2. If one places a car so near a track which cars are being rightfully operated on as to injure the other or his property while in the discharge of his duty to operate in operating cars over the track, the person so placing the car will be liable for injury proximately caused by his negligence.—*Southern Ry. Co. v. Arnold* (Ala.) 200.

§ 2. "Actionable negligence" defined.—*Eastern Ry. Co. v. Smith* (Ala.) 390.

§ 11. Where a complaint for killing of a decedent was based on an alleged willful injury, an instruction authorizing recovery for ordinary negligence held.—*Southern Ry. Co. in Mississippi v. Freed* 442.

(B) Dangerous Substances, Machinery, and Other Instrumentalities

Electricity, see Electricity, §§ 16, 19.

(C) Condition and Use of Land, Buildings, and Other Structures.

Carrier's premises, see Carriers, § 286. Master's liability for acts or omissions of independent contractor in general, see Master and Servant, § 316.

Streets and highways, see Municipal Corporations, §§ 755-816.

Tools, machinery, appliances, and plant, work, see Master and Servant, §§ 316, 317.

§ 47. An owner held liable in damages for those lawfully on his premises for an injury occasioned by spring guns or pitfalls if the injury was wholly or negligently suffered to exist.

giving warning thereof.—*Scheuermann v. Scharf-  
enberg* (Ala.) 335.

## II. PROXIMATE CAUSE OF INJURY.

Injuries to passengers, see Carriers, § 305.  
Loss of or injury to goods shipped, see Carriers,  
§ 123.

## III. CONTRIBUTORY NEGLIGENCE.

Contributory negligence of servant injured, see  
Master and Servant, § 289.  
Of owners of property damaged by fire caused  
by operation of railroad, see Railroads, §§  
459, 460.  
Of passengers, see Carriers, §§ 323-347.  
Of person injured by automobile on the street,  
see Municipal Corporations, § 705.  
Of person injured by defects or obstructions in  
street, see Municipal Corporations, § 803.  
Of person injured by operation of railroad, see  
Railroads, §§ 381, 387.  
Of person injured on or near street railroad  
tracks, see Street Railroads, § 99.  
Of servants, see Master and Servant, §§ 243,  
274.

### (A) Persons Injured in General.

§ 80. The defense of contributory negligence  
may be set up by a plea in all cases where  
simple negligence is counted on in the com-  
plaint.—*Louisville & N. R. Co. v. Smith* (Ala.)  
241.

§ 83. The doctrine of subsequent negligence  
or last clear chance is recognized in Alabama.—  
*Stanford v. St. Louis & S. F. R. Co.* (Ala.)  
110.

### (B) Children and Others Under Disability.

§ 85. A child six years of age killed by a  
street car held not chargeable with contribu-  
tory negligence.—*Pascagoula St. Ry. & Power  
Co. v. Brondum* (Miss.) 97.

## IV. ACTIONS.

Damages, inadequate and excessive, see Dam-  
ages, § 130.

### (A) Right of Action, Parties, Preliminary Proceedings, and Pleadings.

§ 117. A plea of contributory negligence  
must allege the facts constituting the negli-  
gence.—*New Connellsville Coal & Coke Co. v.  
Kilgore* (Ala.) 205.

### (B) Evidence.

Acts and statements accompanying or connected  
with transaction as constituting part of res  
gestæ, see Evidence, §§ 121, 127.  
In actions for injuries to servants, see Master  
and Servant, § 270.

### (C) Trial, Judgment, and Review.

§ 136. In an action for injuries caused by  
falling into an unguarded hole, the question of  
defendant's liability held for the jury.—*Republic  
Iron & Steel Co. v. White* (Ala.) 141.

§ 139. An instruction in an action for in-  
juries caused by falling into an unguarded hole  
held properly refused as misleading.—*Republic  
Iron & Steel Co. v. White* (Ala.) 141.

## NEGOTIABLE INSTRUMENTS.

See Bills and Notes; Bonds.  
Bills of lading, see Carriers, § 58.

## NEGROES.

Abridgment of privileges or immunities of, see  
Constitutional Law, § 206.  
Discrimination against as denial of equal pro-  
tection of laws, see Constitutional Law, §§  
220, 221.

## NEWLY DISCOVERED EVIDENCE.

Ground for new trial, see Criminal Law, §§  
938, 939; New Trial, § 104.

## NEWSPAPERS.

Publication of libelous articles, see Libel and  
Slander.

Publication of notice of intention to apply for  
enactment of special or local law, see Statutes,  
§ 8½.

## NEW TRIAL.

*In particular actions or proceedings.*

Criminal prosecutions, see Criminal Law, §§  
912½-938.

*Review of proceedings.*

Review of discretionary rulings on motion, see  
Criminal Law, § 1156.

Review of questions of fact on motion, see Ap-  
peal and Error, § 1015.

Scope and extent of review on appeal from de-  
cision on motion, see Appeal and Error, § 867.

## I. NATURE AND SCOPE OF REMEDY.

§ 2. New trials may be granted in distress  
proceedings.—*Owens v. Wilson* (Fla.) 674.

## II. GROUNDS.

### (D) Disqualification or Misconduct of or Affecting Jury.

§ 52. Facts held not to show a quotient ver-  
dict.—*Western Union Telegraph Co. v. Hill*  
(Ala.) 248.

### (F) Verdict or Findings Contrary to Law or Evidence.

§ 76. The jury's abuse of its discretion in  
awarding punitive damages may be corrected by  
granting a new trial.—*Cox v. Birmingham Ry.,  
Light & Power Co.* (Ala.) 975.

### (G) Surprise, Accident, Inadvertence, or Mistake.

§ 95. A railroad company, succeeding to the  
rights of another railroad company, held gUIL-  
ty of negligence for failing to know of a stat-  
ute conferring rights on its predecessor, pre-  
cluding it from obtaining a rehearing under  
Code 1907, § 5372.—*Southern Ry. Co. v. Cleve-  
land* (Ala.) 122.

### (H) Newly Discovered Evidence.

§ 104. The court will not be placed in error  
for denying a new trial on the ground of new-  
ly discovered evidence which was merely cumu-  
lative.—*Southern Hardware & Supply Co. v.  
Block Bros.* (Ala.) 1036.

## NEXT OF KIN.

See Descent and Distribution.

## NONSUIT.

Involuntary nonsuit before trial, see Dismissal  
and Nonsuit, § 56.

Voluntary nonsuit, see Dismissal and Nonsuit,  
§§ 25, 26.

## NONSUPPORT.

Criminal responsibility for failure to support  
wife, see Husband and Wife, §§ 305-313.

## NOTARIES.

§ 3. Act No. 101, p. 161, of 1870, fixing the  
fees of a notary public, held not repealed by Act  
No. 203, p. 485, of 1898, and a charge by a  
notary of a "round sum" for taking an inventory

in a succession is contrary to the fee bill.—*Succession of Morgan* (La.) 703.

## NOTES.

Promissory notes, see Bills and Notes.

## NOTICE.

Judicial notice, see Evidence, §§ 14, 32.

*As affecting particular classes of persons.*  
See Partnership, § 239.

Creditors, see Fraudulent Conveyances, §§ 158–169.

Insurance companies, see Insurance, §§ 95, 229.

Purchasers at execution sales, see Execution, § 272.

Purchasers of bills or notes, see Bills and Notes, § 332.

Purchasers of land, see Vendor and Purchaser, §§ 227, 232.

*As affecting particular rights, duties, and liabilities.*

Liability of insurer as affected by notice to agent, see Insurance, § 95.

Liability of seller for breach of warranty as depending on notice of defects, see Sales, § 285.

Liability on bill or note, see Bills and Notes, § 332.

Loss of or injury to goods shipped, see Carriers, § 159.

Rights and liabilities of bona fide purchasers of real property, see Vendor and Purchaser, §§ 227, 232.

Rights, powers, and liabilities after dissolution of partnership as affected by notice of dissolution, see Partnership, § 239.

To produce primary evidence as preliminary to admission of secondary evidence, see Evidence, § 185.

*Of particular facts, acts, or proceedings not judicial.*

Cancellation of insurance policy, see Insurance, § 229.

Defects in goods sold under warranty, see Sales, § 285.

Defects in title of vendor of land, see Vendor and Purchaser, §§ 227, 232.

Defenses to bill or note, see Bills and Notes, § 332.

Dissolution of partnership, see Partnership, § 289.

Fraud as to creditors, notice to grantee in conveyance, see Fraudulent Conveyances, §§ 158–169.

Intention to apply for enactment of statutes, see Statutes, § 8½.

Proposed public improvement or preliminary resolution on application therefor, see Municipal Corporations, § 294.

*Of particular judicial proceedings.*

Appeal, see Appeal and Error, § 405.

Filing of stenographer's notes, see Appeal and Error, § 565.

Seizure in garnishment proceeding, see Garnishment, § 93.

## NUISANCE.

### I. PRIVATE NUISANCES.

#### (A) Nature of Injury, and Liability Therefor.

§ 3. The acts of defendants, causing rock to fall into a stream where plaintiffs were to erect a pier, *held* not a nuisance.—*McCalla v. Louisville & N. R. Co.* (Ala.) 971.

§ 4. No action can be maintained for a private nuisance, except as it affects the comforta-

ble enjoyment of private property.—*McCalla v. Louisville & N. R. Co.* (Ala.) 971.

### II. PUBLIC NUISANCES.

Obstruction or encroachment on highway, see Highways, § 158.

Obstruction or encroachment on street, see Municipal Corporations, §§ 697, 698.

Offenses constituting nuisances, see Disorderly House.

#### (B) Rights and Remedies of Private Persons.

§ 72. Any person suffering damages by a public nuisance may maintain an action to abate or enjoin the same.—*Tedescki v. Burger* (Ala.) 150.

§ 75. In an action to enjoin two defendants from maintaining a nuisance, where plaintiff failed to prove the allegations of knowledge of one of the defendants, or his consent to the use of the house for the purposes alleged, the variance was fatal.—*Tedescki v. Burger* (Ala.) 150.

§ 75. In an action to enjoin the maintenance of a disorderly house, evidence *held* insufficient to establish knowledge of one defendant and concurrence in the use to which the house was devoted.—*Tedescki v. Burger* (Ala.) 150.

§ 75. That complainant maintained a similar nuisance will not prevent the maintenance of an action to enjoin a public nuisance.—*Tedescki v. Burger* (Ala.) 150.

#### (C) Abatement and Injunction.

Obstruction of highway, see Highways, § 158.

Obstruction of street, see Municipal Corporations, § 697.

## NUNC PRO TUNC.

Entry of file mark on information, see Indictment and Information, § 43.

Entry of judgment in criminal prosecution, see Criminal Law, § 996.

## OATH.

See Affidavits.

## OBJECTIONS.

*In judicial proceedings.*

Necessity and sufficiency for purpose of review in civil actions, see Appeal and Error, §§ 189–242.

Necessity and sufficiency for purpose of review in criminal prosecutions, see Criminal Law, §§ 1028–1037.

To evidence at trial, see Criminal Law, §§ 693–696; Trial, §§ 75–85.

To indictment or information, see Indictment and Information, § 140.

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Waiver of grounds of abatement, see Abatement and Revival, § 84.

## OBSTRUCTING JUSTICE.

Indictment in language of statute, see Indictment and Information, § 110.

## OBSTRUCTIONS.

Of highways, see Highways, § 158.

Of receivers, certiorari to review proceedings against persons liable, see Certiorari, § 29.

Of streets, see Municipal Corporations, §§ 697, 698, 755-816.

Of waters, see Waters and Water Courses, § 51.  
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## OCCUPATION.

Subjects and titles of acts relating to occupations and employments, see Statutes, § 114.

## OFFENSES.

See Criminal Law.

## OFFER.

Of proof, see Criminal Law, § 670; Trial, § 46.

## OFFICE JUDGMENT.

See Judgment, §§ 108-130.

## OFFICERS.

Bribery, see Bribery.

Liability of municipal corporation for torts of officers, see Municipal Corporations, § 747.

Mandamus to public officers in general, see Mandamus, §§ 73, 76.

Quo warranto to determine rights in respect to exercise of public office, see Quo Warranto, § 11.

Regulation and conduct of elections in general, see Elections.

Supervision of carriers by public officers, see Carriers, § 10.

### Particular classes of officers.

See Clerks of Courts; District and Prosecuting Attorneys; Judges; Justices of the Peace; Notaries; Receivers; Sheriffs and Constables.

Assignees or trustees for benefit of creditors, see Assignments for Benefit of Creditors, § 268.

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Attorneys, see Attorney and Client.

Bank officers, see Banks and Banking, §§ 109, 116.

Corporate officers in general, see Corporations, §§ 310, 320.

County board, see Counties, § 51.

County officers, see Counties, §§ 65-93.

Municipal officers, see Municipal Corporations, §§ 97, 126-164, 183.

Poor-law officers, see Paupers, § 6.

School officers, see Schools and School Districts, § 53.

Trustees, see Trusts.

Trustees in bankruptcy, see Bankruptcy, §§ 149-191.

## I. APPOINTMENT, QUALIFICATION, AND TENURE.

Of county officers in general, see Counties, § 65.  
Of justices of the peace, see Justices of the Peace, § 6.

Of municipal officers, see Municipal Corporations, §§ 155, 159.

Regulation and conduct of elections in general, see Elections.

### (A) Offices, and Power to Appoint to and Remove from Office.

§ 1. "Office" defined.—Michael v. State (Ala.) 929.

§ 1. "Public officer" defined.—Michael v. State (Ala.) 929.

### (F) Term of Office, Vacancies, and Holding Over.

§ 54. The holding over period of an office does not have the effect of extending the term succeeding.—State ex rel. Wilkinson v. Hingle (La.) 616.

### (G) Resignation, Suspension, or Removal.

Mandamus to compel removal from or reinstatement to office, see Mandamus, § 76.

§ 66. Public officer held guilty of malconduct in office.—Etzler v. Brown (Fla.) 416.

§ 66. Malconduct in office held to include such acts as are a breach of the good faith and right action tacitly required of all officers.—Etzler v. Brown (Fla.) 416.

## II. TITLE TO AND POSSESSION OF OFFICE.

§ 80. A parish treasurer, who is an officer of the police jury, is precluded from questioning in a collateral attack the qualification of the members of such jury.—State ex rel. Wilkinson v. Hingle (La.) 616.

## III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

Compensation of county officers in general, see Counties, § 74.

Compensation of municipal officers, see Municipal Corporations, § 164.

Of clerks of courts, see Clerks of Courts, § 72.

Of county boards, see Counties, § 51.

Of county officers in general, see Counties, §§ 93.

Of sheriffs or constables, see Sheriffs and Constables, § 88.

## IV. LIABILITIES ON OFFICIAL BONDS.

Bonds of county officers, see Counties, § 98.

Bonds of sheriffs and constables, see Sheriffs and Constables, §§ 157, 171.

## OFFSET.

See Set-Off and Counterclaim.

## OPEN ACCOUNTS.

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## OPEN AND CLOSE.

Right to open and close in civil actions in general, see Trial, § 25.

## OPINION EVIDENCE.

See Criminal Law, §§ 448-491; Evidence, §§ 471-539.

## OPINIONS.

Formation and expression of opinion as to cause as affecting competency of jurors, see Jury, § 103.

## ORAL AGREEMENTS.

See Frauds, Statute of.

Specific performance of, see Specific Performance, § 43.

## ORAL STIPULATIONS.

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## ORDER OF PROOF.

At trial, see Criminal Law, §§ 680, 683.

## ORDERS.

Of master, see Master and Servant, § 243.

Orders for payment of money.

See Bills and Notes.

**Orders of court.**

Disobedience to, as contempt of court, see Contempt, § 20.  
Review of appealable orders, see Appeal and Error; Criminal Law, §§ 1019-1189.

**ORDINANCES.**

Municipal ordinances, see Municipal Corporations, §§ 111, 591, 642.

**ORGANIC LAW.**

See Constitutional Law.

**ORGANIZATION.**

Of corporations in general, see Corporations, § 29.

**ORIGINAL BILL.**

See Equity, §§ 145-153.

**OUTSTANDING TITLE.**

On termination of life estate, see Life Estates, § 4.

**OVERSEERS.**

Of the poor, see Paupers, § 6.

**OWNERSHIP.**

Of lands under navigable waters, see Navigable Waters, § 36.  
Of property as affecting performance of contract of sale, see Vendor and Purchaser, § 142.  
Of property, as affecting right of attachment, see Attachment, § 63.  
Of property as affecting right to exemption, see Homestead, § 81.  
Of property as affecting taxation, see Taxation, § 79.  
Of property as element of larceny, see Larceny, § 32.  
Of property insured, promissory warranties, covenants, or conditions subsequent, see Insurance, § 328.  
Of property insured, representations, warranties, or conditions in policy or application therefore, see Insurance, § 282.  
Of property subject to tax, designation of owner in assessment rolls, see Taxation, § 415.

**OYER.**

In pleading, see Pleading, § 306.

**OYSTERS.**

Effect of partial invalidity of statute relating to measurement of, see Statutes, § 64.  
Statutory regulations as to measurement of, see Weights and Measures, § 2.

**PANEL.**

Challenge to jury panel, see Jury, § 116.  
Selection and drawing of jury panel, see Jury, § 66.

**PARAPHERNAL PROPERTY.**

See Husband and Wife, § 274.

**PARENT AND CHILD.**

See Infants.  
Abandonment of wife and child, see Husband and Wife, § 312.  
Appealability of order for payment of money for support of children as dependent on finality, see Criminal Law, § 1023.

Competency of wife as witness on question of paternity in prosecution for abandonment of wife and child, see Witnesses, § 61.  
Custody of child on divorce of parents, see Divorce, § 308.

**PARISHES.**

See Counties.

**PAROL AGREEMENTS.**

See Frauds, Statute of.  
Specific performance of, see Specific Performance, § 43.

**PAROL EVIDENCE.**

In civil actions, see Evidence, §§ 408-450.

**PARTIAL INVALIDITY.**

Of statute, effect, see Statutes, § 64.

**PARTICULARS.**

Bill of, in civil actions in general, see Pleading, § 326.  
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**PARTIES.**

Character, ground of jurisdiction, see Removal of Causes, § 61.  
Competency as witnesses, see Witnesses, § 111.  
Death ground for abatement, see Abatement and Revival, § 52.  
Rights and liabilities as to costs, see Costs.  
Transfer of interest ground for abatement, see Abatement and Revival, § 45.

*In actions by or against particular classes of persons.*

See Executors and Administrators, § 438.

*In particular actions or proceedings.*

See Mandamus, §§ 151-178.  
For destruction of insured property in subrogation to rights of insured, see Insurance, § 606.  
For injuries caused by negligence of servant, see Master and Servant, § 328.  
On insurance policy, see Insurance, § 624.  
To enforce specific performance, see Specific Performance, § 106.  
To establish and protect easement, see Easements, § 61.

*Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.*  
Persons concluded by judgment in general, see Judgment, §§ 668, 682.

*Review as to parties, and parties to proceedings in appellate courts.*

Persons entitled to review, see Appeal and Error, § 150.

*To conveyances, contracts, or other transactions.*  
Assignment, see Assignments, § 93.

**I. PLAINTIFFS.**

(A) *Persons Who may or must Sue.*

§ 5. Authority to sue on behalf of another is special, and must be expressed.—*Casanas v. Audubon Hotel Co. (La.)* 714.

(B) *Joinder.*

Suit by abutting owners to restrain obstructions in streets, see Municipal Corporations, § 671.

## II. DEFENDANTS.

### (B) Joinder.

Misjoinder in bill in equity, see Equity, § 150. Separable controversies against joint defendants permitting removal to federal court by part of defendants, see Removal of Causes, § 61.

§ 35. One cannot be made a party complainant without his consent, and when he refuses to be made a party complainant he must be made a defendant.—*Bentley v. Barnes* (Ala.) 361.

## III. NEW PARTIES AND CHANGE OF PARTIES.

Dismissal of action as to one or more codefendants, see Dismissal and Nonsuit, §§ 25, 26.

## IV. DESIGNATION AND DESCRIPTION.

In verdict, see Trial, § 328.

## V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 95. Amendment of a complaint held not objectionable as a departure.—*Birmingham Ry., Light & Power Co. v. Morris* (Ala.) 198.

§ 95. A defect in parties held amendable, and must be taken advantage of before verdict.—*Southern Ry. Co. v. Stonewall Ins. Co.* (Ala.) 940.

## PARTITION.

Creation of co-tenancies, and rights and liabilities of co-tenants in general, see Tenancy in Common.

### I. BY ACT OF PARTIES.

§ 4. The language of an act of partition held to show a mere partition and not a sale.—*Pearce v. Ford* (La.) 771.

§ 5. A parol partition, followed by possession taken and retained pursuant thereto, is valid and binding.—*Oliver v. Williams* (Ala.) 937.

§ 7. Act No. 25, p. 47, of 1878, held to require a sale, whether public or private, to effect a partition of property in which a minor is interested, to be made of the whole property, and a sale of a minor's interest alone is void.—*Moore v. Gulf Refining Co.* (La.) 596.

## II. ACTIONS FOR PARTITION.

### (A) Right of Action and Defenses.

§ 19. The right to sue for partition of land depends upon actual or constructive possession of the land, and a reversioner cannot maintain the suit against one holding an outstanding life estate in the entire property, and thus entitled to the present and entire use and enjoyment of the land.—*Fies v. Rosser* (Ala.) 287.

§ 19. To compel a sale of land for partition under Code 1907, § 5231, held, that complainant must be entitled to possession or the immediate use of the proceeds after the sale.—*Fies v. Rosser* (Ala.) 287.

§ 30. Where a surviving parent owning property in common with a minor child desires a particular part adjudicated to herself, she must, under Rev. Civ. Code, art. 343, have not only the interest of the minor adjudicated, but that interest together with that of the parent.—*Lyons v. Woman's League of New Orleans* (La.) 18.

### (B) Proceedings and Relief.

Multifariousness of bill, see Equity, § 148.

§ 108. Under Code 1896, § 3176, proceedings leading to a partition sale of lands of a dece-

dent held not subject to collateral attack in ejectment by purchasers at a prior execution sale under a judgment against the administrator.—*Taylor v. Taylor* (Ala.) 375.

§ 109. Title of purchaser, in partition commenced by a life tenant with power to sell, determined.—*Cramton v. Rutledge* (Ala.) 900.

## PARTITION FENCES.

See Fences.

## PARTNERSHIP.

Bankruptcy of partner, right of court to make adjudication as to the firm for other members thereof, see Bankruptcy, § 51.

Bankruptcy, title of trustee in bankruptcy to partnership property, see Bankruptcy, § 149.

False pretenses defrauding partnership, necessity of setting out names of individual partners in indictment, see False Pretenses, § 28.

Married woman as partner, see Husband and Wife, § 97.

### I. THE RELATION.

#### (B) As to Third Persons.

§ 43. Parties may be stockholders in a corporation, and yet so deal with others as to be liable as partners.—*Virginia-Carolina Chemical Co. v. Fisher* (Fla.) 504.

## IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

### (A) Representation of Firm by Partner.

Revocation of agency for firm, see Principal and Agent, § 34.

§ 146. Members of a firm held liable to a bank paying a firm check constituting an overdraft, though it was given for the individual debt of a partner.—*Morris v. First Nat. Bank* (Ala.) 137.

§ 156. A partner held estopped to deny authority of the firm's bookkeeper to draw a check as against a bank paying the check.—*Morris v. First Nat. Bank* (Ala.) 137.

### (C) Application of Assets to Liabilities.

§ 178. The assets of the partnership must be first applied to the payment of the partnership creditors, before anything can be applied to the claims of the individual partners or their creditors.—*Lacey v. Cowan* (Ala.) 281.

§ 186. The creditors of one partner are not entitled to exhaust the funds of the partnership for the payment of their claims.—*Lacey v. Cowan* (Ala.) 281.

### (D) Actions by or Against Firms or Partners.

§ 213. Special pleas in a suit on a note against defendants individually and as partners held wholly insufficient.—*Bank of Waynesboro v. Healing Springs Mercantile Co.* (Ala.) 882.

## VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

### (B) Rights, Powers, and Liabilities after Dissolution.

§ 289. Fact that a firm had been dissolved when a check was drawn in the firm name held not to render the partners free from liability to a bank paying the check.—*Morris v. First Nat. Bank* (Ala.) 137.

## PART OWNERS.

In general, see Tenancy in Common.



Enforcing specific performance of contracts partly performed, see Specific Performance, § 43.

Of contracts, rights and liabilities of parties, see Contracts, § 319.

Recovery on quantum meruit for part performance of services where contract is rescinded or abandoned, see Work and Labor, § 14.

## PASSENGERS.

See Carriers, §§ 245-347.

## PASSION.

Sudden passion or heat of passion as element of manslaughter, see Homicide, § 39.

## PASSWAYS.

See Easements.

## PATERNITY.

Necessity of proof of, in prosecution for abandonment of wife and child, see Husband and Wife, § 312.

## PAUPERS.

### II. POOR-LAW DISTRICTS AND OFFICERS.

§ 6. That a physician elected by the county board of health to attend the inmates of the county poorhouse and jail has not notified the county road and revenue commissioners of his acceptance of the office held no ground for their refusal to fix his salary under Code 1907, § 703, subd. "G."—Revenue and Road Com'rs of Mobile County v. State (Ala.) 972.

## PAVING.

Action by taxpayer to restrain execution of contract for, see Municipal Corporations, § 993.

## PAWNBROKERS.

Subject and title of statute, see Statutes, § 114.

§ 5. Person acquiring merchandise with a view of selling it for the owner acquires no right to pawn the property for his own benefit, and the owner may recover it from the pledgee.—William Frantz & Co. v. J. S. Winehill & Co. (La.) 650.

## PAYMENT.

See Tender.

Admission of imputation of payment by failure to deny, see Pleading, § 129.

For stolen property as a defense in prosecution for larceny, see Larceny, § 26.

*Of particular classes of obligations or liabilities.*

See Bills and Notes, § 511.

Claims against estate of decedent, see Executors and Administrators, § 272.

Debt secured by mortgage, see Mortgages, § 298.

Insurance premiums or dues, see Insurance, § 750.

Mortgages, see Mortgages, §§ 298, 311.

Taxes, see Taxation, § 535.

### I. REQUISITES AND SUFFICIENCY.

§ 35. A writing held not to amount to a receipt in full.—Dewees v. Bostick Lumber & Mfg. Co. (Miss.) 865.

Parol or extrinsic evidence to contradict or vary receipts, see Evidence, § 408.

## PEACE.

Breach of public peace, see Breach of the Peace.

## PECUNIARY LOSS.

Element of damages in general, see Damages, § 40.

## PENALTIES.

Amount of penalty of bond or undertaking on appeal or writ of error, see Appeal and Error, § 465.

Ancillary jurisdiction of equity to enforce, see Equity, § 39.

Construction and operation of penal statutes in general, see Statutes, § 241.

For negligence or misconduct of clerk of court, see Clerks of Courts, § 72.

### II. ACTIONS AND OTHER PROCEEDINGS.

Nature of action, whether in contract or tort, see Action, § 27.

§ 40. In an action for the statutory penalty for destruction of fruit trees, one of defendants could not complain that after the discontinuance as to his codefendant the latter was reinstated as a party defendant and a judgment rendered against her, which was subsequently vacated.—Wright v. Sample (Ala.) 268.

## PENITENTIARIES.

See Convicts.

## PEREMPTORY INSTRUCTIONS.

See Criminal Law, § 753.

## PERFORMANCE.

Part performance of contracts authorizing enforcement of specific performance, see Specific Performance, § 43.

*Of particular classes of duties or obligations.* Conditions of bonds or undertakings in judicial proceedings, see Injunction, § 235.

Contract in general, see Contracts, §§ 295-322.

Contract for transportation of passengers, see Carriers, §§ 275, 277.

Contract of sale, see Sales, §§ 163, 176; Vendor and Purchaser, § 142.

Contract with municipal corporation, see Municipal Corporations, §§ 356-363.

Services by broker, see Brokers, §§ 54-57.

## PERPETUATION OF TESTIMONY.

See Depositions.

## PERSONAL INJURIES.

Imposition of liability for, as denial of equal protection of laws, see Constitutional Law, § 245.

Imposition of liability for, as deprivation of property without due process of law, see Constitutional Law, § 301.

Release of claim for, validity, see Release, § 17.

*Particular causes or means of injury.*

See Assault and Battery; Electricity, §§ 16, 19.

Acts or omissions of carrier, see Carriers, §§ 280-321.

Acts or omissions of municipality in general, see Municipal Corporations, §§ 742-816.

Defects or obstructions in streets, see Municipal Corporations, §§ 755-816.  
Negligence in general, see Negligence.  
Negligence in use of street, see Municipal Corporations, §§ 705, 706.  
Operation of railroads, see Railroads, §§ 260, 297, 310-351, 355-396.  
Operation of street railroads, see Street Railroads, §§ 81-118.

*Particular classes of persons injured.*

Employés, see Master and Servant, §§ 85-205.  
Passengers, see Carriers, §§ 280-321, 323-347.  
Travelers on streets, see Municipal Corporations, §§ 755-816.

*Remedies.*

See Damages.  
Duty of person injured to reduce damages, see Damages, § 62.  
Evidence admissible as part of *res gestæ*, see Evidence, §§ 121, 127.  
Opinion evidence as to cause and effect, see Evidence, § 528.

## PERSONAL PROPERTY.

Gift, see Gifts.  
Life estates in personal property, see Life Estates, § 21.  
Mortgage, see Chattel Mortgages.  
Offenses involving or affecting, see False Pretenses.  
Pledge, see Pledges.  
Protection of future rights in equity, see Equity, § 17.  
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Sales, see Sales.  
Sales by executors or administrators, see Executors and Administrators, §§ 343-402.  
Taxation of, see Taxation.  
Wrongful conversion, see Trover and Conversion.

## PERSONAL REPRESENTATIVES.

See Executors and Administrators.

## PERSONS.

Constitutional guaranty of personal, civil, and political rights, see Constitutional Law, §§ 83, 87.  
Offenses against the person, see Homicide; Rape; Seduction, § 46.

## PETITION.

See Pleading.  
For allowance of appeal or writ of error, see Appeal and Error, § 361.  
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## PETIT JURY.

See Jury.

## PETITORY ACTION.

See Real Actions, § 8.

## PHYSICIANS AND SURGEONS.

Admissibility of documentary evidence in action for compensation, see Evidence, § 355.  
Expert testimony, see Criminal Law, § 470; Evidence, § 528.  
Sufficiency of evidence in action against administrator for medical services to intestate, see Executors and Administrators, § 221.

## PITFALLS.

Liability for injuries caused by negligence in maintaining, see Negligence, § 47.

## PLACE.

For work, duties and liabilities of master as to servants, see Master and Servant, §§ 101-118.  
Of offense, allegations in affidavit charging use of profane language, see Blasphemy, § 3.  
Of offense, allegations in indictment or information, see Indictment and Information, § 86.  
Of trial, see Criminal Law, §§ 134, 135.

## PLATS.

Dedication of property to public use, see Dedication, § 19.

## PLEA.

In civil actions, see Pleading, §§ 85-143, 253.  
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## PLEADING.

Applicability of instructions to pleadings and issues, see Trial, § 251.  
Conformity of judgment to pleadings, see Judgment, § 251.  
Failure to plead ground for judgment by default, see Judgment, § 108.  
Indictment or criminal information or complaint, see Indictment and Information.  
Practice in equity, see Equity, §§ 143-310.  
*Allegations as to particular facts, acts, or transactions.*

See Release, § 52.  
Contributory negligence of person injured by negligence of telegraph company, see Telegraphs and Telephones, § 20.  
Damages, see Damages, § 162.  
Delay in transportation or delivery of goods, see Carriers, § 103.  
Existence of partnership, see Partnership, § 213.  
Fraud in conveyances, see Fraudulent Conveyances, § 263.  
Judgment as estoppel or defense, see Judgment, § 948.  
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Negligence of fellow servant, see Master and Servant, § 259.  
Negligence of master causing injuries to servant, see Master and Servant, § 258.

*In actions by or against particular classes of persons.*

See Brokers, § 82; Carriers, §§ 275, 314; Corporations, § 672; Infants, §§ 93, 94; Master and Servant, §§ 258-295; Municipal Corporations, §§ 706, 816; Partnership, § 213; Railroads, §§ 344, 394, 439, 478; Street Railroads, §§ 110, 111.  
Foreign corporations, see Corporations, § 672.  
Insurance companies, see Insurance, §§ 629-645, 815.  
Telegraph or telephone companies, see Telegraphs and Telephones, § 65.

*In particular actions or proceedings.*

See Assumpsit, Action of, § 19; Ejectment, §§ 84, 85; Quietting Title, §§ 35, 42; Torts, § 26; Trespass, § 40; Trover and Conversion, § 34; Work and Labor, § 24.  
For accounting, see Account, § 17.  
For breach of contract in general, see Contracts, § 346.  
For breach of contract for carriage of passenger, see Carriers, § 275.  
For compensation of broker, see Brokers, § 82.  
For delay in transportation or delivery of goods, see Carriers, § 103.  
For divorce, see Divorce, §§ 90, 91.  
For fraud, see Fraud, § 49.  
For injuries at railroad crossings, see Railroads, § 344.  
For injuries caused by automobile in street, see Municipal Corporations, § 706.

For injuries caused by negligence of telegraph company, see Telegraphs and Telephones, § 20.

For injuries from defects or obstructions in streets, see Municipal Corporations, § 816.

For injuries from fires caused by operation of railroads, see Railroads, § 478.

For injuries from negligence, see Negligence, § 117.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 65.

For injuries to animals on or near railroad tracks, see Railroads, § 439.

For injuries to passengers, see Carriers, § 314.

For injuries to persons on or near railroad tracks, see Railroads, § 304.

For injuries to persons on or near street railroad tracks, see Street Railroads, §§ 110, 111.

For injuries to servants, see Master and Servant, §§ 256-295.

For libel or slander, see Libel and Slander, § 89.

For price or value of goods sold, see Sales, § 354.

On bills or notes, see Bills and Notes, §§ 475, 484.

On bonds in general, see Bonds, § 124.

On insurance policies, see Insurance, §§ 629-645, 815.

Pleas in criminal prosecutions, see Criminal Law, §§ 261-292.

Preliminary complaint in criminal prosecutions, see Criminal Law, § 211.

To enforce specific performance, see Specific Performance, § 114.

To establish and protect easement, see Easements, § 61.

To reform written instrument, see Reformation of Instruments, § 36.

To remove obstruction on highway, see Highways, § 158.

To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 263.

#### *Review of decisions and pleading in appellate courts.*

Presumptions on appeal or writ of error, see Appeal and Error, §§ 916, 917.

Record for purpose of review, see Appeal and Error, § 518.

Review of decisions as dependent on prejudicial nature of error, see Appeal and Error, §§ 1039-1041.

Review of decisions as dependent on presentation of question in lower court, see Appeal and Error, §§ 192-194.

Review of decisions as dependent on presentation of question in record, see Appeal and Error, § 681.

Review of decisions as dependent on taking of exception in lower court, see Appeal and Error, § 254.

Time for taking proceedings for review, see Appeal and Error, § 339.

### **I. FORM AND ALLEGATIONS IN GENERAL.**

§ 8. A general averment of negligence is sufficient.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 8. Where facts stated in a complaint for negligence are sufficient out of which to raise a duty, a very general averment of negligence is enough.—Southern Ry. Co. v. Arnold (Ala.) 293.

§ 8. A bill by a remainderman of personal property to require the life tenant thereof to account *held* insufficient for failing to state the facts justifying the conclusion that the life tenant will convert all of the property.—Underwood v. Underwood (Ala.) 305.

§ 8. A charge of fraud in a pleading, without a statement of facts, is but a statement of a conclusion, and insufficient on demurrer.—Davis v. Simpson Coal Co. (Ala.) 368.

§ 8. General averments of negligence, practically conclusions, *held* sufficient in complaint against a master for injury to a servant.—Huyck v. McNerney (Ala.) 926.

§ 8. In an action on a note, a plea *held* demurrable as stating a conclusion only.—Deleon v. Walter (Ala.) 934.

§ 8. In a servant's action for injuries, a plea *held* not to set up facts showing contributory negligence.—Briggs v. Tennessee Coal, Iron & R. Co. (Ala.) 1025.

§ 8. Allegation that defendants were holders in bad faith *held* not an allegation of fact, but a conclusion of law.—State v. Hackley, Hume & Joyce (La.) 772.

§ 8. Ultimate facts of necessity are conclusions from intermediate and evidentiary facts; but legal conclusions cannot be pleaded as ultimate facts.—State v. Hackley, Hume & Joyce (La.) 772.

§ 12. Matter properly within the knowledge of a party need not be alleged in the pleadings by his adversary.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 21. Allegations in pleadings may be contradictory, and yet not give rise to an estoppel.—State ex rel. Wilkinson v. Hingle (La.) 616.

§ 34. In the construction of a pleading to determine as to whether an alternative averment renders it defective, the whole count must be considered.—Louisville & N. R. Co. v. Smith (Ala.) 241.

§ 34. The construction of a pleading as to equivocal averment *held* to be made with reference to the rule of disfavor to the pleader.—Louisville & N. R. Co. v. Smith (Ala.) 241.

§ 34. A count in a pleading must be construed as a whole.—Louisville & N. R. Co. v. Johnson (Ala.) 300.

§ 34. A pleading must be construed against the pleader.—Batson v. Johnson (Ala.) 348.

§ 34. Rules of pleading are for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible.—Hartford Fire Ins. Co. v. Hollis (Fla.) 985.

§ 36. An admission that a bond was approved and filed is not necessarily an admission that it was executed by the alleged obligors.—Fidelity & Deposit Co. of Maryland v. Aultman (Fla.) 991.

§ 36. In an action by a contractor for extra work, the city *held* not entitled to except to the petition because it failed to allege that the extra work had been ordered in writing as provided by the contract.—Shea v. Sewerage & Water Board of New Orleans (La.) 166.

### **II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.**

In equity, see Equity, §§ 145-153.

Review of decisions, see Appeal and Error, § 193.

#### *In particular actions or proceedings.*

See Assumpsit, Action of, § 19; Quieting Title, § 35; Trespass, § 40.

For injuries caused by automobile in street, see Municipal Corporations, § 706.

For injuries caused by operation of railroad, see Railroads, § 344.

For injuries from defects or obstructions in street, see Municipal Corporations, § 816.

For injuries from fire caused by operation of railroad, see Railroads, § 478.

For injuries from negligent operation of street car, see Street Railroads, § 110.

For injuries to persons on or near railroad tracks, see Railroads, § 394.

For injuries to servants, see Master and Servant, §§ 256-295.

For libel or slander, see Libel and Slander, § 89.

On bonds, see Bonds, § 124.

On insurance policy, see Insurance, § 629.

On note by foreign corporation, see Corporations, § 672.

To enforce specific performance, see Specific Performance, § 114.

To reform written instrument, see Reformation of Instruments, § 36.

To remove obstruction on highway, see Highways, § 158.

To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 263.

§ 48. A declaration should allege every fact essential to plaintiff's right of action.—United States Fidelity & Guaranty Co. v. District Lodge Knights and Ladies of Honor v. Baker (Ala.) 958.

§ 72. The body of the petition may be considered in connection with the prayer, and, where it is evident that waiver was intended, there is no reason to hold the petitioner as having abandoned a right.—Henry Lochte Co. v. Lefebvre (La.) 26.

### III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

In equity, see Equity, § 195.

Pleading res judicata as defense, see Judgment, § 948.

Review of decisions, see Appeal and Error, § 194.

#### *In particular actions or proceedings*

For injuries caused by negligence of telegraph company, see Telegraphs and Telephones, § 20.

For injuries from negligence, see Negligence, § 117.

For injuries to servants, see Master and Servant, § 262.

For price of goods sold, see Sales, § 354.

On bills or notes, see Bills and Notes, §§ 475, 484.

#### (C) Traverses or Denials and Admissions.

§ 129. Imputations of payment not questioned by pleading remain unchanged.—Henry Lochte Co. v. Lefebvre (La.) 26.

#### (D) Matter in Avoidance.

§ 136. In an action against a telegraph company for negligent delay in the delivery of a message, a plea concerning the damages recoverable *held* demurrable.—Western Union Telegraph Co. v. Hill (Ala.) 248.

#### (E) Set-Off, Counterclaim, and Cross-Complaint.

Cross-bill in equity, see Equity, § 195.

§ 138. A plea of set-off or recoupment is in effect a declaration by defendant against plaintiff.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

§ 139. Under the statute, *held*, that recoupment must be specially pleaded.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

§ 142. A plea attempting to plead an award as a set-off *held* insufficient.—Tippett v. Gandy (Ala.) 331.

§ 142. A plea seeking to set off a judgment against plaintiff's demand *held* bad.—Tippett v. Gandy (Ala.) 331.

§ 143. Recoupment *held* confined to transaction sued on.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

§ 143. *Held*, that a plea of recoupment must not be vague or uncertain.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

### IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

In avoidance of defense of release, see Release, § 52.

### V. DEMURRER OR EXCEPTION.

In equity, see Equity, §§ 214-245.

Presumptions on appeal or writ of error, see Appeal and Error, § 917.

Review of decisions, see Appeal and Error, §§ 254, 1040.

Time for taking proceedings for review of rulings, see Appeal and Error, § 330.

§ 193. Where damages other than for mental suffering were alleged, whether they were recoverable could not be determined by demurrer.—Western Union Telegraph Co. v. Jackson (Ala.) 316.

§ 193. Where a declaration states a cause of action for at least nominal damages, a demurrer that no cause of action is stated is unavailing.—Fidelity & Deposit Co. of Maryland v. Aultman (Fla.) 991.

§ 193. Where a cause of action is stated, improper claims for special damages in a declaration cannot be reached by demurrer, but by proper motion or exclusion of evidence or instructions.—Fidelity & Deposit Co. of Maryland v. Aultman (Fla.) 991.

§ 193. Where a cause of action for at least nominal damages is stated, a demurrer reaching only the extent of the damages is unavailing.—Fidelity & Deposit Co. of Maryland v. Aultman (Fla.) 991.

§ 195. Plea of set-off or recoupment *held* not demurrable, because seeking to set off or recoup damages not allowable, if it states a good cause of action as to other damages.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

§ 200. A ground of demurrer to several pleas that they are vague and uncertain presents nothing for consideration unless upon inspection they should be found so faulty as to constitute no defense.—Hartford Fire Ins. Co. v. Hollis (Fla.) 985.

§ 205. A demurrer to a complaint in an action against a railroad company for injuries received while crossing its track *held* insufficient, under Code 1907, § 5340, to raise the objection that the complaint did not aver that the agents or servants of defendant were acting within the scope of their employment at the time the injury occurred.—Louisville & N. R. Co. v. Johnson (Ala.) 300.

§ 205. A general demurrer to a plea will not be considered.—Deleon v. Walter (Ala.) 934.

§ 205. In an action on a bond containing conditions precedent to defendant's liability, a declaration *held* bad on demurrer.—United States Fidelity & Guaranty Co. v. District Grand Lodge No. 27 of Grand United Order of Odd Fellows (Fla.) 952.

§ 209. Assigning certain grounds of demurrer *held* insufficient to raise the question whether the complaint was ex contractu or ex delicto.—Western Union Telegraph Co. v. Griffith (Ala.) 91.

§ 216. Under Code 1907, §§ 3121, 5340, rulings and decrees on demurrers must be confined

to the special causes assigned.—*Louisville & N. R. Co. v. Cowley* (Ala.) 1015.

§ 228. An exception of no cause of action admits the facts well pleaded, but not conclusions of law.—*State v. Hackley, Hume & Joyce* (La.) 772.

§ 228. In suit to annul will, before issue joined, the judge could on exceptions dismiss the suit.—*Oglesby v. Turner* (La.) 859.

## VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

Amendment of indictment or information, see Indictment and Information, § 161.

Effect of amendment on limitation of actions, see Limitation of Actions, § 127.

In suit to quiet title, see Quietening Title, § 42.

Review of decisions, see Appeal and Error, §§ 681, 1041.

§ 237. Under Code 1907, § 5367, *held* error not to allow amendments to a complaint, intended merely to correct the description of the subject-matter, so as to meet the plaintiff's proof.—*Floyd v. Wilson* (Ala.) 122.

§ 237. Where a joint liability is alleged, and there is evidence going to discharge one of the defendants only, the complaint may be amended and a recovery had against the other.—*Lord v. Calhoun* (Ala.) 402.

§ 243. Unless a cause of action is stated, there is no suit, and hence nothing to amend.—*State v. Hackley, Hume & Joyce* (La.) 772.

§ 245. While, on demurrer, the fact that defendant had demurred to the evidence would not, ipso facto, deprive plaintiff of the right to amend his complaint.—*Atlas Coal Co. v. O'Rear* (Ala.) 63.

§ 248. An amendment to a complaint in an action against a telegraph company for negligence in transmitting a message *held* not a departure.—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

§ 248. Failure of counts, added by amendment to the complaint in an action on a judgment, to aver that the judgment was one for the conversion of goods, as alleged in the original complaint, *held* not to constitute a departure.—*J. E. Hough & Sons v. Styles* (Ala.) 349.

§ 248. An amendment to a complaint *held* not to present a new cause of action.—*J. E. Hough & Sons v. Styles* (Ala.) 349.

§ 253. Where the pleas filed to the original complaint were not filed to the amended complaint, not constituting a departure, no ruling was invoked as to the amended complaint.—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

§ 254. Where an amendment to the complaint, made after the overruling of demurrers, materially changes the complaint, the demurrers should be refilled to test the sufficiency of the complaint as amended.—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

## VII. SIGNATURE AND VERIFICATION.

In equity, see Equity, § 310.

§ 291. A plea alleging only fraud or estoppel to maintain an action on a written instrument need not be verified.—*Prestwood v. Carlton* (Ala.) 254.

§ 291. The rule dispensing with proof of execution of a bond, unless the execution is denied by verified plea, does not dispense with production of the bond at the trial.—*Fidelity & Deposit Co. of Maryland v. Aultman* (Fla.) 991.

§ 304. Contract sued on *held* properly permitted to be introduced, where there was sufficient proof of its execution, though its execu-

tion was denied by sworn plea.—*Harris v. Basden* (Ala.) 321.

## VIII. PROPERT, OYER, AND EXHIBITS.

§ 306. Under Code Prac. arts. 174, 175, *held* that defendant, in an action for an injunction founded on deeds not annexed to the petition, has the right to oyer of the documents.—*Baldwin Lumber Co. v. Todd* (La.) 526; *In re Baldwin Lumber Co.*, *Id.*

§ 308. The object of Gen. St. 1906, § 1449, and Rule 14 of Circuit Court Rules in Common-Law Actions (37 South. vii), requiring a cause of action or a copy thereof, in the class of instruments designated therein, to be filed with the declaration, stated.—*Register v. Pringle Bros.* (Fla.) 584.

§ 310. The by-laws of a fraternal order *held* a part of the bill in a suit against the order, in determining the sufficiency of the bill on demurrer.—*Independent Order of Sons and Daughters of Jacob of America v. Moncrief* (Miss.) 558.

§ 312. The rule of pleading, under Ann. Code 1892, § 528, that an exhibit controls in case of conflict between it and the bill, can only be invoked where the exhibit is made the basis of the relief sought.—*McKinney v. Adams* (Miss.) 474.

## IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

Pendency of motion for, as affecting right to judgment by default, see Judgment, § 108.

§ 326. Practice of waiting until the day a plea or demurrer is due to file a motion for a more definite bill of particulars *held* not to be commended.—*Register v. Pringle Bros.* (Fla.) 584.

## X. FILING, SERVICE, AND WITHDRAWAL.

Presumptions on appeal as to abandonment of demurrers, see Appeal and Error, § 917.

§ 339. In an action against two defendants for negligent injuries, *held* that it was within the trial court's discretion to refuse to allow one to withdraw a plea of the general issue in order to file a demurrer.—*Southern Hardware & Supply Co. v. Block Bros.* (Ala.) 1036.

## XI. MOTIONS.

§ 341. If plaintiff considers pleas so framed as to prevent a fair trial, his remedy is to move the court for a compulsory amendment thereof under Gen. St. 1906, § 1433.—*Hartford Fire Ins. Co. v. Hollis* (Fla.) 985.

§ 352. Sustaining a motion to strike pleas, instead of putting plaintiff to his demurrer, *held* error.—*Louisville & N. R. Co. v. Smith* (Ala.) 241.

§ 352. Where pleas are so inconsistent that they cannot be pleaded together, it is error to allow a motion to strike one of them designated therein by plaintiff.—*A. R. Ganus & Co. v. Tew* (Ala.) 1000.

§ 354. That pleas are bad to the complaint as a whole, though good as to some of the counts, must be pointed out by demurrer.—*Dixie v. Harrison* (Ala.) 284.

§ 354. Pleas not tendering an issue of fact and wholly irrelevant may be stricken on motion.—*Fidelity & Deposit Co. of Maryland v. Aultman* (Fla.) 991.

§ 358. In trespass and trover, certain pleas *held* not subject to motion to strike under Code

rison (Ala.) 284.

§ 362. Plea of set-off or recoupment *held* not demurrable, because seeking to set off or recoup damages not allowable, if it states a good cause of action as to other damages.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

§ 369. If pleas are so inconsistent that they cannot be pleaded together, defendant can elect on which he will stand.—A. R. Ganus & Co. v. Tew (Ala.) 1000.

## **XII. ISSUES, PROOF, AND VARIANCE.**

Applicability of instructions to issues, see Trial, § 251.

Conformity of judgment to issues raised by pleading, see Judgment, § 251.

### *In particular actions or proceedings.*

See Ejectment, §§ 84, 85; Trover and Conversion, § 34; Work and Labor, § 24.

Criminal prosecutions, see Indictment and Information, § 176.

For breach of contract in general, see Contracts, § 346.

For broker's commission, see Brokers, § 82.

For fraud, see Fraud, § 49.

For injuries to persons on or near street railroad tracks, see Street Railroads, § 111.

For injuries to servants, see Master and Servant, § 264.

On insurance policy, see Insurance, § 645.

§ 380. Where evidence admitted was competent at the time it was admitted to support some of the counts of the complaint, its admission was not error, though such counts were thereafter withdrawn from the jury.—Birmingham Ry., Light & Power Co. v. Morris (Ala.) 198.

§ 385. Dates given in a bill of particulars under Code 1901, § 5326, *held* not to preclude plaintiffs from showing that the services rendered were furnished on other dates.—Pollak v. Gunter & Gunter (Ala.) 155.

§ 391. Where the counts of a declaration alleged time after a *videlicet*, there was no failure of proof because the evidence did not conform to the exact dates.—Pollak v. Gunter & Gunter (Ala.) 155.

§ 392. Where complainant alleged a joint liability, and the evidence proved a several one, there was a *fatal* variance.—Lord v. Calhoun (Ala.) 402.

§ 399. In actions of tort against two or more defendants jointly, where the proof fails as to any one, a verdict may be rendered against the defendants as to whom the proof is sufficient without thereby in law constituting a variance.—Southern Ry. Co. v. Arnold (Ala.) 293.

## **XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.**

Presumptions on appeal as to waiver of demurrer, see Appeal and Error, § 917.

Review of decisions as dependent on presentation of question in lower court, see Appeal and Error, §§ 192-194.

Review of decisions as dependent on taking of exception in lower court, see Appeal and Error, § 254.

§ 406. Whether an allegation in the bill was objectionable as a conclusion will not be decided on appeal, where the point was not raised by demurrer.—Rudolph v. City of Elyton (Ala.) 80.

§ 428. Plea of set-off or recoupment *held* not demurrable, because seeking to set off or recoup

of action as to other damages.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

§ 430. There was a *fatal* variance between averments of a complaint describing a contract declared on as between plaintiff and others and proof that the contract was between plaintiff and his brother, operating as partners, and others.—Atlas Coal Co. v. O'Rear (Ala.) 63.

## **PLEDGES.**

See Chattel Mortgages; Pawnbrokers.

Procurement of receivership for property in possession of pledgee and ground for sequestration, see Sequestration, § 4.

To secure advances to make crop, see Agriculture, § 12.

§ 27. Pledgee of oil machinery, not having used it, cannot be charged with rental value by pledgor.—Louisiana-Texas Oil & Pipe Line Co. v. Atlanta Oil & Gas Co. (La.) 409.

## **POLICE DEPARTMENT.**

See Municipal Corporations, § 183.

## **POLICE JURY.**

Collateral attack on qualifications of members, see Officers, § 80.

## **POLICEMEN.**

See Municipal Corporations, § 183.

## **POLICE POWER.**

Of municipality, see Municipal Corporations, §§ 591, 642.

Particular subjects of regulation, see Carriers, § 1; Sunday; Taxation, § 1.

## **POLICY.**

Of insurance, see Insurance.

## **POLITICAL RIGHTS.**

Constitutional guaranty of political rights, see Constitutional Law, §§ 83, 87.  
Suffrage, see Elections.

## **POOR LAWS.**

See Paupers.

## **POSSESSION.**

See Adverse Possession.

Of land, as notice affecting bona fides of purchase, see Vendor and Purchaser, § 232.

Of mortgaged property, rights and liabilities of parties, see Chattel Mortgages, § 172.

Of personal property, remedies for recovery, see Detinue.

Of property as affecting liability for taxes, see Taxation, § 79.

Of public office, see Officers, § 80.

Of real property, remedies for recovery, see Ejectment; Forcible Entry and Detainer, §§ 9-34.

Of stolen property, evidence of, in prosecution for burglary, see Burglary, § 42.

Prior possession, element of right of action, see Forcible Entry and Detainer, § 9.

Recovery of possession by vendor of land, see Vendor and Purchaser, § 299.

Right of possession, element of right of action, see Ejectment, § 17.

To support action to quiet title, see Quieting Title, § 12.

**POSSESSORY WARRANT.**

Actions for recovery of personalty founded on right of property, see Detinue.

**POSTHUMOUS CHILDREN.**

Effect of limitations against ancestors, see Limitation of Actions, § 80.

**POSTPONEMENT.**

Continuance of civil actions, see Continuance.  
Continuance of criminal prosecutions, see Criminal Law, §§ 575-615.

**POVERTY.**

See Paupers.

**POWERS.**

Of attorney, see Principal and Agent.  
Of attorney to confess judgment, see Judgment, § 46.

**II. CONSTRUCTION AND EXECUTION.**

§ 33. Though no particular formality is required in the execution of a power, an intent to execute must be shown.—*Cramton v. Rutledge* (Ala.) 900.

§ 43. Under Code 1896, § 1046, a purchaser from a life tenant with power to sell *held* required to show that he purchased from the life tenant, not only his estate, but the entire property.—*Cramton v. Rutledge* (Ala.) 900.

**PRACTICE.**

*In particular civil actions or proceedings.*

See Account, Action on; Assumpsit, Action of; Bankruptcy; Certiorari, §§ 39-66; Detinue; Ejectment, §§ 84-86, 109, 114, 127-135; Execution; Forcible Entry and Detainer, §§ 9-34; Garnishment, §§ 93, 120-164; Habeas Corpus, §§ 44-113; Injunction, §§ 130, 133; Mandamus, §§ 151-178; Partition, §§ 108, 109; Prohibition, § 17; Quieting Title, §§ 35, 42; Real Actions, § 8; Trespass, §§ 40, 45, 50, 56, 67, 68; Trover and Conversion, §§ 22-60; Work and Labor, § 24.

Accounting, see Account, § 17.

Accounting by agent, see Principal and Agent, § 78.

Assessment of damages, see Damages, §§ 208, 216.

Between bailor and bailee, see Bailment, § 31.

Between shareholders and officers or agents of corporation, see Corporations, § 320.

By heirs or distributees, see Descent and Distribution, § 90.

By or against corporations in general, see Corporations, §§ 503-522.

By or against executors or administrators, see Executors and Administrators, §§ 423-454.

By or against firms or partners, see Partnership, § 213.

By or against foreign corporations, see Corporations, § 672.

By or against infants, see Infants, §§ 93, 94.

By or against life tenants, see Life Estates, § 28.

By or against telegraph or telephone companies, see Telegraphs and Telephones, § 20.

By owners of property wrongfully taken for public use, see Eminent Domain, §§ 274, 281.

By vendor to recover possession of land, see Vendor and Purchaser, § 299.

Election contest, see Elections, § 307.

For assault and battery, see Assault and Battery, § 34.

For breach of contract, see Contracts, § 346.

For breach of contract by carrier for transportation of passenger, see Carriers, §§ 275, 277.

For breach of contract of sale, see Sales, § 417.

For breach of covenant, see Covenants, § 130.

For compensation of attorney, see Attorney and Client, § 167.

For compensation of broker, see Brokers, §§ 82, 85.

For conspiracy, see Conspiracy, §§ 19, 21.

For contempt, see Contempt, §§ 30-67.

For conversion of or injury to mortgaged property, see Chattel Mortgages, § 177.

For delay in transportation or delivery of goods, see Carriers, § 103.

For divorce, see Divorce, §§ 90-171.

For equitable relief against judgment, see Judgment, § 461.

For false imprisonment, see False Imprisonment, §§ 27, 30.

For fraud, see Fraud, § 49.

For injuries at railroad crossings, see Railroads, §§ 344-351.

For injuries by servants, see Master and Servant, §§ 328, 332.

For injuries from accidents to trains, see Railroads, § 297.

For injuries from construction or maintenance of railroad, see Railroads, § 114.

For injuries from defects or obstructions in streets, see Municipal Corporations, § 816.

For injuries from fires caused by operation of railroad, see Railroads, §§ 478-484.

For injuries from negligence in general, see Negligence, §§ 117-139.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 60-74.

For injuries from negligent use of street, see Municipal Corporations, § 706.

For injuries from production or use of electricity, see Electricity, § 19.

For injuries to animals on or near railroad tracks, see Railroads, §§ 439-446.

For injuries to passengers, see Carriers, §§ 314-321, 347.

For injuries to persons on or near railroad tracks, see Railroads, §§ 394, 396.

For injuries to persons on or near street railroad tracks, see Street Railroads, §§ 110-118.

For injuries to servants, see Master and Servant, §§ 256-295.

For judgment by default, see Judgment, §§ 108-130.

For libel or slander, see Libel and Slander, § 89.

For penalty, see Penalties, § 40.

For purchase money on sale of goods, see Sales, §§ 354-364.

For purchase money on sale of land, see Vendor and Purchaser, § 303.

For rent, see Landlord and Tenant, § 231.

For tort in general, see Torts, § 26.

On bail bonds or undertakings, see Bail, § 90.

On bills or notes, see Bills and Notes, §§ 475-524.

On bonds in general, see Bonds, §§ 122-142.

On bonds of public officers, see Sheriffs and Constables, § 171.

Probate proceedings and actions relating to wills or probate, see Wills, §§ 289, 417.

Scire facias to enforce bail bond, see Bail, § 90.

Settlement, signing, and filing of bill of exceptions, see Exceptions, Bill of, §§ 38-56.

To cancel written instrument, see Cancellation of Instruments, § 60.

To enforce regulations in respect to interstate transportation, see Carriers, § 18.

To enforce specific performance, see Specific Performance, §§ 106-129.

To enforce taxes, see Taxation, § 623.

To establish and protect easement, see Easements, § 61.

To foreclose mortgage, see Mortgages, § 390.

To recover possession of mortgaged property, see Chattel Mortgages, § 172.

To reform written instrument, see Reformation of Instruments, §§ 36, 45.

To sell property of decedent, see Executors and Administrators, §§ 343, 349.  
To set aside fraudulent conveyance, see Fraudulent Conveyances, §§ 206-299.  
To supply or restore records lost or destroyed, see Records, § 17.

#### *Particular proceedings in actions.*

See Abatement and Revival; Affidavits; Continuance; Costs; Damages, §§ 162-216; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Jury; Limitation of Actions; New Trial; Parties; Pleading; Removal of Causes; Stipulations; Tender; Trial.  
Consolidation of actions, see Action, § 57.  
Examination of witnesses, see Witnesses, §§ 236-287.  
Instructions to jury, see Trial, §§ 191-295.  
Settlement, signing, and filing of bill of exceptions, see Exceptions, Bill of, §§ 33-56.  
Verdict, see Trial, §§ 328-340.

#### *Particular remedies in or incident to actions.*

See Attachment; Depositions; Discovery; Garnishment; Injunction; Receivers; Sequestration.

#### *Procedure in criminal prosecutions.*

See Bail, §§ 39-90; Costs, § 285; Criminal Law; Fines; Grand Jury; Indictment and Information; Jury.  
Habeas corpus proceedings, see Habeas Corpus.  
Search warrant, see Searches and Seizures.

#### *Procedure in exercise of special or limited jurisdiction.*

Bankruptcy, see Bankruptcy.  
Equity, see Equity.  
Insolvency, see Insolvency.  
Justices' courts in civil cases, see Justices of the Peace, §§ 64, 75.  
Probate and administration, see Courts, § 202; Executors and Administrators, §§ 343, 349.  
*Procedure in or by particular courts or tribunals.*  
See Courts; Justices of the Peace, § 174.  
Courts of appellate jurisdiction in particular states, see Courts, §§ 210-224.  
Probate courts, see Courts, § 202.

#### *Procedure on review.*

See Appeal and Error; Certiorari, §§ 39-66; Criminal Law, §§ 1019-1189; Exceptions, Bill of; New Trial.

### PRAYER.

For instructions, see Criminal Law, §§ 825-830; Trial, §§ 255-261.  
For relief, see Pleading, § 72.

### PREJUDICE.

Appeal by counsel to prejudice of jury, see Criminal Law, § 723.  
Ground for reversal in civil actions, see Appeal and Error, §§ 1029-1068.  
Ground for reversal in criminal cases, see Criminal Law, §§ 1166-1173.  
Of witness, ground for impeachment, see Witnesses, §§ 363-374.

### PRELIMINARY EVIDENCE.

Proof of execution, and authentication of documents offered in evidence, see Evidence, §§ 370, 372.

### PRELIMINARY INJUNCTION.

See Injunction, § 133.

### PREMEDITATION.

Element of murder, see Homicide, §§ 156-158.

### PREMIUMS.

Insurance premiums, see Insurance, § 188.

### PREROGATIVE WRITS.

See Certiorari; Habeas Corpus; Mandamus; Prohibition; Quo Warranto.

### PRESCRIPTION.

See Limitation of Actions.

Acquisition of rights, see Adverse Possession, §§ 4-13.

### PRESUMPTIONS.

In civil actions, see Evidence, §§ 56-77.

In criminal prosecutions, see Criminal Law, § 309.

On appeal or writ of error in civil actions, see Appeal and Error, §§ 900-931.

On appeal or writ of error in criminal prosecutions, see Criminal Law, § 1144.

### PRETENSE.

See False Pretenses; Fraud.

### PREVENTIVE RELIEF.

See Injunction.

### PRICE.

Of goods sold, see Sales, §§ 354-364.

### PRINCIPAL AND AGENT.

See Master and Servant.

Declarations by agent as evidence against principal, see Evidence, §§ 242, 244.

Independent contractors, see Master and Servant, § 316.

Order of proof of acts of agent and proof of agency, see Trial, § 60.

*Agency in particular relations, offices, or occupations.*

See Attorney and Client; Banks and Banking, §§ 109, 116; Brokers; Insurance, §§ 95, 375; Telegraphs and Telephones, § 35.

Agency of partner for firm, see Partnership, §§ 146, 156.

Agent of sender of telegraph message, see Telegraphs and Telephones, § 35.

Corporate agents, see Corporations, §§ 310, 320, 399-432.

### I. THE RELATION.

#### (A) Creation and Existence.

§ 22. Agency cannot be established by declarations of the supposed agent himself.—Florida East Coast Ry. Co. v. Lassiter (Fla.) 428.

#### (B) Termination.

§ 34. A power of attorney to liquidators to sell property of an insolvent firm held not revocable by a partner; it being an essential part of the contract with the liquidators under which they had advanced money to settle firm debts.—Union Garment Co., Limited, v. Newburger (La.) 740.

### II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

Attorneys, see Attorney and Client, §§ 133, 167.  
Corporate officers and agents, see Corporations, §§ 310, 320.

#### (A) Execution of Agency.

§ 78. Where the relation of principal and agent partakes of a fiduciary character, and the matters of which an accounting is sought are



within the knowledge of the agent, a bill for an accounting lies.—*Phillips v. Birmingham Industrial Co. (Ala.)* 77.

**(B) Compensation and Lien of Agent.**

Brokers, see *Brokers*, §§ 40-65, 82, 85.

**III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**

Liability of master for injuries to third persons by acts or omissions of servants or independent contractors, see *Master and Servant*, §§ 302-332.

**(A) Powers of Agent.**

Authority of agent of corporations in general, see *Corporations*, §§ 399-432.

Declarations by agent as evidence against principal, see *Evidence*, §§ 242, 244.

Warrant or power of attorney to confess judgment, see *Judgment*, § 46.

§ 101. An agreement between a subrailroad contractor and one who was not the contractor's agent *held* not a modification of the subcontract.—*Grigsby Const. Co. v. Colly (La.)* 855.

§ 103. Liquidators of an insolvent firm who were authorized to sell firm property could make the sale through an auctioneer.—*Union Garment Co., Limited, v. Newburger (La.)* 740.

§ 122. An alleged agent's declarations as to authority at the time of the purchase of the goods in question *held* admissible after proof of the agency.—*Childress v. Smith-Echols-Burnett Hardware Co. (Ala.)* 322.

**(C) Unauthorized and Wrongful Acts.**

Liability of municipal corporation for torts of officers and agents, see *Municipal Corporations*, § 747.

§ 155. A purchase of property at an auction sale by an unauthorized agent was not binding upon the nominal purchaser until ratified by it, and was not binding upon the sellers.—*Union Garment Co., Limited, v. Newburger (La.)* 740.

**(D) Ratification.**

§ 175. A purchase of property at an auction sale by an unauthorized agent not being binding upon the sellers, they could refuse to recognize the sale even after being notified of its ratification by the purchaser.—*Union Garment Co., Limited, v. Newburger (La.)* 740.

**(E) Notice to Agent.**

Notice to insurance agents, see *Insurance*, § 95.

**PRINCIPAL AND SURETY.**

See *Bail*; *Bonds*.

Sureties on bond, see *Injunction*, § 235.

Sureties on bond of county officers, see *Counties*, § 98.

Sureties on bond of sheriff or constable, see *Sheriffs and Constables*, §§ 157, 171.

**PRIOR ADJUDICATION.**

Operation and effect in general, see *Judgment*, §§ 540-584, 668-715.

**PRIORITIES.**

Of mortgages, see *Chattel Mortgages*, § 153; *Mortgages*, § 151.

**PRISONS.**

See *Convicts*; *False Imprisonment*.

Construction of laws embodied in revisions or codes relating to contracts for feeding prisoners, see *Statutes*, § 231.

Place of imprisonment of convict, see *Criminal Law*, § 1218.

**PRIVATE NUISANCE.**

See *Nuisance*, §§ 8, 4.

**PRIVATE ROADS.**

Right of way, see *Easements*.

**PRIVILEGE.**

Grants of privileges by municipal corporation right to use street for purpose of highway, see *Municipal Corporations*, § 681.

Of married women, see *Husband and Wife*, §§ 85-97.

**PRIVILEGED COMMUNICATION.**

Disclosure by witness, see *Witnesses*, § 204.

**PRIVITY.**

Admissions by privies, see *Evidence*, § 101. With party to action, conclusiveness of admission, see *Judgment*, §§ 668, 682.

**PROBABLE CAUSE.**

Allegations in affidavit for violation of laws, see *Intoxicating Liquors*, § 141.

**PROBATE.**

Of will, see *Wills*, §§ 289, 417.

**PROBATE COURTS.**

See *Courts*, § 202.

**PROCEDURE.**

See cross-references under *Practice*.

**PROCEEDS.**

Of sale by executor or administrator of decedents and Administrators, § 402.

**PROCESS.**

Homicide committed in execution of process. Homicide, § 105.

In particular actions or proceedings. Appeal, see *Appeal and Error*, § 405. Criminal prosecutions, see *Criminal Law*.

Particular forms of writs or other process. See *Certiorari*; *Execution*; *Garnishment*; *Beas Corpus*; *Mandamus*; *Prohibition*; *Warranto*; *Sequestration*.

Subpoena for witnesses, see *Witnesses*. Writ of error, see *Appeal and Error*, § 405.

**IV. ABUSE OF PROCESS.**

False imprisonment, see *False Imprisonment*.

**PRO CONFESSO.**

Decree in equity, see *Equity*, § 420.

**PROFANITY.**

See *Blasphemy*.

**PROFITS.**

Loss, element of damages, see *Damages*.

**PROHIBITION.**

Of traffic in intoxicating liquors, see *Intoxicating Liquors*. Prohibitory injunction, see *Injunction*.

## **I. NATURE AND GROUNDS.**

§ 3. Upon subsequent prosecutions for violation of the child labor law (Act No. 301, p. 453, of 1908), a certain contention *held* to be decided by the trial court, and not to be raised by prohibition.—*State v. Rose* (La.) 520; *In re Rose*, Id.

§ 3. The contention that to attempt to punish accused every time he violates the child labor law (Act No. 301, p. 453, of 1908), would be an attempt to punish him for one continuing offense, and would be cruel and unusual punishment, is a question for the trial court, subject to appeal, and cannot be raised on prohibition.—*State v. Rose* (La.) 520; *In re Rose*, Id.

§ 3. The question of former jeopardy is for the trial court to decide, subject to review on appeal, and cannot be raised by prohibition.—*State v. Rose* (La.) 520; *In re Rose*, Id.

§ 3. In a prosecution for violation of the child labor law (Act No. 301, p. 453, of 1908), prohibiting the employment of any child under the age of 14 years to labor in a theater or concert hall, the contention that the violation of the statute involves no moral turpitude, but is good for the child, must be passed upon, if at all, by the trial court, subject to appeal, and cannot be raised by prohibition.—*State v. Rose* (La.) 520; *In re Rose*, Id.

§ 11. The question whether the district court found correctly in holding that certain parties were guilty of contempt in interfering with the receiver in charge of the property of a corporation will not be reviewed in the Supreme Court on application for prohibition.—*Blaise v. Security Brewing Co.* (La.) 816.

## **II. JURISDICTION, PROCEEDINGS, AND RELIEF.**

§ 17. A challenge of jurisdiction of the trial court in a prosecution for violation of a statute would be operative only in that case, and could afford no basis for a prohibition in succeeding prosecutions for violation of the same statute.—*State v. Rose* (La.) 520; *In re Rose*, Id.

§ 17. As a prerequisite to an application for prohibition to prevent proceedings in the juvenile court, there must have been a plea to the jurisdiction of that court.—*State v. Rose* (La.) 520; *In re Rose*, Id.

## **PROMISE.**

See Contracts.

## **PROMISSORY NOTES.**

See Bills and Notes.

## **PROOF.**

See Criminal Law, §§ 309-561; Depositions; Discovery; Evidence; Witnesses.

Amendment to conform to proof, see Pleading, § 237.

Burden of proof in general, see Evidence, § 96.

Order of proof, see Criminal Law, §§ 680, 683; Trial, §§ 59-68.

Pleading and proof, see Indictment and Information, § 176; Pleading, §§ 380-399.

Reception of evidence at trial of civil actions in general, see Trial, §§ 46-57.

Reception of evidence at trial of criminal causes in general, see Criminal Law, §§ 666-683.

## **PROPERTY.**

Affected by judgment lien, see Judgment, § 780.

Constitutional guaranty of right of property, see Constitutional Law, §§ 284-301.

Constitutional guaranty of right to acquire, hold, and dispose of property, see Constitutional Law, § 87.

Evidence of value or market price, see Evidence, §§ 113, 489.

Exemptions, see Exemptions, §§ 37-44; Homestead, §§ 81, 87.

Subject of assessment for municipal improvements in general, see Municipal Corporations, § 426.

Subject of attachment, see Attachment, § 63.

Subject of commerce, see Commerce, § 41.

Subject of compensation on taking for public use, see Eminent Domain, § 84.

Subject of execution, see Execution, § 41.

### *Of particular classes of persons.*

See Partnership, §§ 178, 186; Receivers, §§ 74, 77; Religious Societies, § 20.

Married women, see Husband and Wife, §§ 114-193.

### *Particular estates or interests.*

See Dower.

Community and separate property, see Husband and Wife, § 274.

Married woman's separate property, see Husband and Wife, §§ 114-193.

### *Particular species of property.*

See Animals; Waters and Water Courses.

Corporate stock, see Corporations, § 84.

Logs and lumber, see Logs and Logging.

### *Remedies involving or affecting property.*

See Attachment; Detinue; Ejectment; Execution; Forcible Entry and Detainer, §§ 9-34; Fraudulent Conveyances; Garnishment; Injunction, §§ 35, 38; Partition; Quieting Title; Real Actions; Searches and Seizures; Sequestration; Specific Performance; Trover, §§ 27-68; Trover and Conversion, §§ 22-60.

Bankruptcy proceedings, see Bankruptcy.

Condemnation proceedings, see Eminent Domain, §§ 274, 281.

Distress for rent, see Landlord and Tenant, § 265.

Establishment and enforcement of right of exemption, see Homestead, § 183.

Foreclosure of mortgages, see Chattel Mortgages, § 250; Mortgages, § 390.

Insolvency proceedings, see Insolvency.

Setting aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 206-299.

### *Transfers and other matters affecting title.*

See Abandonment; Adverse Possession; Assignments; Assignments for Benefit of Creditors; Chattel Mortgages; Deeds; Descent and Distribution; Gifts; Mortgages; Partition; Pledges; Powers.

Dedication to public use, see Dedication.

Receivership, see Receivers, §§ 74, 77.

Sale, see Sales; Vendor and Purchaser.

Sale of property of decedent, see Executors and Administrators, §§ 343-402.

Taking for public use, see Eminent Domain.

### *Offenses against or involving property.*

See Arson; Burglary; Forgery; Larceny; Nuisance.

Injuring or killing animals, see Animals, § 45.

Obtaining property by false pretenses, see False Pretenses.

Removal or transfer of property subject to mortgage, see Chattel Mortgages, § 230.

## **PROSECUTING ATTORNEYS.**

See District and Prosecuting Attorneys.

## **PROSTITUTION.**

See Disorderly House.

**PROTECTION.**

Equal protection of the laws, see Constitutional Law, §§ 209-245.  
Of exemption rights, see Exemptions, § 123.  
Of infants, see Infants, § 13.

**PROVINCE OF COURT AND JURY.**

See Criminal Law, §§ 753-764; Trial, §§ 136-145, 191, 194.

**PROVISIONAL REMEDIES.**

See Attachment; Bail; Garnishment; Injunction; Receivers; Sequestration.  
Effect of supersedeas or stay, see Appeal and Error, §§ 488, 489.

**PROVOCATION.**

Defense to civil action for assault, see Assault and Battery, § 12.  
Element of manslaughter, see Homicide, §§ 45, 271.

**PROXIMATE CAUSE.**

Of injury to passenger, see Carriers, § 305.  
Of loss of or injury to goods shipped, see Carriers, § 123.

**PUBERTY.**

Presumptions as to puberty of infant under fourteen years of age, see Infants, § 66.

**PUBLICATION.**

Of notice of intention to apply for enactment of special or local law, see Statutes, § 81½.  
Of petition for public improvements, see Municipal Corporations, § 294.

**PUBLIC CORPORATIONS.**

See Counties; Municipal Corporations.  
Drainage and reclamation districts, see Drains, § 18.

**PUBLIC DEBT.**

See Municipal Corporations, §§ 873, 993.

**PUBLIC FUNDS.**

See Counties, § 154; Municipal Corporations, §§ 873, 993.

**PUBLIC HIGHWAYS.**

See Highways.

**PUBLIC IMPROVEMENTS.**

See Drains; Highways; Levees; Municipal Corporations, §§ 266-446.  
Subjects and titles of acts relating to public works, see Statutes, § 123.

**PUBLIC LANDS.**

Adverse possession, see Adverse Possession, § 7.  
Lands under navigable water, see Navigable Waters, §§ 30, 37.

**III. DISPOSAL OF LANDS OF THE STATES.**

Conclusions in pleading in action to set aside sale for fraud, see Pleading, § 8.  
Power to convey lands under navigable waters, see Navigable Waters, § 37.

§ 152. The state cannot recover land from a third person for fraud of a patentee, where

such third person acquired it for a valuable consideration and without notice of the fraud.—State v. Hackley, Hume & Joyce (La.) 772.

§ 152. Objection for failure to require previous tender in a suit by the state to set aside a sale of lands for fraud *held* not sustained.—State v. Hackley, Hume & Joyce (La.) 772.

**PUBLIC LAWS.**

See Statutes.

**PUBLIC NUISANCE.**

See Nuisance, §§ 72, 75.

**PUBLIC OFFICERS.**

See Officers.

**PUBLIC POLICY.**

Validity of contracts, see Contracts, §§ 101, 136.

**PUBLIC PROPERTY.**

Adverse possession, see Adverse Possession, § 7.

**PUBLIC PROSECUTORS.**

See District and Prosecuting Attorneys.

**PUBLIC RECORDS.**

See Records.

**PUBLIC REVENUE.**

See Taxation.

**PUBLIC SCHOOLS.**

See Schools and School Districts, § 53.

**PUBLIC SERVICE CORPORATIONS.**

See Carriers; Corporations; Railroads; Street Railroads.  
Electric light and heating companies, see Electricity.  
Interstate commerce laws, see Commerce.  
Telegraph and telephone companies, see Telegraphs and Telephones.

**PUBLIC USE.**

Dedication of property, see Dedication.  
Taking property for public use in general, see Eminent Domain.  
What constitutes public use for which property may be taken under power of eminent domain, see Eminent Domain, § 36.

**PUBLIC WAYS.**

See Highways; Municipal Corporations, §§ 648-706, 735-816.

**PUBLIC WORKS.**

See Drains; Highways; Levees; Municipal Corporations, §§ 266-446.  
Subjects and titles of acts relating to, see Statutes, § 123.

**PUNISHMENT.**

See Fines; Penalties.  
For contempt of court in general, see Contempt, §§ 72, 79.  
For crime in general, see Criminal Law, § 1218.  
Instructions as to punishment of accused, see Criminal Law, § 796.

**PUNITIVE DAMAGES.**

See Damages, § 87.

**PURCHASERS.**

See Sales; Vendor and Purchaser.

**QUALIFICATIONS.**

Of expert witnesses, see Evidence, § 539.  
Of witnesses in general, see Witnesses, §§ 37-204.

**QUANTUM MERUIT.**

See Work and Labor.

**QUASHING.**

Indictment or information, see Indictment and Information, § 140.  
Venire, see Jury, § 116.

**QUESTIONS OF LAW AND FACT.**

In civil actions, see Trial, §§ 136-145, 191, 194.  
In criminal prosecutions, see Criminal Law, §§ 753-764.

**QUIA TIMET.**

See Quieting Title.

**QUIETING TITLE.**

Doubt or dispute as to title ground for relief by injunction, see Injunction, § 38.  
Tax titles, see Taxation, § 805.

**I. RIGHT OF ACTION AND DEFENSES.**

§ 12. To sue under Code 1896, §§ 809-813, to quiet title, the complaining party must be in peaceable possession, though the deed under which the adverse parties claim be invalid.—*Holland v. Coleman* (Ala.) 128.

§ 12. The existence of a life estate and the possession of the land by one holding under a life tenant *held* such an obstacle to the assertion of the legal rights of a reversioner as entitled him to maintain a bill to remove a cloud from title, though not in possession.—*Fies v. Rosser* (Ala.) 287.

**II. PROCEEDINGS AND RELIEF.**

Multifariousness of bill, see Equity, § 148.

§ 35. A bill to remove a cloud on title must allege that complainant was in possession at the commencement of the suit.—*Crooker v. White* (Ala.) 227.

§ 42. A bill which, as originally filed, was strictly within Code 1907, § 5443 et seq., to quiet title, was properly allowed to be amended by adding averments leading to relief from defendant's alleged void mortgage.—*State Land Co. v. Mitchell* (Ala.) 117.

**QUI TAM ACTIONS.**

See Penalties, § 40.

**QUITCLAIM.**

Estoppel by quitclaim deed, see Estoppel, § 39.

**QUO WARRANTO.****I. NATURE AND GROUNDS.**

§ 1. Quo warranto *held* not the proper remedy, where the fixing of salary, as required by Code 1907, § 703, subd. "G," is alone sought.—

Revenue and Road Com'rs of Mobile County v. State (Ala.) 972.

§ 11. The office of a city treasurer, appointed pursuant to Municipal Code Act (Acts 1907, pp. 799, 811) §§ 17, 33 (Code 1907, §§ 1067, 1171), and an ordinance thereunder, *held* to be a "public civil office," title to which may be tried by quo warranto under Code 1907, § 5453.—*Michael v. State* (Ala.) 929.

**RACE.**

Discrimination by reason of race as denial of equal protection of laws, see Constitutional Law, §§ 220, 221.

**RAFFLES.**

See Lotteries, § 20.

**RAILROAD COMMISSIONERS.**

Regulations of carriers, review of, see Carriers, § 18.  
Regulations of connecting carriers, see Carriers, § 15.

**RAILROADS.**

See Street Railroads.

As employers, see Master and Servant.  
Carriage of goods and passengers, see Carriers.  
Regulations depriving of property without due process of law, see Constitutional Law, § 297.  
Taxation of, amendment of constitutional provisions, see Constitutional Law, § 9.  
Taxation of, construction of exemption laws, see Taxation, § 196.

**I. CONTROL AND REGULATION IN GENERAL.**

Control and regulation of common carriers, see Carriers, §§ 1-18.  
Regulation of, as regulation of commerce, see Commerce, § 61.  
Regulations, denying equal protection of laws, see Constitutional Law, § 241.  
Regulations depriving of property without due process of law, see Constitutional Law, § 297.

§ 5. The initial discretion as to the means and manner of operating a railroad *held* in those charged with its management, but such discretion is subject to lawful governmental supervision.—*State v. Florida East Coast Ry. Co.* (Fla.) 425.

**III. PUBLIC AID.**

County election on question of, see Counties, § 154.

**V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.**

Acquisition of rights under power of eminent domain, see Eminent Domain.

**VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.**

§ 103. Code 1896, § 3480, *held* to make a demand necessary only to compel the erection of cattle guards by a railroad, and after once erected no further demand to keep them in repair is required.—*Central of Georgia Ry. Co. v. Carroll* (Ala.) 235.

§ 103. Code 1896, § 3480, requiring a railroad to erect cattle guards, being in derogation of the common law, must be strictly construed.—*Central of Georgia Ry. Co. v. Carroll* (Ala.) 235.

§ 103. Railroad company *held* not bound by the common law to erect cattle guards.—*Central of Georgia Ry. Co. v. Carroll* (Ala.) 235.

§ 113. A franchise to construct a railroad in a street is no protection against liability for damage to private property.—*Boagni v. Colorado Southern, N. O. & P. R. Co. (La.)* 748.

§ 114. In an action against a railroad for failure to repair cattle guards, permitting live stock to enter, that plaintiff only owned an undivided one-fifteenth interest in the land *held* not to require that his recovery be limited to one-fifteenth of damage to the crop.—*Central of Georgia Ry. Co. v. Carroll (Ala.)* 235.

§ 114. The measure of damages for failure by a railroad to maintain cattle guards in good repair, permitting stock to enter and damage crops, declared.—*Central of Georgia Ry. Co. v. Carroll (Ala.)* 235.

§ 114. Evidence, in an action by an abutting owner for damage from the construction of a railroad in the street, *held* to preponderate in favor of the amount of damages assessed.—*Boagni v. Colorado Southern, N. O. & P. R. Co. (La.)* 748.

§ 114. In action by owners of property abutting on streets of a city through which a railroad had constructed its tracks for damages by the construction of the road, evidence *held* to sustain a verdict for plaintiff.—*Lastrapes v. Colorado Southern, N. O. & P. R. Co. (La.)* 791.

## VIL SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

§ 131. Act 1902, p. 101, No. 74, forbidding the lease of a competing railroad to another, *held* not to apply to a certain lease.—*New Orleans, Ft. J. & G. I. R. Co. v. New Orleans Southern Ry. Co. (La.)* 467.

## X. OPERATION.

Carriage of passengers, see Carriers, §§ 245-347.  
Injuries to employes, see Master and Servant, §§ 85-301.

### (B) Statutory, Municipal, and Official Regulations.

Denial of equal protection of laws, see Constitutional Law, § 241.

Deprivation of property without due process of law, see Constitutional Law, § 297.

Laws relating to equipment of lumber cars as denial of right of acquiring, possessing and protecting property, see Constitutional Law, § 87.

### (C) Companies and Persons Liable for Injuries.

§ 200. Where a railroad owning a track gives another railroad the right to use it, it owes the duty of an employe of the other railroad rightfully using the track not to place cars so near the track as to injure him while on a passing car.—*Southern Ry. Co. v. Arnold (Ala.)* 293.

### (E) Accidents to Trains.

§ 297. In an action for injuries to a railroad employe from being struck by a car while on a passing train, whether he was negligent *held* under the evidence to be for the jury.—*Southern Ry. Co. v. Arnold (Ala.)* 293.

### (F) Accidents at Crossings.

Applicability of instructions to case, see Trial, § 251.

Sufficiency of demurrer to complaint, see Pleading, § 205.

§ 310. The engineer of a switch engine must be presumed to know the conditions at a public crossing.—*Louisville & N. R. Co. v. Davaner (Ala.)* 276.

§ 310. It is the duty of an engineer of a train to know that the way is clear at a populous crossing.—*Louisville & N. R. Co. v. Davaner (Ala.)* 276.

§ 312. It is the duty of an engineer to give warning signals at short intervals while passing through a town.—*Louisville & N. R. Co. v. Davaner (Ala.)* 276.

§ 344. A count in a complaint in an action for injuries received while crossing a railroad track *held* sufficient.—*Louisville & N. R. Co. v. Johnson (Ala.)* 300.

§ 344. A demurrer to a plea of contributory negligence, addressed to a count in a complaint charging wanton or willful misconduct, *held* properly sustained.—*Louisville & N. R. Co. v. Johnson (Ala.)* 300.

§ 347. Evidence in an action against a railroad company for injuries received while crossing its track *held* admissible.—*Louisville & N. R. Co. v. Johnson (Ala.)* 300.

§ 350. Whether a train had started back when a crossing was attempted, and plaintiff knew it when he went on the crossing, *held* for the jury.—*Louisville & N. R. Co. v. Davaner (Ala.)* 276.

§ 350. Whether it was wanton misconduct to reverse a train after clearing a populous crossing and immediately recross it *held* for the jury.—*Louisville & N. R. Co. v. Davaner (Ala.)* 276.

§ 351. In an action for the death of one killed at a railroad crossing, instructions *held* erroneous as ignoring the "last clear chance" doctrine.—*Stanford v. St. Louis & S. F. R. Co. (Ala.)* 110.

§ 351. An instruction as to contributory negligence *held* properly refused.—*Louisville & N. R. Co. v. Johnson (Ala.)* 300.

§ 351. An instruction, in an action against a railroad company for injuries received while crossing defendant's track, as to defendant's negligence, *held* properly refused.—*Louisville & N. R. Co. v. Johnson (Ala.)* 300.

§ 351. A requested instruction as to damages, in an action for injuries received while crossing defendant's track, *held* properly refused.—*Louisville & N. R. Co. v. Johnson (Ala.)* 300.

### (G) Injuries to Persons on or near Tracks.

Applicability of instructions to pleading and evidence, see Trial, § 252.

Argumentative instructions, see Trial, § 240.

Injuries to persons on or near street railroad tracks, see Street Railroads, §§ 81-118.

§ 355. One is not necessarily a trespasser because on a railroad track, if at the point the track is in or on a public highway.—*Republic Iron & Steel Co. v. White (Ala.)* 141.

§ 355. A person walking along a path at the side of a railroad track, who is killed at a point not at a crossing or in a street, is a trespasser.—*Martin v. Union Springs & N. Ry. Co. (Ala.)* 897.

§ 359. A child lying down on a railroad track between the rails, with his foot over a rail, is a trespasser.—*Southern Ry. Co. v. Smith (Ala.)* 390.

§ 367. Trainmen *held* required to keep a lookout where persons are in the habit of crossing the track.—*Southern Ry. Co. v. Smith (Ala.)* 390.

§ 369. The rule that trainmen need not keep a lookout for a trespasser on the track applies to children and adults.—*Southern Ry. Co. v. Smith (Ala.)* 390.

§ 376. After discovering a person in dangerous proximity to a track or on the track, it is the duty of the person in charge of an approaching engine to take such steps as will avoid injuring such person, and failure to do so is negligence.—*Louisville & N. R. Co. v. Johnson* (Ala.) 300.

§ 376. A railroad only owed to a trespasser, killed while walking along the track, the duty not to have injured him after discovering his peril.—*Martin v. Union Springs & N. Ry. Co.* (Ala.) 897.

§ 378. The presumption that one on a railroad track will move off on seeing a train approaching does not apply to a child only six years old.—*Southern Ry. Co. v. Smith* (Ala.) 390.

§ 381. Person injured at crossing *held*, under the evidence, guilty of negligence per se.—*Tatum v. Rock Island, A. & L. R. Co.* (La.) 796.

§ 387. Negligence of person injured at crossing *held* to be defense in an action to recover for injuries and resulting death.—*Tatum v. Rock Island, A. & L. R. Co.* (La.) 796.

§ 391. To operate a train through a town while it is dark at a rate of speed prohibited by ordinance does not, without more, constitute that wantonness which is the equivalent of intentional wrong, and which would render the railroad liable for the death of a trespasser.—*Martin v. Union Springs & N. Ry. Co.* (Ala.) 897.

§ 394. A complaint in an action for the death of a child struck by a train *held* sufficient, without alleging that the trainmen discovered that the child could not or would not extricate himself from his peril.—*Southern Ry. Co. v. Smith* (Ala.) 390.

§ 394. The complaint in an action for injuries to an infant or adult struck by a train must show that the person injured was not a trespasser.—*Southern Ry. Co. v. Smith* (Ala.) 390.

§ 394. A complaint in an action against a railroad for the death of a child struck by a train *held* demurrable for failure to allege facts showing that the child was not a trespasser.—*Southern Ry. Co. v. Smith* (Ala.) 390.

§ 394. Counts in a complaint for the death of a person while walking along a railroad track *held* insufficient as a charge of mere negligence, in failing to show that decedent was not a trespasser, to whom they owed only the duty of not injuring him after discovering his peril.—*Martin v. Union Springs & N. Ry. Co.* (Ala.) 897.

§ 394. Counts in a complaint for the death of a person walking along a railroad track *held* to charge mere negligence, and not to charge wantonness and willfulness, authorizing a recovery for the death of a trespasser.—*Martin v. Union Springs & N. Ry. Co.* (Ala.) 897.

§ 396. Code 1907, § 5476, construed, and *held* to place on a railroad the burden of showing compliance with the requirements of the statute as to the giving of signals on the approach of trains to public crossings.—*Southern Ry. Co. v. Smith* (Ala.) 390.

§ 396. One suing for the death of a child struck by a train has the burden of proving the failure of the trainmen to exercise due care after the discovery of the peril of the child.—*Southern Ry. Co. v. Smith* (Ala.) 390.

#### (H) Injuries to Animals on or near Tracks.

§ 439. *Held* unnecessary to allege that trainmen, at the time of killing a mule, were acting within the scope of their authority, where it

may be inferred from other facts well pleaded.—*Central of Georgia Ry. Co. v. Williams* (Ala.) 328.

§ 441. Where the evidence conclusively showed that a mule was killed by defendant's train at one of the places specified in Code 1907, § 5473, the burden was, by section 5476, on defendant to acquit itself of negligence.—*Central of Georgia Ry. Co. v. Williams* (Ala.) 328.

§ 441. In an action against a railroad company for injury to a horse by becoming frightened at a train, the burden was upon plaintiff to establish liability; Code 1906, § 1963, not applying to make out a prima facie case of negligence.—*Mobile, J. & K. C. R. Co. v. Kea* (Miss.) 628.

§ 446. Though an engineer may have been negligent, *held*, that it did not follow as a matter of law that the killing of a cow on the track was the proximate result of such negligence.—*Central of Georgia Ry. Co. v. Simons* (Ala.) 50.

§ 446. In an action against a railroad for the killing of a horse, *held* a question for the jury whether defendant's train did the killing.—*Birmingham Belt R. Co. v. Norris* (Ala.) 91.

#### (I) Fires.

Motion to strike pleas setting up contributory negligence, see Pleading, § 352.

§ 459. In an action against a railroad for injuries from fire, an instruction, predicated a finding for defendant on failure of plaintiff to take due care to protect his property, *held* properly rejected.—*Louisville & N. R. Co. v. Smith* (Ala.) 241.

§ 460. In an action for fire set by a locomotive, a plea that plaintiff negligently allowed inflammable material cast by defendant near plaintiff's office to remain there *held* not demurrable.—*Sullivan Timber Co. v. Louisville & N. R. Co.* (Ala.) 941.

§ 478. In an action against a railroad, counts of a declaration, averring that damages were caused by reason of the fire, *held* not subject to demurrer.—*Louisville & N. R. Co. v. Smith* (Ala.) 241.

§ 478. In an action against a railroad for damages from fire, a complaint *held* not defective for the alternative averment that defendant "caused or allowed" the damage.—*Louisville & N. R. Co. v. Smith* (Ala.) 241.

§ 480. Testimony for plaintiff, that witness saw sparks emitted from defendant's locomotive which set fire to cotton of which plaintiff's bales were a part, raised a presumption that the fire igniting the cotton was the result of negligence in the equipment, construction, and operation of the locomotive.—*Louisville & N. R. Co. v. Smith* (Ala.) 241.

§ 490. In an action for fire set by a locomotive, the burden *held* on defendant to show, at least prima facie, that the fire was emitted without negligence in the construction and operation of the locomotive.—*Sullivan Timber Co. v. Louisville & N. R. Co.* (Ala.) 941.

§ 481. In an action against a railroad for damages to cotton by fire, evidence *held* irrelevant as throwing no light on the measure of damages.—*Louisville & N. R. Co. v. Smith* (Ala.) 241.

§ 482. That a locomotive running 50 miles an hour emits more sparks than one running 25 miles per hour does not of itself show that the former is negligently operated or equipped.—*Sullivan Timber Co. v. Louisville & N. R. Co.* (Ala.) 941.

§ 484. In an action against a railroad for damages to cotton by fire, evidence *held* to render the question of negligence one for the jury.—*Louisville & N. R. Co. v. Smith* (Ala.) 241.

## **RAPE.**

### **I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 16. A conviction of assault with intent to rape set aside.—*Rushton v. State* (Fla.) 486.

### **II. PROSECUTION AND PUNISHMENT.**

#### **(B) Evidence.**

Evidence of other offense, see Criminal Law, § 369.

Presumptions as to capacity of accused infant, see Infants, § 66.

## **RATE.**

Of speed of trains, violation of ordinance as wantonness, see Railroads, § 391.

Transportation rates, see Carriers, § 249.

## **RATIFICATION.**

Of acts of agent, see Principal and Agent, § 175.

Of acts of married woman, see Husband and Wife, § 89.

## **REAL ACTIONS.**

See Ejectment; Forcible Entry and Detainer, §§ 9-34.

§ 8. The court in a petitory action by heirs held not entitled, on giving plaintiffs judgment for the interest claimed, to adjudge that the taxes and improvements are equal to the revenues.—*Pearce v. Ford* (La.) 771.

## **REAL ESTATE AGENTS.**

See Brokers.

## **REAL PROPERTY.**

Assets of estate of decedent, see Executors and Administrators, §§ 129, 130.

Conveyances, see Deeds; Vendor and Purchaser. Effect of statute of frauds on agreements relating to real property, see Frauds, Statute of, §§ 56, 75.

Mortgage, see Mortgages.

Remedies involving or affecting, see Ejectment; Forcible Entry and Detainer, §§ 9-34; Real Actions.

Remedies of heirs, see Descent and Distribution, § 90.

Sales by executors or administrators, see Executors and Administrators, §§ 343-402.

Trespass to, see Trespass.

## **REASONABLE DOUBT.**

Degree of proof in criminal prosecutions, see Criminal Law, § 561.

Instructions as to reasonable doubt, see Criminal Law, § 789.

## **REBUTTAL.**

Admission in rebuttal of evidence proper in chief, see Trial, § 63.

Scope of evidence in rebuttal, see Criminal Law, § 683.

## **RECEIPTS.**

Parol or extrinsic evidence to contradict or vary, see Evidence, § 408.

Shipping receipts and bills of lading, see Carriers, §§ 58, 62.

## **RECEIVERS.**

Of corporations in general, see Corporations, § 553.

Procurement of receivership for pro session of pledgee as ground for se see Sequestration, § 4.

## **II. APPOINTMENT, QUALIFICATION AND TENURE.**

Effect of supersedeas or stay, see Error, § 489.

Necessity of affidavit on appeal from refusing to appoint receiver, see Appor, § 361.

Time for appeal from order of appointment, see Appeal and Error, § 344.

## **III. TITLE TO AND POSSESSION OF PROPERTY.**

§ 74. Unauthorized interference with possession of a receiver cannot be justified on ground that the person interfering was the appointment ill-advised or illegal. *Security Brewing Co. (La.)* 816.

§ 74. Actual notice of appointment of receiver is sufficient to render person with his possession guilty of contempt if no official notice has been given.—*Security Brewing Co. (La.)* 816.

§ 74. Interference with the possession of a receiver, or obstruction of his exercise of the right of possession, is punishable for contempt.—*Blaise v. Security Brewing Co. (La.)* 816.

§ 77. Act No. 128, p. 163, of 1884 limit the lessor's right of pledge to one year from the appointment of a receiver.—*I. Trager Co. v. Cavaroc Co. (L.)*

## **IV. MANAGEMENT AND DISPOSITION OF PROPERTY**

(D) Sale and Conveyance or Disposition of Property.

§ 135. The appointment of a receiver does not divest possession of pledgee, nor does sale of property pledged for less secured debt.—*Ozan Lumber Co. v. Lumber Co. (La.)* 839.

## **RECEPTION.**

Of evidence at trial, see Criminal Law, § 683; Trial, §§ 46-85.

## **RECITALS.**

In judgment, construction and operation of, see Judgment, § 525.

## **RECLAMATION.**

Districts, see Drains, § 18.

## **RECOGNIZANCES.**

See Bail.

## **RECONVENTION.**

See Set-Off and Counterclaim.

## **RECORDS.**

Of particular facts, acts, instruments, proceedings not judicial.

Agricultural lien or privilege, see Agriculture, § 12.

Dedication of property to public use, see Dedication, § 19.

Of judicial proceedings.

Information or complaint, see Indictment, § 43.

Judgment, see Judgment, § 286.

Judgment in criminal prosecution, see Criminal Law, §§ 995, 996.

Transcript on appeal or writ of error, see Appeal and Error, §§ 494-690; Criminal Law, §§ 1088-1128.

*Records as notice, and as affecting priorities.*  
See Chattel Mortgages, § 153.

§ 17. Parol evidence admissible under Acts 1886, p. 92, No. 57, to prove contents of a deed alleged to be destroyed, *held* insufficient.—Babington Bros., Limited, v. Barber (La.) 844.

## RECOUPMENT.

See Set-Off and Counterclaim.

## RECUSATION.

See Judges, §§ 51, 56.

Of prosecuting attorney as affecting right of judge to appoint counsel for prosecution, see Criminal Law, § 639.

## REDIRECT EXAMINATION.

See Witnesses, §§ 286, 287.

## REFERENCE.

### III. REPORT AND FINDINGS.

Review of questions of fact, see Appeal and Error, §§ 1017-1022.

## REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

### II. PROCEEDINGS AND RELIEF.

§ 36. A complaint to reform a deed because of mistake must allege the mistake.—Page v. Whatley (Ala.) 116.

§ 45. Mistake as ground for reformation of instrument must be proved by satisfactory evidence.—Page v. Whatley (Ala.) 116.

§ 45. Equity grants reformation of deeds only where error certainly appears.—Page v. Whatley (Ala.) 116.

§ 45. Where it is sought to reform a deed to conform with a parol agreement, proof thereof should be full and convincing.—Prior v. Davis (Fla.) 535.

## REFORMATORIES.

See Convicts.

## REFUNDING.

Taxes paid, see Taxation, § 535.

## REGISTERS OF DEEDS.

See Records.

## REGISTRATION.

See Records.

Of voters, see Elections, §§ 95, 98.

## REHEARING.

See New Trial.

On appeal or writ of error, see Appeal and Error, § 832.

## RELATIONSHIP.

Disqualification of witness by relationship, to party, see Witnesses, §§ 52-61.

Of juror to party or persons interested in suit as affecting competency, see Jury, § 90.

## RELEASE.

See Payment.

From arrest, see Bail.

*Of particular classes of rights and liabilities.*  
See Mortgages, §§ 298, 311.

Judgment lien, see Judgment, § 800.

Liability of carrier in respect to goods, see Carriers, § 159.

### I. REQUISITES AND VALIDITY.

§ 17. A settlement of a claim for injuries, if obtained under certain circumstances, *held* invalid for fraud.—Louisville & N. R. Co. v. Huffstutler (Ala.) 146.

### III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 52. A replication in an injury action *held* sufficiently to allege that plaintiff at the time of an alleged settlement was in such an unsound mental condition as to render him incapable of making a binding contract.—Louisville & N. R. Co. v. Huffstutler (Ala.) 146.

## RELEVANCY.

Of evidence, see Criminal Law, §§ 338-368; Evidence, §§ 106-117.

## RELIGIOUS SOCIETIES.

§ 12. Action of a council, not shown to have authority, in excommunicating a pastor of a local church, *held* not ground for enjoining the pastor and his followers among his congregation from using the church property.—Mason v. Lee (Miss.) 625.

§ 14. The courts will not take jurisdiction of matters concerning religious associations, except to protect some property right.—Houston v. Howze (Ala.) 266.

§ 20. It was not within the authority of a minority of church members to surrender a lot to the church pastor under the guise of a dation en paiement.—Tabernacle Baptist Church v. Green (La.) 1.

## REMAINDERS.

Conclusions in pleading in action by remainderman, see Pleading, § 8.

Duties and liabilities of life tenants as to remaindermen, see Life Estates.

## REMAND.

Of cause by appellate court, see Appeal and Error, §§ 1203-1206.

## REMEDIES.

See Action.

Constitutional guaranty of right to justice, and remedies for injuries, see Constitutional Law, §§ 327, 329.

## REMEDY OVER.

By insurer against person causing loss, see Insurance, § 606.

## REMISSION.

Of debt, see Release.

Of part of claim affecting jurisdictional amount in controversy, see Courts, § 121.

## REMITTITUR.

Of cause by appellate court, see Appeal and Error, §§ 1203-1206.



**REMOVAL.**

Of debtor as ground for attachment, see Attachment, § 30.  
 Of mortgaged property by mortgagor, see Chattel Mortgages, § 229.  
 Of public officers in general, see Officers, § 66.

**REMOVAL OF CAUSES.****III. CITIZENSHIP OR ALIENAGE OF PARTIES.****(B) Separable Controversies.**

§ 61. Method of determining whether action is separable, so as to be removable to the federal court, stated.—Southern Ry. Co. v. Arnold (Ala.) 293.

§ 61. A complaint *held* not to state separable causes against a nonresident railroad company and other resident defendants, so as to warrant removal of the case against the railroad company to the federal court.—Southern Ry. Co. v. Arnold (Ala.) 293.

**REMOVAL OF CLOUD.**

See Quieting Title.

**RENEWAL.**

Of lease, see Landlord and Tenant, § 90.

**RENT.**

See Landlord and Tenant, §§ 190-265.  
 Recovery in action of trespass, see Trespass, § 50.  
 Rights of life tenant, see Life Estates, § 21.

**REOPENING CASE.**

For further evidence, see Trial, § 68.

**REPAIRS.**

Of demised premises, see Landlord and Tenant, § 150.  
 Of streets and other public ways, duty of municipality, see Municipal Corporations, § 757.

**REPEAL.**

Of constitutional provisions, see Constitutional Law, § 24.  
 Of statute, see Statutes, §§ 159, 161.

**REPETITION.**

Of instructions, see Trial, § 280.

**REPLEVIN.**

See Detinue.

**REPRESENTATION.**

Of bank by officers and agents, see Banks and Banking, §§ 109, 116.  
 Of corporation by officers and agents, see Corporations, §§ 399-432.

**REPRESENTATIONS.**

False representations, see False Pretenses; Fraud.  
 In application for insurance, see Insurance, §§ 282, 723.

**REPRESENTATIVES.**

Personal representatives, see Executors and Administrators.

**REPUGNANCY.**

Implied repeal of statute by inconsistent or repugnant act, see Statutes, § 159.  
 In allegations of pleading, see Pleading, § 21.  
 In description of boundaries, see Boundaries, § 3.  
 In instructions to jury, see Trial, § 243.  
 Of constitutional amendment as against original provisions, see Constitutional Law, § 24.

**REPUTATION.**

Of parties or other persons, evidence of in civil actions in general, see Evidence, § 106.  
 Of witness, see Witnesses, §§ 337-358.

**REQUESTS.**

For instructions, see Criminal Law, §§ 825-830; Trial, §§ 255-261.  
 For instructions, necessity for purposes of review, see Appeal and Error, § 216.

**RESCISSION.**

Cancellation of written instrument, see Cancellation of Instruments.  
 Of contract, see Contracts, §§ 266, 270.  
 Of contract of sale, see Vendor and Purchaser, § 102.  
 Of gift, see Gifts, § 41.  
 Of insurance policy, see Insurance, § 229.

**RESERVATIONS.**

Creation of easement by reservation in grant, see Easements, § 14.  
 In conveyances of timber, see Logs and Logging, § 3.

**RES GESTÆ.**

In civil actions, see Evidence, §§ 121, 127.  
 In criminal prosecutions, see Criminal Law, §§ 364-368.

**RESIDENCE.**

Of parties as determining jurisdiction of federal courts, see Removal of Causes, § 61.

**RES JUDICATA.**

See Judgment, §§ 540-584, 668-715.

**RESPONDEAT SUPERIOR.**

See Master and Servant, §§ 302-332; Principal and Agent, § 155.

**RESPONSIVENESS.**

Of answers of witnesses, see Witnesses, § 248.

**RESTORATION.**

Of consideration on cancellation of instrument, see Cancellation of Instruments, § 24.  
 Of consideration on rescission of contracts in general, see Contracts, § 266.  
 Of lost records, see Records, § 17.

**RETURN.**

Of record for purpose of review, see Appeal and Error, § 606.

**REVENUE.**

See Taxation.

**REVERSAL.**

Of judgment or order in criminal prosecutions, see Criminal Law, § 1189.

## REVERSIONS.

Landlord's reversion, see Landlord and Tenant, § 63.  
Right of reversioner to sue for partition, see Partition, § 19.

## REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1019-1189; Habeas Corpus.  
Of assessment of taxes, see Taxation, §§ 474-499.  
Of judgment of justice of the peace, see Justices of the Peace, § 174.  
Right to trial by jury on appeal or other proceeding for review, see Jury, § 17.

## REVISION.

Of statutes, see Statutes, § 231.

## REVOCATION.

See Cancellation of Instruments.  
Of agency, see Brokers, § 44; Principal and Agent, § 34.  
Of gift, see Gifts, § 41.  
Of liquor licenses, see Intoxicating Liquors, § 106.

## RIGHT OF WAY.

See Easements.  
Over street railroad tracks, see Street Railroads, § 85.

## RIPARIAN RIGHTS.

See Navigable Waters, § 39; Waters and Water Courses, § 51.

## RISKS.

Assumed by servant, see Master and Servant, §§ 203-222, 295.  
Within insurance policy, see Insurance, § 402.

## RIVERS.

See Navigable Waters.  
Riparian rights, see Waters and Water Courses, § 51.

## ROADS.

See Highways; Street Railroads.  
In cities, see Municipal Corporations, §§ 648-706.

## ROLLS.

Assessment roll, see Taxation, § 415.

## RULES.

Of master governing work of servant, see Master and Servant, §§ 144, 243.  
Of telegraph companies relating to business hours, see Telegraphs and Telephones, § 31.

## SABBATH.

See Sunday.

## SAFES.

Requirement of insurance policy as to keeping books and papers in safe, see Insurance, § 335.

## SALARY.

Of municipal officers, see Municipal Corporations, § 164.

## SALES.

Conclusiveness, as against buyer of judgment against seller, see Judgment, § 682.  
Powers of sale, see Powers.  
Regulation of weights and measures, see Weights and Measures.  
Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

*Sales by or to particular classes of persons.*

See Executors and Administrators, §§ 343-402; Principal and Agent, § 103; Receivers, § 135.  
Mortgagors, see Chattel Mortgages, § 229.  
Trustees, see Trusts, § 203.

*Sales of particular species of, or estates or interests in, property.*

See Intoxicating Liquors.

Decedent's property, see Executors and Administrators, §§ 343-402.

Logs or lumber, see Logs and Logging, § 34.

Mortgaged property, see Chattel Mortgages, § 229.

Real property in general, see Vendor and Purchaser.

Standing timber, see Logs and Logging, § 3.

Trust property, see Trusts, § 203.

*Sales on judicial or other proceedings.*

See Execution, § 272.

By executors or administrators, see Executors and Administrators, §§ 343-402.

By receivers, see Receivers, § 135.

On partition, see Partition, §§ 108, 109.

Tax sales, see Taxation, § 623.

## I. REQUISITES AND VALIDITY OF CONTRACT.

§ 3. A contract considered, and held not changed by certain provisions from a builder's contract to one for the sale of a chattel, so as to make the law governing sales of chattels apply.—Walstrom v. Oliver-Watts Const. Co. (Ala.) 46.

§ 38. The misrepresentation justifying rescission of a contract of sale must be shown to be untrue, the seller must have known or had good reason to believe it untrue, and the buyer must have relied on it.—Crooker v. White (Ala.) 227.

§ 40. A representation by a seller made to induce the buyer to purchase held material, justifying rescission of the contract of sale if fraudulent.—Crooker v. White (Ala.) 227.

§ 52. In a suit to rescind a contract for the sale and purchase of a patent right on the ground of the fraudulent representations of the seller, evidence held not to show that fraud was practiced on the buyer.—Crooker v. White (Ala.) 227.

## IV. PERFORMANCE OF CONTRACT.

(C) *Delivery and Acceptance of Goods.*

§ 163. A seller's notice to the buyer of inability to furnish the balance of the goods held a breach of the contract.—Minor's Estate v. Crusel (La.) 590.

§ 176. The buyer of goods held bound to pay the price to the seller's assignee in due course.—Farmers' Loan & Trust Co. v. Rainer (Miss.) 491.

## V. OPERATION AND EFFECT.

(D) *Bona Fide Purchasers.*

Of mortgaged property, see Chattel Mortgages, § 153.

## VI. WARRANTIES.

§ 260. The warranty by a seller that an unsound horse sold was sound would not be a

fraud unless the seller knew of its unsoundness.—*Jordan v. Austin* (Ala.) 70.

§ 262. Buyer *held* entitled to rely on warranty, except as to patent defects, and not bound to make any examination.—*W. T. Adams Mach. Co. v. Turner* (Ala.) 308.

§ 280. Stipulation in contract of sale of machinery *held* not to impose upon the buyer the duty to inspect with a view to giving, within 10 days after the machinery was received, notice of any imperfection.—*W. T. Adams Mach. Co. v. Turner* (Ala.) 308.

§ 285. Contract of sale construed, and *held*, that notice to the seller, within 10 days after the machinery was received, of an imperfection, was not a condition precedent to a recovery for breach of the warranty.—*W. T. Adams Mach. Co. v. Turner* (Ala.) 308.

§ 286. Under contract of sale of machinery, the dependent right of the seller to furnish material or do the work in perfecting the machinery *held* to become extinct after the 10 days to report discovered imperfections to the seller had expired.—*W. T. Adams Mach. Co. v. Turner* (Ala.) 308.

## VII. REMEDIES OF SELLER.

### (B) Actions for Price or Value.

Application of general statute of limitations, see Limitation of Actions, § 46.

Entries in books of accounts as evidence, see Evidence, § 354.

§ 354. Pleas of recoupment in an action for cement sold, alleging delay in its shipment, *held* sufficient, and not subject to demurrer, because not alleging defendant's inability to procure the cement elsewhere.—*Carolina Portland Cement Co. v. Alabama Const. Co.* (Ala.) 332.

§ 354. Plea of recoupment in an action for cement sold, alleging delay in shipment by plaintiff, *held* not demurrable on stated ground.—*Carolina Portland Cement Co. v. Alabama Const. Co.* (Ala.) 332.

§ 358. In an action on a note given for a horse, where defendant claimed a rescission of the sale for breach of warranty, plaintiff *held* entitled to show by defendant's witnesses that defendant had subsequently traded the horse.—*Jordan v. Austin* (Ala.) 70.

§ 358. In an action on a note given for a horse sold, certain testimony *held* admissible.—*Jordan v. Austin* (Ala.) 70.

§ 358. Evidence that statements of account for mantels sold to defendant through her authorized agent were retained without objection was admissible to show agency.—*Childress v. Smith-Echols-Burnett Hardware Co.* (Ala.) 322.

§ 364. Requested charge in an action for breach of warranty *held* properly refused as confusing.—*Byrd v. Beall* (Ala.) 53.

## VIII. REMEDIES OF BUYER.

### (C) Actions for Breach of Contract.

§ 417. Evidence *held* sufficient to show the market price of oil at the point of delivery at the time of defendant's breach of a contract of sale.—*Minor's Estate v. Crusel* (La.) 590.

## IX. CONDITIONAL SALES.

Chattel mortgages distinguished from conditional sales, see Chattel Mortgages, § 6.

§ 465. The statute requiring a conditional sale contract to be recorded is not in force in Jefferson county.—*Higdon v. Garrett* (Ala.) 323.

§ 480. The measure of damages for conversion of personalty conditionally sold stated.—*Higdon v. Garrett* (Ala.) 323.

## SALOONS.

See Intoxicating Liquors.

## SANITY.

Opinion evidence, see Criminal Law,

## SATISFACTION.

See Payment; Release; Tender.

Of mortgage, see Mortgages, §§ 298, 3

## SCALES.

Regulation, see Weights and Measures

## SCHEDULE

In bankruptcy proceedings, see Bankruptcy, § 32.

## SCHOOLS AND SCHOOL DIS'

Laws providing for taxation of property of colored persons for support of his school, for white persons only as abridgment of privileges and immunities of citizenship constitutional Law, § 206; as denial of protection of law, see Constitution, § 220.

## II. PUBLIC SCHOOLS.

### (C) Government, Officers, and Meetings.

§ 53. Under Acts 1902, p. 408, No. 1, removal of members of the parish school directors for "the deplorable condition of the school affairs of the parish" *held* unconstitutional.—*State ex rel. Muller v. Cyr* (La.) 595.

§ 53. Under Acts 1902, p. 408, No. 1, the removal of school directors by the Board of Education *held* not a removal of the Governor; his mere approval of the board of which he was a member, *held* unconstitutional.—*State ex rel. Muller v. Cyr* (La.) 595.

## SCIRE FACIAS.

To enforce bail bond, see Bail, § 90.

## SCROLL.

Execution of tax deed under private sale, see Taxation, § 765.

## SEALS.

Effect of answer in equity not under seal, see Equity, § 310.

On tax deeds, see Taxation, § 765.

## SEARCHES AND SEIZURE.

§ 7. An ordinance prohibiting the sale of intoxicating liquor for lawful or unlawful purposes, and providing for the seizure and forfeiture of such liquor and the arrest of suspected of violating such ordinance, *held* unconstitutional.—*Const. 1901, Bill of Rights* against an unreasonable search or seizure.—*Bessemer v. Eidge* (Ala.) 270.

## SECONDARY EVIDENCE

See Criminal Law, § 398; Evidence, §§ 398, 399.

## SECURITY.

See Bail; Bonds; Chattel Mortgage; Collateral security, see Plea.

In proceedings for injunction, see Injunction, § 235.

On appeal or writ of error, see Appeal and Error, §§ 383, 465, 475.  
To keep the peace, see Breach of the Peace, § 19.

## SEDUCTION.

### II. CRIMINAL RESPONSIBILITY.

§ 46. The weight or sufficiency of corroborative evidence is a question for the jury.—Allen v. State (Ala.) 279.

§ 46. Under Code 1907, § 7297, providing that no indictment or conviction shall be had on the uncorroborated testimony of prosecutrix, the corroboratory evidence is sufficient if it extends to a material fact and satisfies the jury that the woman is worthy of credit.—Allen v. State (Ala.) 279.

§ 46. The corroboration of the prosecutrix need not be as to every material fact but is sufficient if it extends to a material fact and satisfies the jury that the woman is worthy of credit.—Pannell v. State (Ala.) 281.

## SEIZURE.

See Searches and Seizures.

## SELF-DEFENSE.

Defense to prosecution for homicide, see Homicide, §§ 116, 187-194, 300.

## SENTENCE.

See Criminal Law, §§ 977-996.

## SEPARABLE CONTROVERSIES.

Removal from state court, see Removal of Causes, § 61.

## SEPARATE ESTATE.

Of husband or wife, distinguished from community property, see Husband and Wife, § 274.

Of married woman, see Husband and Wife, §§ 114-193.

## SEPARATION.

Of husband and wife, see Divorce.

## SEQUESTRATION.

§ 4. Sequestration of sawmill plant by pledgee in possession held unauthorized.—Ozan Lumber Co. v. Goldonna Lumber Co. (La.) 839.

## SERVANTS.

See Master and Servant.

## SERVICE.

Of copy of indictment or information before trial, see Criminal Law, § 627.

## SERVICES.

See Master and Servant; Work and Labor.

Of broker, sufficiency to entitle to compensation, see Brokers, §§ 54-57.

## SERVITUDE.

See Easements.

## SET-OFF AND COUNTERCLAIM.

Burden of proof, see Evidence, § 96.

Pleading matter of set-off or counterclaim, see Pleading, §§ 138-143.

## I. NATURE AND GROUNDS OF REMEDY.

§ 6. "Recoupment" defined.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

### II. SUBJECT-MATTER.

§ 27. A buyer of farm produce, when sued for breach of contract, is entitled to show and recoup damages for the seller's failure to fulfill his contract.—Red Snapper Sauce Co. v. Bolling (Miss.) 401.

### III. OPERATION AND EFFECT.

§ 56. Recoupment does not confess plaintiff's action, as does the plea of set-off, but denies the right to recover at all, or to the amount claimed.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

§ 59. If plaintiff suing on a note given for a horse sold by him was also indebted to defendant and the debt was pleaded as a set-off, the jury could find for defendant for the sum due, even if plaintiff was not entitled to recover anything, under Code 1907, § 5860.—Jordan v. Austin (Ala.) 70.

§ 59. Where defendant's claim in recoupment equals that of plaintiff, he is entitled to judgment, and, if it exceeds that of plaintiff, to judgment for the excess.—Carolina Portland Cement Co. v. Alabama Const. Co. (Ala.) 332.

## SETTING ASIDE.

Indictment or information, see Indictment and Information, § 140.  
Verdict, see New Trial.

## SETTLEMENT.

See Account Stated; Payment; Release.

Of bill of exceptions, see Criminal Law, § 1092; Exceptions, Bill of, §§ 38, 39.

## SEVERANCE.

Of verdict as to parties, see Trial, § 328.

## SEWERS.

See Drains.

In cities, use and regulation, see Municipal Corporations, § 712.

## SEXUAL INTERCOURSE.

See Rape; Seduction.

## SHARES.

Of corporate stock, see Corporations, § 84.

## SHERIFFS AND CONSTABLES.

### I. APPOINTMENT, QUALIFICATION, AND TENURE.

#### (A) Sheriffs.

§ 6. Under Const. 1901, § 138, and Code 1907, §§ 182, 7191, a sheriff held subject to impeachment for neglect in permitting a negro confined in jail to be lynched.—State v. Cazales (Ala.) 296.

### III. POWERS, DUTIES, AND LIABILITIES.

Service of process in justice's court, statutory provisions, see Justices of the Peace, § 64.

§ 88. Where goods are seized by a sheriff in detinue, it is immaterial where they are kept, so

long as they are kept safely by the officer and ready to be delivered as the law might require.—*Carmichael v. United States Fidelity & Guaranty Co. (Ala.)* 1003.

#### IV. LIABILITIES ON OFFICIAL BONDS.

§ 157. Where a sheriff seized property under a writ of detinue and delivered it to the plaintiff in the detinue suit before the expiration of the five days within which the defendant had the right under the statute (Code 1907, § 3780) to execute a replevy bond, he violated the statute and was guilty of a breach of his bond.—*Carmichael v. United States Fidelity & Guaranty Co. (Ala.)* 1003.

§ 171. In a suit for breach of a sheriff's bond in failing to require and take a forthcoming bond of plaintiff in detinue, evidence held sufficient to make the question whether a forthcoming bond was taken one for the jury.—*Carmichael v. United States Fidelity & Guaranty Co. (Ala.)* 1003.

#### SHIPPING.

See Navigable Waters.

Marine insurance, see Insurance, § 402.

#### SHIPWRECKS.

Marine insurance, see Insurance, § 402.

#### SIDEWALKS.

Injuries from defects or obstructions, see Municipal Corporations, §§ 755-816.

#### SIGNALS.

From trains, see Railroads, §§ 312, 367, 369.

#### SIGNATURES.

To pleading, see Equity, § 310.

To will, see Wills, § 111.

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§ 43. A parol contract to convey land is not enforceable unless the vendor is required to require the payment of the price and delivery of possession, is enforceable notwithstanding the statute of frauds.—*Bentley v. Barnes (Ala.)* 361.

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§ 129. Attorney's fees are not recoverable as part of the damages in a suit for specific performance.—*Manning v. Cohen (La.)* 778.

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§ 13. Act Nov. 23, 1907 (Sp. Acts 1907, p. 49), held passed in violation of Const. 1901, § 62, and a nullity.—*State v. Smith* (Ala.) 364.

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§ 23. A wrong date in a message from one branch of the Legislature to the other transmitting a bill may be treated as a clerical misprision.—*Rushton v. State* (Fla.) 486.

§ 64. A statute may be valid in part and invalid in part.—*State v. Cognevich* (La.) 439; *In re Cognevich*, Id.

§ 64. Acts 1908, p. 134, No. 92, providing for the standard measure, held void.—*State v. Cognevich* (La.) 439; *In re Cognevich*, Id.

§ 64. The unconstitutionality of the exemption of lighting and electric railway companies and the department of police and public buildings of New Orleans from Act No. 178, p. 250, of 1908, regulating the licensing of electricians, held to vitiate the entire act.—*State v. Gantz* (La.) 524.

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§ 108. An act is not invalid as containing a plurality of subjects if, however numerous the heads in its title, or provisions, they are germane to the general subject.—*Allman v. City of Mobile* (Ala.) 238.

§ 109. The requirement of Const. 1901, § 45, held met where the provisions of a statute are referable and cognate to the subject expressed in the title.—*Darrington v. State* (Ala.) 398.

§ 109. Const. art. 31, requiring the object of an act to be expressed in its title, limits an act purporting to amend a section of the general law to the subject-matter thereof.—*State v. Tolman* (La.) 607.

§ 110½. The subject-matter of Code 1907, § 703, subd. "G," amendatory of Act Oct. 9, 1903, p. 500, §§ 3, 4, held to be, as required by

Const. 1901, § 45, expressed in the title of Act Aug. 15, 1907 (Acts 1907, p. 893) of which it is section 3, subd. "G."—Revenue and Road Com'rs of Mobile County v. State (Ala.) 972.

§ 114. Act No. 209, p. 312, of 1908, amending Act No. 171, p. 392, § 5, of 1898, which imposed a license tax on pawnbrokers only, *held* unconstitutional to the extent that it provides for a license tax on money lenders; the title not expressing the object of the act, as required by Const. art. 31.—State v. Tolman (La.) 607.

§ 118. The title and the body of Sp. Acts 1907, p. 189, *held* to contain but one subject expressed in the title, as required by Const. § 45.—State v. Semmes (Ala.) 120.

§ 118. Under Const. 1901, § 45, the title of Gen. Acts 1907, p. 366, *held* sufficient to include certain clauses in the body of the act.—Darrington v. State (Ala.) 396.

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§ 140. Act Aug. 15, 1907 (Acts 1907, p. 893), *held*, notwithstanding its title, not to amend Act Oct. 9, 1903 (Acts 1903, p. 504) § 8.—Revenue and Road Com'rs of Mobile County v. State (Ala.) 972.

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§ 211. The title of act No. 74, p. 113, of 1886, providing for the recusation of district attorneys prescribed by section 2 of act No. 35, p. 35, of 1877, *held* not to enlarge the enacting clause of the act.—State v. Boasberg (La.) 162.

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§ 231. That section of two conflicting sections of a general compilation or code of laws should prevail which presents the last legislative will.—Hillsborough County Com'rs v. Jackson (Fla.) 423.

§ 231. Gen. St. 1906, § 976, and section 4108, *held* in conflict, and, under section 976, the latest expression of the Legislature, there is no authority in a county to contract for feeding its prisoners.—Hillsborough County Com'rs v. Jackson (Fla.) 423.

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§ 113. In an action against an electric railway company for death of a traveler, evidence as to the speed of the car from which intestate had just alighted before crossing the opposite track *held* admissible.—Birmingham Ry., Light & Power Co. v. Morris (Ala.) 198.

§ 114. Certain proof *held* to raise a prima facie case of the killing of an animal by an electric car and of negligence in the operation thereof.—Mobile Light & R. Co. v. Mackay (Ala.) 1035.

§ 114. In an action for injuries caused by collision with a street car, evidence *held* to sustain verdict for defendant.—Alpern v. New Orleans Ry. & Light Co. (La.) 483.

§ 114. In an action against a street railroad for the death of a child struck by a car, evidence *held* to show negligence in the operation of the car.—Pascagoula St. Ry. & Power Co. v. Brondum (Miss.) 97.

§ 117. In an action for personal injury and injury to a horse and vehicle in a collision with a street car, certain questions *held* for the jury.—Birmingham Ry., Light & Power Co. v. McLain (Ala.) 149.

§ 117. Whether an animal near a street railroad track showed a likelihood of moving onto the track, so as to require the car to be stopped or its speed slackened, is a question for the jury, in an action for killing it.—Mobile Light & R. Co. v. Mackay (Ala.) 1035.

§ 117. Whether an electric railroad was liable for the killing of a mule by a car *held*, under the evidence, for the jury.—Mobile Light & R. Co. v. Mackay (Ala.) 1035.

§ 117. Whether a motorman saw the danger in which a traveler was placed by reason of his horse becoming frightened by the car, and whether the motorman exercised reasonable care, *held*, under the evidence, for the jury.—Austin v. Vicksburg Traction Co. (Miss.) 632.

§ 118. In an action against an electric railroad company for the death of a traveler, a requested charge *held* properly refused as eliminating intestate's peril and as raising a distinction between the cars required of an experienced motorman and of the one in question.—

§ 118. A requested charge *held* properly refused as eliminating the duty of defendant's motorman to warn intestate of her danger.—Birmingham Ry., Light & Power Co. v. Morris (Ala.) 198.

## STREETS.

See Highways.

Crossing by railroads, accidents, at crossings, see Railroads, §§ 310-351.

Dedication of, see Dedication.

Improvement of, see Municipal Corporations, §§ 266-446.

Injuries from defects or obstructions, see Municipal Corporations, §§ 755-816.

Injuries to persons on street by collision with street cars, see Street Railroads, §§ 81-118.

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## STRIKING OUT.

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## SUBMERGED LANDS.

See Navigable Waters, §§ 36, 37.

## SUBPŒNA.

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## SUBROGATION.

Of insurer, see Insurance, § 606.

## SUBSCRIPTIONS.

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## SUCCESSION.

See Descent and Distribution.

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## SUFFRAGE.

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## SUGAR CANE.

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## SUMMONING.

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## SUNDAY.

§ 13. At common law the execution of a contract on Sunday did not vitiate it.—Hooks v. State (Fla.) 586.

§ 13. Whether or not a contract is affected by having been executed on Sunday depends upon the statute.—Hooks v. State (Fla.) 586.

§ 13. The execution of a note, mortgage, or other contract on Sunday *held* not prohibited by Gen. St. 1906, § 3565.—Hooks v. State (Fla.) 586.

**SUPERSEDEAS.**

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**SUPERVISION.**

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**SUPERVISORS.**

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Of states, see Courts, §§ 210-224.

**SURRENDER.**

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**SURVIVAL.**

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**SURVIVORSHIP.**

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**SUSPENSIVE APPEALS.**

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**TAXATION.**

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**I. NATURE AND EXTENT OF POWER IN GENERAL.**

§ 1. "Tax" defined.—Louisiana Ry. & Navigation Co. v. Madere (La.) 609.

**II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.**

Deprivation of property without due process of law, see Constitutional Law, § 284.  
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**III. LIABILITY OF PERSONS AND PROPERTY.**

(A) Private Persons and Property in General.

§ 79. A contract for sale of timber held to pass the ownership so that the buyers were liable for taxes thereon.—Craighead v. Connely (La.) 804.

**(D) Exemptions.**

Amendment of constitutional provisions, see Constitutional Law, § 9.

§ 196. The general temporary exemption of a new railroad from "taxation" granted by Const. 1898, art. 230, and the constitutional amendment of 1904 (Laws 1904, p. 19, No. 16), held to include ad valorem levee district taxes, but not local assessments and the mileage tax.—Louisiana Ry. & Navigation Co. v. Madere (La.) 609.

§ 206. Delegated power to levy a tax on all property within a district held not to extend to property coming into existence under constitutional exemption from taxation.—Louisiana Ry. & Navigation Co. v. Madere (La.) 609.

**IV. PLACE OF TAXATION.**

§ 253. Acts 1908, p. 230, No. 170, held to be a mere modification of the revenue law, with no retroactive effect.—Orient Ins. Co. v. Board of Assessors (La.) 778.

**V. LEVY AND ASSESSMENT.**

Deprivation of property without due process of law, see Constitutional Law, § 284.

**(C) Mode of Assessment in General.**

§ 347. An assessment held not null because grossly excessive.—Orient Ins. Co. v. Board of Assessors (La.) 778.

**(E) Assessment Rolls or Books.**

§ 415. Assessment of land of "Jack Mitchell" to "Jacob Mitchell" held fatal to tax title founded thereon.—State Land Co. v. Mitchell (Ala.) 117.

(G) Review, Correction, or Setting Aside of Assessment.

§ 474. On reassessment by a commissioner, he is required to return it to the commissioners' court, by which notice to the taxpayer is given, in case of undervaluation.—State v. Sloss-Sheffield Steel & Iron Co. (Ala.) 366.

§ 474. A tax commissioner is authorized to make an additional assessment, when in his opinion there has been an undervaluation of the property for taxation.—State v. Sloss-Sheffield Steel & Iron Co. (Ala.) 366.

§ 486. Where a reassessment is made by a tax commissioner, the issue before the commissioners' court is whether the assessment made

by the tax assessor is correct.—*State v. Sloss-Sheffield Steel & Iron Co. (Ala.)* 366.

§ 491. In a proceeding by the tax commissioner to raise an assessment, under Code 1907, § 2250 (Gen. Acts 1903, p. 295), it is not necessary that his reassessment should follow the assessment made by the tax assessor or the return of the taxpayer.—*State v. Sloss-Sheffield Steel & Iron Co. (Ala.)* 366.

§ 491. On a return of a tax commissioner's reassessment, the commissioners are to determine the valuation of the property on the basis of the original assessment.—*State v. Sloss-Sheffield Steel & Iron Co. (Ala.)* 366.

§ 493. On appeal from a tax assessment to the circuit court, neither party can object to the return or reassessment made by the tax commissioner.—*State v. Sloss-Sheffield Steel & Iron Co. (Ala.)* 366.

§ 493. On appeal to the circuit court from a tax assessment reviewed by the county commissioners, the hearing is de novo, as provided by Code 1907, §§ 2148, 2265.—*State v. Sloss-Sheffield Steel & Iron Co. (Ala.)* 366.

§ 493. On appeal in a tax proceeding to the circuit court, the state may claim a valuation in excess of that of the tax commissioner, the taxpayer's return, or that found by the commissioners' court.—*State v. Sloss-Sheffield Steel & Iron Co. (Ala.)* 366.

§ 493. A declaration on appeal from a tax assessment properly made no reference to the additional assessment by the tax commissioner or the commissioners' court.—*State v. Sloss-Sheffield Steel & Iron Co. (Ala.)* 366.

§ 499. The operation of Revenue Law (Acts 1898, p. 360, No. 170) § 26, prescribing the limitation for an action to test an assessment, cannot be stayed by agreement of tax officers.—*Orient Ins. Co. v. Board of Assessors (La.)* 778.

§ 499. Where action to test an assessment is not brought in the time prescribed by statute, *held*, courts can give no relief, though the assessment is grossly excessive.—*Orient Ins. Co. v. Board of Assessors (La.)* 778.

## VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

Tax records showing payment as evidence of adverse possession, see *Adverse Possession*, § 118.

§ 535. Code 1907, § 2340, relating to recovery of taxes paid by mistake, construed.—*State v. Goldsmith (Ala.)* 394.

## VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

Deprivation of property without due process of law, see *Constitutional Law*, § 284.

## IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 623. A sale for taxes which have been paid is void.—*State Land Co. v. Mitchell (Ala.)* 117.

## XI. TAX TITLES.

Tax sale or deed as color of title, see *Adverse Possession*, § 79.

### (B) Tax Deeds.

§ 765. Tax deed executed in 1904 by the clerk under a private scroll is invalid, and placing of official seal to certificate of recordation is not an attaching of the official seal as required by Gen. St. 1906, § 590.—*Norman v. Beekman (Fla.)* 876.

### (C) Actions to Confirm or Try Title.

§ 805. After three years from the adoption of the Constitution of 1898, a party in possession under a duly recorded tax deed cannot be disturbed, except for a dual assessment or an antecedent payment of taxes, under Const. 1898, art. 233.—*Holland's Heirs v. Southern States Land & Timber Co. (La.)* 436.

§ 805. A tax sale made under an actual assessment, however illegal, comes within the curative scope of Const. 1898, art. 233.—*Holland's Heirs v. Southern States Land & Timber Co. (La.)* 436.

## TELEGRAPHS AND TELEPHONES.

Application by telephone for suspensive appeal, see *Appeal and Error*, § 361.

Exercise of power of eminent domain, see *Eminent Domain*, § 36.

## I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 15. The fact that a pedestrian, who stumbled on the stump of a telephone pole in a street, attempted to cross the street at night when he could not see the stump, must be considered in determining whether he employed proper care.—*Dobbins v. Western Union Telegraph Co. (Ala.)* 919.

§ 15. Assumption of risk is not available as a defense in an action against a telephone company for injuries to a pedestrian, stumbling over the stump of a telephone pole left in the street.—*Dobbins v. Western Union Telegraph Co. (Ala.)* 919.

§ 15. A telephone company *held* guilty of negligence in leaving an obstruction in a street.—*Dobbins v. Western Union Telegraph Co. (Ala.)* 919.

§ 20. In an action against a telegraph company, maintaining the stump of a telephone pole in a street, for injuries to a pedestrian stumbling over it, a plea of contributory negligence *held* sufficient as against a demurrer.—*Dobbins v. Western Union Telegraph Co. (Ala.)* 919.

§ 20. A pedestrian, injured by an obstruction placed in a street by a telegraph company, *held* not guilty of contributory negligence as a matter of law.—*Dobbins v. Western Union Telegraph Co. (Ala.)* 919.

## II. REGULATION AND OPERATION.

Action for negligence in transcribing name of person in message, whether in contract or tort, see *Action*, § 27.

Amendment of pleading setting up new orders for cause of action in action for damages, see *Pleading*, § 248.

Ground for demurrer to complaint in action for delay, see *Pleading*, § 193.

Opinion evidence as to mental anguish from failure to deliver message, see *Evidence*, § 472.

Sufficiency of plea in bar setting up contract made in another state, see *Pleading*, § 136.

§ 27. In an action against a telegraph company for negligent delay in delivering a message sent from Georgia to Alabama, *held*, that plaintiff was entitled to recover for mental anguish under the law of Alabama, though the Georgia law permitted no such recovery.—*Western Union Telegraph Co. v. Hill (Ala.)* 248.

§ 28. A telegraph company is bound to serve the public without discrimination.—*Western Union Telegraph Co. v. Hill (Ala.)* 248.

§ 31. Telegraph companies *held* to have a right to provide reasonable regulations as to office hours.—*Western Union Telegraph Co. v. Hill (Ala.)* 248.

§ 35. A telegraph company's agent, in writing out a message for an illiterate sender, acted as his agent.—*Western Union Telegraph Co. v. Jackson* (Ala.) 316.

§ 36. A telegraph company is not an insurer.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 37. That a message offered a telegraph company was not on its regular blanks, but was telephoned to the operator, *held* not to affect the company's liability for failure to deliver.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 37. A telegraph company may not receive messages out of its office hours and set up the regulation as to office hours as a defense to an action for breach of its contract.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 38. A telegraph company *held* to waive its rules as to office hours by accepting a message without the office hours.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 38. Delivery of a message should be made as soon after transmission as is reasonably practicable.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 38. Duty of a telegraph company on receipt of a message, stated.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 38. Where a death message was not filed until after office hours, the telegraph company was not bound to transmit it that night.—*Western Union Telegraph Co. v. Jackson* (Ala.) 316.

§ 54. A telegraph company cannot by contract relieve itself from liability for its own negligence in the transmission and delivery of messages.—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

§ 54. Rules and conditions, indorsed on a message received and transmitted by a telegraph company, are binding only when they become a part of the contract between the sender and the company, and the action is for breach thereof.—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

§ 54. A telegraph company cannot evade liability for negligence by contract.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 60. A seller, whose cablegram, accepting an offer, was delayed in delivery, during which time the price offered had declined, *held* not entitled to recover against the telegraph company.—*Western Union Telegraph Co. v. William Rhett & Co.* (Miss.) 696.

§ 65. A complaint, in an action against a telegraph company for delaying a message, *held* sufficiently to aver certain facts.—*Western Union Telegraph Co. v. Griffith* (Ala.) 91.

§ 65. An action in tort may be maintained by the addressee of a death message for negligent delay in delivery without any contractual relation between plaintiff and the company.—*Western Union Telegraph Co. v. Jackson* (Ala.) 316.

§ 65. Where a delayed message announcing the death of plaintiff's father was set out in his complaint for negligent delay, it was not necessary that the complaint should also charge that the message was sent for his benefit.—*Western Union Telegraph Co. v. Jackson* (Ala.) 316.

§ 66. A sender of a message, suing the telegraph company for negligence in transmitting it, has the burden of proving every allegation of the complaint.—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

§ 66. In an action against a telegraph company for negligent delay in delivering a message, *held* proper to admit evidence tending to show facilities whereby defendant might have delivered the message.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 67. In the absence of notice to the telegraph company, evidence *held* not to authorize special damages for loss of a sale because of the nondelivery of the message.—*Guilford & Deal v. Western Union Telegraph Co.* (Ala.) 112.

§ 67. The addressee of a delayed message *held* not entitled to recover tolls paid for transmission by the sender.—*Western Union Telegraph Co. v. Jackson* (Ala.) 316.

§ 68. A telegraph company *held* liable for the mental anguish of plaintiff owing to defendant's delay in delivering a death message.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 68. Overcharge collected from the addressee of a telegram *held* recoverable, and to constitute the basis of a recovery for mental suffering.—*Western Union Telegraph Co. v. Jackson* (Ala.) 316.

§ 68. Mental anguish *held* not recoverable by the sender of a social message.—*Sledge v. Western Union Tel. Co.* (Ala.) 886.

§ 68. The parties *held* not to have contemplated mental suffering by the sender as a result of the nondelivery of a telegram, so that, in an action for nondelivery, she could not recover damages for mental suffering.—*Western Union Telegraph Co. v. Peagler* (Ala.) 913.

§ 68. When damages are recoverable for mental anguish, suffered by the nondelivery of a telegram, stated.—*Western Union Telegraph Co. v. Peagler* (Ala.) 913.

§ 68. Damages for mental suffering caused by the nondelivery of a telegram are actual, and not punitive, damages.—*Western Union Telegraph Co. v. Peagler* (Ala.) 913.

§ 69. The sender of a social message *held* not entitled to recover punitive damages for delay in delivery.—*Sledge v. Western Union Tel. Co.* (Ala.) 886.

§ 71. A verdict for \$1,100 for mental anguish owing to negligent delay in the delivery of a death message *held* not excessive.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 73. Whether a telegraph company negligently changed a name therein *held*, under the evidence, for the jury.—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

§ 73. In an action against a telegraph company for delaying a message, certain questions *held* for the jury.—*Western Union Telegraph Co. v. Griffith* (Ala.) 91.

§ 73. In an action for negligent delay in the delivery of a telegram, *held* a question for the jury whether defendant had waived its rules as to office hours.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 73. What constitutes diligence as to delivery of a telegram is usually for the jury.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

§ 73. Whether a telegraph company was negligent in delivering a death message *held* for the jury.—*Western Union Telegraph Co. v. Jackson* (Ala.) 316.

§ 74. In an action against a telegraph company for negligent delay in the delivery of a message, it was proper to charge that, though defendant had adopted office hours, if it undertook to transmit the message, the jury had a

right to look to that circumstance, the nature of the message, and everything else in the case, in saying whether defendant was negligent.—*Western Union Telegraph Co. v. Hill* (Ala.) 248.

## TEMPORARY INJUNCTION.

See Injunction, § 133.

## TENANCY.

For years, see Landlord and Tenant, § 90.

## TENANCY IN COMMON.

Partition of property held in common, see Partition.

Rights of tenant in common as subject to recorded judgment lien, see Judgment, § 780.

### I. CREATION AND EXISTENCE.

§ 3. A husband, taking a life estate in his wife's separate property under Code 1907, § 3765, held a tenant by the curtesy, and not a tenant in common thereof with his children under section 3762.—*Fies v. Rosser* (Ala.) 287.

§ 3. Under the facts persons held tenants in common in a crop of cotton.—*Haynes Mercantile Co. v. Bell* (Ala.) 311.

### II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF CO-TENANTS.

§ 13. Where one of two tenants in common, leasing his co-tenant's half of the land, distinctly notifies him he will not rent again on the former terms, and they fail to agree, his occupancy at the end of the term becomes, as it was before, possession for both.—*Long v. Grant* (Ala.) 914.

§ 13. Each of two tenants in common holds for himself and his co-tenant, and the relation of landlord and tenant does not exist between them, though one be in actual occupancy of the lands, appropriating the proceeds.—*Long v. Grant* (Ala.) 914.

§ 13. That possession of one tenant in common is the possession of all is not a defense for trespass by one tenant in common against one holding the actual possession and claiming the entire property.—*Brown v. Floyd* (Ala.) 995.

§ 15. The possession of one tenant in common is the possession of all, until there is an actual adverse possession, brought home to the knowledge of the other.—*Cramton v. Rutledge* (Ala.) 900.

§ 15. A tenant's repudiation of the right of his co-tenants, and a claim of exclusive ownership, brought to their actual knowledge, will make his possession adverse.—*Oliver v. Williams* (Ala.) 937.

§ 33. Two tenants in common can enter into an agreement by which one becomes tenant of the other, and liable for rent.—*Long v. Grant* (Ala.) 914.

§ 34. A co-tenant cannot defeat another co-tenant in any right which he may undertake to assert by showing the true title in another.—*Baker v. Richardson* (Miss.) 447.

## TENDER.

Of price paid in action by state to set aside sale of lands for fraud, see Public Lands, § 152.

§ 1. When a plea of tender is available, in absence of statute, stated.—*A. R. Ganus & Co. v. Tew* (Ala.) 1000.

## TENURE.

Of office, see Officers, § 54.

## TERM.

Of agency, see Principal and Agent, § 34.  
Of lease, see Landlord and Tenant, § 90.

## TERMINATION.

Of agency, see Principal and Agent, § 34.  
Of authority of trustee, see Trusts, § 169.  
Of representative or official capacity ground for abatement of action, see Abatement and Revival, § 45.

## TESTAMENT.

See Wills.

## TESTIMONY.

See Depositions; Evidence; Witnesses.

## THEFT.

See Burglary; Larceny.

## THREATS.

Evidence of, in prosecutions for homicide, see Homicide, § 190.

## TICKETS.

For carriage of passengers, see Carriers, § 249.

## TIDE LANDS.

See Navigable Waters, §§ 36, 37.

## TIMBER.

See Logs and Logging.

Cutting and removing, restraining, see Injunction, § 38.

Laws regulating equipment of timber cars as interfering with interstate commerce, see Commerce, § 81.

Laws relating to equipment of timber cars as denial of right of acquiring, possessing and protecting property, see Constitutional Law, § 87.

## TIME.

Computation of period of limitation, see Limitation of Actions, §§ 46-127.

Of accrual of right of action within statute of limitations, see Limitation of Actions, §§ 46, 55.

Of offense, allegations in indictment or information, see Indictment and Information, § 87.

Of offense, variance between allegations and proof, see Indictment and Information, § 176.

Of taking effect of interest devised by will, see Wills, § 417.

For particular acts in or incidental to judicial proceedings.

Amendment of pleading, see Pleading, § 245.

Appeal or other proceeding for review, see Appeal and Error, §§ 338-344; Certiorari, §§ 30, 40.

Filing or service of pleadings, see Pleading, § 85.

Motion or application for new trial, see Criminal Law, § 951.

Objection at trial to reserve ground of review, see Appeal and Error, § 230.

Objection to evidence, see Criminal Law, § 693; Trial, § 76.

Presentation, allowance, and filing of bill of exceptions, see Criminal Law, § 1092; Exceptions, Bill of, §§ 38, 39.

Service of copy of indictment and venire on accused, see Criminal Law, § 627.  
Suit for reduction of assessment of tax, see Taxation, § 499.

§ 4. The words "current year," in Code Prac. art. 645, exempting from seizure upon execution apart from the land supplies necessary for running a plantation for the current year, means from harvest to harvest.—*Hinton v. Roane* (La.) 798.

## TITLE.

Acquired by purchaser from life tenant with power to sell, see Powers, § 43.  
After-acquired title, estoppel to assert, see Estoppel, §§ 38, 39.  
Color of title, see Adverse Possession, §§ 70-79, 100, 101.  
Doubt or dispute as to title ground for relief by injunction, see Injunction, § 38.  
Of lessor, see Landlord and Tenant, § 63.  
Of purchaser at execution sale, see Execution, § 272.  
Of receiver, see Receivers, §§ 74, 77.  
Of trustee in bankruptcy to property of bankrupt, see Bankruptcy, §§ 149, 151.  
Of vendor, sufficiency to support contract of sale, see Vendor and Purchaser, § 142.  
Removal of cloud, see Quieting Title.  
Tax titles, see Taxation, §§ 763, 806.  
To property as affecting liability for taxes, see Taxation, § 79.  
To property as affecting right of attachment, see Attachment, § 63.  
To property insured, promissory warranties, covenants, or conditions subsequent, see Insurance, § 328.  
To property insured, representations, warranties, or conditions in policy or application therefor, see Insurance, § 282.

### *Particular matters affecting title.*

See Abandonment; Adverse Possession; Dedication; Deeds; Descent and Distribution; Mortgages.  
Estoppel to assert title, see Estoppel, §§ 38, 39.  
Sale of personal property in general, see Sales.  
Sale of real property in general, see Vendor and Purchaser.

### *Particular species of property or rights.*

See Bills and Notes, §§ 332, 324.  
Public office, see Officers, § 80.

*Title necessary to maintain particular actions.*  
See Ejectment, §§ 10, 13; Real Actions.

### *Titles of particular acts or proceedings.*

See Statutes, §§ 108-123, 211.

## TOOLS.

Liability of master for injuries to servant from defects in or failure to furnish tools, see Master and Servant, §§ 101-118.

## TORTS.

Action for distinguished from action on contract, see Action, § 27.  
Dismissal of action as to one or more codefendants, see Dismissal and Nonsuit, § 26.  
Failure of proof as to one of two or more defendants jointly sued, see Pleading, § 399.  
Individual liability of administrator, see Executors and Administrators, § 119.  
Limitation of actions, see Limitation of Actions, § 55.

### *Liabilities of particular classes of persons.*

See Carriers, §§ 103, 123, 159, 280-321; Clerks of Courts, § 72; Municipal Corporations, §§ 742-816; Railroads, §§ 113, 114, 260, 297, 310-351, 355-396, 439-446, 459-484; Street Railroads, §§ 81-118.

Agents, see Principal and Agent, § 155.  
Bailees, see Bailment, § 14.  
Banks, see Banks and Banking, § 148.  
Electric light or power companies, see Electricity, §§ 16, 19.  
Employers, for injuries to employes, see Master and Servant, §§ 85-295.  
Employes, for injuries to third persons, see Master and Servant, §§ 302-332.  
Fellow servants, see Master and Servant, §§ 177-196.  
Telegraph or telephone companies, see Telegraphs and Telephones, §§ 15, 27-74.

### *Liabilities respecting particular species of property or instrumentalities.*

See Electricity, §§ 16, 19; Railroads, §§ 113, 114, 260, 297, 310-351, 355-396, 439-446, 459-484; Street Railroads, §§ 81-118; Telegraphs and Telephones, §§ 15, 27-74.  
Automobiles, see Municipal Corporations, §§ 706, 706.  
Carrier's premises, see Carriers, § 286.  
Conveyances and other means for transportation of passengers, see Carriers, § 297.  
Injuries from defects or obstructions in streets, see Municipal Corporations, §§ 755-816.  
Streets and highways, see Municipal Corporations, §§ 755-816.  
Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101-118.

### *Particular torts.*

See Assault and Battery, §§ 12-34; Conspiracy, §§ 19, 21; False Imprisonment, §§ 27, 30; Forcible Entry and Detainer, §§ 9-34; Fraud; Libel and Slander; Nuisance; Trespass.  
Delay in transportation or delivery of goods, see Carriers, § 103.  
Injuries by servants, see Master and Servant, §§ 302-332.  
Injuries from construction or maintenance of railroad, see Railroads, §§ 113, 114.  
Injuries from construction or maintenance of telegraph or telephone line, see Telegraphs and Telephones, § 15.  
Injuries from negligence, see Negligence.  
Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 27-74.  
Injuries from negligent or wrongful use of street, see Municipal Corporations, §§ 706, 706.  
Injuries from operation of railroads, see Railroads, §§ 260, 297, 310-351, 355-396, 439-446, 459-484.  
Injuries from operation of street railroads, see Street Railroads, §§ 81-118.  
Injuries incident to production or use of electricity, see Electricity, §§ 16, 19.  
Injuries to passengers, see Carriers, §§ 280-321.  
Injuries to servants, see Master and Servant, §§ 85-299.  
Interference with relation of master and Servant, see Master and Servant, § 341.  
Loss of or injury to goods by carrier, see Carriers, §§ 123, 159.  
Obstruction and detention of waters of natural water courses, see Waters and Water Courses, § 51.  
Payment by bank of forged or altered check, see Banks and Banking, § 148.  
Wrongful conversion, see Trover and Conversion.

### *Remedies for torts.*

See Damages; Trespass, §§ 27-68; Trover and Conversion, §§ 22-60.

§ 2. Where a tort is committed in one state and sued on in another, the *lex loci delicti* controls.—*Western Union Telegraph Co. v. Hill* (Ala.) 243.

§ 26. In an action for an alleged joint conversion, plaintiff could not recover, where there

anything to do with the property.—Stevenson & Herzfeld v. Whatley (Ala.) 41.

## TOWNS.

See Counties; Municipal Corporations; Schools and School Districts, § 53.  
Highways, see Highways.

## II. GOVERNMENT AND OFFICERS.

Constables, see Sheriffs and Constables.

## TRADE.

Married women carrying on trade, see Husband and Wife, § 97.  
Regulation of trade as denial of equal protection of laws, see Constitutional Law, § 240.  
Regulation of trade as deprivation of property without due process of law, see Constitutional Law, § 296.

## TRAINS.

See Carriers; Railroads.

## TRAMPS.

See Vagrancy.

## TRANSCRIPTS.

Of record for purpose of review, see Appeal and Error, § 606.

## TRANSFER OF CAUSES.

Change of venue, see Criminal Law, §§ 134, 135.

## TRANSFERS.

See Assignments; Deeds; Sales; Vendor and Purchaser.  
Of bills and notes, see Bills and Notes, § 332.  
Of bills of lading, or shipping receipts, see Carriers, § 58.  
Of mortgaged property by mortgagor, see Chattel Mortgages, § 229.  
Of personal property as security, see Chattel Mortgages.  
Of real property as security, see Mortgages.

## TRANSMISSION.

Of record on appeal or other proceeding for review, see Appeal and Error, § 630.  
Of telegraph or telephone messages, see Telegraphs and Telephones, §§ 27-74.

## TRANSPORTATION.

Of goods, see Carriers, §§ 1-18, 40-159.  
Of passengers, see Carriers, §§ 245-347.

## TRAVELERS.

On streets in general, see Municipal Corporations, §§ 705, 706.  
On streets, injuries from defects or obstructions, see Municipal Corporations, §§ 755-816.

## TRAVERSE.

In pleading in general, see Pleading, § 129.

## TREASURERS.

County treasurer, compensation, see Counties, § 74.  
County treasurer, liabilities of sureties on bond of, see Counties, § 98.  
Quo warranto to try title to office of city treasurer, see Quo Warranto, § 11.

See Logs and Logging.

Nature of action for penalty for destruction of or injury to fruit trees, whether in contract or tort, see Action, § 27.

## TRESPASS.

See False Imprisonment.

Injuries to trespassers, see Railroads, §§ 355-396.

Liability of municipality for wrongful removal of trespassers by mayor, see Municipal Corporations, § 747.

To the person, see Assault and Battery.

## I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREOF.

§ 4. An owner of a store in which goods are kept for sale and in deposit *held* not liable in trespass to a would-be burglar, shot by a spring gun placed in the store to shoot persons attempting to burglarize it, in violation of Code 1907, § 6415.—Scheuermann v. Scharfenberg (Ala.) 835.

## II. ACTIONS.

(A) Right of Action and Defenses.

Individual liability of administrator, see Executors and Administrators, § 119.

§ 27. A sole owner of a land or chattel cannot commit a trespass to recover their possession, although they are wrongfully withheld by one having no claim or title.—Brown v. Floyd (Ala.) 995.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

Amendment of complaint to conform to proof, see Pleading, § 237.

§ 40. A complaint *held* to be in trespass *quare clausum*, and not for the statutory penalty for cutting trees.—Floyd v. Wilson (Ala.) 122.

(C) Evidence.

§ 45. In trespass for cutting timber, the exclusion of a deed conveying to defendant all the timber standing, growing, or being on the land, *held* erroneous.—Wilmer Lumber Co. v. Eisely (Ala.) 225.

(D) Damages.

§ 50. In an action for trespass, plaintiff is not entitled to recover for rent of the lands trespassed upon, where she left the premises at the request of a third party, and not because of the trespass.—Brown v. Floyd (Ala.) 995.

§ 56. Exemplary damages may be allowed when a trespass was wantonly or recklessly committed, or committed with such reckless indifference to another's rights as to amount to an intentional violation thereof.—Garden v. Houston Bros. (Ala.) 1030.

§ 56. If defendant retook a horse after the purchase-money notes, retaining title in him until the notes were paid, had in fact been paid, the jury could allow punitive damages in trespass for taking the horse.—Garden v. Houston Bros. (Ala.) 1030.

(E) Trial, Judgment, and Review.

Assumption as to facts, see Trial, § 191.  
Conformity of judgment to pleadings and proof, see Judgment, § 251.

§ 67. In trespass for the removal of timber, etc., whether trees taken from the land were of sufficient size to constitute timber *held* for the jury.—Wilmer Lumber Co. v. Eisely (Ala.) 225.



for the statutory penalty for destruction of fruit trees, proof that the trees were taken from a yard and orchard *held* to show prima facie that they were removed from an inclosure; "orchard" being defined by Webster as meaning an inclosure containing fruit trees, and the word "yard" meaning an inclosure.—*Wright v. Sample* (Ala.) 268.

§ 68. In trespass, certain requests to charge that plaintiff could not recover if he consented expressly or impliedly to defendant's acts *held* improperly refused.—*Wilmer Lumber Co. v. Eiseley* (Ala.) 225.

§ 68. In trespass for the cutting and removal of wood from plaintiff's land, a request to charge, requiring that the wood must have been removed without plaintiff's consent, and that the jury must find the value thereof, *held* erroneously refused.—*Wilmer Lumber Co. v. Eiseley* (Ala.) 225.

§ 68. A request to charge that the jury could not assess certain damages as specific damages, *held* properly refused as misleading.—*Wilmer Lumber Co. v. Eiseley* (Ala.) 225.

## TRESPASS TO TRY TITLE.

See Ejectment; Forcible Entry and Detainer; Real Actions.

## TRIAL.

Practice in equity, see Equity, §§ 373, 388.

Trial de novo on appeal, see Justices of the Peace, § 174.

Witnesses, see Witnesses.

### *Proceedings incident to trials.*

See Continuance; New Trial; Railroads, § 297. Assessment of damages, see Damages, §§ 208, 216.

Competency of and challenge to jurors, see Jury, §§ 90-116.

Entry of judgment after trial of issues, see Judgment, § 251.

Examination of witnesses, see Witnesses, §§ 236-287.

Impaneling jury, see Jury, § 149.

Right to trial by jury, see Jury, §§ 10-28.

Summoning, attendance, discharge, and compensation of jury, see Jury, §§ 66-82.

*Trial of actions by or against particular classes of persons.*

See Attorney and Client, § 167; Carriers, §§ 320, 321, 347; Master and Servant, §§ 286-295, 332; Railroads, §§ 350, 351, 446, 484; Street Railroads, §§ 117, 118.

Insurance companies, see Insurance, §§ 825, 826. Telegraph or telephone companies, see Telegraphs and Telephones, §§ 73, 74.

*Trial of particular civil actions or proceedings.*

See Ejectment, § 109; Forcible Entry and Detainer, § 34; Trespass, §§ 67, 68.

Application for judgment after default, see Judgment, § 123.

For compensation of attorney, see Attorney and Client, § 167.

For conspiracy, see Conspiracy, § 21.

For injunction, see Injunction, § 130.

For injuries at railroad crossings see Railroads, §§ 350, 351.

For injuries by servants, see Master and Servant, § 332.

For injuries caused by operation of railroad, see Railroads, § 297.

For injuries from fires caused by operation of railroads, see Railroads, § 484.

For injuries from negligence, see Negligence, §§ 136, 139.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 73, 74.

tracks, see Railroads, § 446.

For injuries to passengers, see Carriers, §§ 320, 321, 347.

On bonds in general, see Bonds, § 142.

On insurance policies, see Insurance, §§ 825, 826.

### *Trial of criminal prosecutions.*

See Burglary, § 45; Criminal Law, §§ 625-893; Homicide, §§ 269-314; Larceny, § 77.

## I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

Consolidation of actions, see Action, § 57.

In criminal prosecutions, see Criminal Law, §§ 625, 627.

## III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

In criminal prosecutions, see Criminal Law, §§ 636-658.

Review of discretionary ruling on application for inspection of place of injury, see Appeal and Error, § 969.

Review of proceedings as dependent on prejudicial nature of error, see Appeal and Error, § 1046.

Review of rulings involving discretion of lower court, see Appeal and Error, § 969.

Withdrawal of remarks as rendering error harmless, see Appeal and Error, § 1046.

§ 25. In action on a note, where there is a common count and a plea of the general issue, the plaintiff has the right to open and close.—*Pyles v. Piedmont Mt. Airy Guano Co.* (Fla.) 872.

§ 25. In every case where the general issue or a general or special denial is pleaded, the right to open and close is with the plaintiff.—*Pyles v. Piedmont Mt. Airy Guano Co.* (Fla.) 872.

§ 25. Where plaintiff has anything to prove under any one of several issues in the first instance, the right to open and close is with him.—*Pyles v. Piedmont Mt. Airy Guano Co.* (Fla.) 872.

§ 25. If the plaintiff would succeed on the pleadings alone, defendant may open and close; but, if defendant would succeed, then the plaintiff may open and close.—*Pyles v. Piedmont Mt. Airy Guano Co.* (Fla.) 872.

§ 25. Where plaintiff has anything to prove in order to get a verdict, the right to begin and conclude the argument belongs to him.—*Pyles v. Piedmont Mt. Airy Guano Co.* (Fla.) 872.

## IV. RECEPTION OF EVIDENCE.

Examination of witnesses, see Witnesses, §§ 236-287.

In criminal prosecutions, see Criminal Law, §§ 666-683.

Review of rulings involving discretion of lower court, see Appeal and Error, § 970.

### (A) Introduction, Offer, and Admission of Evidence in General.

§ 46. A question in an action on a life policy *held* subject to objection of calling for irrelevant and immaterial evidence.—*Supreme Lodge Knights and Ladies of Honor v. Baker* (Ala.) 958.

§ 46. Question not clearly calling for relevant evidence *held* open to objection, in the absence of statement as to what was expected to be elicited.—*Supreme Lodge Knights and Ladies of Honor v. Baker* (Ala.) 958.

§ 56. Where defendant in action on a note has already testified as to certain letters written by him acknowledging liability, it was not

**(B) Order of Proof, Rebuttal, and Re-opening Case.**

In criminal prosecutions, see Criminal Law, §§ 680, 683.

Proof of facts preliminary to introduction of secondary evidence, see Evidence, §§ 183, 185.

§ 59. Order of introduction evidence held in the trial court's discretion.—Atlantic Coast Line R. Co. v. Partridge (Fla.) 634.

§ 60. Proof of acts of an agent before proof of the agency, which is subsequently established, is not error.—Childress v. Smith-Echols-Burnett Hardware Co. (Ala.) 322.

§ 63. Failure on the part of plaintiff to offer evidence of title at the proper time cannot be corrected by offering the same under the guise of rebuttal.—Babington Bros., Limited, v. Barber (La.) 844.

§ 68. It is within the trial court's discretion to allow other testimony by a party after he has closed.—Higdon v. Garrett (Ala.) 323.

**(C) Objections, Motions to Strike Out, and Exceptions.**

In criminal prosecutions, see Criminal Law, §§ 693-696.

Necessity for purpose of review on appeal or writ of error, see Appeal and Error, § 237.

Objections to evidence on ground of insufficiency of pleading, see Pleading, § 428.

Objections to evidence on ground of variance, see Pleading, § 430.

§ 75. Where an objection to evidence is limited to a certain point, all other objections are impliedly waived.—Higdon v. Garrett (Ala.) 323.

§ 76. An objection to a question, after the question has been answered, comes too late.—Louisville & N. R. Co. v. Johnson (Ala.) 300.

§ 82. A map held properly received in evidence in connection with the testimony of witnesses.—Republic Iron & Steel Co. v. White (Ala.) 141.

§ 82. General objection to evidence held properly overruled, unless the evidence is inadmissible for any purpose.—Atlantic Coast Line R. Co. v. Partridge (Fla.) 634.

§ 83. General objections to evidence held properly overruled, unless the evidence is inadmissible for any purpose.—Brown v. Bowie (Fla.) 637.

§ 84. Objection to reception of receipts in evidence held not to raise the question of want of proof of their genuineness.—Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.) 958.

§ 85. Though a part of witness' answer may be improper, it is not error to refuse to exclude the entire answer where the other part is proper.—Louisville & N. R. Co. v. Davaner (Ala.) 276.

**V. ARGUMENTS AND CONDUCT OF COUNSEL.**

In criminal prosecutions, see Criminal Law, §§ 706-730.

Review of proceedings as dependent on prejudicial nature of error, see Appeal and Error, § 1060.

§ 122. Argument of counsel held improper.—Jordan v. Austin (Ala.) 70.

§ 131. Objections to argument of counsel must be taken when the statements are made, and not by requests to charge.—Birmingham Ry., Light & Power Co. v. Morris (Ala.) 198.

In criminal prosecutions, see Criminal Law, §§ 753-764.

Review of rulings as dependent on prejudicial nature of error, see Appeal and Error, § 1061.

**(A) Questions of Law or of Fact in General.**

*As to particular facts, issues, or subjects.*

Contributory negligence of passenger, see Carriers, § 347.

Contributory negligence of person injured by negligence of telegraph company, see Telegraphs and Telephones, § 20.

Contributory negligence of servants, see Master and Servant, § 289.

Damages, see Damages, § 208.

Incompetency of fellow servant, see Master and Servant, § 287.

Negligence of master causing injury to servant, see Master and Servant, § 286.

Relation of master and servant, see Master and Servant, § 332.

*In particular civil actions or proceedings.*

See Ejectment, § 109; Forcible Entry and Detainer, § 34; Trespass, § 67.

Assessment of damages, see Damages, § 208.

For compensation of attorney, see Attorney and Client, § 167.

For injuries at railroad crossings, see Railroads, § 350.

For injuries by servants, see Master and Servant, § 332.

For injuries caused by operation of railroad, see Railroads, § 297.

For injuries from fires caused by operation of railroads, see Railroads, § 484.

For injuries from negligence, see Negligence, § 136.

For injuries from negligence of servant, see Master and Servant, § 332.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 73.

For injuries to animals on or near railroad tracks, see Railroads, § 446.

For injuries to passengers, see Carriers, §§ 320, 347.

For injuries to persons on or near street railroad tracks, see Street Railroads, § 117.

For injuries to servants, see Master and Servant, §§ 286-289.

For obstruction of street, see Municipal Corporations, § 698.

For personal injuries caused by negligence of telegraph company, see Telegraphs and Telephones, § 20.

On bond of sheriff, see Sheriffs and Constables, § 171.

On insurance policies, see Insurance, § 825.

§ 136. An affirmative charge for either defendant was properly refused, where it was a jury question whether either of them converted plaintiff's property as alleged.—Darden v. Mann (Ala.) 1033.

§ 139. Certain charges held properly refused under the evidence.—Western Union Telegraph Co. v. Griffith (Ala.) 91.

§ 139. Where there was evidence tending to support simple and wanton negligence of defendant, and thus to authorize actual and punitive damages, the general affirmative charge for defendant as to any count of the complaint was properly refused.—Louisville & N. R. Co. v. Weathers (Ala.) 268.

§ 139. A verdict should not be directed for defendant, unless there is no evidence that in law could support a verdict for plaintiff.—Bass v. Ramos (Fla.) 945.

§ 139. If the evidence tends to prove the issue presented by plaintiff, it should be submitted to the jury.—*Bass v. Ramos* (Fla.) 945.

§ 142. Where the evidence, if believed, is the same thing as the facts sought to be proved, the judge *held* authorized to charge the jury that if they believe the evidence they must find for plaintiff (or defendant, as the case may be).—*Western Union Telegraph Co. v. Louisell* (Ala.) 87.

§ 142. If the evidence will admit of different reasonable inferences it should be submitted to the jury.—*Bass v. Ramos* (Fla.) 945.

§ 143. A general affirmative charge for a party is properly refused, where there is a conflict in the evidence.—*Higdon v. Garrett* (Ala.) 323.

§ 143. If the evidence is conflicting, it should be submitted to the jury.—*Bass v. Ramos* (Fla.) 945.

§ 145. Plea of set-off or recoupment *held* not demurrable, because seeking to set off or recoup damages not allowable, if it states a good cause of action as to other damages, but the remedy is by motion to strike, or by instructions limiting such improper damages.—*Carolina Portland Cement Co. v. Alabama Const. Co.* (Ala.) 332.

#### (B) Demurrer to Evidence.

Effect on right to amend, see Pleading, § 245.

#### (D) Direction of Verdict.

In criminal prosecutions, see Criminal Law, § 753.

In ejectment, see Ejectment, § 109.

Review of rulings as dependent on prejudicial nature of error, see Appeal and Error, § 1061.

### VII. INSTRUCTIONS TO JURY.

In criminal prosecutions, see Criminal Law, §§ 778-823, 825-830, 844.

Presumptions on appeal or writ of error, see Appeal and Error, § 928.

Review as dependent on prejudicial nature of error, see Appeal and Error, §§ 1064-1068.

Review as dependent on presentation of question in lower court, see Appeal and Error, § 216.

#### *As to particular issues or subjects.*

Assumption of risk by servant injured, see Master and Servant, § 295.

Damages, see Damages, § 216.

Negligence of master causing injuries to servant, see Master and Servant, § 293.

#### *In particular civil actions or proceedings.*

See Trespass, § 68.

Application for judgment after default, see Judgment, § 123.

Assessment of damages, see Damages, § 216.

For injuries at railroad crossings, see Railroads, § 351.

For injuries from negligence, see Negligence, § 139.

For injuries from negligence or default in transmission or delivery of telegraph or telephone messages, see Telegraphs and Telephones, § 74.

For injuries to passengers, see Carriers, § 321.

For injuries to persons on or near street railroad tracks, see Street Railroads, § 118.

For injuries to servants, see Master and Servant, §§ 293, 295.

For obstruction of street, see Municipal Corporations, § 698.

For price or value of goods sold, see Sales, § 364.

On bonds in general, see Bonds, § 142.

On insurance policies, see Insurance, § 826.

### (A) Province of Court and Jurisdiction.

In criminal prosecutions, see Criminal Law, §§ 753-764.

§ 191. An instruction, which assumes which is for the jury to find, is refused.—*Montgomery Moore Mfg. Co.* (Ala.) 210.

§ 191. In trespass and trover for horse through another, a charge *held* as assuming that the trespass was *ed*.—*Garden v. Houston Bros.* (Ala.) 53.

§ 194. A requested charge, in a affirmative charge for defendant, *held* declined, where defendant's liability a question for the jury.—*Byrd v.* 53.

§ 194. In an action against a telegraph company for delaying a message, a charge for mental pain *held* properly instructing that the jury were not to infer mental pain from only a evidence.—*Western Union Telegraph Co. v. Griffith* (Ala.) 91.

§ 194. In an action against a telegraph company for delaying a message, where evidence of plaintiff's mental pain from the delay, a charge that the not assess damages for mental anguish was properly refused, as *me* argument invading the province of *Western Union Telegraph Co. v. G.* 91.

§ 194. A charge *held* a charge of the evidence, in violation of Co 5362, 5364.—*Fidelity & Deposit Co. land v. Art Metal Const. Co.* (Ala.)

§ 194. The court cannot be required a charge that there is no evidentiary fact.—*New Counellsville C Co. v. Kilgore* (Ala.) 205.

§ 194. An instruction *held* proper because invading the province of *Montgomery Moore Mfg. Co. v. I* 210.

§ 194. An instruction as to contrary *held* properly refused.—*Louis R. Co. v. Johnson* (Ala.) 300.

#### (B) Necessity and Subject-Matter.

§ 202. The court cannot be put giving an instruction in accordance evidence, though it was not required.—*Montgomery Moore Mfg. Co. v. I* 210.

§ 206. A charge that there is no a certain fact need not be given.—*Co. v. Kennedy* (Ala.) 73.

#### (C) Form, Requisites, and Sufficiency.

§ 234. In an action for trespass, a request to charge that the on plaintiff to establish the case preponderance of the evidence, *held* refused.—*Wilmer Lumber Co. v. E* 225.

§ 234. A charge that the jury on case on the evidence presented to them on the attorney's assertions, was not for failure to charge that they should case on the law, as well as the evidence could not have misled the jury to perjury.—*Green v. Southern States L* (Ala.) 917.

§ 237. While a charge that the must preponderate in plaintiff's favor him to recover, may be refused, it to give it.—*Green v. Southern States Co.* (Ala.) 917.

argumentative.—Tennessee Coal, Iron & R. Co. v. King (Ala.) 25.

§ 240. In an action against a telegraph company for delaying a message, where there was evidence of plaintiff's mental pain resulting from the delay, a charge that the jury could not assess damages for mental pain and anguish was properly refused, as merely an argument invading the province of the jury.—Western Union Telegraph Co. v. Griffith (Ala.) 91.

§ 240. An instruction in an action for the death of a child struck by a train *held* properly refused as argumentative.—Southern Ry. Co. v. Smith (Ala.) 390.

§ 242. An instruction *held* to be properly refused, as confusing, involved, and calculated to mislead the jury.—Louisville & N. R. Co. v. Johnson (Ala.) 300.

§ 242. Misleading instructions are properly refused.—Birmingham Paint & Roofing Co. v. Gillespie (Ala.) 1032.

§ 243. Where a party had requested a charge that the action was *ex contractu*, which was given, it was not error to refuse to subsequently charge for the same party that the action was *ex delicto*.—Western Union Telegraph Co. v. Griffith (Ala.) 91.

§ 244. An instruction, which singles out a portion of the evidence and requires a separate finding thereon, is properly refused.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 244. Requested charge, in an action for breach of warranty, *held* properly refused as selecting and emphasizing one element of fact.—W. T. Adams Mach. Co. v. Turner (Ala.) 308.

(D) **Applicability to Pleadings and Evidence.**

Review as dependent on prejudicial nature of error, see Appeal and Error, § 1068.

§ 248. An abstract instruction is properly refused.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 250. It is not error to refuse charges requested merely to answer the argument of opposing counsel.—Birmingham Waterworks Co. v. Copeland (Ala.) 57.

§ 250. In an action for damages from the bursting of a water pipe in a house, *held* not error to refuse charges that no extra damages could be allowed because the pipe bursted on Christmas Eve.—Birmingham Waterworks Co. v. Copeland (Ala.) 57.

§ 250. A requested instruction *held* properly refused, as not applicable to the case.—Birmingham Ry., Light & Power Co. v. Moore (Ala.) 115.

§ 251. Requests not applicable to the issues raised by the only count submitted to the jury were properly refused.—Birmingham Ry., Light & Power Co. v. Morris (Ala.) 198.

§ 251. Where a declaration counted in case for consequential injury instructions on the theory that the action was trespass, *held* properly rejected.—Louisville & N. R. Co. v. Smith (Ala.) 241.

§ 251. Requested instructions, in an action against a railroad company for injuries received while crossing its track, *held* properly refused as abstract.—Louisville & N. R. Co. v. Johnson (Ala.) 300.

§ 251. In a personal injury action by a passenger, the giving of certain charges on a question not in issue *held* harmless.—Birmingham Ry., Light & Power Co. v. Anderson (Ala.) 1021.

§ 251. Where, by the plea of the general issue, one defendant in a personal injury action

Hardware & Supply Co. v. Block Bros. (Ala.) 1036.

§ 252. In an action for injuries to a servant, a requested charge *held* properly refused as abstract.—Tennessee Coal, Iron & R. Co. v. King (Ala.) 75.

§ 252. Certain charges *held* properly refused under the evidence.—Western Union Telegraph Co. v. Griffith (Ala.) 91.

§ 252. On the issue whether a sale of merchandise was made in fraud of creditors, an instruction *held* properly refused because of the absence of evidence on which to predicate it.—Montgomery Moore Mfg. Co. v. Leeth (Ala.) 210.

§ 252. An instruction in an action for the death of a child struck by a train *held* properly refused as argumentative.—Southern Ry. Co. v. Smith (Ala.) 390.

§ 252. In an action for injuries to a passenger, an instruction on contributory negligence *held* erroneous, because of the absence of evidence on which to base it.—Easley v. Alabama Great Southern Ry. Co. (Miss.) 491.

§ 252. In an action against a railroad company for the death of a telegraph operator, an instruction on the theory that decedent went to sleep on the platform so near the track that he was struck by a train *held* unauthorized by the evidence.—Hunnicut v. Alabama Great Southern R. Co. (Miss.) 697.

§ 253. Where adverse possession was an issue to be determined by the jury, an instruction premitting the same was erroneous.—Clark v. Dunn (Ala.) 93.

§ 253. In an injury action by a servant, charges *held* erroneous.—United States Cast Iron, Pipe & Foundry Co. v. Driver (Ala.) 118.

#### (E) **Requests or Prayers.**

In criminal prosecutions, see Criminal Law, §§ 825-830.

Review as dependent on prejudicial nature of error, see Appeal and Error, § 1067.

Review of failure to give instructions as dependent on request in lower court, see Appeal and Error, § 216.

§ 255. Where defendant considers that admissible evidence may be confusing to the jury, he should request a proper charge explaining it.—First Nat. Bank v. Alexander (Ala.) 45.

§ 255. Where questions asked witnesses did not necessarily seek proof as to permanent injuries of plaintiff, but for matters tending to show the extent of the injury received, if defendant wished to limit the scope of the testimony, so as not to extend to proof of permanent injuries, charges to that effect should have been asked.—United States Cast Iron, Pipe & Foundry Co. v. Driver (Ala.) 118.

§ 256. An instruction as to the jury's duty to award damages *held* at most merely misleading; and, if defendant desired this tendency, an explanatory charge should have been requested.—Louisville & N. R. Co. v. Wilson (Ala.) 188.

§ 256. Where instructions correctly stating the law possess any misleading tendency, it is the duty of the adverse party to meet them by a counter or explanatory charge.—Dickens v. Murray & Peppers (Ala.) 1019.

§ 260. It is not error to refuse a request to charge substantially covered by other requests given.—Birmingham Ry., Light & Power Co. v. Morris (Ala.) 158.

§ 261. A request to charge, eliminating several elements of possible basis for recovery, was properly refused.—Wilmer Lumber Co. v. Eisey (Ala.) 225.

(F) **Objections and Exceptions.**

In criminal prosecutions, see Criminal Law, § 844.

Necessity of objection or request for purpose of review, see Appeal and Error, § 216.

(G) **Construction and Operation.**

In criminal prosecutions, see Criminal Law, §§ 821-823.

§ 295. The oral charge of the court must be considered as a whole.—Birmingham Ry., Light & Power Co. v. Moore (Ala.) 115.

**VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.**

Disqualification or misconduct of or affecting jury, ground for new trial, see New Trial, § 52.

In criminal prosecutions, see Criminal Law, § 858.

**IX. VERDICT.**

In criminal prosecutions, see Criminal Law, §§ 881, 893.

Review of sufficiency of evidence, see Appeal and Error, §§ 1002-1005.

Setting aside verdict, see New Trial.

Verdict contrary to law or evidence ground for new trial, see New Trial, § 76.

(A) **General Verdict.**

§ 328. In an action against two defendants for negligent injuries, a verdict may go against one defendant only.—Southern Hardware & Supply Co. v. Block Bros. (Ala.) 1036.

(B) **Special Interrogatories and Findings.**

Review of rulings involving discretion of lower court, see Appeal and Error, § 974.

§ 349. In the absence of a statute, a trial court held not justified in directing the jury to find a special verdict, though the court may in its discretion recommend one.—Florida East Coast Ry. Co. v. Lassiter (Fla.) 428.

**X. TRIAL BY COURT.**

Hearing in equity, see Equity, §§ 377, 388.

Presumptions on appeal or writ of error, see Appeal and Error, § 931.

**XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.**

Error in instructions cured by verdict or judgment, see Appeal and Error, § 1068.

Error waived in appellate court, see Appeal and Error, § 1078.

Review in appellate court as dependent on prejudicial nature of error, see Appeal and Error, §§ 1029-1068.

Review in appellate court as dependent on presentation of questions in lower court, see Appeal and Error, §§ 171-254.

**TRIAL DE NOVO.**

On appeal, see Justices of the Peace, § 174.

**TRIBUNALS.**

See Courts.

**TROVER AND CONVERSION.**

See Larceny.

Conversion of mortgaged property, see Chattel Mortgages, § 169.

**I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.**

§ 9. Where there has been a wrongful assumption of property by defendant which is of itself a conversion thereof, plaintiff may sue in trover without a previous demand.—Dixie v. Harrison (Ala.) 284.

**II. ACTIONS.**

(A) **Right of Action and Defenses.**

Motion to strike pleas, see Pleading, § 358.

§ 22. Demanding payment for property converted is not a waiver of the right to sue for conversion.—Dixie v. Harrison (Ala.) 284.

(B) **Jurisdiction, Parties, Preliminary Proceedings, and Pleading.**

§ 34. In trover, certain evidence held admissible under the general issue.—Gandy v. Cowart (Ala.) 355.

(D) **Damages.**

§ 60. If defendant retook a horse after the purchase-money notes, retaining title in him until the notes were paid, had in fact been paid, the jury could allow punitive damages in trover for taking the horse.—Garden v. Houston Bros. (Ala.) 1030.

(E) **Trial, Judgment, and Review.**

Assumption as to facts, see Trial, § 191.

**TRUST DEEDS.**

See Chattel Mortgages; Mortgages.

**TRUSTEE PROCESS.**

See Garnishment.

**TRUSTEES.**

See Trusts.

**TRUSTS.**

Charitable trusts, see Charities.

Conveyances in trust for creditors, see Assignments for Benefit of Creditors.

Interest of beneficiary of active trust as subject to sale on execution, see Execution, § 41. Particular fiduciary relations, see Brokers; Executors and Administrators; Principal and Agent.

Powers in general, see Powers.

Trust deeds, see Chattel Mortgages; Mortgages.

**II. CONSTRUCTION AND OPERATION.**

Charitable trusts, see Charities, § 43.

(B) **Estate or Interest of Trustee and of Cestui Que Trust.**

Interest of beneficiary of active trust as subject to sale on execution, see Execution, § 41.

**III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.**

§ 169. Under Code 1907, §§ 6093, 6094, 6097-6099, held, that proceedings for the appointment of the successor of a trustee who resigned were not invalid on the ground that certain interested persons were not properly brought in by notice.—Reese v. Ivey (Ala.) 223.

**IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.**

Cross-bill by creditor seeking to enforce claim against trust estate, see Equity, § 195.

§ 203. Rights of one purchasing property from a trustee thereof, stated.—*Reese v. Ivey* (Ala.) 223.

§ 243. A power to sell held to have passed to the successor of a trustee.—*Reese v. Ivey* (Ala.) 223.

## TURPENTINE.

Reservation of in conveyance of timber, see Logs and Logging, § 3.

## ULTRA VIRES.

Effect of ultra vires acts and contracts of corporations in general, see Corporations, §§ 370, 387, 487.

## UNDERTAKINGS.

See Bail; Bonds.

In proceedings for injunction, see Injunction, § 235.

## UNDERWRITERS.

See Insurance.

## UNDUE INFLUENCE.

Affecting validity of deed, see Deeds, § 72.

Parol or extrinsic evidence to show, see Evidence, § 436.

## UNITED STATES.

Constitutional guaranties as to privileges and immunities of citizens of the United States, see Constitutional Law, § 206.

Courts, see Removal of Causes.

Status of states under United States Constitution and relation to United States, see States, § 4.

### I. GOVERNMENT AND OFFICERS.

Courts, see Courts, § 489.

## UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

## UNREASONABLE SEARCHES AND SEIZURES.

See Searches and Seizures, § 7.

## USURY.

### I. USURIOUS CONTRACTS AND TRANSACTIONS.

(B) Rights and Remedies of Parties.

§ 103. A firm held estopped to set up the defense of usury against a bank.—*Morris v. First Nat. Bank* (Ala.) 137.

## VACATION.

Of injunction, see Injunction, §§ 178, 184.

Of verdict, see New Trial.

## VAGRANCY.

Keeper of disorderly house as vagrant, see Disorderly House, § 5.

§ 1. The offense of vagrancy defined.—*Gavin v. State* (Miss.) 488.

## VALUATION.

Of property for purpose of taxation, see Taxation, § 347.

## VALUE.

Limits of jurisdiction, see Courts, § 122; Justices of the Peace, § 44.

Of property, relevancy of evidence, see Evidence, § 113.

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## VARIANCE.

Between judgment and process, pleadings, proofs, verdict, or findings, see Judgment, § 251.

Between pleading and proof in civil actions, see Pleading, §§ 391, 399.

Between pleading and proof in criminal prosecutions, see Indictment and Information, § 176.

## VENDOR AND PURCHASER.

Compensation of broker procuring conveyance, see Brokers, §§ 40-65.

Declarations by vendor as evidence against vendee and subsequent purchasers, see Evidence, § 230.

Dedication of other property to public use implied from sales, see Dedication, § 19.

Powers of sale, see Powers.

Specific performance of contract, see Specific Performance.

Transfers of property insured, effect on insurance, see Insurance, § 323.

Validity of sales as to creditors or subsequent purchasers, see Fraudulent Conveyances.

*Sales by or to particular classes of persons.*

See Executors and Administrators, §§ 343-402; Principal and Agent, § 103; Receivers, § 135.

Life tenants, see Life Estates, § 23.

Trustees, see Trusts, § 203.

*Sales of particular species of, or estates or interests in, property.*

Personal property in general, see Sales.

Property of decedent, see Executors and Administrators, §§ 343-402.

Public lands, see Public Lands, § 152.

Standing timber, see Logs and Logging, § 3.

Trust property, see Trusts, § 203.

*Sales on judicial or other proceedings.*

See Execution, § 272.

By executors or administrators, see Executors and Administrators, §§ 343-402.

By receivers, see Receivers, § 135.

On partition, see Partition, §§ 108, 109.

Tax sales, see Taxation, § 623.

### I. REQUISITES AND VALIDITY OF CONTRACT.

Application of statute of frauds, see Frauds, Statute of, § 75.

§ 44. In an action by a vendee to rescind purchases of land, evidence held insufficient to show false representations by the vendor or fraud by her agent in her behalf.—*Duy v. Higdon* (Ala.) 378.

### III. MODIFICATION OR RESCISSION OF CONTRACT.

(B) Rescission by Vendor.

§ 102. A vendor, dispossessing the purchaser without violating the contract does not thereby rescind the contract.—*Batson v. Johnson* (Ala.) 348.

### IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§ 142. A stipulation on a sale of real estate for the return of the earnest money with an additional equal amount should the sale fail

through the vendor's fault will be enforced.—*Lyons v. Woman's League of New Orleans* (La.) 18.

## V. RIGHTS AND LIABILITIES OF PARTIES.

Purchasers at execution sales, see Execution, § 272.

Purchasers of trust property at trustee's sale, see Trusts, § 203.

### (B) As to Third Persons in General.

Subsequent purchaser from vendor as proper party to suit by original purchaser for specific performance, see Specific Performance, § 106.

### (C) Bona Fide Purchasers.

Of property sold on execution, see Execution, § 272.

Of public lands, see Public Lands, § 152.

§ 227. A grantee of land held not entitled to set up claim of bona fide purchaser for value without notice.—*Martin v. Evans* (Ala.) 997.

§ 232. Where a husband conveyed a lot to his wife by deed, which was not recorded, and there was no change of possession, it was no notice of the wife's rights as against bona fide purchasers through the husband.—*Langley v. Pulliam* (Ala.) 365.

§ 244. Rights of purchaser at foreclosure of husband's mortgage of lot previously conveyed to wife as against wife stated.—*Langley v. Pulliam* (Ala.) 365.

## VI. REMEDIES OF VENDOR.

### (A) Lien and Recovery of Land.

§ 254. There is no vendor's lien, where the consideration is the grantee's agreement to care for and support the grantor for life.—*Burroughs v. Burroughs* (Ala.) 1025.

§ 299. Under certain circumstances, the vendor will not be required to tender return of the price as a condition precedent to an action to recover the property.—*State v. Hackley, Hume & Joyce* (La.) 772.

### (B) Actions for Purchase Money.

§ 303. The payment of a note for the price of real estate, payable on a day fixed, without fixing the date of conveyance, held an independent condition.—*Batson v. Johnson* (Ala.) 348.

## VENDOR'S LIENS.

See Vendor and Purchaser, §§ 254, 299.

## VENUE.

Of action by or against corporations in general, see Corporations, § 503.

Of criminal prosecutions, see Criminal Law, §§ 134, 135.

## III. CHANGE OF VENUE OR PLACE OF TRIAL.

Of criminal prosecutions, see Criminal Law, §§ 134, 135.

## VERDICT.

Contrary to law or evidence, ground for new trial, see New Trial, § 76.

In civil actions in general, see Trial, §§ 328-349.

In criminal prosecutions in general, see Criminal Law, §§ 881, 893.

Review in civil cases, see Appeal and Error, §§ 1002-1006.

Review in criminal cases, see Criminal Law, §§ 1158-1160.

Setting aside, see New Trial.

## VERIFICATION.

Of pleading, see Pleading, §§ 291, 304.

## VICE PRINCIPALS.

Liability of master for injuries to servant from acts or omissions of vice principal, see Master and Servant, §§ 185-190.

## VINDICTIVE DAMAGES.

See Damages, § 87.

## VOLUNTARY ASSIGNMENTS.

See Assignments for Benefit of Creditors.

## VOLUNTARY BANKRUPTCY.

See Bankruptcy, §§ 42, 51.

## VOLUNTARY DISMISSAL OR NON-SUIT.

See Dismissal and Nonsuit, §§ 25, 26.

## VOTERS.

See Elections.

## VOTING.

At meetings of municipal council, see Municipal Corporations, § 97.

## WAIVER.

See Estoppel.

Errors waived in appellate court, see Appeal and Error, § 1078; Criminal Law, § 1178.

Of objections to particular acts, instruments, or proceedings.

Default or delay in delivering goods sold, see Sales, § 176.

Errors on appeal or other proceeding for review, see Appeal and Error, § 754.

Insurance policies, see Insurance, § 375.

Performance of contracts, see Contracts, § 305.

Pleadings, see Pleading, §§ 406, 430.

### Of rights or remedies.

Abatement of action, see Abatement and Revival, § 84.

Exemption, by bankrupt, see Bankruptcy, § 309.

Forfeiture of insurance policy, see Insurance, § 375.

Jury trial, see Jury, § 28.

Notice of cancellation of insurance policy, see Insurance, § 229.

Objections to evidence, see Trial, § 75.

## WARNING.

Precautions against injuries to servants, see Master and Servant, § 153.

## WARRANT.

Of attorney to confess judgment, see Judgment, § 46.

Preliminary warrant in criminal prosecution, see Criminal Law, § 218.

## WARRANTY.

Covenants of, damages for breach, see Covenants, § 180.

In insurance policy, see Insurance, § 723.

On sale of goods, see Sales, §§ 260-286.

# WATERS AND WATER COURSES.

See Drains; Levees; Navigable Waters.  
Compensation for water rights taken for public use, see Eminent Domain, § 84.  
In cities, use and regulation, see Municipal Corporations, § 712.

## II. NATURAL WATER COURSES.

### (B) Obstruction and Detention.

§ 51. A railroad acquiring a right of way crossing natural drains did so sub modo; the condition being that it would not obstruct the drains.—*Petit Anse Coteau Drainage Dist. v. Iberia & V. R. Co. (La.)* 512.

## WAYS.

Public ways, see Highways; Municipal Corporations, §§ 648-706.

## WEAPONS.

Liability for negligence in maintaining spring guns, see Negligence, § 47.  
Liability of owner of store for injuries to burglar caused by spring guns, see Trespass, § 4.  
Nature of weapon used in homicide, see Homicide, § 290.

## WEIGHTS AND MEASURES.

Partial invalidity of statute relating to measurement of oysters, see Statutes, § 64.

§ 2. Acts 1894, p. 88, No. 35, relating to standard measure, *held* in part repealed by Acts 1902, p. 274, No. 153 so far as it relates to oysters; but in other parts the act remains in force and may be amended.—*State v. Cognevich (La.)* 439; *In re Cognevich, Id.*

## WIDOWS.

Dower, see Dower.  
Rights as to homestead, see Homestead, §§ 141-147.

## WIFE.

See Husband and Wife.

## WILLS.

See Descent and Distribution; Executors and Administrators.  
Charitable bequests and devises, see Charities.  
Validity, construction, and execution of trusts in general, see Trusts.

## III. CONTRACTS TO DEVISE OR BEQUEST.

Requirements of statute of frauds, see Frauds, Statute of, §§ 75, 103.

## IV. REQUISITES AND VALIDITY.

### (A) Nature and Essentials of Testamentary Dispositions.

§ 70. Will made in Canada *held* entitled to probate in the state on proof that the formalities prescribed by the Canadian laws have been observed.—*Succession of Drysdale (La.)* 30.

(B) Form and Contents of Instruments.  
Requirements of statute of frauds, see Frauds, Statute of, §§ 75, 103.

### (C) Execution.

§ 111. An addition to a will *held* a continuation of the will itself, so that the signatures

were properly placed at the conclusion or end of the one act.—*Oglesby v. Turner (La.)* 859.

## V. PROBATE, ESTABLISHMENT, AND ANNULLMENT.

### (H) Evidence.

§ 289. Sheets bound together and constituting the will at testator's death are presumed to have been bound together at the time of attestation.—*Succession of Drysdale (La.)* 30.

### (M) Operation and Effect.

§ 417. The interest devised by will takes effect immediately on the death of testator, though the will is not probated until several years later.—*Touart v. Bickert (Ala.)* 896.

## VI. CONSTRUCTION.

### (A) General Rules.

§ 457. The word "codicil" is synonymous with the word "bequest" or disposition, and is so used in Rev. Civ. Code, art. 1570.—*Oglesby v. Turner (La.)* 859.

### (E) Nature of Estates and Interests Created.

§ 614. Bequests of specific things *held* to amount in most cases to an absolute gift.—*Underwood v. Underwood (Ala.)* 305.

### (H) Estates in Trust and Powers.

Management and disposal of trust property in general, see Trusts, §§ 203, 243.

## VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

### (C) Advancements, Ademption, Satisfaction, and Lapse.

Advancements to heirs and distributees, see Descent and Distribution, §§ 102, 109.

## WIRES.

Of electric light or power companies, see Electricity.

## WITHDRAWAL.

Of action, see Dismissal and Nonsuit, §§ 25, 26.  
Of particular counts by trial court, see Trial, § 145.  
Of pleading, see Pleading, § 339.  
Of remarks of court as rendering error harmless, see Appeal and Error, § 1046.

## WITNESSES.

See Affidavits; Depositions; Evidence.  
Comments of counsel on witnesses, see Criminal Law, § 720.  
Experts, see Criminal Law, §§ 479, 491; Evidence, §§ 527, 528, 539.  
Opinions, see Criminal Law, §§ 448-491; Evidence, §§ 471-539.  
Presumptions from failure to testify or call witness, see Evidence, § 77.  
Testimony of accomplices, see Criminal Law, § 511.

## I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

Absence of witness, ground for continuance, see Criminal Law, §§ 594-596.

§ 10. Under Gen. St. 1906, § 2253, *held*, that a subpoena for a witness may be issued by the Supreme Court clerk upon order of the justice issuing a writ of habeas corpus or hearing the cause.—*Ex parte Nathan (Fla.)* 38.



**II. COMPETENCY.**

Of expert witnesses, see Evidence, § 539.

**(A) Capacity and Qualifications in General.**

Competency of dying declaration of ex-convict, see Homicide, § 213.

§ 37. Where a witness disclaimed knowledge as to the contents of the books of a bank concerning credits on a note not indorsed, the court properly disallowed questions asked her concerning the contents of the books as to such credits.—*First Nat. Bank v. Alexander* (Ala.) 45.

§ 37. On the issue whether a sale of merchandise was in fraud of the seller's creditors, a statement of the seller *held* a statement of his best recollection of the amount of the indebtedness and was admissible.—*Montgomery Moore Mfg. Co. v. Leeth* (Ala.) 210.

§ 52. The common law made no distinction between the incompetency of one spouse to testify for or against the other as a matter of disability and incompetency as a matter of privilege.—*Ex parte Beville* (Fla.) 685.

§ 52. At the common law, neither the husband nor the wife could be witnesses for or against the other, except where the offense was directed against the person of the wife.—*Ex parte Beville* (Fla.) 685.

§ 53. Under Gen. St. 1906, § 1502, and Rev. St. 1892, § 2863, the law as to competency of husband and wife as witnesses in civil cases also obtains in criminal cases.—*Ex parte Beville* (Fla.) 685.

§ 61. A wife is a competent witness against her husband in a prosecution for abandonment.—*Carnley v. State* (Ala.) 362.

§ 61. In a prosecution for abandonment of wife and child, the wife *held* competent to testify that defendant was the father of the child.—*Carnley v. State* (Ala.) 362.

**(B) Parties and Persons Interested in Event.**

§ 111. In an action for injuries, it was competent for plaintiff to testify as to his physical condition within a reasonable time prior and subsequent to the accident, and that he had done no work since the accident, and could do none.—*St. Louis & S. F. R. Co. v. Savage* (Ala.) 113.

**(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.**

§ 139. The dismissal of the action as to one joint maker *held* not to remove his disqualifying interest to testify against the executor of the deceased joint maker.—*Anthony v. Sturdivant* (Ala.) 1028.

§ 139. One maker of a note, who is joined in an action thereon with the executor of his joint maker, is incompetent, under Code 1907, § 4007, to testify as to any transaction with or statements by deceased relative to the subject-matter of the action.—*Anthony v. Sturdivant* (Ala.) 1028.

§ 140. In an action by a bank on a note, a witness having no pecuniary interest in the suit was not disqualified to testify concerning his employment by the bank's cashier to work on the railroad, because the cashier had since died.—*First Nat. Bank v. Alexander* (Ala.) 45.

§ 140. In an action by a bank on a note, an uninterested witness was properly permitted to testify to declarations by plaintiff's cashier, since deceased, as to how the note was to be paid.—*First Nat. Bank v. Alexander* (Ala.) 45.

§ 140. That plaintiff bank had another suit pending against witness did not render witness incompetent to testify to a payment made by defendant to the bank's cashier, since deceased, on the note sued on.—*First Nat. Bank v. Alexander* (Ala.) 45.

§ 140. Interest of a witness, sufficient to disqualify him to testify concerning a transaction with a person since deceased, under Code 1907, § 4007, defined.—*Oliver v. Williams* (Ala.) 937.

§ 140. The calling of a witness by one opposed in interest is not sufficient to remove the disqualifying interest of the witness, under Code 1907, § 4007, where the other party opposed in interest objects.—*Anthony v. Sturdivant* (Ala.) 1028.

**(D) Confidential Relations and Privileged Communications.**

§ 188. The change of the common-law rule by making one spouse a competent witness against the other does not affect the rule as to marital communications.—*Ex parte Beville* (Fla.) 685.

§ 204. Admitting in evidence a letter from defendants' attorney to them relating to a settlement in the action on trial, and compelling the attorney over protest to testify as to such letter, *held* error, it being a privileged communication.—*A. R. Ganus & Co. v. Tew* (Ala.) 1000.

**III. EXAMINATION.**

Of expert witnesses, see Criminal Law, § 491.

Of nonexpert witnesses as to opinions, see Evidence, § 501.

Review of discretion as to cross-examination, see Criminal Law, § 1153.

Review of rulings, see Appeal and Error, § 1048; Criminal Law, § 1170½.

**(A) Taking Testimony in General.**

§ 236. Question to a witness *held* sufficiently apt to elicit his recollection of the similarity between a deed and a copy.—*Clark v. Dunn* (Ala.) 98.

§ 236. Where a question is so general that irrelevant evidence would be responsive thereto, the trial court cannot be put in error for sustaining an objection thereto.—*Phillips v. State* (Ala.) 194.

§ 240. It is within the trial court's discretion to allow a leading question.—*St. Louis & S. F. R. Co. v. Savage* (Ala.) 113.

§ 240. Permitting leading questions is largely in the discretion of the court.—*Montgomery Moore Mfg. Co. v. Leeth* (Ala.) 210.

§ 240. In an action for work and materials furnished in constructing a building, a question *held* properly excluded as leading.—*Fleming v. Lunsford* (Ala.) 921.

§ 240. Question to witness, being leading, *held* open to objection.—*Supreme Lodge Knights and Ladies of Honor v. Baker* (Ala.) 958.

§ 240. The trial court has wide discretion in permitting leading questions.—*Camp v. State* (Fla.) 537.

§ 248. Where a state's witness was asked on cross-examination whether he had not been taking an interest in the prosecution, the latter part of his answer, "Well, I have; only telling about who the witnesses were," was properly allowed, within the court's discretion, as explaining the extent of his activity, even if it went beyond the question.—*Lowman v. State* (Ala.) 43.

§ 248. An answer *held* not unresponsive.—*St. Louis & S. F. R. Co. v. Savage* (Ala.) 113.

§ 248. Answers *held* properly stricken as not responsive.—*Fleming v. Lunsford* (Ala.) 921.

§ 248. Answer of witness *held* irresponsible.—Supreme Lodge Knights and Ladies of Honor v. Baker (Ala.) 958.

§ 252. Cross-examination, by exhibiting a cinder and questioning a locomotive engineer as to the size of sparks or cinders emitted through a proper spark arrester, *held* proper.—Louisville & N. R. Co. v. Smith (Ala.) 241.

§ 262. Party, after examination of witness, *held* to have no absolute right to recall him to establish matters not in rebuttal.—Jenkins v. State (Fla.) 582.

§ 263. A simple repetition of a witness' examination in chief *held* properly denied, where recalled in rebuttal.—Jenkins v. State (Fla.) 582.

#### (B) Cross-Examination and Re-Examination.

Review of discretion as to cross-examination, see Criminal Law, § 1153.

§ 267. Matters testing the accuracy of a witness' statements may be inquired about on his cross-examination, the extent of which is largely within the discretion of the trial court.—Davis v. Anderson (Ala.) 1002.

§ 268. In an injury action by a servant, certain cross-examination of plaintiff *held* admissible.—United States Cast Iron, Pipe & Foundry Co. v. Driver (Ala.) 118.

§ 269. Scope of cross-examination stated.—Jenkins v. State (Fla.) 582.

§ 270. Certain cross-examination *held* improper.—Hill v. State (Ala.) 41.

§ 271. A witness cannot be cross-examined as to an affidavit he admits having made until exhibited to him.—Stewart v. State (Fla.) 642.

§ 286. Evidence on redirect examination *held* not necessarily subject to the rule governing evidence in rebuttal.—Telfair v. State (Fla.) 573.

§ 287. Where accused being asked on cross-examination whether he had made a certain statement to another, denied the statement, he should have been allowed on redirect examination to tell what the conversation was.—Stewart v. State (Fla.) 642.

### IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

Continuance to secure impeaching evidence, see Criminal Law, § 596.

Credibility of witnesses as affecting weight and sufficiency of evidence, see Evidence, § 588. Instructions as to credibility, see Criminal Law, § 785.

#### (A) In General.

§ 318. Evidence that accused was out on bail after the termination of his first trial was inadmissible to establish his status as a witness.—State v. Bouvy (La.) 849.

§ 319. Before one is tendered as a witness, testimony as to his probable bias is incompetent.—Cox v. State (Fla.) 875.

§ 329. Refusal to permit an extended cross-examination as to matters irrelevant to the issue, to test the memory of the witness, *held* not an abuse of discretion nor a denial of the right of cross-examination.—Cox v. State (Ala.) 398.

§ 330. Cross-examination *held* not allowable as to tests of the witness' credibility.—Louisville & N. R. Co. v. Smith (Ala.) 241.

#### (B) Character and Conduct of Witness.

§ 337. If accused voluntarily becomes a witness, his general reputation for truth may be impeached.—Clinton v. State (Fla.) 580.

§ 338. Repeated violations of a statute will affect one's general reputation, though the act done is wrong merely because prohibited by statute.—Lowman v. State (Ala.) 43.

§ 338. One's "general character," as relating to his credibility as a witness, means the estimate in which he is held by the community.—Lowman v. State (Ala.) 43.

§ 344. The general reputation of a witness for truth and veracity cannot be impeached by evidence that he falsified on another occasion.—State v. Blount (La.) 12.

§ 349. The bad general character of a witness, or his reputation for truth, may be shown, and a state's witness could be asked on cross-examination whether he had not been charged with running after other men's wives; but it could not be shown that on one or more specific occasions he had been charged with lewdness.—Lowman v. State (Ala.) 43.

§ 358. On cross-examination, an impeaching witness can be questioned as to what he has heard of acts of the witness impeached likely to affect his character or reputation, in order to test the extent and the soundness of the impeaching witness' knowledge of general character.—Lowman v. State (Ala.) 43.

#### (C) Interest and Bias of Witness.

§ 363. That the state's witness had previously appeared and testified in other cases, his testimony not being connected with accused or the offense with which he was charged, *held* not a circumstance going to the discredit of the witness.—Grayson v. State (Ala.) 349.

§ 370. Bias, however strong, is no ground for exclusion, but may always be shown for the purpose of affecting the credibility and weight of the evidence.—Grayson v. State (Ala.) 349.

§ 372. A wide range of cross-examination should be allowed, to show the motive, interest, or animus of a state witness.—Stewart v. State (Fla.) 642.

§ 374. In a prosecution for carrying concealed weapons, certain evidence *held* admissible to show bias of a witness towards accused.—Grayson v. State (Ala.) 349.

#### (D) Inconsistent Statements by Witness.

§ 380. A party *held* not entitled, for the purpose of discrediting his witness, to inquire whether he had had a conversation with third persons in reference to the subject-matter of his testimony.—Davis v. Anderson (Ala.) 1002.

#### (E) Contradiction and Corroboration of Witness.

Corroboration of testimony of accomplices, see Criminal Law, § 511.

Corroboration of testimony of female in prosecution for seduction, see Seduction, § 46.

§ 405. Irrelevant questions on cross-examination may be excluded, though they may contradict witness upon new and irrelevant matter brought out on cross-examination.—Gilbert v. State (Fla.) 535.

§ 406. Where the bookkeeper of another testified that the account of the later was never less than \$200, a receipt in full of account for \$49.34 was admissible to show whether the bookkeeper was accurate in his statement.—Davis v. Anderson (Ala.) 1002.

## WOMEN.

Married women, see Husband and Wife.

## WOODS AND FORESTS.

See Logs and Logging.

## WORDS AND PHRASES.

"Account stated."—Jasper Trust Co. v. Lampkin (Ala.) 337.  
 "Actionable negligence."—Southern Ry. Co. v. Smith (Ala.) 390.  
 "Adjudication of his bankruptcy."—Anthony v. Sturdivant (Ala.) 1028.  
 "Advocate in the cause."—State v. Perkins (La.) 805.  
 "Allow."—Louisville & N. R. Co. v. Smith (Ala.) 241.  
 "Amendment."—Board of Public Instruction of Polk County v. Board of Com'rs of Polk County (Fla.) 574.  
 "Any judicial or ministerial officer."—State v. Babin (La.) 825.  
 "Ariasing."—Mugge v. Warnell Lumber & Veneer Co. (Fla.) 645.  
 "Arraignment."—Howard v. State (Ala.) 954.  
 "Assistant solicitors."—Clinton v. State (Fla.) 580.  
 "Bacteriology."—State v. Duncan (Ala.) 265.  
 "Bequest."—Oglesby v. Turner (La.) 859.  
 "Caused."—Louisville & N. R. Co. v. Smith (Ala.) 241.  
 "Character."—Pate v. State (Ala.) 357.  
 "Civil contempt."—Ex parte Dickens (Ala.) 218.  
 "Claim of title."—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.  
 "Codicil."—Oglesby v. Turner (La.) 859.  
 "Collateral attack."—McKinney v. Adams (Miss.) 474.  
 "Color of title."—Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co. (Ala.) 230.  
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§ 14. A modification of the requirement of a contract by mutual consent of the parties is not a waiver of special stipulations thereof, and the party consenting to such modification is liable for reasonable compensation to the other party, whose work has been accepted. —Smith v. Sharp (Ala.) 882.

§ 14. Plaintiffs held not entitled to a quasi contract for work and furnished under a contract which was not completed, leaving 15 per cent. of the finished work. —Maxwell & Delehomme (Ala.) 882.

§ 24. A count for work and labor on a certain date could not be sustained where the work was done on any other date. —Southern States Lumber Co. (Ala.) 958.

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Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
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99	49	992	244	50	26	492	50	481	614	50	600	738	50	671	906
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Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	45	19	129	45	614	234	46	73	381	45	367	532	46	188	632
9	45	5	141	45	721	244	45	834	386	46	827	540	46	66	638
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